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Immunity for Blackpool FC? It's not clear...

Article by Samuel Cathro, 30th August 2023

If the court blesses a transaction, the trustee is immune from subsequent challenge. One might be forgiven for thinking that is an uncontroversial statement of the law – but the Court of Appeal's recent decision in *Denaxe Ltd v Cooper* [2023] EWCA Civ 752 (30 June 2023) calls it into question.

The decision has two significant implications:

1. First, it suggests that a trustee who obtains the court's blessing to enter into a transaction may not be immune from a negligence claim in respect of the very same transaction that has been blessed.
2. Second, it suggests that the trustee might not have protection unless *all* affected parties are joined to the proceedings.

Although these appear to be fundamental changes, the decision's true scope is far from clear.

The sale of the Club

The proceedings concerned the proposed sale of Blackpool Football Club (the **Club**). A minority shareholder in the Club successfully brought an unfair prejudice petition against the club's former owner, Mr Oyston, and his company, Denaxe Ltd. Mr Oyston and Denaxe were ordered to buy out the minority shareholder for c. £31m. They were unable to raise the price, and **Receivers** were appointed (by way of equitable execution). The Receivers proposed to sell various **Footballing Assets**, including the Club and its stadium, to pay the minority shareholder (the **Transaction**).

The Receivers applied to the court for an order permitting them to enter into the Transaction. Their preferred purchaser was Mr Sadler, a lifelong supporter of Blackpool who wished to see it continue to play football at the stadium. Marcus Smith J was satisfied the Receivers' decision to sell the Footballing Assets was a "*momentous decision*", and approved the transaction (*Cooper v VB Football Assets* [2019] EWHC 1599 (Ch)). This was because the price was a reasonable one and Mr Sadler's bid was clearly the best (at [73]). The Judge was also satisfied that the Receivers acted as ordinary, prudent and reasonable receivers; that (without seeking to second-guess the Receivers) the sale of the Club was a proper transaction in all the circumstances; and that the Receivers genuinely held the view that the transaction was a proper one which should be entered into ([72]-[73]).

After Marcus Smith J's decision, Denaxe issued a separate claim arguing that the sale to Mr Sadler was at an undervalue, and that the Receivers had therefore breached their duties of care. The Receivers applied to strike out that claim or for summary judgment. Fancourt J granted the strike out application ([2022] EWHC 764 (Ch), [2022] 4 WLR 52). He held that the Receivers' decision to sell the Club "*was the very decision that the court [had] approved*" ([88]) and they therefore had immunity against a claim that they should have sold the Club in a different way which would have achieved a higher price (drawing on cases concerning trustee blessing applications). Denaxe appealed.

The Court of Appeal's decision

The leading judgment was given by Snowden LJ (Asplin LJ gave a four-paragraph judgment agreeing with Snowden LJ, and Falk LJ agreed with both Judges). The court proceeded on the basis that the principles which applied to trustee blessing applications applied equally to equitable receivers (albeit on the somewhat equivocal footing that neither party had suggested the Court should conclude otherwise ([70])).

Lord Snowden decided that there was a lack of binding authority or specific analysis on trustee immunity in these circumstances, so it was necessary to return to first principles ([115]). This was notwithstanding the fact that, in *Cotton v Brudenell-Bruce* [2014] EWCA Civ 1312, [2015] WTLR 3, Vos LJ had considered this precise question (albeit in *obiter*). Vos LJ concluded that a trustee who had successfully made a blessing application would have

immunity against a beneficiary's claim that the subject transaction was at an undervalue (at [78], [87]).

The first strand in Lord Snowden's reasoning in the Court of Appeal was to decide that there is no separate doctrine of trustee "immunity", and rather that the validity of any challenge following a blessing application would be determined by applying the principles of *res judiciata* or abuse of process ([118]). It was on this basis that Snowden LJ ultimately dismissed the appeal – Denaxe was a party to the proceedings below, and its opportunity for objecting to the proposed sale was before Marcus Smith LJ. It was clearly a *Henderson v Henderson* abuse of process for it to bring fresh proceedings objecting to the transaction when it should have done so before the trial judge ([162]).

Is it necessary to join every beneficiary?

