Neutral Citation Number: [2023] EWCA Civ 752

Case Nos: CA-2022-000811, 000811A and 000811B

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN MANCHESTER
Mr. Justice Fancourt
[2022] EWHC 764 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Friday 30 June 2023

Before :

LADY JUSTICE ASPLIN
LORD JUSTICE SNOWDEN
and
LADY JUSTICE FALK

- -

Between :

DENAXE LIMITED	**Claimant/ Appellant**
- and -	
(1) PAUL COOPER **(2) DAVID RUBIN**	**Defendants/ Respondents**

- -

Matthew Collings KC and Gareth Darbyshire (instructed by **FieldFisher LLP**) for the **Appellant**
David Mohyuddin KC and Daniel Burton (instructed by **Beale & Co. Solicitors LLP**) for the **Respondents**

Hearing date : 22 February 2023

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Approved Judgment

Remote hand-down: This judgment was handed down remotely at 10.30 a.m. on 30 June 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

Lord Justice Snowden :

1. This is an appeal against a decision of Mr. Justice Fancourt ("the Judge"), striking out a negligence claim ("the Claim") by the Appellant ("Denaxe") against the Respondents ("the Receivers"): [2022] EWHC 764 (Ch), [2022] 4 WLR 52. The appeal concerns the extent of immunity from subsequent claims which is enjoyed by receivers appointed by the court by way of equitable execution who obtain the approval of the court for a sale of assets over which they have been appointed.

A. BACKGROUND

2. The factual history of the dispute is complicated, and was set out in some detail by the Judge in his judgment (the "Judgment"). A shorter summary will suffice for the purposes of this judgment. Given the nature of the appeal, it will, however, be necessary to set out what occurred in relation to the relevant court hearing to approve the sale of assets by the Receivers in a little detail.

The parties

3. Denaxe was formerly known as Blackpool Football Club (Properties) Limited. It was the owner of about 76.3% of the shares in Blackpool Football Club Limited ("BFCL") which operated the Blackpool football club business ("the Club"). About 20% of the shares in BFCL were owned by VB Football Assets ("VB") and the remaining about 3.7% were owned by individual supporters of the Club.

4. Denaxe also owned the football stadium at Bloomfield Road, Blackpool ("the Stadium") at which the Club played its home games and rented out office space. Denaxe also owned the shares in a subsidiary company which ran a hotel located in one of the stands at the Stadium. It also owned the training ground used by the Club and some residential properties near the Stadium. Denaxe's shares in BFCL, and its real properties used in the operation of the Club (including, in particular, the Stadium and the training ground), were referred to collectively in the various judgments as "the Footballing Assets" and I shall continue to use that expression in this judgment.

5. Following a season in the Premier League in 2010–2011 and the increased revenues that this generated, a dispute broke out between Denaxe (as majority shareholder of BFCL) and Denaxe's owner and controller, Mr. Owen Oyston ("Mr. Oyston") on the one hand, and VB (as minority shareholder in BFCL), on the other. The dispute led to an unfair prejudice petition being issued by VB, in which VB ultimately succeeded in obtaining an order (the "Buy-Out Order") from Marcus Smith J for its shares in BFCL to be bought by Denaxe and Mr. Oyston at a price of £31.27 million: see VB Football Assets v Blackpool Football Club (Properties) Limited [2017] EWHC 2767 (Ch). A large part of that sum related to concealed dividends paid by BFCL to Denaxe or Mr. Oyston and his son, rather than the value of VB's shares in BFCL.

The appointment of the Receivers

6. Denaxe and Mr. Oyston paid less than a third of the amount due under the Buy-Out Order. Following failed attempts at enforcement using third party debt orders and charging orders, VB applied for the appointment of the Receivers by way of equitable execution over various categories of assets owned by Mr. Oyston (including his shares

in Denaxe) and over the assets of Denaxe itself (including, in particular, the Footballing Assets).

7. On 13 February 2019, Marcus Smith J refused some of the orders sought but appointed the Receivers over Mr. Oyston's shares in Denaxe and Denaxe's Footballing Assets. In his judgment, VB Football Assets v Blackpool Football Club (Properties) Limited [2019] EWHC 530 (Ch), at [7]-[10] and [15]-[20], the judge identified that the jurisdiction to appoint receivers by way of equitable execution would only be exercised where there was some hindrance or difficulty with execution at law. He made it clear that if he had thought that the most efficacious way of maximising the value of the Footballing Assets was simply to close down the Club and sell the Stadium and the other real properties separately by way of the conventional procedures for obtaining charging orders and orders for sale, he would have been minded to refuse the appointment of the Receivers over the Footballing Assets. The judge recited and relied on the evidence on behalf of VB to the effect that it had approached the Receivers because they had significant experience of football receiverships and that VB understood that it was their intention, if appointed, to sell the Footballing Assets as a single package and as a going concern, rather than as separate assets, because they believed that this would maximise their sale value.

8. The order appointing the Receivers (the "Receivership Order") included a provision (paragraph 18) that Mr. Oyston's shares in Denaxe should only be sold by the Receivers "on terms subject to the further approval of the court following the reaching of an agreement in principle with a proposed purchaser or purchasers" and required Mr. Oyston to file any evidence in opposition to such application prior to the hearing.

The marketing of the Footballing Assets

9. After their appointment, the Receivers used their powers over the shares in Denaxe to replace the existing board of directors of Denaxe and BFCL, thereby excluding Mr. Oyston from the management of the companies and the Club. The Receivers also instructed Lambert Smith Hampton ("LSH") on about 25 February 2019 to give valuation advice, with a view to the marketing of the Footballing Assets, and instructed Hilco on about 27 March 2019 to advise how the sale of the Footballing Assets could best be advertised to attract potential buyers. The marketing process for the sale of the Footballing Assets formally started on 9 April 2019.

10. As a result of the sales process, a number of expressions of interest and offers were received, but a problem emerged. The problem was that although Denaxe and Mr. Oyston had not paid the balance of amount due to VB under the Buy-Out Order, the possibility remained that they could do so, and so acquire VB's 20% of the shares in BFCL. The Receivers were told by several interested parties that any prospective buyer would insist on acquiring as close to 100% of the Club as possible, and would not countenance ending up with Mr. Oyston or anyone associated with him as a minority shareholder in BFCL.

The Applications

11. The decision was therefore taken that the Receivers should apply for an order permitting them to sell the Footballing Assets in conjunction with a sale of VB's shares in BFCL. On 10 May 2019 the Receivers issued an application (the "Sanction Application") to

the court for an order that they might sell the Footballing Assets over which they had been appointed together with VB's minority stake in BFCL as part of one transaction. The Receivers' evidence stated,

> "In order to complete a successful sale of the assets, we intend to sell all assets related to the operation of the football club as part of one transaction in order to protect the football club and maximise value."

12. The Receivers' evidence in support of the Application included a confidential exhibit outlining the valuations and strategy underpinning the sales process. That evidence was to the effect that LSH had valued the various income streams from the Stadium (i.e. the football operations, the office space and the hotel), together with the training ground and residential properties, at a total of £12.6 million.

13. This capital value was stated to have been arrived at on the basis of a number of assumptions, the main one of which was that the Club would remain in occupation and take a lease of the Stadium at a rent of about £275,000 per annum. The report noted that the problem with this assumption was that even with the receipt of rent from the offices at the Stadium, the Club was loss-making and could not afford to pay such a rent. However, the report also stated that it was unlikely that the Stadium could be used by any other football club, so that there was no market for sale of the Stadium as such without the on-going operations of the Club. The result was said to be that if the assets were sold on a stand-alone basis, the Club would be deprived of a venue to play football and its major source of income, destroying the value of the shares in BFCL, and the only realisable value of the Stadium would be as its underlying land for redevelopment.

14. At a hearing on 14 May 2019, attended by the Receivers and VB, Marcus Smith J gave directions for an expedited hearing of the Sanction Application. These also included permission for VB to issue an application for a variation of the Buy-Out Order to enable it to sell its shares in BFCL in conjunction with a sale of the Footballing Assets by the Receivers. That application (the "Variation Application") was issued the following day, 15 May 2019.

15. On 22 May 2019 the Receivers served further evidence in support of the Sanction Application outlining the marketing which had been conducted and the state of the bids. The preferred buyer was a Mr. Simon Sadler ("Mr. Sadler"), a lifelong supporter of the Club who wished to see it continue to play football at the Stadium. Mr. Sadler had made an offer of £8.2 million for the Footballing Assets and the shares in BFCL owned by VB. A second offer was for a nominal £1 from a Malaysian businessman, and the third was an offer from a local businessman with an interest in a rival football club who had offered £7.5 million to buy the real property assets (including the Stadium and training ground).

16. The evidence reiterated the Receivers' opinion that the value of the Stadium and the operation of the Club should be considered in the round. It contended that the assets were interconnected and disaggregating the potential strands of income would have a detrimental effect on the values to be obtained.

17. At the conclusion of the Receiver's evidence, the key terms of Mr. Sadler's favoured bid were set out. They included as a condition, that any court approval required in order

for the proposed acquisition to complete should be obtained, such approval to include the sale of a list of specified assets, including, in particular, Denaxe's and VB's 96.3% of the shares in BFCL, the shares in the company which operated the hotel, and the remainder of the Footballing Assets such as the Stadium and the training ground.

18. In response, Mr. Oyston served a witness statement dated 28 May 2019, which reported that he had "sought to sell the Club and the football related assets after the judgment in November 2017 in order to assist in discharging the judgment debt", and that from such experience he could well understand that purchasers were not prepared to have a 20% minority shareholder in BFCL. That said, his witness statement concluded, in paragraph 8,

> "I understand the present applications to be limited to the issue of being able to include VB's shareholding in the potential sale as a matter of mechanics. That is why I have not commented on the evidence as to marketing and value, as to which my rights are reserved."

19. That statement prompted a letter dated 29 May 2019 from the Receivers' solicitors which stated,

> "[In his witness statement], Mr. Oyston appears to accept the necessity of selling the [Denaxe] and VB shareholdings together. Along with the [Denaxe] and VB shareholdings, the Receivers intend to sell those assets set out in the [Sanction Application] together as part of one transaction. What is unclear is your client's position in relation to the relief sought.
>
> We note the reservation of rights in relation to the marketing and valuation of the proposed sale contained at paragraph 8 of your client's witness statement. For the avoidance of doubt, the Receivers will be requesting the Court to direct them to complete a sale of the assets listed in the Application on the terms and in the manner set out in our client's evidence. If your client objects, it is incumbent upon him to explain the basis of such objection. His evidence as filed does not explain his current position on these points. Please clarify what it is."

20. Mr. Oyston did not respond to that request. The Receivers then served a final short witness statement bringing matters up to date before the hearing of the two applications, concluding,

> "We continue to believe that the assets must be sold together to facilitate a global sale of all football assets as a going concern in a swift manner. I remain confident that Mr. Sadler's offer is the most positive offer for the receivership and the future of Blackpool FC, which is capable of being delivered in the required timeframe."

The hearing of the Applications

21. The Sanction Application and the Variation Application were heard together by Marcus Smith J on 5 June 2019. The Receivers, VB and Mr. Oyston were represented at the hearing. Denaxe was not separately represented.

22. The Receivers were represented by Mr. Mark Phillips KC, whose skeleton argument concluded by asking the court to direct the Receivers to complete a sale of the Footballing Assets and VB's shares in BFCL to Mr. Sadler on the terms outlined in the Receivers' evidence.

