

COMMERCIAL DISPUTES WEEKLY – ISSUE 142

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BITE SIZE KNOW HOW FROM THE ENGLISH COURTS

"...there should be a real prospect that the information sought will lead to the location or preservation of the misappropriated cryptocurrencies."

LMN v Bitflyer Holdings Inc and others

Cryptocurrency – Information

LMN, a cryptocurrency exchange, successfully sought information orders against six other cryptocurrency exchanges. LMN's exchange had been hacked and millions of dollars' worth of cryptocurrency transferred out. LMN's expert traced the currency to the six other exchanges but was unable to identify the particular account details. The court considered that LMN had a good arguable case for Bankers Trust relief (to ascertain the whereabouts of misappropriated property), the law of England and Wales was applicable and England was the appropriate forum. It rejected a suggestion that making a Bankers Trust order against foreign defendants would be an infringement of sovereignty of a foreign jurisdiction because there were exceptional circumstances, namely crime and fraud, that justified such an order. Any issue could be avoided by including a provision in the order that the defendants were not required to do anything contrary to local law. The court ordered all

defendants to provide the account name, KYC information and any other information/documents relating to the account. They were also required to provide to the best of their ability, an explanation of what had become of the allegedly misappropriated currency. LMN gave an undertaking only to use the information to recover the allegedly misappropriated assets and not for any substantive claim against any of the defendants without the permission of the court.

LMN v Bitflyer Holdings Inc and others [2022] EWHC 2954 (Comm), 29 November 2022

Relief from forfeiture

A landlord granted the claimant tenant a call option which was registered at HM Land Registry as a unilateral notice against the freehold title. The option granted the claimant a right to call for its landlord to grant it a new lease on materially the same terms. The lease also contained a clause permitting forfeiture for various events, including rent remaining unpaid for 21 days. The claimant fell into arrears of rent during the pandemic. The landlord served notice to terminate the option, but not forfeit the lease. The claimant subsequently repaid all the arrears. The claimant was granted relief from forfeiture by establishing that the option gave it sufficient proprietary interest in the premises; and that the termination provision secured the performance of the tenant covenants in the lease (including the rent payment obligation). The court exercised its discretion to grant unconditional relief because the claimant's default was not wilful and the defendant landlord had taken advantage of the repayment of rent but nonetheless deployed their security, by terminating the option but not the lease. It would therefore be unconscionable for them to retain the benefit of termination of the option.

Hush Brasseries Ltd v RLUKREF Nominees (UK) One Ltd [2022] EWHC 3018 (Ch), 1 December 2022

Disclosure – Control

Several individuals employed by or in positions of responsibility for the Republic of Mozambique used personal email devices and accounts routinely to receive and send communications for Mozambique. Mozambique was ordered to identify which individuals had been asked to consent to a search of their personal devices for documents relevant to the dispute and which of those individuals had consented. Where the relationship between a party to litigation and its employees was governed by English law, the court will readily find that the party has the necessary control as against the employee for the purposes of disclosure. The judge rejected an argument that without expert evidence of foreign law there could be no presumption that a foreign company had a right of access to documents. Employees of foreign companies will have materially the same obligations as those of English companies. Further, an evidential rule in English Law allowed a judge to assume that foreign law was the same as English Law unless the contrary was shown.

The Republic of Mozambique v Credit Suisse International and others [2022] EWHC 3054 (Comm), 30 November 2022

Contract Interpretation

Last Bus operated a fleet of passenger coaches and entered into hire purchase agreements for new coaches with Dawson. Last Bus asserted that several of the coaches were in breach of the statutorily implied term that they be of satisfactory quality. Dawson pleaded in response a contract term that provided that "*all such representations, conditions and warranties whether express or implied by law are excluded*". The court held that this clause passed the UCTA reasonableness test. Last Bus was a substantial commercial party who could have acquired the coaches elsewhere. There was no basis for suggesting that Dawson took advantage of Last Bus, nor that Last Bus must not have properly understood what they were signing. There was a long and consistent prior course of dealing between the parties including this clause to which no objection had ever been raised. There was no real prospect of Last Bus resisting Dawson's defence and summary judgment was granted dismissing the claim against Dawson.

Last Bus Ltd v Dawsongroup Bus and Coach Ltd [2022] EWHC 2971 (Comm), 28 November 2022

Should you wish to discuss any of these cases in further detail, please speak with a member of our London dispute resolution team below, or your regular contact at Watson Farley & Williams:

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