NCN: [2024] EWHC 2767 (Ch)

Ref. CR-2024-000467

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INSOLVENCY AND COMPANIES LIST

7 Rolls Buildings
Fetter Lane
London

Before DEPUTY ICC JUDGE SCHAFFER

IN THE MATTER OF

COINFLOOR LIMITED IN MEMBERS VOLUNTARY LIQUIDATION

MS HELEN PUGH appeared on behalf of the Joint Liquidators (Mr Jeremy Karr and Mr Simon Killick)

JUDGMENT
24 SEPTEMBER 2024

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DEPUTY ICC JUDGE SCHAFFER:

INTRODUCTION

1. The application before me this afternoon is made by Jeremy Karr and Simon Killick in their capacity as the joint liquidators of Coinfloor Limited. I shall refer to Mr Karr and Mr Killick as the joint liquidators and Coinfloor Limited as the company for the purposes of this judgment.

2. Appearing on behalf of the joint liquidators was Helen Pugh of counsel who has provided a detailed skeleton argument accompanied by 21 authorities and text book references. For these, I am grateful. The evidence in support of the application was substantial with three witness statements in support with over 450 pages of exhibits.

3. I have read the witness statements and was taken where appropriate by Miss Pugh to some of the exhibits during the course of her submissions.

THE APPLICATION

4. The application was primarily seeking a declaration that the novating of customer contracts with the company was effective or, in the alternative, directions or declarations that certain customers of the company defined within the evidence as "passive customers" have no proprietary rights or entitlements to assets within the company. Consequential directions depending on what findings were made by the court were also sought.

BACKGROUND FACTS

5. These can be summarised shortly. The company, which was a cryptocurrency exchange, entered into a contract to sell its assets and business Coincorner Limited ("Coincorner") on 29 September 2021.

6. By that sale, Coincorner assumed all the liabilities of the company arising under its contracts with all the company's customers. The company was obliged under the sale to advise all of its customers about the proposed novation of their contracts making it clear that "by conduct" the contracts would be novated and their funds transferred to Coincorner.

7. Although not obliged to do so, the company contacted the FCA seeking its directions pursuant to regulation 74C(6) of The Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017.

8. After exchanges of various emails, these directions were agreed by the FCA and signed off by the company on 23 September 2021. Following various steps taken by the company to fulfil its obligations under the contract for sale, subsequently, the assets and liabilities were transferred to Coincorner on 4 November 2021 for a consideration of £100,000 and a revenue share.

9. The company was placed into Members Voluntary Liquidation, on 6 June 2022 and the joint liquidators appointed. There were 79,098 customers of the company in September 2021, some of whom closed their accounts and some of whom expressly consented to the novation. This led to 61,278 customers who were defined in the evidence as the passive customers. I shall adopt that description for the purposes of this judgment.

10. The joint liquidators made an interim distribution to members of £2 million on 12 May 2023 and held, as at 22 January 2024, £2,430,160.93 which has yet to be distributed. The application before this court was made by the joint liquidators on 25 January 2024 where preliminary directions were given by ICC Judge Barber.

11. The adjourned application came before me on 26 July 2024 which I adjourned further to ascertain the position from the FCA as to the novation. That evidence was procured and filed on or around 13 September. By 16 July 2024, most of the passive customers had engaged successfully in Coincorner and there remained around 2,200 left, of which around 800 had more than £1 in their respective accounts.

SUBMISSIONS

12. Miss Pugh put the joint liquidators' case on three premises: novation, implied variation or estoppel. Dealing with each in turn, she submitted that the customers' contracts had been novated by conduct. The passive customers had been contacted on numerous occasions. They must have been aware of the changes and they had been advised that if they did not reply, novation would take effect.

13. Converting the holdings unilaterally to cash could expose the company to claims depending on the value of the asset at the time of sale even though there was sound contractual defences were such action to been taken.

14. As for there being an implied variation, the terms and conditions of the contract between the customer and the company permitted amendment. Furthermore, this contract on its construction permitted unilateral variation in circumstances such as was the case here.