23. In his Skeleton Argument for the hearing, Mr. Collings KC, who appeared for Mr. Oyston, contended that the Receivers did not need a direction from the court to sell the shares in BFCL and the other Footballing Assets because their power to do was plainly covered by the Receivership Order. He objected that the letter from the Receivers' solicitors of 29 May 2019 impermissibly sought to widen the scope of the application to seek a direction that the Receivers should enter into a specific sale transaction. He submitted that such sales were a matter for the commercial judgment of the Receivers and not the court, and that,

> "… if the Receivers want what is, in effect, protection against any allegation of professional negligence, it behoves them to say so clearly so that those concerned may file evidence accordingly."

24. At the hearing, Mr. Phillips took Marcus Smith J through the summary in the evidence of the marketing of the Footballing Assets and the bids that had been received, including that from Mr. Sadler. He also agreed with a comment made by the judge concerning the purpose behind paragraph 18 in the Receivership Order, which was to enable Mr. Oyston to object to the terms agreed for a sale of his shares in Denaxe if he thought that the Receivers "could do better". Mr. Phillips submitted that although the proposed sale of the shares in BFCL to Mr. Sadler did not include Mr. Oyston's shares in Denaxe, a similar approach should apply, which was why the Receivers were seeking the court's approval to the particular transaction with Mr. Sadler.

25. In his submissions, Mr. Phillips accepted that the courts do not generally get involved with approving day-to-day commercial decisions that office-holders, such as administrators appointed under the Insolvency Act 1986, have to make. However, he suggested that where the decision facing such an office-holder was particularly momentous, "the court will get involved". He submitted that the proposed sale to Mr. Sadler was such a decision.

26. In support of his contentions, Mr. Phillips referred by analogy to a first instance decision of mine concerning the approval of a compromise of worldwide litigation by the administrators of a substantial group of companies in Re Nortel Networks UK Limited [2016] EWHC 2769 (Ch), [2017] Bus LR 590 ("Nortel"). Mr. Phillips placed particular emphasis on the following part of paragraph [49] of my judgment (as reflected in the headnote) where I stated, after a review of the authorities,

> "In short, the court should be concerned to ensure that the proposed exercise is within the administrator's power, that the

> administrator genuinely holds the view that what he proposes will be for the benefit of the company and its creditors, and that he is acting rationally and without being affected by a conflict of interest in reaching that view. The court should, however, not withhold its approval merely because it would not itself have exercised the power in the way proposed."

27. The following exchanges then took place at the hearing,

> "MR. JUSTICE MARCUS SMITH: So, in short, I am not concerned to second-guess the Receivers' decision; my role is to ensure that they are acting properly, both in the sense of within their powers and that they are taking a course that is one that viewed, as it were, from a certain distance, is one that is proper?
>
> MR. PHILLIPS: Absolutely, my Lord, yes.
>
> MR. JUSTICE MARCUS SMITH: So, does that answer one of the other points that Mr. Collings made, namely that we are in no sense here seeking to absolve the receivers from any claims that might exist by a third party against them?
>
> MR. PHILLIPS: Snowden J's judgment will answer that question, but the other way because, by answering those questions … what Snowden J says is that the court acts with caution because the result of giving approval is that the beneficiaries will be unable thereafter to complain, that the exercise is a breach of trust and even set it aside as flawed."

28. That latter reference by Mr. Phillips to the result of the court giving approval was in fact to a dictum of David Richards J in Re MF Global UK Limited (No.5) [2014] EWHC 2222 (Ch), [2014] Bus LR 1156 at [32] ("MF Global"), in which the judge approved a passage from *Lewin on Trusts* (18th ed) (2008) ("*Lewin*") which was in the following terms,

> "The court's function where there is no surrender of discretion is a limited one. It is concerned to see that the proposed exercise of the trustees' powers is lawful and within the power and that it does not infringe the trustees' duty to act as ordinary, reasonable and prudent trustees might act, ignoring irrelevant, improper or irrational factors; but it requires only to be satisfied that the trustees can properly form the view that the proposed transaction is for the benefit of beneficiaries or the trust estate and that they have in fact formed that view. In other words, once it appears that the proposed exercise is within the terms of the power, the court is concerned with limits of rationality and honesty; it does not withhold approval merely because it would not itself have exercised the power in the way proposed. The court, however, acts with caution, because the result of giving approval is that the beneficiaries will be unable thereafter to complain that the exercise is a breach of trust or even to set it aside as flawed; they

> are unlikely to have the same advantages of cross-examination or disclosure of the trustees' deliberations as they would have in such proceedings. If the court is left in doubt on the evidence as to the propriety of the trustees' proposal it will withhold its approval (though doing so will not be the same thing as prohibiting the exercise proposed). Hence it seems that, as is true when they surrender their discretion, they must put before the court all relevant considerations supported by evidence. In our view that will include a disclosure of their reasons, though otherwise they are not obliged to make such disclosure, since the reasons will necessarily be material to the court's assessment of the proposed exercise."

29. After further reference to the judgment in Nortel, Mr. Phillips concluded his submissions on this aspect of the case as follows,

> "Your Lordship will note that your Lordship acts with caution, and your Lordship will note that the result of giving approval is that no one, no interested party, will be able thereafter to complain that the exercise is a breach of the Receivers' fiduciary duties or even to set it aside as flawed. Of course, your Lordship notes, if you are in any doubt, that you withhold your approval. That is clear from the cases, and it is also clear from the authorities that the trustees in that case, and we in this case, must put before the court all relevant considerations supported by evidence. In my respectful submission, we have done precisely that."

30. In response, Mr. Collings adhered to his position that the Sanction Application concerned a straightforward sale of assets with which the court should not get involved. He said that the only unusual feature of the case was that the Receivers wished, as a matter of mechanics, to sell Denaxe's shares together with those of VB, which required a variation of the Buy-Out Order. Mr. Collings unsuccessfully opposed that variation of the Buy-Out Order for reasons that are not relevant to the current appeal.

The judgment of Mr. Justice Marcus Smith

31. In his *ex tempore* judgment, reported as Cooper v VB Football Assets [2019] EWHC 1599 (Ch), Marcus Smith J referred to the Footballing Assets that the Receivers were seeking approval to sell as "the Club", "because that is the reality of the matter". He also referred to the views of the Receivers that a better price could be obtained by selling the Footballing Assets together with VB's shares in BFCL so as to preserve the business of the Club as a going concern rather that separately in an asset sale.

32. After quoting from Nortel at [45]-[49], Marcus Smith J then held (at [41]) that the Receivers had been entitled to bring the matter to the court. His first reason was that although paragraph 18 of the Receivership Order did not strictly apply because the proposed transaction did not involve the sale of Mr. Oyston's shares in Denaxe, nonetheless for similar reasons in the interests of Mr. Oyston, "I regard the sale of the Club as a matter requiring court scrutiny".

33. After citing and agreeing with paragraphs [45]-[49] of the judgment in Nortel, Marcus Smith J also justified entertaining the Sanction Application on the further basis that, "the decision and question of whether, and on what terms, to sell the Club, is a momentous decision, one that is enormously important for by Mr. Oyston and VB".

34. Marcus Smith J then commented, at [46],

> "46. Mr Collings, in his submissions, laid great stress on the fact that, at least in the case of trustees and administrators, a degree of immunity follows if the court sanctions a particular transaction. That is not a question that is before me today. Logically, it follows from the analogy I have drawn with Re Nortel, but it is unnecessary for me to decide that point today. It seems to me the more important point is that there are some transactions conducted by receivers by way of equitable execution that are of sufficient importance so as to require the court appointing such receivers to look at the transaction in question to ensure that it is in the interests of all those concerned. If, as a result of such scrutiny and approval, a degree of immunity follows, then so be it. But I do not decide that question today."

35. At the conclusion of his judgment, Marcus Smith J returned to the question of whether to approve the proposed sale to Mr. Sadler. He stated, at [70]-[73],

> "70. I move on to the third and final question, namely, whether I should approve the sale of the Club. It would appear that Mr. Oyston has no issue with the sale. He has certainly not raised such an issue. In his statement before me, at paragraph 8, he seeks to reserve his rights to make further points. That, I consider, is inappropriate. Mr. Oyston has had every opportunity to take points in relation to the proposed sale. The timetable leading up to this hearing was structured expressly with Mr. Oyston's interest in mind. It is, in my judgment, inappropriate for Mr. Oyston to say, as he does in paragraph 8, "I have not commented on the evidence as to marketing value as to which my rights are reserved". It seems to me, however, that it is significant that at this hearing Mr. Oyston has raised no substantive point against the transaction that the Receivers propose.
>
> 71. Applying the criteria laid down in Re Nortel, I must ask myself whether the exercise of the power by the Receivers that they propose to exercise is a lawful one, within the scope of the powers conferred on them by my order. Clearly, it is. The order is drafted expressly to entitle them to get in and sell the assets that they are proposing to sell, having got them in.
>
> 72. Have the Receivers acted as ordinary, prudent and reasonable receivers? Am I satisfied, without seeking to second-guess the Receivers, that the sale of the Club to [Mr. Sadler] that they advocate is a proper transaction in all the circumstances?

> And do the receivers genuinely hold the view that the transaction is a proper one which should be entered into? I shall answer these questions, which all arise out of the Re Nortel case, in compendious form rather than taking them one at a time.
>
> 73. It seems to me that the transaction is one that I should approve. The price that has been obtained in agreement with [Mr. Sadler] has been achieved after a competitive process. I am satisfied that the price is a reasonable one and I am satisfied that [Mr. Sadler] is, not simply on grounds of price but on the other grounds I have referenced, clearly the best bid. Even if there were not the question of the urgency of the sale, there is, in my judgment, no proper point in waiting and seeing whether something better can be achieved. The fact is that the Petitioner has been kept out of its money for quite long enough and there is, for that reason alone, a degree of urgency in effecting the sale. But, over and above that, there is the overriding urgency that unless the sale takes place and a further injection of cash by [Mr. Sadler] occurs, [BFCL] will be facing solvency difficulties. So, waiting and seeing will not just achieve nothing; it will positively hinder the future of the Club.
>
> 74. Accordingly, I conclude that the sale ought to go ahead with all due expedition, and that the sale proposed to [Mr. Sadler] is one that is a proper one that should be sanctioned by this court, and I do so."

36. The order made by Marcus Smith J on 5 June 2019 (the "Sanction Order") included, as the first operative paragraph,

> "The [Receivers and VB] may sell to Mr. Simon Sadler the assets set out at the schedule to this order together as part of one transaction on the terms described in the confidential second witness statement of Mr. Paul Cooper dated 22 May 2019, with the combined net proceeds of the sale being applied in diminution of the amounts owed by [Denaxe and Mr. Oyston] to [VB] in accordance with the terms of the Receivership Order."

The assets set out in the Schedule were the Footballing Assets and VB's shares in BFCL.

37. The sale of the Footballing Assets and VB's shares in BFCL to Mr. Sadler was duly completed on 13 June 2019. That still left a sum outstanding on the Buy-Out Order, but on 16 December 2019 VB reached a confidential settlement of the remainder of its dispute with Denaxe and Mr. Oyston.

