Neutral Citation Number: [2022] EWHC 764 (Ch)

Case No: BL-2020-MAN-000014

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN MANCHESTER
BUSINESS LIST (ChD)

Manchester Civil Justice Centre
1 Bridge Street West
Manchester
M60 9DJ

6th April 2022

Before :

MR JUSTICE FANCOURT
Vice-Chancellor of the County Palatine of Lancaster

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Between :

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

- -
- -

Matthew Collings QC and Gareth Darbyshire (instructed by **Fieldfisher LLP**) for the **Claimant**
David Mohyuddin QC (instructed by **BLM**) for the **Defendants**

Hearing dates: 8, 9 March 2022

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

The Vice-Chancellor:

This judgment comprises the following sections:

Introduction

1. This is an application by the Defendants ("the Receivers") to strike out a claim for damages for breach of duty brought by the Claimant company ("Denaxe"). The claim relates to the sale of some of Denaxe's assets by the Receivers on 13 June 2019. There is, alternatively, a claim by the Receivers for reverse summary judgment on their Defence, on the basis that there is no realistic prospect of the claim succeeding. Denaxe's principal claim is that the Receivers were in breach of their duty to use reasonable endeavours to achieve the best price obtainable in the market for its assets. The claim was originally for more than £78,000,000.

2. The Receivers were appointed by Order made on 13 February 2019 ("the Receivership Order") as receivers of identified assets of Denaxe (then known as Blackpool Football Club (Properties) Ltd) and Mr Owen Oyston, in an attempt to satisfy a judgment debt of more than £31,000,000 against them.

3. The Denaxe assets that the Receivers sold on 13 June 2019 were a sub-set of those receivership assets. They comprised Denaxe's shares in Blackpool Football Club Limited ("BFCL"), the Blackpool F.C. football stadium at Bloomfield Road, Blackpool ("the Stadium"), the Club's training ground in Fylde ("the training ground") and other smaller property assets (together referred to in this judgment as "the footballing assets"). The footballing assets were sold together with other shares in BFCL owned by VB Football Assets ("VB"). The sale was effected shortly after an Order made on 5 June 2019 ("the Sanction Order") approving the proposed sale.

4. By the Sanction Order, the Court specifically approved the sale of the footballing assets together with the VB shares in BFCL as a single transaction, on terms that had been identified in evidence that was before the Court, to an identified purchaser, Mr Sadler.

5. The circumstances in which the application for the Sanction Order ("the Sanction Application") was made, on notice to Denaxe, Owen Oyston, Karl Oyston and BFCL, the exact terms of the Sanction Application, what occurred at the hearing, the terms of the judgment of Marcus Smith J dated 5 June 2019 and the terms of the Sanction Order are central to the matters argued on this application and I will return to them in detail.

6. The application raises, among other matters, an interesting question about the extent of immunity conferred on a trustee or office-holder who seeks and obtains the sanction of the Court for their decision to enter into a particular transaction.

7. In the run up to the hearing of the application before me, Denaxe served draft Amended Particulars of Claim and then formally applied at a late stage for permission to amend the Particulars of Claim. The effect of the proposed amendment is to withdraw very serious allegations of negligence made against the Receivers. These include, in particular, an alleged failure to obtain in the region of £59,700,000 for the shares of Denaxe in BCFC. The Particulars of Claim were supported by a statement of truth.

8. What remains in the claim is, principally, an allegation that the Receivers were negligent in proceeding to sell the footballing assets with the VB shares, as a single sale to one purchaser, having failed to take advice about, market and then sell the real property assets, in particular the Stadium, in separate transactions. It is now alleged in Denaxe's evidence in opposition to this application that the shares in BFCL were "an impaired, or even 'toxic' asset" that adversely affected the price obtained for the real property assets. Rather remarkably, Denaxe, by its proposed amendment, intends to abandon its argument that in the region of £59,700,000 should have been obtained for the shares in BFCL, and now contends that the Club was insolvent.

9. In addition to the principal allegation of breach of duty, there are some allegations of breach of duty in relation to the conduct of the receivership, unconnected with the sale of the Denaxe assets. These allegations, if proved, appear on the basis of the pleaded case and evidence before the Court either to have caused no loss or to have caused losses that may amount to a few thousand pounds at most.