Although the *Henderson* argument appears correct, the conclusion that there is no separate doctrine of "immunity" led on to the first questionable implication of this judgment. Snowden LJ suggested that, if trustees or office-holders do not join interested parties to the blessing proceedings and thereby "bind" them, he could not see how they would obtain immunity (at [134]). Such an approach would suggest that, where a trustee seeks blessing of a momentous decision, it must join every possible beneficiary who might seek to challenge that decision in future. That would at least appear to be inconsistent with CPR 19.10, which provides that a claim brought by trustees is binding even if not all the beneficiaries are joined:

> *(1) A claim may be brought by or against trustees, executors or administrators in that capacity without adding as parties any persons who have a beneficial interest in the trust or estate ('the beneficiaries').*
>
> *(2) Any judgment or order given or made in the claim is binding on the beneficiaries unless the court orders otherwise in the same or other proceedings.*

Consistently, CPR 64.4 and PD 64B, which relate specifically to blessing applications, provide that it may not be necessary to join beneficiaries if their point of view will be advocated by other beneficiaries who are already parties.

These provisions are consistent with the usual practice in blessing proceedings where the court will give directions as to which parties ought to be served and joined. This

presumably follows from the fact that blessing applications are governed by the court's supervisory jurisdiction, rather than being Part 7 proceedings where all parties must be joined for the decision to be bind them.

Does a blessing actually offer protection?

The second questionable implication of the Court of Appeal's decision relates to the protection afforded to trustees by a blessing application. Snowden LJ suggested that a trustee whose decision to enter into a transaction has been blessed is not necessarily protected against a subsequent claim for negligence in relation to that very same transaction (at [147]). The court's reasoning on this point appears to rely on the fact that a *Public Trustee v Cooper* style inquiry is different to the inquiry where a beneficiary has brought a claim in negligence. The former asks whether the trustees have formed a view which, in all the circumstances, reasonable trustees could properly have formed. The latter might concern the more specific factual question of whether the proposed sale price was the best reasonably obtainable for the property in question (see [111]-[112], [130]-[131]).

The court appeared to be concerned that it is not well placed to determine commercial issues that are outside its expertise (see [74], [98]). But, consistent with Fancourt J's conclusion (at [88] of the decision under appeal), the whole purpose of seeking blessing of a decision to enter into a transaction is to provide the trustees with protection from subsequent claims in respect of that same transaction. As the Guernsey Court of Appeal explained in *Re F* (unreported, September 10, 2013 at [11]), when granting a blessing application, the Court is deciding: "*that the trustees' proposed exercise of the power is lawful; … and [they] have not reached a decision that no reasonable body of trustees could have reached. The effect is to protect the trustees from any challenge to their decision by persons interested in the trust…*" It is difficult to see why trustees would or should embark on a blessing application if, in exercising their power in the manner which the court has approved, they are nevertheless open to allegations of negligence.

The trustees' duty of care is to "*[take] in managing trust affairs all those precautions which an ordinary prudent man of business would take in managing similar affairs of his own*" *Speight v Gaunt* (1883) 9 App. Cas. 1, HL. The court does not need to make the trustees' commercial decision itself to decide whether the trustee has complied with its duty. Rather, in circumstances where Marcus Smith LJ had concluded that the price was

reasonable and clearly the best bid, that the Receivers acted as ordinary, prudent and reasonable receivers, that the sale of the Club was a proper transaction in all the circumstances, and that the Receivers genuinely held the view that the transaction was a proper one ([72]-[73]), it is hard to see how they would have been in breach of that duty of care. This is particularly so where the Receivers took the further, prudent step of seeking court approval of the Transaction before entering into it.

Perhaps for this reason, the Court of Appeal got into difficulty when it came to applying the new distinction it had drawn between claims that could survive a blessing and be brought against trustees, and those that would be barred ([147]). There was "*some force*" in the submission for Denaxe that Marcus Smith J had not specifically decided whether the Receivers had exercised all due skill and care in obtaining the best price ([151]). On the other hand, there was "*considerable merit*" in the Receivers' argument that the substance of the alleged breach of duty was merely the decision to enter into the very same decision that had been blessed ([153]-[154]). Lord Snowden did not consider that he needed to decide which was right ([155]). That is unfortunate – although it was clear on these facts that Denaxe should have raised its objections sooner (and its claim was therefore barred on *Henderson v Henderson* grounds), the decision leaves open the critical question of what protection a court blessing will offer, and where a trustee will remain vulnerable.

Conclusion

The postscript to the decision rightly notes that the issues encountered here will be avoided if first instance judges are very clear about what decision they are blessing and what consequences should flow from that ([164]). However, the Court of Appeal's judgment appears to leave the law in an unsettled state – both as to who should be joined to a blessing application, and what protection it will offer. Trust practitioners might hope that this decision is confined to the commercial context rather than expanded to blessing applications generally. It may be that the *Henderson* argument prevents any appeal from this decision to the Supreme Court. However, important questions remain which that court might be called on to resolve in future.

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