38. Following that settlement, at a hearing on 17 December 2019, Marcus Smith J discharged the Receivership Order and Mr. Oyston was restored to control of Denaxe. Marcus Smith J also granted a release to the Receivers from all claims arising out of or in connection with the receivership, unless such a claim was commenced by claim form by 31 January 2020.

The Claim

39. On 30 January 2020, Denaxe issued the Claim against the Receivers asserting that they had breached their duties of care and had sold the Footballing Assets at an undervalue.

40. The Receivers first sought to contend that the Claim was barred by the release granted by Marcus Smith J on 17 December 2019 because permission of the court had not been sought to commence the proceedings against its former officers. I rejected that contention in a judgment given on 15 April 2021: see Blackpool Football Club (Properties) Ltd v Cooper and Rubin [2021] EWHC 910 (Ch).

41. The Receivers then sought to strike out the Claim or obtain summary judgment. The Judge approached the application to strike out the Claim on the basis of draft Amended Particulars of Claim (the "APOC"). That draft pleading contended (at paragraphs 31-32) that the Receivers owed Denaxe a duty of care, which was said to include a duty to exercise reasonable skill, care and diligence, to undertake proper marketing of any assets proposed to be disposed of, and to obtain the best price available in the market for any assets disposed of.

42. The APOC recited the fact of the Sanction Application and Variation Application having been made and granted. The APOC then alleged (at paragraph 40) that,

> "…no attempts were made to offer the property assets for sale separately to the shares in BFCL itself".

The APOC went on to allege (at paragraph 41) that Denaxe had provided the Receivers with copies of "Red Book" valuations of the Stadium and the training ground which had been obtained by Mr. Oyston from Colliers International in October 2018 and which suggested that, as individual assets, the Stadium was worth £25 million and the training ground was worth £1.5 million (the "Colliers Valuations").

43. Apart from a claim for failure to return a computer to the company after the receivership had ended, the central allegation in paragraph 54 of the APOC was that, "As a result of the matters complained of above", the Receivers had breached their duty of care. The supposed particulars of that breach were in the most general of terms: the only relevant particular which was supported by any previously pleaded matter was an allegation that the Receivers had failed to consider selling the shares in BFCL separately to the Stadium or other assets.

44. In similarly brief terms, the only relevant claim for loss and damage made in the APOC was at paragraph 55, and was a claim for damages of,

> "A sum to be assessed by the court on expert evidence being the difference between the value obtained for the assets and the price which ought to have been obtained if the assets had been sold separately with proper marketing."

45. The Receivers' application to strike out the Claim or for summary judgment was made on a number of bases. These were (a) that by reason of the Sanction Order, the Receivers had immunity from any claim against them based upon an allegation that the Footballing Assets were wrongly sold as a single package of assets in a single

transaction, (b) that Denaxe was subject to an issue estoppel preventing it from bringing any such claim on the basis of *res judicata*, (c) if not subject to an issue estoppel, that the claim was an abuse of process of the type identified in Henderson v Henderson (1843) 3 Hare 100 because Denaxe could and should have raised its arguments against the sale at the hearing before Marcus Smith J, such that it was an abuse to seek to do so now, and (d) that the claim that the real property assets could have been sold for more if they had been sold separately from the sale of the shares in BFCL had no real prospect of success on the merits.

46. Denaxe refuted all those arguments. In particular, and in answer to the first argument, Denaxe contended that the immunity referred to in cases such as The Public Trustee v Cooper [2001] WTLR 901 ("Public Trustee v Cooper") and MF Global was limited to immunity from claims alleging that a fiduciary had acted in excess of his powers or had improperly exercised a fiduciary power, and did not extend to claims of breach of a common law duty to exercise reasonable skill and care. It also denied that the Claim was an abuse of process on the basis that the hearing of the Sanction Application had not been the occasion upon which to investigate the question of negligence in the decision to sell the Footballing Assets together.

B. THE JUDGMENT

47. In his Judgment, after setting out the background, the Judge dealt with the four grounds upon which the Receivers sought to strike out the Claim.

48. On the immunity ground, he first held, at [71], that Marcus Smith J had approved a specific transaction involving the sale of specific assets, to a specific person, at a specific price. The Judge then expressed the view, at [78] et seq., that although the principle of immunity derived from cases where the court was giving directions to a trustee, where a claim might otherwise be brought for breach of trust, there was nothing in the authorities to suggest that immunity was limited to claims for breach of fiduciary duty or that it could not extend to claims for breach of a common law or statutory duty of care.

49. The core of the Judge's reasoning in this regard was as follows,

> "79. Immunity results from the fact that the court concludes that the decision to exercise a power is a proper decision for the trustee or office-holder to have made, in reliance on which the trustee or office-holder then acts. It follows that a person affected cannot thereafter bring a claim that involves alleging that the trustee or office-holder's decision was an improper decision, whatever cause of action is invoked. A claim that a power was exercised in breach of a duty of care owed to the claimant by a trustee or office-holder may be (or involve) a claim that the decision was improper just as much as a claim that the exercise was a breach of fiduciary duty.
>
> 80. The fact and extent of immunity derives in principle from two matters: the nature of the review conducted by the court and the decision that the court approves. Whether

immunity extends to the particular claim brought depends on what allegations are made (or necessarily involved) in the claim.

81. As explained in *Lewin on Trusts*, the court does not decide whether an intended transaction is the right one to enter into because the office-holder has not surrendered their discretion to the court. It decides whether (1) the office-holder has decided (subject to the court) to enter into it, (2) the decision to enter into it was properly considered by the office-holder, taking into account relevant matters and uninfluenced by irrelevant matters or conflicting interests, and (3) it was a rational decision that a reasonable office-holder could properly make. Other than the question of conflict of interests, there is nothing in this that suggests that the focus is only on whether a fiduciary power was properly exercised. On the contrary, Millett J said in Richard v Mackay [2008] WTLR 1667 at page 1671 that the court was:

> "concerned to ensure that the proposed exercise of the trustees' powers is lawful and within the power *and that it does not infringe the trustees' duty to act as ordinary reasonable and prudent trustees might act* …"
>
> (Emphasis added)

In Marley v Mutual Security Merchant Bank and Trust Co Limited [1991] 3 All ER 198, Lord Oliver of Aylmerton said, at p 203:

> "The question whether the trustee has demonstrated that the contract submitted for approval is in the best interests of the beneficiaries reduces, in a case such as this, to *whether the trustee can satisfy the court that it has taken all the necessary steps to obtain the best price that would be taken by a reasonably diligent professional trustee*."
>
> (Emphasis added)

82. The immunity conferred on an administrator or receiver will extend to a claim that the office-holder failed properly to consider the matter, or failed to have regard to all relevant considerations, or was wrongly influenced by an irrelevant or inappropriate consideration, or that the decision approved was an irrational decision. In my judgment, it also necessarily extends to a claim that the office-holder wrongly did not enter into a different transaction, or that they were wrong to sell at all. A claim that the office-holder should have entered into a different transaction, or none, is an allegation that the office-holder's power was wrongly exercised. I do not consider that it makes any difference whether the failure to decide on a better alternative and the wrongful entry into the transaction is

> presented as a breach of trust, a breach of a duty of care or a fraud on a power."

50. The Judge then considered my decision in Nortel, saying, at [83],

> "83. I cannot imagine that Snowden J believed that immunity for the Nortel administrators would be limited to claims that might be brought against them for breach of fiduciary duty, so that if the company or creditors alleged that the compromise authorised by the court was a negligent breach of their duty to obtain the best price available (see In re Charnley Davies Ltd (No.2) [1990] BCLC 760) rather than a breach of the fiduciary obligation not to prefer their own interests, there would be no immunity as a result of the sanction of the compromise. Snowden J referred to the consequence of approval being that it would "prevent subsequent challenge" in general terms."

51. The Judge concluded his analysis in this regard by stating, at [86],

> "86. If the court approves an office-holder's decision to enter into a specific sale, as was the case here, a person affected cannot allege a breach of duty by not retaining the asset, or not selling it in a different way, to someone else, or for a higher price. Such claims necessarily involve an allegation that it was wrong to decide to sell the asset in the way that the court has authorised."

52. The Judge then applied that analysis to the facts of the Claim. He referred to the APOC and concluded that the only basis for the allegation that the Receivers failed to achieve the best price for the Footballing Assets was an allegation that they should have sold the assets in a different way. But since "the very decision" that Marcus Smith J took was to approve the sale to Mr. Sadler at the price of £8.2 million, the Receivers had immunity from a claim that they should have sold the assets in any different way.

53. After determining to strike out the Claim on the immunity ground, the Judge proceeded to deal with the *res judicata* and abuse of process grounds in the alternative.

54. On the *res judicata* ground, the Judge held as follows,

> "98. *Res judicata* only arises if the same claim or the same issue within a claim has previously been decided by a court (or by a different tribunal) in proceedings between the same parties or their privies.
>
> 99. Had I reached the contrary conclusion on the immunity issue, the Receivers' immunity would not have extended to claims based on breach of common law or equitable duties of care. In those circumstances, Marcus Smith J's judgment could not be taken to have decided, expressly or impliedly, that there was no breach by the Receivers of their duty to use reasonable endeavours to obtain the best price for the footballing assets. The exercise for the court in determining an application such as the

> Sanction Application is in any event different from evaluating after the event whether there was such a breach of a duty of care.
>
> 100. *Res judicata* only exists where exactly the same issue has previously been decided between the same parties or their privies. That would clearly not be the case here and so the argument based on *res judicata* would fail. It seems to me that it fails in any event: the conclusion of immunity to a claim for breach of a duty of care does not mean that the court has decided the allegation of breach of duty of care."

There is no cross-appeal against that decision.

55. On the abuse of process ground, the Judge held that even if he had reached a different decision on the immunity ground, he would nonetheless have struck the Claim out as a Henderson v Henderson abuse of process.

56. The Judge held, at [106], that at the time of the hearing of the Sanction Application it was clear to Denaxe (by its then directors) and Mr. Oyston that the court was being asked by the Receivers to review and approve the sale of the Footballing Assets together as a single transaction at a specific price. The hearing of the Sanction Application took place on notice to Denaxe and Mr. Oyston and had been scheduled to give them an opportunity to bring forward any objection which they had to the proposed sale. The Judge had also noted, at [105], that both Denaxe (through its then directors) and Mr. Oyston, had access to the Colliers Valuations and knew of the financial state of the Club's business, and he reflected this at [106(d)].

57. Accordingly, the Judge reasoned at [106(f)],

> "Any objection on the basis of misjudged marketing and packaging of the assets, or price, therefore could and should have been raised before Marcus Smith J, as the judge himself held, because it would go directly to the propriety of the decision made by the Receivers in the exercise of their powers, which was the very question that the court was being asked to approve."

58. The Judge further observed, at [106(h)] that if Denaxe had raised an objection, this might well have resulted in the sale not being approved by the court, because the Colliers Valuations and the financial state of the Club would have provided a prima facie basis for an argument that more might be able to be realised if the assets had been sold separately from the shares in BFCL. The Judge therefore concluded at [106(i)] that Denaxe's opportunity to bring its Claim arose as a consequence of not having raised objections when it could have done.

59. The Judge also rejected an argument that it was unrealistic to have expected Denaxe to object to the proposed sale by the Receivers in circumstances in which its directors at the time had been appointed by the Receivers. He commented, at [105], that the company might in theory have a complaint against the then directors if the allegations had been well-founded, but that was not an answer to the question of why such matters had not been raised.

