Reference No: FW49

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

AND IN THE MATTER OF A PURPORTED APPLICATION

Before Arbitrator Barry Denyer-Green Barrister at Law

BETWEEN:

FAC 251 LIMITED and ZECOL LIMITED (Applicant)

and

SILVER PAGODA REALTY GROUP LIMITED (Respondent)

PRELIMINARY ISSUE AWARD

Introductory matters

1. In this Preliminary Issue Award, the Applicant is FAC251 Limited and Zecol Limited and the Respondent is Silver Pagoda Realty Group.

2. Mr Aaron Mellor, acting for the Applicant and others, has contended that by an email dated the 22nd September 2022 timed 16:24, he applied on behalf of the Applicant and others to the Falcon Chambers Arbitration (FCA) for some seven disputes under the Commercial Rent (Coronavirus) Act 2022 (CRCA) to be determined by arbitration. The clerk to the FCA reported that this email was not

forwarded to her by Mr Mellor until the 27th September 2022, with the hard copies received by post after that latter date.

3. In the email dated 27th September 2022 timed 22:11 Mr Mellor says, "*I've today received a mail sending error on these - I think maybe as I sent too many at one go - please find attached resent in two halves*".

4. On the 4th October 2022 the clerk to the FCA sent an email timed 13:47 to Mr Mellor to the effect that the reference to arbitration did not seem to have been in time.

5. By email dated the 4th October 2022 timed 23:12 from Mr Mellor to the clerk, Mr Mellor sought, inter alia, confirmation that the reference had been made in time.

6. The clerk then commissioned a report from the FCA IT consultant. The consultant confirmed, inter alia, that there was no record of emails from aaron@tokyoindustries.com or with the subject "CRCA – referral to Arbitration (multiple companies)" on the 22nd September, which report the clerk then forwarded to Mr Mellor. Copies of the emails referred to in the above paragraphs were Annexes A to D to my Directions of 23rd February 2023.

7. I, Barry Denyer-Green (the Arbitrator) was assigned to this reference and I formed an initial view, subject to any submissions, that there should first be determined a preliminary issue as to whether the purported references by the Applicant were made by the expiration of the time limit under the CRCA of the 23rd September 2022. Having regard to the order in which the seven purported references were listed, and that the first of these had been withdrawn, I decided that there should be a preliminary issue determination in the purported reference of a dispute between the Applicant and the Respondent. By Directions dated the 23rd February 2023, I

ordered that there should be a hearing of a preliminary issue as to whether the purported reference by the Applicant of a dispute between the Applicant and the Respondent was made before the expiration of the time limit under the 2022 Act (the Preliminary Issue).

8. In accordance with the Directions, I gave on the 23rd February 2023, as amended on 4th and 13th April 2023, I have received Submissions on behalf of the parties. Mr Mellor has made submissions on behalf of the Applicant and Mr Michael Wilson, solicitor, of Glaisyers Solicitors LLP has made submissions on behalf of the Respondent. In my Directions I said that if either party wishes to adduce any factual evidence that it believes may be relevant, such matters must be put forward in a Witness Statement. As it happens both parties made their principal submissions within Witness Statements, which statements I shall treat as including the respective submissions of the parties. My Directions made provision for a reply by the Applicant, if so advised, to the submissions for the Respondent. No such reply was received by the due date of 28th April 2023. As the Respondent included an application for costs in its submissions, I instructed the clerk to the FCA to enquire of Mr Mellor acting for the Applicant as to whether a reply would be made. Mr Mellor provided a reply by two emails on 2nd and 3rd May, to which Mr Wilson replied also on the 3rd May. I have considered all these submissions and representations.

Decision

9. I have decided that the purported reference by the Applicant of a dispute between the Applicant and the Respondent was not made before the expiration of the time limit under the 2022 Act.

Reasons

10. My reasons are set out below in my findings of facts and in my consideration of the parties' respective submissions.

Whether FAC251 Ltd and/or Aaron Mellor has authority to act for Zercol Ltd

11. This matter was addressed at paras 9-13 of the submissions of Mr Wilson on behalf of the Respondent. He submitted that in the absence of evidence, the presumption should be that FAC251 Ltd has no authority to act on behalf of Zecol Ltd and, for the reasons he gave at paras 10 to 13, FAC251 Ltd cannot pursue a claim on behalf of Zecol Ltd. Mr Mellor attached a form of authority signed by a director of Zecol Ltd, and dated 2nd May 2023, to his email dated 3rd May. In his email of the 3rd May, Mr Wilson invited me to conclude that FAC251 Ltd did not have requisite authority to act on Zecol's behalf when this matter was referred to arbitration and the provided authority to act does not provide the Applicant with that requisite authority.