15. Finally, the passive customers on the facts here were estopped from denying that the novation took effect.

CONCLUSIONS

16. I have considered the evidence here and in particular the difficult position in which the joint liquidators find themselves where they wish, on the one hand, to fulfil their duties in distributing the balance of funds they hold for the members whilst, on the other hand, to make sure that they do not disadvantage the remaining rump of the passive customers who have not positively engaged for whatever reason in providing instructions as to the holdings they originally had with the company.

17. Here, I am satisfied that by conduct the contracts were novated. The test is pithily put by Lightman J in *Evans v SMG Television* [2003] EWHC 1423 (Ch.) where at paragraph 181, he said:

> "The proper approach to discerning whether a novation should be inferred is to decide whether that inference is necessary to give business efficacy to what actually happened (compare *Miles v Clarke* [1953] 1 WLR 537 at 540). The inference is necessary for this purpose if the implication is required provide a lawful explanation or basis for the parties' conduct."

18. Here, there is no doubt in my mind that business efficacy supports the contention that a novation has taken place. Objectively, no other plausible conclusion can be reached. There has been no response from the remaining 2,200-odd passive customers despite numerous attempts for them to engage in the process.

19. On the balance of probability, they must be aware of the transfer. No complaints have been made for over two years. Critically and an important factor in reaching this view is the fact that all these remaining passive customers were advised that, if they did not respond, the contract would be automatically novated (see JK2 at page 361).

20. Furthermore, the evidence before me indicates, although it is not pivotal to my decision, that Coincorner had been in regular touch with those remaining passive customers but who were not interested in addressing these outstanding issues.

21. The behaviour exhibited here is sufficient in my view. Referring again to the *Evans*' decision just cited, Lightman J said this at paragraph 56:

> "The consent of all parties is required for a novation. Consent can either be provided expressly or can be inferred from conduct. Whether consent has been provided is a question of fact. For example, in *Re Head* [1894] 2 Ch 236 a transfer of funds from a current to a deposit account following the death of a partner in a banking partnership was held to amount to a novation of liability to the surviving partner."

22. Though not mirroring exactly the facts here, the situation is not entirely dissimilar in the movement of assets from the company to Coincorner.

23. If, however, I am wrong in determining that novation by conduct has taken effect, I am satisfied on the alternative argument that there has been an implied variation to the terms and conditions that there was a deemed consent. The contract with any customer provided for this. By clause all customers agreed to abide by the company's terms and conditions and clauses 2.2 and 14 permitted unilateral changes to the terms and conditions on notice being given.

24. Here, it clearly was, on the evidence before me, in circumstances where by retaining its assets on the platform which had been passed to Coincorner, the relevant customer had accepted that there had been a variation to the terms.

25. The court looks to see if there are inconsistencies raised by the subsequent conduct of, as here, the passive customers. As was put by Bingham LJ in *The Aramis* [1989] 1 Lloyds Reports 213 at page 224:

> "It would, in my view, be contrary to principle to countenance the implication of a contract from conduct if the conduct relied upon is no more consistent with an intention to contract than with an intention not to contract. It must, surely, be necessary to identify conduct referable to the contract contended for or, at the very least, conduct inconsistent with there being no contract made between the parties to the effect contended for. Put another way, I think it must be fatal to the implication of the contract if the parties would or might have acted exactly as they did in the absence of a contract."

26. Here, everything points to the passive customers accepting the contract now in place with Coinfloor - put conversely, as per Bingham LJ, there was not one shred of evidence to support the contention that there is any inconsistent conduct demonstrated by those passive customers. The failure to engage fully, to use the vernacular, does not even get off first base.

27. As to the third submission, estoppel, this I do not intend to address given what I have concluded earlier in this judgment, nor do I need to consider the possibile ineffectiveness of the novation.

28. Finally, for the sake of completeness, and because I was the one who initiated an enquiry be made of the FCA of the relief now sought, I have seen the email exchanges between the solicitors for the joint liquidators and the FCA, culminating in its email of 6 September. From that, I conclude that although the FCA were not prepared to give its blessing, this was only because it took the view that it was not required to do so. Its response of 28 August 2024 set out at page 11 of JK3 is sufficient in my view.