60. In any event, the Judge pointed out, even if Denaxe had been under the control of Mr. Oyston, there was no basis for a conclusion that it would have raised an objection, any more than Mr. Oyston himself did. In that regard, the Judge determined, at [106(k)], that Mr. Oyston's decision not to object to the composite sale of the Footballing Assets was a calculated one, because, as a long-standing supporter of the Club, Mr. Oyston did not wish to see it broken apart, which would have been the result of a sale of the properties separate from the shares in BFCL. The Judge concluded that these factors, in particular, made the bringing of the Claim the clearest possible abuse of process.

61. Finally, the Judge considered the merits of Denaxe's claim. The Judge held that if he had been wrong on the immunity and the Henderson v Henderson abuse of process grounds, he would not have struck the Claim out as having no reasonable prospect of success. The Judge accepted that Denaxe had grounds for contending that the Receivers had planned to sell the Footballing Assets as a package from the outset, that the Receivers did not appear to have considered alternative strategies apart from such a sale, that LSH had not been instructed to advise on the value of the Stadium and training ground separately from the Club, and that Hilco had only been appointed to advise how to market the Footballing Assets for sale as a package.

62. Although the Judge recorded that Denaxe accepted that there were problems with the Colliers Valuations, and that the Receivers might well be proved right in their judgment about how to maximise the realisations from the assets over which they had been appointed, he nevertheless stated that he could not, at an initial stage, reach a conclusion that the contrary was not properly arguable.

C. THE APPEAL

63. On appeal on the immunity ground, Mr. Collings contended that the jurisdiction of the court to give its approval to transactions originated in cases where trustees sought confirmation that their proposed actions were within the scope of their fiduciary powers and not tainted by some conflict of interest or collateral purpose that might vitiate their exercise of the power and lead to the transaction being set aside. Mr. Collings did not dispute that such jurisdiction could be extended by analogy to cases involving the exercise of powers owed in a fiduciary capacity by insolvency office-holders such as administrators or liquidators, or a receiver appointed by the court.

64. However, Mr. Collings contended that on any such approval application, the issues that the court should be prepared to decide, and any resultant immunity from suit, were strictly limited. In particular, he submitted that given the equitable nature of the duties of trustees, the court's function on an approval application did not extend to consideration of whether a trustee was acting in accordance with a common law duty to exercise due skill and care to obtain the best price reasonably obtainable for the sale of assets. He submitted that the same limitation should apply to an application for approval by court-appointed receivers. He further submitted that this was especially so where the proposed decision was essentially a matter of commercial judgment, and the applicant Receivers were insolvency practitioners who had been appointed for their professional experience and expertise in that regard.

65. Mr. Collings submitted that the various dicta in the cases regarding the immunity that would result from approval being given by the court to transactions proposed by trustees should be read in a similar fashion and limited to immunity from claims to set aside the

transaction for breach of fiduciary duty or for equitable compensation on the basis that it was a breach of fiduciary duty. Mr. Collings submitted that there was no authority to support the suggestion that approval of a proposed transaction would immunise a trustee from claims for damages caused by it being entered into in breach of a common law duty of care, and there was no warrant for extending immunity to cover such matters in relation to court-appointed receivers.

66. On the facts, Mr. Collings submitted that Marcus Smith J had followed Nortel and had only satisfied himself that the Receivers were acting honestly and rationally in accordance with their fiduciary duties. He submitted in light of Marcus Smith J's express indication that he was not deciding the question of immunity, there was no basis upon which to the Judge should have held that Marcus Smith J intended to confer any wider immunity upon the Receivers so as to absolve them of any breach of the common law duty of care to obtain the best price for the assets sold.

67. On the question of abuse of process, Mr. Collings contended that if he was right that the hearing before Marcus Smith J was, or should have been, limited to questions of the propriety of the exercise of the Receivers' powers as a matter of equity, then Mr. Oyston had been entitled to reserve his position on the different question of whether the Receivers had complied with their common law duty of care. Mr. Collings submitted that Denaxe could be in no worse position.

68. For the Receivers, Mr. Mohyuddin KC submitted that the Judge was right on the immunity and abuse of process points, essentially for the reasons that he gave. In addition, he submitted, by a Respondent's Notice, that because the Receivers were appointed by way of equitable execution, the duties which they owed to Denaxe were purely equitable in nature rather than being common law duties of care. Accordingly, he argued, the Receivers were covered by the immunity from claims for compensation for breach of equitable duties by analogy to the cases on trustees.

69. On the merits, the Receivers did not seek to challenge the Judge's finding that if he were wrong on other grounds, the Claim had a realistic prospect of success. However, the Receivers did contend that if minded to allow the appeal, the Court of Appeal should make its order conditional upon the provision of further security by Denaxe for the costs of the Receivers pursuant to CPR rule 24.6.

D. ANALYSIS

Jurisdiction

70. The court has long had a jurisdiction to entertain claims by trustees for the determination of questions arising in the execution of a trust. That jurisdiction is now to be found in CPR rule 64.2(a) and Paragraph 1 of Practice Direction 64A which gives, as an example of the type of claims which can be made under CPR 64.2(a), a claim for "an order approving any sale, purchase, compromise or other transaction by a trustee", and a claim for "an order directing any act to be done which the court could order to be done if the … trust in question were being administered or executed under the direction of the court".

71. The court also has a jurisdiction to give directions to insolvency office-holders in connection with their functions (see e.g. paragraph 63 of Schedule B1 to the Insolvency

Act 1986 in relation to administrators) and to give directions to receivers appointed by the court (see CPR Practice Direction 69 paragraph 6.1). Although these jurisdictional gateways are couched in terms of the court giving "directions" to its own officers, neither party suggested that the function of the court on such an application could not extend to giving its approval for proposed transactions, applying analogous principles to those exercised in relation to trustees.

Surrender of discretion and approval applications

72. Although the position might be different in other jurisdictions, at least as a matter of English law, it is clear that applications to the court by trustees under CPR 64.2(a) may be analysed by reference to a number of categories that were described by Hart J in Public Trustee v Cooper, citing an unreported decision of Robert Walker J given in chambers in 1995. For present purposes the primary categories are (i) cases in which the court accepts a surrender of discretion from the trustees, and then makes the relevant decision for itself and gives directions accordingly, and (ii) cases in which the trustees seek the approval of the court to a proposed course of action which they have themselves decided to take.

73. Although the Sanction Application and Mr. Phillips KC's initial submissions to Marcus Smith J were couched in terms of the court giving a "direction" to the Receivers, which reflected the wording of paragraph 6.1 of CPR PD 69, it is clear that the Receivers were not seeking to surrender their discretion to the court, but were seeking the approval of the court to a transaction that they had already decided upon. Likewise, by the end of the hearing, and in his judgment, it is also clear that Marcus Smith J was not approaching the matter on the basis that he was deciding to exercise any discretion himself, but was merely considering whether to approve the sale proposed by the Receivers. That is consistent with the terms of the Sanction Order, which is in permissive rather than mandatory terms.

74. That is not surprising. In the absence of some deadlock or disabling conflict of interest, it is relatively rare for the court to accept a surrender of discretion from trustees. It is all the more difficult to imagine circumstances in which the court would think it appropriate to accept a surrender of discretion in relation to a proposed sale of assets by professional office-holders who had been appointed for their expertise in taking commercial decisions in relation to the realisation of assets, and who were being remunerated to do that job.

Approval applications and immunity: the authorities

75. One of the singular features of this case is that none of the English cases to which we were referred actually involved a subsequent claim against a trustee or office-holder in respect of an earlier transaction that had been approved by the court. Hence we were not referred to any case that has directly addressed the precise extent of the immunity conferred by an approval decision. The authorities contain only passing comments on the issue of immunity in relatively general terms. However, since both parties sought to rely upon dicta in the cases, it is necessary to refer to them.

Richard v Mackay

76. In Richard v Mackay [2008] WTLR 1667, a decision from 1987, the trustees in question sought approval, for the future and if they might think it appropriate, to transfer part of the trust funds from an English trust to a new trust to be established in Bermuda. Millett J drew the distinction between a case involving a surrender of discretion and an approval case. He then continued, at 1671,

> "Where, however, the transaction is proposed to be carried out by the trustees in exercise of their own discretion, entirely out of court, the trustees retaining their discretion and merely seeking the authorisation of the court for their own protection, then in my judgment the question that the court asks itself is quite different. It is concerned to ensure that the proposed exercise of the trustees' power was lawful and within the power and that it does not infringe the trustees' duty to act as ordinary, reasonable and prudent trustees might act, but it requires only to be satisfied that the trustees can properly form the view that the proposed transaction is for the benefit of beneficiaries or the trust estate."

77. Millett J then observed,

> "It must be borne in mind that one consequence of authorising the trustees to exercise a power is to deprive the beneficiaries of any opportunity of alleging that it constitutes a breach of trust and seeking compensation for any loss which may flow from that wrong. Accordingly, the court will act with caution in such a case when evaluating the possibility of risk and it will need to be satisfied that the proposed transaction is not imprudent. But the appropriateness of the transaction is essentially for the trustees to decide, and different minds may have different views on what it appropriate in particular circumstances."

78. At the time of Millett J's decision, the equitable duty of care imposed upon trustees was usually expressed as a requirement to exercise the same degree of diligence and care which an ordinary prudent person of business would take in the management of his own affairs: see Speight v Gaunt (1883) 9 App Cas 1. Accordingly, at [81] of his Judgment, the Judge placed reliance on Millett J's reference to prudent trustees to support a conclusion that the court could, on such an application for approval, consider matters going beyond the question of whether a trustee was acting in accordance with his fiduciary duties, and could also consider whether the trustee was discharging his equitable duty of care.

79. The Judge also took Millett J's reference to beneficiaries being deprived of the opportunity to bring claims for breach of trust and seeking compensation for loss as envisaging that the immunity conferred on the trustees could extend to preventing claims against them for breach of that equitable duty of care.

80. I agree that Millett J's comments could, if taken out of context, be read in that way. But they were plainly *obiter*. Millett J was not dealing with a case in which there was any suggestion that there might be a breach of a duty of care, still less was any claim of that nature being made. It is also not altogether easy to reconcile Millett J's statement that the court should only need to be satisfied that the trustees could properly form the view

that the proposed transaction was for the benefit of beneficiaries or the trust estate, with his immediately preceding reference to the trustees' duty to act as ordinary, reasonable and prudent trustees might act, and his later remark that the court would need to be satisfied that the proposed transaction was not imprudent.

Marley

81. In [81] of his Judgment, the Judge also placed reliance on the decision of the Privy Council in Marley v Mutual Security Merchant Bank and Trust Company [1991] 3 All ER 198 ("Marley"). I do not, however consider that Marley is of any direct relevance to the instant case. That is because the Privy Council treated that case as involving a surrender of discretion to the court, rather than an approval case. That much is clear from the comment of Lord Oliver at page 201,

> "A trustee who is in genuine doubt about the propriety of any contemplated course of action in the exercise of his fiduciary duties and discretions is always entitled to seek proper professional advice and, if so advised, to protect his position by seeking the guidance of the court. If, however, he seeks the approval of the court to an exercise of his discretion and thus surrenders his discretion to the court, he has always to bear in mind that it is of the highest importance that the court should be put into possession of all the material necessary to enable that discretion to be exercised. It follows that, if the discretion which the court is now called upon to exercise in place of the trustee is one which involves for its proper execution the obtaining of expert advice or valuation, it is the trustee's duty to obtain that advice and place it fully and fairly before the court, for it cannot be right to ask the judge in effect to assume the burdens of a trustee without the information which the trustee himself either has or ought to have to enable him to carry out his duties personally."