12. I decline to accede to that invitation. As my decision in this Award is that the reference made by the Applicant was out of time and therefore in effective, it would be wholly academic to consider the issue of authority.

Findings of fact

13. I have considered the parties' respective submissions in making my findings of facts using the civil burden of proof of a balance of probabilities.

14. The Applicant's principal submissions relating to the chronology and relevant events appear to be based on a Witness Statement of Mr Aaron Mellor made on the 20th December 2022, and sent to the FCA for the second time as an attachment to an email dated 31st March 2023 timed 12:13. At the first paragraph 15 Mr Mellor states

the "*further service of the 7 referrals including the test case one made by eMail from my aaron@tokyoindustries.com email address to the email noted on the referral application form being arbitrationclerk@falcon-chambersarbitration.com this email was sent on 22 September 2022 timed 16:24hrs*". A copy of this email is identified as "Evidence 002" to that Witness Statement.

15. At the first paragraph 16 of the Witness Statement of the 20th December, Mr Mellor states that the internet 'Header Details' in the coding show the IP address sent and received by this mail as being 22 September 2022 timed at 16:24 and noted at Evidence 003. The Applicant has not produced any other factual evidence relating to the sending by email of the references in this arbitration (or any others), or in relation to whether the email was received into the inbox of the FCA. The only other evidence is that set out at paragraphs 2 to 6 above relating to the further exchange of emails between Mr Mellor and the clerk to the FCA.

16. I referred at para 3 above to the email dated 27th September 2022 timed 22:11, where Mr Mellor says "*I've today received a mail sending error on these - I think maybe as I sent too many at one go ..*". Mr Mellor has not provided a copy of whatever it is that constitutes the 'mail sending error on these'.

17. I therefore have no evidence adduced on behalf of the Applicant that goes to show that the email of the 22nd September was in fact received into the inbox of the FCA. I therefore find on a balance of probabilities that the email of the 22nd September timed 16:24 was not received into the inbox of the FCA on either the 22nd or 23rd September and a copy only was only received with the email sent by Mr Mellor to the clerk to the FCA on the 27th September 2022.

18. In the Witness Statement of the 20th December 2022, Mr Mellor also states at the second paragraph 15 that on the 22nd September 2022 timed at 17:21 hours, he posted by Royal Mail Counter at 109 Deansgate, Manchester: "*the 'Certified Posting' of an envelope containing all 7 of the referral applications to the registered postal address of FALCON CHAMBERS, Fleet Street, London. EC4Y 1AA – A 'Certificate of Posting' shows a weight of 0.148kg, the delivery by FIRST CLASS to postcode EC4Y 1AA. Crucially the 'Certificate' states 'After Last Acceptance Time?' and indicates 'N' meaning service was deemed good as of 22 September 2022*". I do not read the 'N' in the certificate of posting as meaning that service, in the sense of delivery, was deemed good as of 22 September 2022, as the purpose of the certificate was one only of posting, as its heading makes clear. As mentioned at paragraph 2 above, the posted documents had not been received by the FCA by the 27th September 2022, the date when an exchange of emails commenced.

19. I therefore find as a fact that the reference documents were posted on the 22nd September 2022 as stated by the Certificate of Posting at Evidence 004 to the witness statement of 20th December 2022, but they were not physically delivered to FCA by the 23rd September. I have seen no evidence that they were posted by recorded delivery, and I cannot so find. The Applicant has adduced no evidence relating to the delivery of the documents that were posted by Mr Mellor. I deal with the Applicant's submissions supporting a deemed delivery below.

20. Before considering the parties' submissions, I refer to the relevant provisions of both the CRCA and the AA.

The Law

21. Section 22 of, and Schedule 1 to, the CRCA modifies Part 1 of the Arbitration Act 1996 (AA) in relation to arbitrations under Part 1 of the CRCA. Section 30 of the AA (competence of Tribunal to rule on its own jurisdiction) applies subject only to the omission of the words in sub-section (1) "unless otherwise agreed by the parties". There is no agreement by the parties as to the omission or otherwise of section 30, and accordingly I have jurisdiction to make an award on the Preliminary Issue. This jurisdiction is also confirmed at para 12.1 of the Commercial Rent (Coronavirus) Act 2022 Guidance (the Guidance).

