

Wirecard Bank v. Scott, van Meel & Shepherd

Company veil pierced in on-line credit card Olympic ticket scam.

Introduction

Lawyers involved in advising organizations connected to the London 2012 Olympic Games should note the lessons to be learned from the Beijing Olympics and the opportunities that the internet provided to fraudsters who pretended to sell tickets and made off with the cash. Even those individuals who hide behind a limited company can be held to account according to Mr Justice Tugendhat in the High Court¹ in *Wirecard Bank AG v. Scott, van Meel & Shepherd* [2010] EWHC 451 (QB).

Xclusive Tickets

Xclusive Tickets claimed on its website to be able to provide official tickets to the 2008 Beijing Olympic Games. It took payments by credit card and its merchant facilities were provided by German bank, Wirecard. Xclusive was run by Scott, van Meel and Shepherd. Mr Shepherd was disqualified from acting as a company director so only Scott and van Meel were shown as directors at Companies House. Xclusive was a scam - it never did have any tickets. The disappointed customers turned to Wirecard for refunds on their credit cards. Wirecard suffered losses of £2million. Wirecard sought to recover these losses from these 3 individuals.

Wirecard made 3 claims – all of which were upheld against all 3 defendants:

- Tort of deceit,
- Conspiracy to injure by unlawful means, and
- Personal liability under the Company Director's Disqualification Act 1986 ("CDDA").

Deceit

To prove deceit, Wirecard had to show that Xclusive made a misrepresentation that it was a legitimate and honest business which involved the legitimate and honest sale of genuine tickets for the 2008 Beijing Olympics. Wirecard also had to prove that Xclusive were entitled to receive genuine tickets from the main sponsors of the 2008 Olympics. The Judge found both of these elements to be proved by Wirecard and upheld the deceit claim. Mr van Meel had in November 2007 written an email to Wirecard after he met them in Munich to negotiate the card processing contract. This email stated that the Beijing tickets were "supplied by main sponsors". As there never were any tickets, this email proved to be the basis by which Wirecard proved the deceit by Xclusive.

Conspiracy to Injure

There was a merchant agreement between Wirecard and Xclusive under which Wirecard provide the credit card processing facilities. To prove conspiracy to injure,

¹ www.bailii.org/ew/cases/EWHC/QB/2010/451.html

Wirecard had to show Xclusive had been in breach of this contract. Wirecard also had to show there were breaches of fiduciary duty owed by the Defendants as directors to Xclusive. Interwoven with this conspiracy claim were the other 2 claims.

Counsel for Wirecard submitted that an earlier 1983 case² in which a constructive trust had been found to exist where a payment had been credited to a company at a time where it had resolved to cease trading applied. In the 1983 case this payment was held on constructive trust by the company as it could not in good conscience retain it. The Judge said the constructive trust submission was plausible – but it had not been developed in evidence before him.

However, the judge found that the liquidator of Xclusive had not discovered where all the money from the ticket sales had gone. He noted that van Meel lived in a £2million house and Shepherd had the use of expensive houses and cars. Both van Meel and Shepherd purported to leave Xclusive in January 2008. The Judge found that if they knew then that no official tickets for the Beijing Olympics would be forthcoming – they should have told Wirecard this to correct the impression given in the November 2007 email to the contrary. As they did not, the judge found the conspiracy claim to be made out.

Company Directors Disqualification Act 1986³

Section 15 of the CDDA imposes personal liability for all relevant debts of a company on 2 types of persons:

- Disqualified to act as a company director because of an order made under section 11 of the CDDA he is involved in the management of a company, or
- Involved in the management of the company, acts or is willing to act on the instructions of a disqualified director (or undischarged bankrupt).

It should be noted that there is no need to prove either dishonesty or conspiracy to make out a claim under the CDDA – so this claim should be easier to prove. There is a presumption in section 15(5) that where a person knows another is a disqualified director he is presumed to have been willing to act on those instructions “unless the contrary is shown”.