82. As Hart J subsequently made clear in Public Trustee v Cooper at pages 922-925, that approach did not reflect the practice in England and Wales, where a distinction has been drawn between cases involving a surrender of discretion and cases in which the court is merely asked to approve an exercise of discretion by a trustee. As such, the subsequent comments of Lord Oliver upon which the Judge relied must be read in context. Lord Oliver said, at page 203,

> "The question whether the trustee has demonstrated that the contract submitted for approval is in the best interests of the beneficiaries reduces, in a case such as this, to whether the trustee can satisfy the court that it has taken all the necessary steps to obtain the best price that would be taken by a reasonably diligent professional trustee".

83. Those comments would be entirely apposite in a case in which the court was being asked to decide for itself how to exercise a particular discretion to use or dispose of trust assets. But they cannot be taken as authority for the proposition that a court in

England or Wales hearing an approval application where there was no surrender of discretion should necessarily take the same course.

Public Trustee v Cooper

84. In Public Trustee v Cooper, the application was to approve a sale of a substantial holding of shares in a company founded by the deceased settlor, which were held on trust for the employees of the company. An offer was made by a third party to buy the shares together with another block of shares held by a charitable trust. The offer had been accepted by the trustees of the charitable trust, and the trustees of the employee trust were also minded to accept it, but the sale was opposed by a number of the employees who were concerned for the future of the company. They contended (a) that the court did not have jurisdiction to grant approval (as opposed to accepting a surrender of discretion), (b) that the trustees' decision to accept the offer was not in accordance with the proper interpretation of a particular provision of the trust deed, and (c) that the trustees of the employee trust were disabled by a conflict of interest arising from the fact that they were also trustees of the charitable trust.

85. Hart J rejected all three arguments. In doing so, his focus was on whether to follow the approach of the Privy Council in Marley, on the vires of the sale as a matter of interpretation of the relevant trust provisions, and on the question of whether there was a disabling conflict of interest.

86. It is important to note that there was no issue that the proposed sale was on the best terms reasonably obtainable. As Hart J stated in the first paragraph of his judgment,

> "It has not and cannot be disputed that the terms of that offer represent in financial terms the best offer for their shares that the [trustees] can in current conditions expect to receive."

87. Hart J also did not consider the extent of the immunity that the trustees would obtain as a result of his approval of the proposed sale.

X v A

88. X v A [2006] 1 WLR 741 is a further decision of Hart J. The case concerned the issue of whether the trustees of a marriage settlement could exercise a power of revocation and reappointment to release a substantial part of the trust to the wife to be used by her for charitable purposes. The case had nothing to do with questions of duties of care or the price to be obtained for sale of trust assets.

89. It was in that very different context that Hart J quoted from his earlier judgment in Public Trustee v Cooper and Millett J's dictum in Richard v Mackay, and then continued, at [30],

> "I would add that an additional reason for caution is that for procedural and other practical reasons the adversely affected beneficiaries are likely to be at a relevant disadvantage in such proceedings (assuming even that they have been made parties, which will not always be the case) as compared with the position they might be in if pursuing a hostile action after the event either

> against the trustees for breach of trust or designed simply to set aside the transaction as flawed. In particular the extent to which it is possible, or (while future discretions remain to be exercised) politic, to obtain full disclosure of all relevant deliberations of the trustees, or to subject evidence to cross-examination, is likely to differ in the two types of proceedings."

90. That dictum, referring to the fact that beneficiaries would be deprived by the court's approval of the possibility of pursuing a claim for breach of trust or to set aside a transaction as flawed was clearly the basis for the reference in the passage in *Lewin* which was approved by David Richards J in MF Global and to which I referred in Nortel. It can be seen, however, that it was made in a case in which the issue before the court had nothing at all to do with questions of whether trustees had fulfilled their equitable duty to obtain the best price on a sale of assets.

MF Global

91. In MF Global, David Richards J was also not concerned with a question of whether the trustee in question had taken due care to obtain the best price reasonably obtainable on a sale of trust assets. In MF Global, the issue was whether the court should approve a compromise of claims to assets held by a financial services company which had been obliged by financial services regulations to hold so-called "client money" on trust in a client money pool ("CMP"). The company had become insolvent in circumstances in which there was a shortfall of segregated assets to meet such trust claims as well as a deficiency as regards the general body of unsecured creditors.

92. The administrators applied for approval of a compromise of the rival claims to the available assets, both on behalf of the company as trustee for the clients who had client money claims under the relevant regulations ("the CMP trustee"), and as insolvency office-holders representing the interests of the general body of unsecured creditors of the company. As David Richards J remarked, at [29], the compromise of these rival claims Was not necessarily in the same category as a decision by a trustee to dispose of the principal asset of a trust estate.

93. Moreover, after endorsing the extract from *Lewin* which I have set out in paragraph 28 above, David Richards J also made clear that he was carrying out a limited review exercise. That appears from [33] of his judgment in which he stated,

> "33. Applying this approach, I am satisfied that Mr Fleming, with the benefit of appropriate legal advice, and acting on behalf of the CMP trustee has properly formed the view that the proposed compromise is for the benefit of clients as beneficiaries of the trust and that there is no reason why the court should not give liberty to the CMP trustee to enter into the proposed compromise, and indeed every reason why it should do so.

94. David Richards J referred, at [36], and only in outline, to the advice obtained by the CMP trustee which indicated that there were novel legal issues that would cause any reasonable trust claimant to discount the full value of their claims. In that regard, he referred to the position of a number of sub-groups of clients. These included "decreased clients" whose open positions at the commencement of the administration had later

closed at a lower value, and hence who had claims against the CMP which were larger than their contractual claims; and other clients whose open positions had improved after commencement of the administration, and who therefore had larger contractual claims against the company as well as their claims against the CMP. David Richards J continued, at [40],

> "40. These are all considerations which the CMP trustee has had to take into account in considering whether it is appropriate to settle the potential claims on the terms proposed. Having regard to all the factors mentioned above, the CMP trustee is satisfied that the settlement is in the best interests of the decreased clients as well as the other clients. This is a view with which I agree, although I need only be satisfied that the CMP trustee's decision is a reasonable decision taken on proper grounds."

95. On that basis, it is clear that David Richards J did not consider it necessary to determine whether the legal advice relied upon by the CMP trustee was actually correct, or that the terms of the proposed compromise were, as a matter of fact, the best terms reasonably obtainable. His approach was limited to a consideration of the rationality of the CMP trustee's decision based upon the expert advice which it had received.

96. That was the background to my decision in Nortel, which requires some analysis because of the central place that it occupied in the argument before Marcus Smith J and in the Judge's analysis.

Nortel

97. In Nortel, I applied the principles derived from the cases on trustees to an application by administrators for approval to a proposed compromise by their companies of claims to very substantial monies held in escrow in the US. Those monies were the proceeds of sale of the worldwide Nortel group business. The administrators had been appointed to a number of the Nortel companies from Europe, the Middle East and Africa (EMEA), and the proposed settlement was intended to put an end to years of litigation over the entitlement to the proceeds of sale between the various different sub-groups of Nortel companies in the US, Canada and EMEA.

98. As indicated above, after referring to Public Trustee v Cooper and MF Global, I stated, at [49]-[50],

> "49. …In short, the court should be concerned to ensure that the proposed exercise is within the administrator's power, that the administrator genuinely holds the view that what he proposes will be for the benefit of the company and its creditors, and that he is acting rationally and without being affected by a conflict of interest in reaching that view. The court should, however, not withhold its approval merely because it would not itself have exercised the power in the way proposed.
>
> 50. In these respects the approach of the court will mirror the attitude which the court would take to a subsequent challenge to

> the decision by a creditor: see e.g. In re Longmeade Ltd [2016] Bus LR 506, paras 61–65. But having regard to the fact that its approval will prevent subsequent challenge, the court will require the administrator to put all relevant material before it, including a statement of his reasons, and the court will not give its approval if it is left in any doubt as to the propriety of the proposed course of action."

In passing, I would note that the word "subsequent" in the second line of paragraph 50 was incorrect. My reference to Re Longmeade was to authorities on the approach of the court to challenges to a *proposed* course of action by liquidators, which is that the court will not generally give directions to liquidators on commercial matters, and will only interfere with a proposed course of action if the liquidators are proposing to take a course that is wrong in law or "conspicuously unfair".

99. It will be recalled from the exchange cited at paragraph 27 above, that a summary of these paragraphs from Nortel was cited to Marcus Smith J at the hearing of the Sanction Application. This led him to ask whether his role was not to "second guess" the Receivers' decision but only to determine whether their proposed course, "when viewed from a certain distance … was proper". That was a view with which counsel for the Receivers agreed in argument, and was reflected in paragraph [72] of his judgment.

100. However, counsel for the Receivers then also suggested to Marcus Smith J that my decision in Nortel – and in particular the last sentence of paragraph [50] – would answer the further question which had been raised in Mr. Collings' skeleton argument as to whether the court was being asked to absolve the Receivers from any allegations of professional negligence.

101. Although Marcus Smith J expressly declined to consider the issue of immunity in his judgment on the Sanction Application, the decision in Nortel was also relied upon by the Judge when he came to decide the immunity point. In particular, as set out in paragraph 50 above, the Judge stated, at [83], that he could not imagine that I believed that any immunity for the Nortel administrators would be limited to claims for breach of fiduciary duty, and would not also extend to claims by creditors alleging that the Nortel compromise was a negligent breach of the administrators' common law duty to obtain the best price reasonably available.

102. Unfortunately, and for the following reasons, the Judge's view of my thought process and what I decided in Nortel was not correct.

103. As with MF Global, Nortel did not concern a sale of trust assets, but a complex negotiation leading to the compromise of factual and legal disputes which had already occupied the courts in the US and Canada for many years. As the judgment illustrates, I was able to review, in general terms, the process which had been adopted by the administrators during the administrations, the methods that they had adopted to deal with the obvious potential conflicts between the various creditors of the different companies to which they had been appointed, and their overall approach to the merits of the proposed compromise of the various disputes. I also had the benefit of confidential legal opinions that the administrators had obtained from various law firms in the UK, the US and Canada on the more important legal issues that had arisen.

104. However, given the very great complexity of the issues, even on the basis of the lengthy (but necessarily one-sided) evidence that I was given, there was no conceivable basis upon which I could sensibly have attempted to satisfy myself on the facts that the creditors of one or more companies might not have fared (slightly) better if the administrators had adopted a different approach, or that the administrators had not overlooked something in the negotiations, or that there was not some point on which the administrators might have obtained a (slightly) better deal for one or more groups of creditors.

105. In short, I did not consider that I was being asked to satisfy myself on the facts that no better deal might have been possible, or that the administrators had discharged their common law duty of care. I considered that my role was to conduct the more limited review of the case on the basis identified by *Lewin* and endorsed by David Richards J in MF Global, namely to concern myself "with limits of rationality and honesty", and not to refuse approval simply because I might have taken a different decision (i.e. not to "second guess" the administrators).

