Browne Jacobson

Insolvency practitioners and trustee immunity

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In Denaxe Limited v Cooper & Rubin, the Court of Appeal has recently considered the important issue of immunity from suit against a party who has previously sought the Court's approval for a particular course of action. This is commonly utilised by trustees (under CPR 64) and insolvency practitioners (for example under CPR 69 and Schedule B1 of the Insolvency Act 1986) when faced with difficult questions concerning entitlements and distributions to different classes of beneficiary or creditor.

Interestingly, in this case the insolvency practitioner had sought court approval for the sale of assets rather than any distributions.

The facts

The Defendants were appointed as equitable receivers over the Claimant in 2019. The Claimant owned the majority of shares in Blackpool Football Club Ltd (the Club), as well as separately owning the stadium, training ground and other property (the Assets). It had been ordered to buy out the shares of the minority owner of the Club following an unfair prejudice petition but had not paid the sums due and the minority owner applied to appoint the receivers over it.

The receivers explored a sale but were concerned that the main shareholder in the Claimant, Mr Owen Oyston, might acquire the shares in the minority owner and that would affect the sale price of the Club and the Assets. The receivers therefore applied to the Court to vary the buy-out Order and obtain the sanction of the Court to sell the Club and Assets together. Mr Oyston was given the opportunity to attend the hearing and did so, reserving his position on whether a sale together would achieve the best price and arguing that the receivers did not need a direction from the Court as it was within their powers and a matter of commercial judgment for them.

The Court approved the sale and the receivership was discharged, with the shares in the Claimant restored to the control of Mr Oyston. In January 2020 the Claimant then issued proceedings against the Defendants, alleging they breached their duties of care in selling the Assets at an undervalue.

The Defendants sought to strike out the claim and/or obtain summary judgment on various grounds and at first instance Marcus Smith, J struck out the claim on the ground that as a result of the approval hearing the Defendants were immune from any claim that they should have sold the Assets in a different way. The Claimant appealed.

The decision

The Court of Appeal found that the immunity of a defendant in such circumstances was not a discrete legal concept. The relevant legal principles to consider were whether the proceedings were (i) res judicata on the ground of issue estoppel or (ii) an abuse of process pursuant to the rule in *Henderson v Henderson* (that a party may not raise a claim in subsequent litigation that they ought to have raised in a previous action).

The Court of Appeal held that the proceedings were an abuse of process. Mr Oyston as the majority shareholder had been given the opportunity at the approval hearing to object to the sale of the Club and Assets together and chose to stay silent on the questions of the marketing and valuation of the Assets. He made a calculated decision not to do so and it would be manifestly unfair to the Defendants and a misuse of the Court's resources to permit the Claimant to now pursue an allegation that could have been raised then.

Due to their finding on abuse, the Court of Appeal declined to decide whether issue estoppel arose on the facts, stating that there were powerful competing submissions. It did note that the question would always be very fact specific, depending for example on the precise questions determined by the Court and whether they were simply deciding if an applicant was acting honestly and rationally or something further. An essential requirement for any argument of issue estoppel would be that a claimant had been a party to the earlier decision, or had at least appeared at the hearing.

Despite the unusual nature of the application here, the Court of Appeal also took the opportunity to reiterate previous judicial comment that the Court was "*not a sanctuary or bomb shelter for office holders*". They differed from trustees and would normally be expected to make their own commercial decisions, even difficult ones. Approval hearings would normally require questions to arise on matters such as whether they were acting within their powers or whether there are potential conflicts of interest.

Implications

Despite the Court of Appeal stressing the need for professional office holders to make hard commercial decisions themselves rather than involve the Courts, the case is a very helpful example of boundaries being pushed in order to allow them to protect themselves from future challenges. This can be an extremely powerful risk management tool in appropriately difficult cases. Whilst issue estoppel arguments will be very fact dependent, ensuring that interested parties who may later complain are joined as parties is essential to obtain protection on at least the ground of abuse of process.

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