22. The provisions of Part 1 of the AA apply to every arbitration under an enactment (a statutory arbitration) subject to the adaptations and exclusions specified in sections 95 to 98 of the AA: see section 94(1) of AA. Section 94(2) of AA provides that the provisions of Part 1 of the AA do not apply to a statutory arbitration if or to the extent that their application is inconsistent with the provisions of the enactment concerned, with any rules or procedure authorised by it or is excluded by any other enactment. Under section 95 of the AA, the provisions of Part 1 to that Act apply to a statutory arbitration as if the arbitration were pursuant to an arbitration agreement, as if the enactment were that agreement, and as if the persons by and against whom a claim subject to arbitration in pursuance of the enactment may be or has been made, were parties to that agreement. Accordingly, any arbitration under the CRCA is a statutory arbitration and is subject to the provisions of the AA as if the CRCA were an arbitration agreement, and subject also to any modifications in Schedule 1 to the CRCA. I am satisfied that the provisions of sections 96 to 98 of AA are not relevant to my jurisdiction to determine the Preliminary Issue.

23. Section 9(2) of the CRCA provides that a reference to arbitration may be made by either the tenant or the landlord within a period of 6 months beginning with the day on which this Act is passed. It is not disputed between the parties that the latest date for making a reference would have been the 23rd September 2022. Pursuant to section 10(4) of the CRCA, a reference to arbitration must be made to an approved arbitration body. Under the terms of the CRCA, the FCA is such a body. Again, section 10(4) of the CRCA uses the word "made" in relation to an arbitration. Although paragraph 1(a) of schedule 1 to CRCA disapplies subsections (1) and (2) of section 14 to the AA (commencement of arbitral proceedings), section 14(5) of the AA has application to the CRCA and provides that where the arbitrator or arbitrators are to be appointed by a person other than a party to the proceedings, arbitral proceedings are commenced in respect of a matter where one party gives notice in writing to that person requesting him to make the appointment in respect of that matter. On the basis that the CRCA is an agreement to arbitrate, and that an arbitration under the CRCA is a statutory arbitration for the purposes of section 95 of the AA, it seems that an arbitration under CRCA might only commence when one party gives a notice in writing to the party that may appoint an arbitrator. If section 14(5) of the AA does have application, which I believe it does, then a notice in writing should have been given, or deemed to have been given, to the FCA by at the latest on 23rd September 2022.

24. As I have found on the facts that the application for an arbitration reference was not physically received by the FCA by the 23rd September 2023, the only real issue is whether the application can be treated as deemed to have been delivered.

Submissions on behalf of the Applicant

25. The second paragraphs 16, 17 and 18 of the witness statement of Mr Mellor made on the 20th December 2022 contain part of the Applicant's principal submissions directed to the Preliminary Issue.

26. At the second paragraph 16 Mr Mellor first refers to the Recorded Delivery Act 1962: I assume he means the Recorded Delivery Service Act 1962 (RDSA). He submits that that Act allows for Certified and Recorded mail to be deemed served at the point of posting *"irrelevant if the date of delivery ...*". This sentence is incomplete, but I assume he means that it is irrelevant if the date of delivery is later. He then refers to section 23 of the Landlord and Tenant Act 1927 (L&TA1927) and section 196 of the Law of Property Act 1925 (LPA), and he then says, "*it does provide useful caselaw guidance as to the date of 'Certified' posting being the date of service 'for this Referral Application*'".

27. I have not found the word 'certified' in the RDSA, and Mr Mellor has not made any submissions as to why an enactment dealing with recorded delivery of post should have any application to 'certified post'. Indeed, I have no submissions from him as to what 'certified post' is. The only use of a word that is related to 'certified' in the RDSA is the word 'certificate', which appears at paragraph 1 of the schedule in the phrase 'certificate of delivery of a registered letter'; those words have no application here or to the certificate of posting referred to at para 18 above.