106. As such I determined whether the administrators genuinely held the views that they espoused, that they had addressed the obvious conflicts of interest between the various companies, and that their views as to the merits of the proposed compromise had been formed rationally. That limited scope of review was reflected in the way in which I expressed my conclusions. At [54] of my judgment I stated,

> "54. At the end of that process, and on the basis of the evidence that I have seen, I am satisfied that the administrators … and the conflict administrator are genuinely and firmly of the view that the global settlement is in the best interests of each of the EMEA Companies for which they are responsible, together with their respective creditors. I am also satisfied that those views have been formed properly and rationally."

See also the further references to rationality in [61], [76] and [79].

107. I would add that I was not asked in Nortel to determine the question of the immunity that would flow from my decision, and it is notable that my judgment does not contain any analysis of that question. My passing reference in [50] to the fact that approval "would prevent subsequent challenge" was, as the Judge observed at [83], in entirely general terms. It would be reading far too much into those very few words to think that I had considered, let alone reached any view on the precise extent of, the immunity for the administrators which would result from my approval of the proposed compromise.

108. I shall return to these aspects of Nortel at the end of this judgment, but for now I should simply record that I do not consider that it can bear the weight that the Judge placed upon it, either in relation to the scope of the exercise that I was conducting, or the immunity that would result from it.

Cotton

109. The final authority to which I should refer is one which did involve a proposed sale of assets by trustees. It is the decision of this court in Cotton v Brudenell-Bruce [2014] EWCA Civ 1312, [2015] WTLR 39 ("Cotton"). The case concerned involving a

dispute over whether trustees should sell an unoccupied listed building in accordance with advice which they had received from expert valuers and estate agents (GVA) who had conducted a limited and confidential marketing exercise. The trustees took the view, on the basis of that advice, that the price offered by a purchaser (Mr. A) identified by that process was "an opportunity not to be missed"; but one of the beneficiaries contended that it was "inadequate and the result of an ineffective marketing exercise".

110. The court at first instance approved the sale by the trustees. Unusually, the parties were also engaged in a linked application in which the beneficiary had sought the removal of the trustees on the basis that they were unfit to act, based largely on the same allegations as to the inadequacy of the marketing process. After a lengthy review of a considerable amount of written evidence that had been filed by the parties, but upon which there had been no cross-examination, Vos LJ rejected the challenge to the approval based upon the alleged inadequacy of the marketing exercise. Vos LJ stated, at [72] and [77],

> "72. …. GVA were advising on marketing and sale processes. GVA in fact advised the trustees clearly and cogently that a limited directed marketing strategy was advantageous and appropriate. GVA gave good reasons for rejecting an open market campaign if the targeted approach produced the desired results. Those reasons were sensible and intelligible ... In my judgment, the trustees were entitled to take this advice ... I do not accept that the trustees were obliged to second-guess the professional view of the experts they had instructed to market the property and to obtain the best price available in the circumstances.
>
> …
>
> 77. I do not think that the trustees can be criticised for accepting GVA's clear view. They were the experts. They were accomplished and well-reputed in this market … It is true, of course, that GVA may have acted negligently in selecting the bidders. If, for example, they were later shown to have excluded a worthy bidder for an inappropriate reason, there 26ightt be a claim by the trustees against them. But there is no evidence of anything of the sort, and, in any event, as I said at the outset, there is a clear distinction to be drawn between the duties of the trustees to the beneficiaries and the duties of the experts to the trustees."

111. At [78], Vos LJ considered the purpose and proper procedure to be adopted by the court on an approval application by trustees. He stated,

> "78. This aspect of the argument raised in sharp focus the procedure that is adopted when trustees seek the approval of the court to a momentous transaction. The procedure is intended to be quick and accessible. The question was raised as to what ought to happen when issues of contested fact are raised that the CPR Part 8 procedure is not well adapted to resolve. As it turns

> out, in this case, it does not ultimately seem to me that such issues were central to the court's determination. But one can imagine cases where they would be. In such a case, the court can always order that the issues of fact are tried under the Part 7 procedure, or anyway after disclosure and oral evidence. I do not, however, think that such a situation would frequently arise, because the trustees are not asking the court to find facts. They are asking the court to decide whether they have presented sufficient evidence to satisfy it that the trustees have fulfilled their duties to their beneficiaries in deciding upon the transaction in question, and have formed a view which, in all the circumstances, reasonable trustees could properly have formed. This is a very different exercise from the situation, after the event, where a beneficiary is seeking to prove that the trustees have failed in their duties by selling, for example, at an undervalue."

112. I consider that it is readily apparent from this passage that Vos LJ did not think that trustees should ordinarily ask, or that the court would ordinarily be prepared to undertake in advance, the type of detailed fact-finding exercise involving oral and/or expert evidence which would be required to determine whether a proposed sale price was the best price reasonably obtainable for the property in question.

113. That having been said, Vos LJ returned to the question of the possibility of a subsequent claim by a beneficiary when dealing with the references in earlier authorities to the need for caution. At [84]–[87], Vos LJ said,

> "84. … The authorities that I have mentioned above that emphasise the need for caution in approving a trustee's decision to undertake a momentous transaction need, I think, to be placed in context. The court will not approve a trustee's decision without a proper evidential basis for doing so. But the court should equally not deprive a trustee of approval without good reason.
>
> …
>
> 86. The decision that these trustees have reached is indeed a momentous one. The court is not a rubber stamp and must be cautious to ensure that it is satisfied that the trustees are indeed justified in proceeding in accordance with their decision. But the court should not place insurmountable hurdles in the way of trustees in the position of those before this court. The court has a supervisory jurisdiction that needs to be exercised in appropriate circumstances. Caution cuts both ways.
>
> 87. Finally, in this context, the fact that the beneficiary is in a weaker position than he would be, after full disclosure and cross-examination at a trial of an action to challenge the trustees' actions, cannot, by itself, mean that the court should withhold consent. It is true that court approval will prevent a later

> challenge. But if the court is given sufficient and appropriate material on which to act, it should not withhold consent just in case something better might in the future turn up."

114. Cotton is perhaps the case that comes closest to containing an indication that an approval decision by a court would necessarily prevent a subsequent claim by a beneficiary that a sale of assets had involved a breach of a duty of care to obtain the best price by a trustee. However, the case was unusual in that the court was prepared to review a considerable amount of expert evidence in some detail. It is also clear that Vos LJ's brief comment in [87] was *obiter* since no question of immunity was being decided.

Immunity: the underlying principles

115. Given the lack of binding authority or any specific analysis in the cases of the degree of immunity that flows from an approval decision, I think it is necessary to return to first principles and to ask what is meant by a trustee or other office-holder obtaining "immunity" or "protection" from a subsequent claim. Put another way, what principle of law prevents such a claim from being pursued?

116. For the purposes of this analysis I assume, as the Judge held in the instant case, that the claimant has an arguable cause of action in equity or in negligence at common law, so that the trustee or office-holder could not seek to strike out the claim on the basis that there are no reasonable grounds for bring the claim or apply for summary judgment on the basis that it has no real prospect of success. In such a situation, the claimant will have a *prima facie* right to have his claim tried and determined by a court. Further, and subject to the possibility that an office-holder such as an administrator or receiver might have been granted a release when discharged from office, trustees or other office-holders have no special legal status to prevent such claims being made against them.

117. Although, following the lead of the parties, the Judge treated "immunity" as a discrete concept, there is in fact no separate doctrine of English business or property law called "immunity", and none was identified in the Judgment. As such, to claim "immunity", it seems to me that trustees or other officer-holders would have to be able to invoke some other established legal principle to prevent the subsequent claim from being pursued. In my view, although the parties and the Judge treated them as separate and distinct, the only two candidates to provide content to the notion of "immunity" are the doctrines of *res judicata* and abuse of process.

118. In Virgin Atlantic Airways v Zodiac Seats UK [2014] AC 160 ("Virgin") at [17], Lord Sumption described *res judicata* as a portmanteau term for a number of principles based upon an underlying policy against abusive proceedings. Of the various categories of *res judicata* described by Lord Sumption, it is obvious that an approval decision could not give rise to a cause of action estoppel or merger of the first cause of action, because the basis of the application by trustees or office-holders in seeking the approval of the court is manifestly different from the cause of action which the claimant would be pursuing in a subsequent claim.

119. The only two potentially relevant categories of *res judicata* are Lord Sumption's fourth and fifth categories, which he described in the following way, at [17],

> "Fourth, there is the principle that even where the cause of action is not the same in the later action as it was in the earlier one, some issue which is necessarily common to both was decided on the earlier occasion and is binding on the parties: Duchess of Kingston's Case (1776) 20 State Tr 355 . "Issue estoppel" was the expression devised to describe this principle by Higgins J in Hoysted v Federal Commissioner of Taxation (1921) 29 CLR 537, 561 and adopted by Diplock LJ in Thoday v Thoday [1964] P 181, 197–198.
>
> Fifth, there is the principle first formulated by Wigram V-C in Henderson v Henderson (1843) 3 Hare 100, 115, which precludes a party from raising in subsequent proceedings matters which were not, but could and should have been raised in the earlier ones."

120. In relation to issue estoppel, Lord Sumption referred to the classic statement of that principle by Lord Keith in Arnold v National Westminster Bank plc [1991] 2 AC 93 ("Arnold") at page 105D-E,

> "Issue estoppel may arise where a particular issue forming a necessary ingredient in a cause of action has been litigated and decided and in subsequent proceedings between the same parties involving a different cause of action to which the same issue is relevant one of the parties seeks to reopen that issue."

121. After considering the decision in Arnold, Lord Sumption also held, at [22], that there could be a limited exception to the doctrine of issue estoppel to avoid injustice, either where a point had been decided against a party or where it had not been raised in the first proceedings because it would not have been reasonable to do so, but where there had been a material change of circumstance since the first decision.

122. In relation to Henderson v Henderson abuse of process, Lord Sumption referred in Virgin at [24] to the well-known statement by Lord Bingham in Johnson v Gore-Wood [2002] 2 AC 1 at page 31,

> "Henderson v Henderson abuse of process, as now understood, although separate and distinct from cause of action estoppel and issue estoppel, has much in common with them. The underlying public interest is the same: that there should be finality in litigation and that a party should not be twice vexed in the same matter. This public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole. The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all. I would not accept that it is necessary, before abuse may be found, to identify any additional element such as a collateral attack on a previous decision or some dishonesty, but

> where those elements are present the later proceedings will be much more obviously abusive, and there will rarely be a finding of abuse unless the later proceeding involves what the court regards as unjust harassment of a party. It is, however, wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before."

123. As Lord Bingham indicated, issue estoppel undoubtedly has much in common with the concept of Henderson v Henderson abuse of process. There are, however, some differences. In Virgin, at [25], Lord Sumption identified that issue estoppel is a substantive legal principle, whereas Henderson v Henderson abuse of process is a procedural means by which the courts prevent abusive litigation. Another distinction is that issue estoppel only relates to attempts to relitigate issues that were a necessary ingredient of the original cause of action between parties to the original proceedings (or their privies), whereas Henderson v Henderson abuse is potentially broader in scope, both as to the centrality of the issues to the decision, and as to the identity of the litigants.

124. It should also be noted that there is a further category of abuse of process cases in which a second proceeding by someone who was not a party or a privy of a party to an earlier proceeding might amount to an abuse of process if the second proceeding constitutes an impermissible collateral attack on the decision in the earlier proceeding. The category is, however, very limited. In relation to civil proceedings, a subsequent claim which challenges the earlier decision will only be an impermissible collateral attack if (i) it would be manifestly unfair to a party to the later proceedings that the same issues should be relitigated or (ii) to permit such re-litigation would bring the administration of justice into disrepute: see Secretary of State for Trade and Industry v Bairstow [2004] 1 Ch 1 at [38] per Morritt V-C.