10. It was effectively common ground that the merits of the Receivers' application should be considered taking into account the terms of the draft Amended Particulars of Claim and that, if the application fails, permission to amend should be granted to Denaxe (subject to some minor points to which the Receivers objected in any event).

The Dramatis Personae

11. Mr Owen Oyston, the second respondent to the original receivership application and the Sanction Application, was the majority shareholder in Denaxe, which was the controlling shareholder of BFCL. VB was a significant minority shareholder in BFCL, holding about 20% of its issued shares. A little under 4% of shares in BFCL were owned by more than 150 individual shareholders, likely to be supporters of the Club.

12. The third respondent to the Sanction Application, Karl Oyston, is Mr Owen Oyston's son and business partner. It is unnecessary in this judgment to refer to Karl Oyston further, and so references hereafter to Mr Oyston are to the father, Owen Oyston.

13. When the Receivers were appointed, they used their control of shares in Denaxe and shares in BFCL to appoint new members of the board of Denaxe and BFCL. There were five such directors of Denaxe, one of whom, Mr Bolingbroke, is alleged to have been paid by the Receivers as an expense of the receivership and to have worked closely with the Receivers to sell the Club.

Background to the Sanction Application

14. In 2010–2011, the Club, which has a long and famous history, enjoyed a brief period in the 21st Century football limelight when it played for one season in the Premier League. In consequence, the Club would have earned substantially increased revenue during that year, and in the following year on receipt of the Football League's "parachute payment" for clubs relegated from the Premier League. The Club's and Mr Oyston's treatment of the revenue and profits for that period became the subject of a petition issued by VB under s.994 of the Companies Act 2006. VB succeeded in obtaining an order for its shares in BFCL to be bought out by Denaxe and Mr Oyston at a price of £31.27 million ("the Buy-out Order"). 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.

15. Denaxe and Mr Oyston paid less than a third of the judgment sum. Following failed attempts at enforcement using third party debt orders and charging orders, VB applied for the appointment of the Receivers over specified assets of Denaxe and Mr Oyston. The purpose of appointing a receiver, it is agreed, was to facilitate the sale of the Club and the "footballing assets" (as described in the judgment of Marcus Smith J of 13 February 2019, acceding to the application) as a going concern.

16. It is clear that prior to the receivership application, which was made on 4 January 2019, and possibly as early as November 2018, VB had consulted the Receivers and they and the Receivers formed the view that the best realisation would be achieved by selling the shares in BFCL and the real property assets associated with the Club as a package, rather than selling the assets individually. That had been Mr Oyston's intention too, prior to 2019, as he made clear in his witness statement dated 28 May 2019 in opposition to the Sanction Application.

17. The Receivers had substantial prior experience with high profile football clubs that had become insolvent and they had previously been appointed as administrators of several clubs.

18. The Order appointing the Receivers was sealed on 20 February 2019. By that time, they had already done substantial work to prepare for the conduct of the receivership. After their appointment, they instructed Lambert Smith Hampton ("LSH") on about 25 February 2019 to give valuation advice, with a view to the marketing of the footballing assets. The Receivers instructed Hilco on about 27 March 2019 to advise how the sale of the footballing assets could best be

advertised to attract potential buyers and conducted. The marketing process for the sale of the Club as a package of assets formally started on 9 April 2019, before LSH had reported on value (as they did on 26 April 2019).

19. Denaxe now alleges that the Receivers had in mind from the outset a single sale of the Club and the assets needed for its continuation as a going concern. That is not substantially in dispute, at least for the purposes of the Receivers' application. Denaxe further alleges that the Receivers wrongly closed their eyes to the advantage of selling the real properties without the shares in BFCL, because they were motivated to try to save the Club rather than maximise the realisation of the assets.

20. Following the Receivership Order, Mr Oyston no longer had control of Denaxe, from a time shortly after the Receivers were appointed until after the Receivers were discharged pursuant to an Order made on 17 December 2019. The position now is that Denaxe is once again controlled by Mr Oyston.

21. There is a dispute about how independently the newly-appointed directors of Denaxe acted in 2019. Mr Bolingbroke was allegedly involved in identifying the strategy for sale of the Club as a going concern. It is also evident that the board supported the strategy: it did not oppose the Sanction Application.