28. Mr Mellor then refers to three legal decisions.

29. First, the decision of the Court of Appeal in Blunden v Frogmore Investments Limited [2002] EWCA Civ 573, in respect of which Mr Mellor submits that the tenant was deemed served on the date of posting regardless that it was proven the

letter in question failed to arrive. The issue in that case was whether certain notices had been served by a certain date: whether a notice of termination of a lease by the landlord had been served in accordance with clause 6.9 of the lease, which prescribed an additional mode of service in accordance with section 196 of the LPA, as amended by the RDSA, and whether a notice under section 25 of the Landlord and Tenants Act 1954 (L&TA1954) had been served by the relevant date. I note that the notices were sent by recorded delivery, and a certificate of posting was obtained. The notices were not seen by the tenant before the relevant date.

30. Robert Walker LJ, with whom Schiemann and Carnwath LJJ agreed, concluded at paras 41 to 45 that the landlord had achieved good service by post (under the express terms of clause 6.9 referring to section 196 of the LPA), as amended by the RDSA, and under section 23 of the L&TA1927, despite the known non-delivery. What mattered was the use of recorded delivery, and its effect under the above legislation of a deemed delivery on the date of sending. It was the sending of the notices, not their physical delivery, that was decisive. That the landlord had also obtained a certificate of posting was not the deciding point. The decision in Blunden v Frogmore Investments Limited does not assist the Applicant, as Mr Mellor did not use recorded delivery when he posted the applications for arbitration, and the fact that he obtained a certificate of posting does not assist the Applicant either, as that is no proof of delivery or deemed delivery.

31. Second, the Court of Appeal's decision in CA Webber (Transport) Limited v Railtrack Plc [2003] EWCA Civ 1167. The appeal in that case also concerned the application of the RDSA and section 23 of the L&TA1927; a notice sent by recorded delivery is irrebuttably deemed to have been served on the date when the server entrusted the notice to the post; the risk of non-receipt was cast on the recipient. Again, this decision does not assist the Applicant, as Mr Mellor did not use recorded

delivery when he posted the applications for arbitration. Mr Mellor is correct in saying that the Court of Appeal rejected the argument that deeming notices served on the date of posting, not the date of receipt, contravenes the European Convention on Human Rights. The Court held that the rule is not unfair or overly favourable to landlords but provides certainty and avoids disputes. But the Respondent in this matter has not raised any issue about Human Rights, so this additional submission does not assist the Applicant.

32. Third, the decision of Neuberger J (as he then was) in Beanby Estates Limited v Egg Stores (Stamford Hill) Limited [2003] 1 WLR 2064. In issue was the effect of the RDSA where a statutory notice had been served by recorded delivery. Mr Mellor is correct in submitting that the notice was deemed served on the day of posting, but this decision also does not assist the Applicant, as Mr Mellor did not use recorded delivery when he posted the applications for arbitration.

33. Mr Mellor has made no direct submissions on the meaning and effect of section 9(2) of the CRCA, whether any provisions of the AA have any relevance to this issue, such as section 14(5), and whether there is any case law concerning the issue as to what amounts to the making of a reference to arbitration, as suggested in my Directions of the 23rd February 2023. However, I am satisfied that Mr Wilson for the Respondent has drawn my attention to such material as may be relevant.

34. I conclude that the Applicant has not persuaded me that the deeming effect of the RDSA, that delivery is deemed at the date of posting under that Act, has any application to the facts here where recorded delivery was not used.

Submissions on behalf of the Respondent

35. At paragraph 14 of his submissions on behalf of the Respondent, Mr Wilson asks for a second issue to be determined: by not providing supporting evidence pursuant to section 11(3) of the CRCA, has the Applicant failed to provide a formal proposal pursuant to section 11(1) of the CRCA and therefore no valid referral to arbitration has been made. I decline to determine this additional point. The Respondent could have applied for this point to be considered at an earlier stage when directions were being considered, and before submissions were to be prepared. It is now too late to be dealt with as part of the Preliminary Issue. If I decide the Preliminary Issue in favour of the Respondent, which I have, it will have the relief it seeks.

36. At paragraph 18 of his submissions, Mr Wilson refers to the email of the 27th September 2022 from Mr Mellor to the FCA, and he notes that the Applicant has failed to provide a copy of the error confirmation email. I also noted that point, but I am unable to draw any evidential conclusions from that failure. Mr Wilson refers to the report of the IT consultant that the email of the 22nd September was not received, and submits that on a balance of probabilities the latter email was not received by the Arbitrator before the deadline date. For the reasons set out under my finding of facts, and those in the Respondent's submissions, I agree.