125. Whatever the precise boundaries or overlap of these principles, it is readily apparent that in each of the relevant categories of issue estoppel and abuse of process there is a focus on the issues that were determined (or which could and should have been raised for determination), by the first court. For each of the doctrines, a comparison is then made with the issues that the claimant asks the court to decide in the subsequent claim.

126. In that regard, whilst I do not think the Judge's formulation was entirely correct, I think that he was on the substantially the right track when he observed, at [80] of his Judgment, that the "immunity" which flows from an approval decision derives in principle from the nature of the review conducted by the approving court, and whether "immunity" extends to a subsequent claim depends upon the allegations made or necessarily involved in that second claim.

127. In my judgment, the concept of "immunity" flowing from an approval decision is most easily understood as judicial shorthand for the bar on subsequent proceedings that results from an issue estoppel. Although it is not entirely apposite to speak in terms of the applicant trustees or office-holders having a "cause of action" when making an approval application, the essence of the point is that if the judge hearing the approval application determines a particular issue as a step in deciding to give his approval, that will operate as a bar to a party to the application (or one of their privies) seeking to relitigate that issue in subsequent proceedings against the trustees or office-holder. Although this is simply shorthand, the concept of a trustee or office-holder having the status of "immunity" from subsequent suit is also consistent with Lord Sumption's point that issue estoppel is a substantive principle of law, rather than being a broader discretionary means by which it is the court that seeks to protect its own process from abuse.

128. Focussing in this way on the issues that have been decided also serves to emphasise that the question of the "immunity" which attaches to an approval decision does not permit a "one-size fits all" answer.

129. The cases to which I have referred above illustrate that the court's willingness to entertain a particular application for approval and the issues that it may be prepared to determine will vary from case to case. They may, for example, depend on the identity of the applicant (e.g. are they a professional trustee or office-holder, or an unpaid family trustee?); the reasons why the proposed decision is said to be momentous (e.g. is it a disposal of hugely valuable or sensitive assets, or does it involve acute allegations of conflict of interest?); and the nature of the legal or evidential inquiry that would be involved (e.g. would the court be required to resolve a difficult question of law or be required to review complex expert evidence and reach a factual conclusion?).

130. Understood in this way, if, for example, the issue which the court was to ask itself on an approval application was whether the trustees were acting honestly and rationally in deciding to enter into a transaction, then the trustees would be protected by the court's approval against a subsequent claim to set aside the transaction and for any consequential relief on the basis that they were not exercising their powers honestly or rationally in the best interests of the beneficiaries. Even that exercise would, of course, require the trustees to satisfy the court that they had put all information relevant to those issues before the court, and the comments on the caution required before granting approval are perfectly understandable, even on that limited basis.

131. At the other end of the spectrum, if, for example, the issue which the court was asked to determine was whether trustees had reached a decision to sell an asset in accordance with their equitable duty of care, then one might well expect the court to be even more cautious about determining that issue. The precise procedure to be adopted would be a matter for the court, but if the matter was contested, one might ordinarily expect a judge to be very wary of determining that issue, at least in the absence of disclosure, production of expert evidence and/or cross-examination. That was, I believe the point that Hart J was alluding to in X v A at [30] and Vos LJ was making more explicitly in Cotton at [78] and [87] concerning the procedural differences between applications for approval and claims in hostile litigation. As Vos LJ further observed, a court asked to approve a transaction in advance might very well consider it inappropriate to embark upon a lengthy and detailed fact-finding process better suited to a trial after the event.

132. For the sake of completeness, I should add that the extent of the "immunity" conferred by an approval decision will also depend upon the identity of the parties to the approval decision and the subsequent claim.

133. As I have indicated, it is an essential requirement of issue estoppel that the claimant in the second set of proceedings should also have been a party (or a privy of a party) to the earlier decision. This is the underlying reason why, for example, trustees seeking approval to a proposed transaction will join all potentially interested beneficiaries, or, if that is not practical, seek the appointment of representative respondent beneficiaries. That regularly occurs, for example, in cases involving pension funds: see e.g. Re Merchant Navy Ratings Pension Fund [2015] EWHC 448 (Ch) at [9]-[14]. That is also often the case where insolvency office-holders seek the court's determination of legal issues affecting the distribution of assets in an insolvency.

134. If, however, whether because of shortage of time or because it would be impracticable, trustees or office-holders do not seek to bind interested parties by joining them as parties or by the appointment of representative respondents, then I cannot see how they could obtain "immunity" from subsequent claims in any substantive sense. To that extent I would respectfully suggest that the references to "immunity" in MF Global and in my own decision in Nortel were misplaced.

135. What can, however, be said, is that if trustees or office-holders advertise their intention to seek approval for a momentous decision, so that beneficiaries or creditors have the opportunity to attend and be heard (which was the course adopted in MF Global at [15], and in Nortel at [39]-[43]), then the trustees or office-holders will undoubtedly have a better prospect of persuading a court that a subsequent claim by a beneficiary or creditor would be an abuse of process. In such a situation it would plainly be relevant to ask whether the claimant in those subsequent proceedings had knowledge of the earlier proceedings and had a proper opportunity to participate in them.

136. Some of the points that I have set out above are illustrated by a recent decision of Miles J in Re Sova Capital Limited [2023] EWHC 452 (Ch) ("Sova"), a case which was decided after the argument had concluded in the instant case, but which both parties subsequently referred us to.

137. The case concerned an application by joint special administrators (the "JSAs") of an FCA authorised and regulated brokerage company, whose business involved trading in the Russian market for clients, and which had been severely affected by the turmoil in the financial markets following the invasion of Ukraine. The JSAs sought the approval of the court to a specific transaction under which the company would transfer an identified portfolio of Russian securities to one of its largest unsecured creditors in return for a waiver of that creditor's claims against the company. The transaction was opposed by another creditor ("BZ") who was part of a consortium that had made a rival bid to acquire the assets.

138. After quoting from some of the authorities referred to above and the Judgment in the instant case, Miles J continued, at [182],

> "182. It appears to me that the scope of any subsequent immunity where the court is asked for directions from an office-holder must be sensitive to the particular facts: it depends on the

> specific nature of the question(s) before the court on the application and of any answer(s) given by the court. I do not think there can be a blanket rule of law that the court's approval of a transaction automatically generates full immunity in all respects concerning the transaction. It depends on the issues raised and the court's answers."

For the reasons that I have already set out, I entirely agree with that statement.

139. Miles J also set out, at [184], a number of further observations on the authorities. It is worth repeating those points in full,

> "(a) Administrators are professionals who fulfil a commercial role in conducting the business and affairs of the company in administration. They are generally required to make their own commercial decisions and cannot expect to rely on the approval of the court in those respects.
>
> (b) There may in this regard be differences between trustees of private trusts and office-holders appointed under the insolvency legislation. Office-holders are required routinely to take momentous commercial decisions and to weigh up the risks and rewards of competing courses. As Snowden J observed in Nortel the principles may be similar, but they may not be identical in all respects.
>
> (c) The question whether there are particular reasons for applying to the court cannot depend on whether the commercial decision is more or less difficult. Even hard commercial decisions are for the administrators, not the court. Nor can the scale of the transaction be the touchstone. Administrators should not assume that the court will entertain an application for directions simply because the matter is hard or large.
>
> (d) It may be appropriate to seek the court's approval where doubts have been expressed about the administrators' powers or there are potential conflicts of interest or where there may be potential issues as to the legality of a proposed transaction. This is not an exhaustive list but, putting it negatively, the court is unlikely to give directions in a case which is in truth seeking the blessing of a commercial decision.
>
> (e) The court may in an appropriate case also be asked to consider the rationality of the proposed course of action (for the purposes of the proper purpose rule). Where it does so, it does not necessarily follow from a ruling on rationality that the court is satisfied that there are no possible claims against the office holder (for example in negligence) concerning the process which has led up to the relevant decision. The scope of any immunity will depend very much on the facts (see above).

> (f) The court is not a sanctuary or bomb shelter for office-holders. There is no blanket or automatic rule about the scope of any immunity for the office-holder. The scope of any immunity depends on what precisely the court decides.
>
> (g) What most matters for office-holders and others interested in the estate is that the transaction covered by the approval is secure against future challenge (absent some flaw in the approval process).
>
> (h) On an application for directions, the court does not have the benefit of disclosure or cross examination. The court depends on the administrators to make complete and candid disclosure of the necessary material but the court is not in the position of making a full investigation of the position. A directions hearing should be comparatively short and contained. It is not intended to be a trial, even a mini one. This is a further reason why the court will be cautious about reaching findings of fact going beyond those strictly required by the directions sought."

Again, I agree with those observations. In particular, I would endorse Miles J's observation at (f) that the scope of any immunity depends on precisely what the court decides.

140. At [185] of his judgment, Miles J then identified the four issues for determination: (i) was it appropriate for the JSAs to seek the approval of the court to the proposed transaction; (ii) were they acting within their statutory powers and in accordance with insolvency law; (iii) was their decision to enter into the transaction rational and honest; and (iv) was there a real risk that the transaction would breach applicable sanctions laws?

141. Having identified those issues, Miles J determined them in favour of the JSAs and approved the proposed transaction. At the end of his analysis of the first three issues, Miles J concluded as follows, at [279]-[280],

> "279. Overall I have concluded that the decision of the JSAs to enter the Transaction is an honest and rational one, within the scope of their powers.
>
> 280. However I am not expressing a more general view as to the conduct of the JSAs. I do not e.g. express any view as to whether a different outcome could have been achieved had the JSAs taken the steps now suggested by BZ to market the assets. Nor do I express any view about the negotiations of the Transaction or whether better terms could have been reached. Nor do I express any overall view as to whether the JSAs have achieved the best price reasonably achievable. In setting out these reservations, I do not wish it to be understood either that I am suggesting that the JSAs have failed to act reasonably or have failed to achieve the best price. I am simply making no ruling either way. I return to something I explained earlier: the

> commercial decision to enter the Transaction is one the JSAs have already taken and by giving them permission to carry it out I am not seeking to remake or second guess the decision."

142. Miles J's clear expression of the limits of his approval and of the issues that he was determining reflected similar reservations made (albeit in a slightly different context) in earlier insolvency cases such as Re Montin [1999] 1 BCLC 663 at 669 (Neuberger J), Re Osmosis Group [1999] 2 BCLC 329 at 335 (Rimer J), and Re T&D Industries plc [2000] 1 WLR 646 at 658-659 (Neuberger J). In each of those cases the judge expressly stated that the direction he was giving that an administrator could dispose of a company's assets prior to obtaining the approval of creditors to the proposals for the administration, would not insulate the administrator from a claim that the decision to make the disposal had been made negligently. I shall return to that point at the end of this judgment.

