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BITE SIZE KNOW HOW FROM THE ENGLISH COURTS

> "The issue by a bank of a term sheet in general represents an important degree of commercial commitment to the proposed transaction."
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> Havila Kystruten A.S. v Hijos de J Barreras S.A

Shipbuilding – termination – refund guarantees

The Commercial Court held that a shipyard had wrongfully terminated two shipbuilding contracts. The bank commitment letter did satisfy the contract requirement for a committed statement of finance and the parties had not concluded that no alternative financial arrangement was available. The additional payments were not due as the condition precedents had not been satisfied and so the buyer was not in default for not paying them. The buyer was entitled to accept the yard's wrongful termination as a repudiatory breach and to terminate on that basis, as well as under a contract provision that permitted cancellation for delay beyond the drop dead date. The buyer was able to claim any wasted expenditure as reliance loss so long as the value of any partial performance was taken account of. The refund guarantee was a demand bond and responded to termination at common law for repudiatory breach, not just an express contractual termination.

Havila Kystruten A.S. v Hijos de J Barreras S.A [2022] EWHC 3196 (Comm), 16 December 2022

WFW acted for the successful buyer. A detailed article on the case can be found **here**.

Insurance – assignment

An aircraft manufacturer delivered two aircraft late. The buyer received liquidated damages under an insurance policy and the insurer then sought to recover those sums from the manufacturer as assignee of the buyer's rights to claim liquidated damages (which occurred automatically by operation of Japanese law). The manufacturing contract contained a no assignment clause. The court held that this prohibition applied to assignments by operation of law. It would not apply to truly involuntary assignments but here there was a voluntary act by the buyer in taking out the policy and claiming under it. As a result, the insurer could not make a claim in arbitration under the contractual arbitration clause and the tribunal had no jurisdiction.

Dassault Aviation SA v Mitsui Sumitomo Insurance Co Ltd [2022] EWHC 3287 (Comm), 20 December 2022

Damages – warehouse receipt fraud

The Court of Appeal dismissed an appeal by a defendant in a dispute arising out of forged warehouse receipts. The claimant had bought the forged receipts relating to a quantity of nickel for $284m and then sold them on to a third party for $291m. When the receipts proved to be fakes, the claimant reached an agreement with the third party for a sum less than $284m but which required the claimant to pursue the fraudsters for the full amount of the loss and reimburse the third party. The claimant's loss arising from the conspiracy to injure by unlawful means was therefore $284m and the defendant was liable to the claimant for that sum. The defendant's liability was not limited to the payment made under the settlement agreement.

ED&F Man Capital Markets Ltd v Come Harvest Holdings Ltd [2022] EWCA Civ 1704, 21 December 2022

Adjudication

The claimant was contractor under an agreement to fit out a data hall on the JCT Design and Build 2011 form. It sought to enforce a decision of an adjudicator that was in its favour. The employer challenged that decision on the basis that the adjudicator was in breach of natural justice as he had concluded that he was bound by certain findings of an earlier adjudicator and had therefore taken too narrow a view of his own jurisdiction. The court agreed and this challenge was successful. The adjudicator had, however, made alternative findings in case his primary decision was wrong. He had consulted with the parties before doing so, the decision weas not *obiter dicta* and could be enforced. The court upheld one alternative finding in favour of the employer.

Sudlows Ltd v Global Switch Estates 1 Ltd [2022] EWHC 3319 (TCC), 21 December 2022

Fraudulent misrepresentation

The two founders of a start-up company that sells the fitness bike "CAR.O.L" have been held liable for fraudulent misrepresentation and breaches of warranty in relation to investments of £2.5m . The two claimant investors were induced by the fraud to fund the company through share subscriptions and had lost significant sums of money as a result. The defendants had been aware of their duties as directors of the company and the importance of the accuracy of the information given to potential investors. They had been in breach of those duties by making misrepresentations and concealing key information. That deception included failing to reveal that their relationship with the previous investors had significantly broken down, mainly as a result of the behaviour of one of the founders. They had also failed to explain that the existing investors were unwilling to contribute additional funds without that founder resigning as CEO. In addition, they had seriously misused company funds for personal expenses and gifts for them, their families and friends.

Bell and another v Singh and another [2022] EWHC 3272 (Comm), 21 December 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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