37. Mr Wilson then makes submissions that notices under the AA can be sent by email, and in particular he refers to the judgment of Christopher Clarke J in Benuth Lines Ltd v High Seas Shipping Ltd [2005] EWHC 3030 at para 28 to the effect that the learned judge said that pursuant to section 76 of the AA:

> *"any means of service will suffice provided that it is a recognised means of communication effective to deliver the document to the party to whom it is sent at his address for the purpose of that means of communication (e.g. post,*

fax or e-mail). There is no reason why, in this context, delivery of a document by e-mail - a method habitually used by businessmen, lawyers and civil servants - should be regarded as essentially different from communication by post, fax or telex.

38. He added at para 29:

"That is not to say that clicking on the 'send' icon automatically amounts to good service. The e-mail must, of course, be despatched to what is, in fact, the e-mail address of the intended recipient. It must not be rejected by the system. If the sender does not require confirmation of receipt he may not be able to show that receipt has occurred ..."

39. The central question in the Bernuth Lines case was whether an arbitration was validly commenced within the meaning section 14(4) of the AA, which requires the service of a notice in writing. There is an analogy here to subsection (5) of section 14, which has application to the instant arbitration, where a notice in writing is to be given where a third party is to appoint the arbitrator. In Bernuth, an email had been sent to a Bernuth Agency part of the shipping line, not the relevant part of the shipping line for the purposes of the dispute in question, it being agreed that an email constituted "writing" for the purposes of section 5(6) of the AA. I agree with Mr Wilson that the decision of Christopher Clarke J was strictly *obiter dicta*, but the guidance at para 29 of his judgment is highly persuasive having regard to section 76 of the AA. I accept that where a request for arbitration is sought by email, that email must not be rejected by the email system. Mr Wilson submits at para 21 that the email 'sent' by Mr Mellor must be received by the arbitrator before being deemed served. For the reasons he gives, I agree.

40. Mr Wilson then makes submissions about the meaning of section 9(2) of the CRCA and the words concerning a reference "may be made". He refers to the Guidance at para 3.15 that a reference is made "when the applicant gives notice in writing to an approved arbitration body". He also refers to paras 12.19 and 12.20 of

the Guidance, which refer to section 76 of the AA that a notice shall be treated as effectively served if, inter alia, it is addressed, prepaid, and delivered by post, and that notices and other documents under the Act may be served by email provided this is an effective means.

41. I agree with Mr Wilson's submissions, and for the reasons he gives, at para 29 that a reference is only made when there has been an actual delivery (or in certain cases, such as where the RDSA applies, which it does not here, a deemed delivery), and that this applies to the giving of a notice sent by email. I further agree with his submissions, and the reasons he gives, at para 32 that the effect of the email of 22nd September not being delivered on or before the 23rd September, and the letter being posted on 22nd September and not being received, or deemed received, until after 23rd September 2022, is that the Applicant's reference is out of time.

42. But Mr Wilson quite properly considers the possible application of section 7 of the Interpretation Act 1978, which provides that where an Act requires or authorises any document to be served by post, then unless the contrary intention appears, the service is deemed to be effected by properly addressing, pre-paying and posting a letter containing the document and, unless the contrary intention is proved, service is deemed effective at the time at which a letter would be delivered in the ordinary course of post. On section 7, Mr Wilson makes three submissions.

43. First, he submits that the contrast between the use of 'addressing, pre-paying and posting' in the Interpretation Act and 'addressed, pre-paid and delivered' in the 1996 Act suggests that the 1996 Act is an Act where 'the contrary intention appears'. I agree that that is a possibility.

44. Second, he submits that the words in section 7 "unless the contrary intention is proved" have application here as the correspondence Mr Mellor posted was not

received by the FCA until after the 27th September 2022. Mr Wilson relies on the decision of Morgan J in Calladine-Smith v Saveorder Ltd [2011] EWHC 2501 (Ch). That case concerned the service of a counternotice under the Leasehold Reform, Housing and Urban Development Act 1993. Morgan J considered the words in section 7 of the Act, "unless the contrary is proved", and at paras 26 to 33 he concluded that the provision requires a court to make findings of fact on the balance of probabilities on all of the evidence before it. On the basis of my findings of fact set out in this Award, and on the submissions on behalf of the Respondent, the contrary has been proved on a balance of probability, and the reference was not received by the FCA by post by the 23rd September 2022.