The instant case

143. Having made those observations, I turn to apply them to the instant case.

144. As a preliminary observation it is evident that I think that the parties were wrong to invite the Judge to approach the first and second questions of immunity and issue estoppel separately. In my view they were one and the same question.[1]

145. The need to focus on the issues that were decided by the approving court and those that are raised in the subsequent proceedings also explains why, in my view, Mr. Collings was wrong to submit that for the purposes of immunity, there was a conceptual distinction between claims alleging breach of a fiduciary duty or breach of an equitable duty of care (which he accepted would be covered by immunity), and breach of a common law duty of care or breach of a statutory duty of care (to which he contended that immunity would not attach). For reasons that I have explained, in my judgment the question of immunity depends upon a comparison of issues determined (or which could and should have been determined) in the earlier proceedings and those raised in the subsequent claim, not the precise juridical origins (i.e. common law or equity) of the applicant's duties or the subsequent cause of action.

146. For the same reason, I do not consider that it is necessary to decide in the instant case whether a court-appointed receiver's duty of care is properly to be characterised as a common law duty of care (as Mr. Collings contended in reliance on the dicta of Dillon LJ in IRC v Hoogstraten [1985] 1 QB 1077 at 1093-1094) or an equitable duty of care (as Mr. Mohyuddin contended, relying on the historical origins of the jurisdiction to appoint receivers by way of equitable execution). The relevant question is the content of the duty and the issues to which it gives rise, not its juridical origins.

147. I also do not agree with the way in which the Judge framed his analysis of immunity at [79], [82] and [86] of the Judgment, which depended on the proposition that if the court approved a specific transaction with a specific third party at a specific price, that necessarily conferred a wide immunity in respect of all subsequent claims. The Judge's

[1] In that respect, all that I think that the Judge was saying in [98]-[100] of his Judgment was that if he had not found that there was immunity, he would also not have found there to be an issue estoppel. For reasons that I have explained, I think that this approached the question the wrong way around, but it was a consistent conclusion.

reasoning was that a subsequent claim that the transaction had been wrong, improper, irrational or a breach of a duty of care, would all be tantamount to saying that the applicant should not have entered into the specific transaction that the court had approved. It is, however, frequently the case that trustees or office-holders seek approval for a specific transaction on specific terms. But just because the subject matter, counterparty and terms of the proposed transaction are specifically identified, that does not mean that the approving court will think it appropriate to decide every potential issue that might be raised in a subsequent complaint, and for the reasons that I have outlined (and to borrow Miles J's expression in Sova), approval does not confer blanket immunity: each case depends on its own facts.

148. In my view, in determining whether there was "immunity" in the sense in which I would prefer to use that term, the focus must first be on identifying the issues that were decided by Marcus Smith J, and then asking whether any of the same issues is a necessary ingredient of the Claim that Denaxe is now making.

149. In that regard, it is clear that Marcus Smith J was invited to approach his task by reference to my judgment in Nortel, and counsel expressly agreed that this did not require him to "second-guess" the Receivers' decision but simply to check, "viewed from a certain distance", that it was a proper decision. That limited formulation of his task was reflected in [71] and [72] of Marcus Smith J's judgment, which faithfully reflected the principles derived from cases such as Richard v Mackay, Public Trustee v Cooper, MF Global and Nortel. However, as I have explained above, none of those authorities were a case in which any question of breach of a duty of care arose.

150. Likewise, when Marcus Smith J's answer at [73] of his judgment is examined closely, it is clear that the judge only expressed himself satisfied that the price had been achieved after a competitive process for sale of the Footballing Assets together, that the price was "reasonable", and that it was the best bid that had been received in that process. Those findings do not suggest that, at the hearing of the Sanction Application, Marcus Smith J had conducted the type of inquiry that would have been necessary to satisfy himself that the Receivers had in every respect exercised all necessary skill and care, and it is notable that he did not describe the agreed price as the best price reasonably obtainable for the Footballing Assets.

151. In particular, there is some force in Mr. Collings' submission that Marcus Smith J did not expressly decide the issue of whether the Receivers had exercised all due skill and care to ensure that the best price would be obtained in the receivership by deciding to sell the Footballing Assets together in a composite transaction. There is no doubt that the Receivers had, from the outset, clearly explained their thought process in that regard, and indeed their views in this respect were the very reason that Marcus Smith J had thought it appropriate to appoint them by way of equitable execution in the first place.

152. However, there was no challenge raised at the hearing to the Receivers' approach of selling all of the Footballing Assets together. Although Marcus Smith J's judgment contains a detailed analysis of the bids that had resulted from the marketing process and he went on to consider the desirability of selling the VB shares in BFCL together with those held by Denaxe, he did not revisit the question of whether a better price would be obtained if the marketing had been of the property assets without the Club *in situ*. Nor

did he address the type of questions that the Judge subsequently addressed when holding that the Claim disclosed an arguable case of negligence by the Receivers.

153. Against those points, there is considerable merit in Mr. Mohyuddin's argument based upon the point that the only relevant allegation of breach of a duty of care of which any particulars are given is at paragraph 40 of the APOC, namely that no attempt was made to offer the property assets for sale separately to the shares in BFCL. That allegation is also reflected in the only pleaded claim for damages which depends upon the proposition that the Footballing Assets should have been sold separately.

154. Mr. Mohyuddin contended that the evidence in support of the Sanction Application made it clear that the Receivers were seeking approval to sell the Footballing Assets as a composite lot, and that this was implicit in the very way in which the Sanction Application was put to the court. He also contended that this was implicit in the Variation Application which was only needed because it was intended that the Receivers should sell Denaxe's shares in BFCL together with its property assets, and could only do so if VB was also free to sell its shares as part of the same transaction. Reflecting that approach, he pointed out that the terms of the Sanction Order also made it express that the Footballing Assets listed in the schedule to the order, and VB's shares in BFCL, could be sold "together as part of one transaction".

155. These are powerful competing submissions. I do not, however, consider that I need to choose between them in order to dispose of the appeal. That is because even if the decision of Marcus Smith J and the Sanction Order did not give rise to an issue estoppel, I have no doubt whatever that the Judge was entirely correct to find, for the reasons that he gave, that it is a Henderson v Henderson abuse of process for Denaxe to bring the Claim, having been given the clearest possible opportunity at the hearing of the Sanction Application to raise what is now the only pleaded basis for its Claim, and not having done so.

156. As I have explained, the Sanction Application and Variation Application both depended upon a fundamental assumption, supported by evidence from the Receivers as to their opinion, that the Footballing Assets should be sold together in a composite transaction so as to preserve the Club in operation and thereby to maximise value for the assets sold.

157. The directors of Denaxe at the time did not object to the proposed sale, and as Marcus Smith J observed in his judgment at [70], the hearing of the Sanction Application had been fixed precisely in order to enable Mr. Oyston to raise any points that he wished to about the proposed sale. Although Mr. Oyston had been displaced as a director of Denaxe, he was still its majority shareholder and would remain so after the sale to Mr. Sadler was completed. As such, it was plain that the hearing had been arranged in order that everyone who could claim to be interested in Denaxe, and who might be entitled to express a view on its behalf in relation to the proposed transaction, had the opportunity to do so.

158. In that regard, as pointed out by the Judge, Mr. Oyston and Denaxe were in possession of the Colliers Valuations and were well aware of the financial state of the Club. The directors did not oppose the proposed sale, and Mr. Oyston chose to stay silent on the fundamental question of whether there should be a composite sale of the Footballing

Assets, simply reserving his rights, very generally, on the questions of "marketing and value".

159. Mr. Collings protested at the hearing of the appeal that Mr. Oyston was entitled to keep his (and Denaxe's) powder dry in this respect, and he even went so far as to contend that a separate sale of the property assets is precisely what Mr. Oyston would have wished to see if he had been in control of the board of Denaxe at the time.

160. As Marcus Smith J indicated at [70], the former submission is unsustainable given paragraph 18 of the Receivership Order and the way in which the hearing of Sanction Application was set up, precisely so as to enable Mr. Oyston to raise any concerns he might have about the proposed sale. For the reasons given by the Judge at [105], and certainly taking the broad, merits-based view suggested by Lord Bingham in Johnson v Gore-Wood, it is unreal to draw a distinction between Mr. Oyston and Denaxe in this respect.

161. Mr. Collings' second submission is also at odds with reality, not least given Mr. Oyston's own evidence that after the Buy-Out Order he had "sought to sell the Club and the football related assets" together. On the facts in that respect, I consider that the Judge was entirely justified in his conclusions that Mr. Oyston made a calculated decision, as a long-time supporter of the Club, not to advocate a separate sale of the Footballing Assets that would have resulted in the Club ceasing to operate. The Judge was also entitled to find that if Mr. Oyston had spoken up, a different course might have been adopted by the Receivers and by Marcus Smith J.

162. In those circumstances, it seems to me that the Judge was entirely right to conclude that Denaxe could with reasonable diligence and should in all the circumstances have raised at the hearing of the Sanction Application the central issue upon which its Claim now depends, namely whether the Receivers should have sought to sell the property assets separately from the remainder of the Footballing Assets. I also consider that the Judge was right to conclude that it would be manifestly unjust to the Receivers and a misuse of the court's resources for Denaxe now to be able to pursue the Receivers with that allegation. In my view, Denaxe is now prevented from raising that issue in the Claim on the basis of Henderson v Henderson abuse of process.

163. For these reasons, I consider that the Judge's decision to strike out the Claim was correct, and I would dismiss the appeal.

E. POSTSCRIPT

164. As a postscript I should add that much of the difficulty in this case could have been avoided if, in the context of what was hotly contested litigation, Marcus Smith J had been invited to give more detailed consideration to the question of the consequences that would flow from his decision on the Sanction Application.

165. That would have reflected the reality that the whole purpose of trustees or other applicants in seeking the approval of the court is to obtain some measure of protection from subsequent complaints by interested parties. The court hearing an approval application is plainly not required actually to decide in advance precisely what immunity will flow from a decision to approve the transaction. However, identifying as clearly as possible the issues which the court is deciding and following that through

by identifying specifically the type of claims that would or would not be barred, would, in my view, be a helpful exercise.

166. That is precisely what Miles J did in Sova, and it follows the example set in T&D Industries plc and the cases that preceded it. Indeed, with the benefit of hindsight, it would have been better had I followed that course in Nortel, not least because it would have made it clearer to Marcus Smith J and to the Judge in the instant case precisely what the parameters and effect of my decision had been.

Lady Justice Falk:

167. I agree with the judgments of Snowden LJ and Asplin LJ.

Lady Justice Asplin:

168. I agree that the appeal must be dismissed for the reasons set out in Snowden LJ's judgment.

169. It seems to me to be quite clear that the protection afforded to officers of the court or trustees seeking directions and the approval of the court for their proposed conduct, must depend on the nature of the approval sought, the issues which the court is required to consider in order to reach its decision and the parties which were before the court. If an issue has been decided as part of the process of giving approval, a party to the approval application or one of their privies, cannot seek to re-litigate the issue in subsequent proceedings against the trustees or office-holders.

170. When considering the extent of any protection afforded, it is important, therefore, not only to take into account the issues which were decided on the approval application but also the identity or interest of the parties who were before the court. A party to the approval proceedings will not be allowed to raise the same issues in subsequent proceedings. It is for this reason that it is usual for trustees or office-holders to seek to join all interested parties or to seek representation orders so that all interests are before the court on the hearing of the approval application.

171. As Snowden LJ points out, one size does not fit all. There is a wide spectrum of applications which may be made by trustees or office-holders and the nature of the approval they seek will vary. Inevitably, the factual background of each application will be different. It follows that the nature of any immunity which may arise is highly fact sensitive and must be considered with some care. There is no single answer to the question of whether subsequent proceedings will be barred.