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Blessing, Immunity & Abuse of Process

Denaxe Ltd. v Cooper & Rubin

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THE CASES

Denaxe Ltd. v Cooper [2023] EWCA 752, Court of Appeal (30 June 2023)

Subject: Civil procedure; Torts; Equity

Key Themes: Abuse of process | Asset sales | Breach of duty of care | Equitable execution | Henderson v Henderson rule | Immunity from suit | Issue estoppel | Receivers | Receivers' powers and duties | Res judicata | Transactions at an undervalue

Denaxe Ltd. v Cooper [2022] EWHC 764 (Ch) | [2022] 4 W.L.R. 52, Fancourt J (6 April 2022)

Subject: Negligence

Key Themes: Abuse of process | Approvals | Asset sales | Best endeavours | Breach of duty of care | Directions | Equitable execution | Football clubs | Immunity from suit | Issue estoppel | Receivers' powers and duties | Res judicata

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THE LEGAL CONTEXT (1)

- Appointment of receivers by way of equitable execution:
  - A method of enforcement of a judgment debt.
  - Express power of appointment by the Court under section 37(4) of the Senior Courts Act 1981.
  - The jurisdiction will not be exercised unless there is some hindrance or difficulty in using the normal processes of execution and certainly not if the appointment would be fruitless: see *Cruz City 1 Mauritius Holdings v Unitech Ltd.* [2014] EWHC 3131 (Comm).

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THE LEGAL CONTEXT (2)

- Jurisdiction to bless, approve or sanction a momentous decision:
  - **Trustees:** Inherent jurisdiction: *Public Trustee v Cooper* [2001] W.T.L.R. 901 (Ch); *Cotton v Brudenell-Bruce* [2014] EWCA Civ 1312; *Re MF Global UK Ltd. (No.5)* [2014] EWHC 2222 (Ch).
  - **Officeholders:** Para.63 of Sch.B1 of the Insolvency Act 1986:
    - **Administrators:** *Re Nortel Networks UK Ltd*. [2016] EWHC 2769 (Ch); *Re Petropavlovsk Plc (in administration)* [2022] EWHC 2097 (Ch); *Re Sova Capital Ltd.* [2023] EWHC 452 (Ch).
    - **Receivers**: *Denaxe Ltd. v Cooper* [2022] EWHC 764 (Ch).
- **BUT**: What ”immunity” does a “blessing” create?

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THE FACTUAL CONTEXT (1)

- Denaxe Ltd. = Blackpool Football Club (Properties) Ltd.
- Denaxe owned 76.3% of the shares in Blackpool Football Club Ltd. as well as Blackpool FC's stadium at Bloomfield Road.
- There arose a dispute between Denaxe (controlled by Owen Oyston) and another shareholder, VB Football Assets (controlled by Valeri Belokon), which owned 20%.
- In *VB Football Assets v Blackpool Football Club (Properties) Ltd.* [2017] EWHC 2767 (Ch), Denaxe and Mr Oyston were ordered to buy out VB's shares for £31.27m.
- In *VB Football Assets v Blackpool Football Club (Properties) Ltd.* [2019] EWHC 530 (Ch), Paul Cooper and David Rubin were appointed receivers by way of equitable execution.

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THE FACTUAL CONTEXT (2)

- The Receivers were tasked with realising the judgment debt, which involved selling assets, including the so-called Footballing Assets.
- The Receivers conducted an extensive marketing campaign to generate bidders.
- It was not possible to sell the Footballing Assets without including both of the large shareholdings in Denaxe.
- The best deal was a sale of both shareholdings in one transaction to a specific bidder at a specific price.
- VBFA applied to Court to vary the buy-out order and the Receivers applied for approval to sell in a single transaction.

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THE FACTUAL CONTEXT (3)

- The Court varied the buy-out order and approved the proposed transaction: *VB Football Assets v Blackpool Football Club (Properties) Ltd.* [2019] EWHC 1599 (Ch).

- Mr Oyston was represented at the hearing and had filed evidence - though he sought to reserve his position on the sale.

- Marcus Smith J criticised Mr Oyston's position as "*remarkably unsatisfactory*" (§52).

- Denaxe (then controlled by independent, non-Oyston directors) was served but did not take part.

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THE FACTUAL CONTEXT (4)

- In January 2020, Denaxe issued a professional negligence claim against the Receivers seeking damages of £86.2m, initially complaining that there had been a sale of the shares and other assets at a significant undervalue.

- By the time of the first instance hearing, Denaxe had pivoted so as to abandon its claim that the shares in the Club had any value at all (now describing them as toxic) and focused on an allegation that the other assets should have been sold separately in order to maximise value; the claim was revalued at £26.5m.

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FIRST INSTANCE (1)

- The Receivers applied (1) to strike out the claim as an abuse of process; and (2) for reverse summary judgment. Specifically:
  - **Immunity:** The Receivers were immune from suit, the sale having been sanctioned or blessed by the Court.
  - **Abuse (1):** Denaxe could and should have raised the issue now included in the claim at the hearing and were thereby precluded by the principle in *Henderson v Henderson*.
  - **Abuse (2)**: An issue estoppel arose in favour of the Receivers by way of *res judicata.*
  - **Merits:** The claim had no reasonable prospects of success.

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FIRST INSTANCE (2)

- Denaxe resisted the application on the following bases:
  - **Immunity:** The Receivers were only immune from claims for breach of equitable duty and not breaches of any common law duty concerning the decision to sell the Footballing Assets together.
  - **Abuse (1):** Neither the company nor Mr Oyston was obliged to raise the issue of a common law claim at the Sanction Hearing and so it could not be a *Henderson v Henderson* abuse of process.
  - **Abuse (2):** The issue was not decided and so it could not be *res judicata*.
  - **Merits:** The claim had reasonable prosects of success.