Dutchman, Mr van Meel spoke 5 languages and negotiated the merchant agreement with Wirecard and wrote the November 2007 email afterwards that was vital in this case. The judge found that van Meel had acted on the instructions of the disqualified Shepherd when he did so, he had not displaced the statutory presumption – so the CDDA claim against van Meel was proved.

Scott was not represented at the February 2010 trial – so judgment was entered against him. The judgment refers to him having a drink problem and the Judge again found he had acted on Shepherd’s instructions.

As to Shepherd, the Judge clearly found him to be a disqualified director and that he was involved in the management of Xclusive throughout. The Judge approved an earlier 1983 Court of Appeal decision⁴ in which it said “be concerned in” should not be narrowly construed to mean “take part in”.

² *Neste Oy v. Lloyds Bank PLC* (“The Tiskieri”) [1983] 2 Lloyd’s Rep 658 (QBD – Bingham J)

³ www.opsi.gov.uk/acts/acts1986/pdf/ukpga_19860046_en.pdf

⁴ *R v. Campbell* (Archibald James) [1984] BCLC 83

Section 15(3) of the CDDA says that “relevant debts” are those that are incurred “at a time when” the person was either involved in the management of a company or was willing to act on instructions of a disqualified director.

The CDDA claim was added as a late amendment and the Judge felt that technical issues under the CDDA should be better determined by a Chancery judge than a Queen’s Bench one. Both van Meel and Shepherd tried to argue that “at a time when” they were involved with Xclusive it had no debts because the chargebacks due to Wirecard had not yet kicked in. Counsel for Shepherd cited 2 Australian cases in support of this submission. The judge rejected this submission and said that liability to Wirecard arose as each payment was made by it to Xclusive. On the facts the judge found both van Meel and Shepherd to have been involved in running Xclusive long after they purported to have left it.

Practical Guidance for Practitioners

This case serves as reminder to as to the joint and several personal liability provisions under the CDDA where individuals act on the instructions of a disqualified company director. It is prudent to check the public register⁵ before accepting any such instructions.

Wirecard had a merchant agreement in place with Xclusive which was governed by German law. Under this, Wirecard retained 5% of the amount of all card transactions for 180 days. Cardholders had up to 180 days to notify a dispute or chargeback to their card issuer. Wirecard had contemplated increasing this to 10%. Xclusive approached Wirecard because no UK-based bank would touch them.

Those advising banks with a merchant acquiring division should be alert to the higher risks presented by ticket issuing businesses and structure the contracts so that retentions are set at a high enough level and are retained for the correct period. These contracts should have adequate audit rights, so that where a merchant acquirer suspects there may be a problem it can investigate and suspend facilities.

Those who are not prepared to learn from the lessons of history are condemned to relive them. We are likely to see similar ticket fraud cases in the future. It should be noted that under the section 31 of the 2006 Act⁶ it is an offence to sell or purport to sell tickets for the 2012 London Olympics without a written authorization from the London Organising Committee. Tickets⁷ for this will go on sale in 2011.

Under section 75 of the Consumer Credit Act 1974⁸, a credit card issuer is made jointly liable for breach of contract or misrepresentation with the actual supplier. So a credit card holder is entitled to a refund from their card issuer if promised tickets do not materialize. Section 75 (3)(a) sets the parameters for these claims and says that it applies to a single item to which the supplier has attached a cash price “not exceeding £100 or more than £30,000”. As a result of this provision, tickets for more expensive events such as Olympics, premium sporting events or festivals are more likely to be over the £100 threshold – whereas tickets for concerts or play are not. This is another factor to be considered when drafting a merchant acquiring agreement for a bank.

⁵ <http://wck2.companieshouse.gov.uk/d2a293bb1c5555a0acb982dc41d6bb21/dirsec>

⁶ London Olympic Games and Paralympic Games Act 2006 www.opsi.gov.uk/acts/acts2006/ukpga_20060012_en_1

⁷ www.london2012.com/visiting/tickets/index.php

⁸ www.opsi.gov.uk/acts/acts1974/pdf/ukpga_19740039_en.pdf