45. Third, Mr Wilson makes submissions about the meaning of the words in section 7 "the ordinary course of post", and he refers to the guidance in CPR 6.26 and PD 6A 10.2 of the Civil Procedure Rules (CPR), and to a now Kings Bench Practice Direction at page 25 that delivery in the case of first-class mail is treated as on the second working day after posting. I agree that that would be the 26th September 2022. But I disagree that the rules and practice directions in the CPR have any direct application to arbitrations, they can only be an indication of the position. In any event it is unnecessary for the Respondent to rely on this third submission in the light of my conclusions on the previous two.

The Applicant's Reply

46. Mr Mellor, acting for the Applicant, sent an email dated 2nd May 2023 as the Applicant's reply to the submissions on behalf of the Respondent. Mr Mellor says: "*My intent and belief was that the matter was serviced in good time by email and posts*". There are no other submissions in the email directed to the Preliminary Issue, as such. I do not accept that Mr Mellor's intention and belief can overcome the very serious difficulty for the Applicant that neither the email of the 22nd September 2022,

nor the posted applications, were delivered or deemed delivered to FAC by 23rd September 2023. The Applicant's submissions by way of the reply therefore do not assist me on the Preliminary Issue.

47. I have addressed the further material in the emails sent by Mr Mellor on the 2nd and 3rd May above in relation to the issue of authority, and I do so below in relation to the question of costs.

Conclusions on the submissions

48. I therefore agree with the submissions on behalf of the Respondent that as neither the email of the 22nd September 2022, nor the posting of the applications for arbitration, were or can be deemed to have been delivered by or on the 23rd September for the purposes of the CRCA, the Applicant has failed to make a valid reference under that Act.

Respondent's Costs

49. Finally, Mr Wilson asks that the Applicant should pay the Respondent's costs on the grounds of the unreasonable behaviour of the Applicant as detailed at para 49 of the Respondent's submissions.

50. In his email reply of 2nd May 2023 Mr Mellor says that he believes neither party has purposefully operated unreasonably, and each party should bear its own costs as intended; sharing the arbitrator's pre-paid fee.

51. Mr Wilson recognises that section 19(7) of CRCA states that the parties must meet their own or other costs. He submits that if I find that the Applicant failed to make an effective reference to arbitration, then section 19(7) and (8) does not bind the Respondent.

52. Section 19(7) provides that, except as provided by subsection (5) and section 20(6), the parties must meet their own legal or other costs. Subsection (5) applies to awards under section 13 or 14 and concerns the sharing of the arbitrator's fees. Section 20(6) provides that when the arbitrator makes an award under section 13 or 14, the arbitrator must (subject to subsection (7)) also make an award requiring the other party to reimburse the applicant for half the hearing fees. My award on the Preliminary Issue is not an award under section 13 or 14.

53. The restriction in section 19(7) appears in the context of awards under the terms of the CRCA, and therefore the terms of the deemed agreement between the parties. The words 'arbitration' and 'awards' used in section 19 appear to be in that context. But as the CRCA is treated as an agreement to arbitrate under the AA, the terms of the AA may also be relevant to the extent that they are not modified by schedule 1 to CRCA.

54. First, the jurisdiction to determine whether there had been an effective application for arbitration lies in section 30 of AA, subject to modifications that are not relevant here: see para 1(j) of schedule 1 to CRCA.

55. Second, any arbitration under the CRCA is a statutory arbitration and is subject to the provisions of the AA as if the CRCA were an arbitration agreement (see section 95 of AA), and subject also to any modifications in Schedule 1 to the CRCA.

56. Third, section 61(2) of AA (award of costs) provides that "unless the parties otherwise agree, the tribunal shall award costs on the general principle that costs follow the event … ". The short but difficult point is whether section 19(7) of CRCA is such an agreement within the meaning of section 61(2) of AA when the

competency powers under section 30 of AA are being exercised, or whether section 19(7) is more limited and is an agreement about the allocation of costs limited to the scope of the matters the subject of the deemed agreement to arbitrate as constituted in the CRCA.