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FIRST INSTANCE (3)

- Fancourt J struck out the claim on the following two bases:
  - **Immunity:** The Receivers were immune from both equitable and common law claims arising out of the transaction, which had been approved by the Court (§71-§86).
  - **Abuse (1)**: In any event, it was the clearest possible abuse of process under the principle in *Henderson v Henderson* (§106).
- **Abuse (2)**: *Res Judicata* did not apply (§100).
- **Merits:** It was also held that the claim, if it were not an abuse, did have reasonable prospects of success and would not be subject to summary judgment (§113-§116).

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GROUNDS OF APPEAL (1)

- Denaxe obtained permission to appeal from Snowden LJ on the following grounds:
  - **The Immunity Ground:** The immunity conferred applied only to a claim for breach of equitable duty.
  - **The Abuse of Process Ground:** Denaxe was not bound to raise the issue of the claim at the hearing of because the scope of the application was limited to exercising a narrow jurisdiction in relation to breach of an equitable duty only.
- The Receivers resisted the appeal for the reasons Fancourt J gave but put forward an additional ground:
  - **The Duty Ground:** The Receivers owed Denaxe no duties in tort, and so the claim should be struck out as disclosing no cause of action recognised in law.

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GROUNDS OF APPEAL (2)

- The Duty Ground was premised on the following principles:
  - The appointment by the Court of receivers by way of equitable execution is a form of equitable relief, which originated from the Court of Chancery, see e.g. *Morgan v Hart* [1914] 2 KB 183, 188 (CA).
  - Such receivers have an equitable duty to protect, get in, realise and ultimately pass on to others assets and property, see e.g. *Re Magadi Soda Company Ltd* (1925) 94 LJ Ch 217, [1925] B & CR 70.
  - The equitable duty includes (as with other receivers) to take reasonable care to obtain the best price reasonably obtainable for any property which they sell, see e.g. *Telsen Electric v JJ Eastick* [1936] 3 All ER 266 and cf. *Downsview Nominees Ltd. v First City Corp. Ltd.* [1993] AC 295.

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GROUNDS OF APPEAL (3)

- The Duty Ground (cont.):
  - The imposition of a common law duty of care by the Courts was only appropriate when there was perceived to be a lacuna, see e.g. and *Anns v Merton London Borough Council* [1978] AC 728, 751-752 (HL).
  - Whilst the Court of Appeal had accepted in *Inland Revenue Commissioners v Hoogstraten* [1985] QB 1077 (CA) that a common law duty of care was owed by sequestrators, there was no need to do so with receivers by way of equitable execution (there already being a concurrent equitable duty) and the *obiter* remarks in *Clarke v Heathfield* [1986] 6 WLUK 303 (CA) were *per incuriam*.
  - Thus, the Receivers did not in fact owe the legal duties which were the subject matter of the claim.

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ON APPEAL (1)

- The Court of Appeal (Asplin, Snowden and Falk LLJ) unanimously dismissed the appeal.
- The lead judgment was from Snowden LJ (§1-166) with a short supporting judgment from Asplin LJ (§168-171).
- In summary:
  - **Immunity Ground:** Undecided.
  - **Abuse Ground:** Decided in favour of the Receivers.
  - **The Duty Ground:** Undecided.

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ON APPEAL (2)

- General Conclusions on the Immunity Ground:
  - There existed the jurisdiction to bless or sanction an exercise of power by an office-holder as well as a trustee, e.g. *Re Nortel Group Ltd*. (§70-§71).
  - Immunity was in fact judicial shorthand for the bar on subsequent proceedings that resulted from an issue estoppel (§127).
  - The question of the immunity which attached to an approval decision did not permit a "one-size-fits-all" answer (§128), is sensitive to the particular facts and depends on the specific nature of the question before the Court, approving *Re Sova Capital Ltd.* (§138).

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ON APPEAL (3)

- Specific conclusions on the Immunity Ground (cont.):
  - Denaxe was therefore wrong to distinguish between common law and equitable claims as the relevant question was which issue was decided (§145).
  - There were powerful competing submissions as to whether or not the transaction implicitly included a decision to sell the club as a going concern – and ultimately the Court did not need to decide the Immunity Ground (§155).
  - Much of the difficulty would have been avoided if Marcus Smith J had been invited to give more detailed consideration to the question of consequences (§164-165).

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ON APPEAL (4)

- Asplin LJ's conclusion:

"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."

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ON APPEAL (5)

- Asplin LJ's conclusion (cont.):

  "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."

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ON APPEAL (6)

- Conclusions on the Abuse Ground:
  - Fancourt J was right to hold that Denaxe could and should have raised the issue at the Sanction Hearing and that it was the clearest possible *Henderson v Henderson* abuse of process not to do so (§155).
- Conclusions on the Duty Ground:
  - It was not necessary to decide the Duty Ground, on the basis that the juridical origins of the duty are not relevant to the issue estoppel created as a result of so-called immunity (§145).

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IMPACT AND RELEVANCE

- This is the first case to deal in detail with the consequences of "blessing" or "sanction" applications.
- The Court of Appeal has sought to give guidance on such applications by trustees and officeholders.
- The guidance is necessarily broad-brush.
- It is axiomatic that the Court should be invited to determine the scope of "immunity" in any application and that the correct parties are served.
- In practice, the scope and extent of such applications amount to a judgment call: Too wide and the Court might refuse, too narrow and the "immunity" might be insufficient.
- Possible further clarification / guidance in the Supreme Court?

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