57. Reading subsection (7) in the context of the rest of section 19, and in the context of the CRCA as a whole, I construe that subsection as an agreement about legal costs where an award is made in respect of a dispute that is validly referred to arbitration under the CRCA and is an award dealing with the substantive matters referred to arbitration under the deemed agreement of the CRCA. The objectives underlying the CRCA, of relief from the payment of protected rent debts, are identified in sections 1(1), and 3-6 of the CRCA. Procedural matters addressing how such relief is to be obtained are at section 9 (the parties are not in agreement as to the resolution of the matter of relief from payment of a protected rent debt) and at section 11(1) (a reference to arbitration must include a formal proposal for resolving the matter of relief from payment of a protected rent debt). The awards that can be made under the CRCA are those identified in sections 13 and 14. Treating the CRCA as an agreement to arbitrate subject to the provisions of the AA, and subject to the modifications in schedule 1, leads me to the conclusion that the reference to an agreement on costs in section 19(7) is not sufficiently wide as to include an agreement on legal costs, for the purposes of section 61(2) of AA, where the issue is one of competency within the meaning of section 30 of AA, and outside the objectives and purposes of the CRCA. There is also the obvious difficulty of how subsections (5) and (6) of section 19 can work where an award is in terms of section 30 of the AA (competency) and is not an award under sections 13 and 14. I conclude that the deemed agreement on legal or other costs in section 19(7) is limited to disputes that are the substantive subject of the CRCA. That the agreement envisaged by section 19(7) of the CRCA is not an agreement for the purposes of section 61(2) of

the AA where an award is made under the substantive competency power in section 30 of AA.

58. I therefore agree with Mr Wilson, for the reasons he gives, that I have power to award costs in relation to this award.

59. The Respondent seeks its costs for the reasons at para 49 of its submissions. I have had regard to the submissions on behalf of the Applicant that neither party has operated unreasonably. Whilst unreasonable behaviour is not the only ground for an adverse award of costs, the Respondent has identified certain acts of unreasonable behaviour by the Applicant, which I have taken into account. Ultimately the Applicant was the unsuccessful party in relation to the Preliminary Issue. The Respondent was put in the position of having to make submissions on the Issue, and the Respondent was the successful party, and in my view costs should follow the event as envisaged by section 61(2) of the AA. I have had full regard to the Respondent's allegations of unreasonable behaviour in deciding that the Respondent should have its costs of the arbitration. Essentially the Applicant has always maintained that its arbitration application, had been validly made but was unsuccessful in the Preliminary Issue.

60. I direct that the Applicant shall pay the Respondent its costs of the arbitration as defined in section 59 of AA. That will include the costs of the Preliminary Issue.

61. The Respondent also submits that if I find that section 19(5) is engaged, then I am invited to adjust the general rule under section 19(6) and reduce the Respondent's contribution to the arbitration fees to zero. If I am wrong to make a direction that the Applicant shall pay the Respondent's costs of the arbitration, and if I have jurisdiction under section 19(6), then I direct that Respondent's contribution to the

arbitration fees should be zero. That is because I have decided the Preliminary Issue in favour of the Respondent, and I see no reason why the Respondent should pay any part of the arbitration fees where the Applicant failed to make the reference timeously.

Publication

62. This Award must be published pursuant to section 18 of the CRCA. I am not aware that the Award contains any confidential commercial information, but I am prepared to consider any submissions concerning such matters if received by 4pm on 11th May. For the purposes of section 95(2) of the AA, the seat of this arbitration is England and Wales.

Disposal

63. In terms of the Preliminary Issue, the purported reference by the Applicant of a dispute between the Applicant and the Respondent was not made before the expiration of the time limit under the CRCA, and therefore there has been no valid and effective arbitration.

64. The Applicant shall pay the Respondent its costs of the arbitration as defined in section 59 of AA.

Date of the award

65. The award is made by me, Barry Denyer-Green, on 5th May 2023.

Corrections

66. In accordance with the provisions of section 57 of the AA, and after giving the parties an opportunity to make representations, of which there were none, I have corrected the spelling of "Silva" in the title and in paragraph 1 of this Award to read "Silver". These corrections are part of the Award.

B Denyer-Green

Falcon Chambers **BARRY DENYER-GREEN**

Falcon Court

London EC4Y 1AA **5th May 2023**

B Denyer-Green

BARRY DENYER-GREEN

Corrections made 22nd May 2023