22. With the benefit of the valuation advice from LSH (initial views provided on 18 April 2019; full report on 25 April 2019) and marketing and sale advice from Hilco, the Receivers set about selling the footballing assets as a single package. Mr Cooper says that the advice received from LSH confirmed his own view that the best price would be obtained by a packaged sale. Denaxe now strongly disputes that that conclusion was justified by the advice received.

23. As a result of the marketing, nineteen interested parties signed non-disclosure agreements and were granted access to a data room that Hilco had prepared. Negotiations with interested parties led to three serious offers, and one offer of a nominal £1. One of the bids was made at a very late stage, which the Receivers concluded was not a reliable bid.

24. In the course of the negotiations, a problem with the prospective purchasers emerged. It was this. Denaxe and Mr Oyston had not paid VB the price that had to be paid under the Buy-out Order. VB therefore remained a minority shareholder and - however unlikely it may have appeared that it would eventuate - Denaxe and Mr Oyston retained the right to pay the balance of the price and take a transfer of VB's 20% shareholding in BFCL. The Receivers concluded that that possibility would prevent the sale of the Club as a going concern. Mr Cooper, the First Defendant, says that he was told unequivocally by all parties with whom detailed negotiations for sale and purchase of the footballing assets were conducted that they required as near to 100% ownership as was possible, and that they would not accept Mr Oyston or anyone associated with him as a substantial minority shareholder in BFCL.

25. Accordingly, the Receivers and VB decided that VB's shares in BFCL would need to be sold together with Denaxe's shares. To achieve that, it was necessary for VB to apply to vary the terms of the Buy-out Order.

26. The Receivers, who were still encountering significant opposition from Mr Oyston in their attempts to realise assets, considered that it was appropriate to seek the Court's approval of the proposed sale of the footballing assets and VB's shares in a single transaction. The Receivers decided to apply to the Court for approval, as Mr Cooper puts it in his first witness statement in support of this application: "…to facilitate the sale of the Shares and other Footballing Assets…"

27. By the time of the Sanction Application, the Receivers had fully negotiated and agreed terms with a Mr Sadler to buy the footballing assets and VB's shares in BFCL for £8,200,000. A letter of intent had been signed on 22 May 2019 and Mr Sadler had paid an essentially non-refundable deposit of £500,000 as a mark of his intent. The terms of the proposed sale and the bids and circumstances of the other serious bids were disclosed in the confidential second witness statement of Mr Cooper dated 22 May 2019.

28. It is accepted by Denaxe that Mr Oyston knew of and had access to a valuation of the property assets of Denaxe prepared by Colliers International dated 15 September 2018. This was a Red Book valuation prepared for a prospective lender to Denaxe, and it placed a value of £25 million on the Stadium site, which included tenanted offices and an hotel. The LSH valuation, on the other hand, was between £10.28 and £11.56 million for the same assets.

The Sanction Application

29. The Sanction Application was issued and served on Denaxe, Mr Oyston, his son and BFCL on 10 May 2019 with Mr Cooper's witness statement and the confidential exhibit.

30. The Sanction Application states that the Receivers ask the Court to make an order as follows:

> "Pursuant to paragraph 1(j) of the order of Mr Justice Marcus Smith dated 13 February 2019 … a direction that the Applicants may sell the assets set out at the schedule to the attached draft order as part of one transaction"

and ancillary and further or other relief. The draft order attached sought an order in the following terms:

> "The Applicants may sell the assets set out at the schedule to this order together as part of one transaction."

The schedule to the draft order identified Denaxe's and VB's shares in BFCL and properties owned by Denaxe, including the Stadium, the training ground, a car park in Bloomfield Road, some land adjoining the Stadium and 32 and 34 Henry Street, Blackpool.

31. The Sanction Application was supported by the first witness statement of Mr Cooper. He says in para 2 that he seeks an order that:

> "The Receivers may sell:

2.1.1 Segesta's 28,607 ordinary shares in BFC;

2.1.2 Football Stadium, Bloomfield Road, Seasiders Way, Blackpool FY1 6JJ (LA876874) (the "Stadium");

2.1.3 other football-related assets:

(a) Training Ground (land and buildings at back of 2 - 20 (even only) Martin Avenue), Lytham St Annes, FY8 253 (LA884189);

(b) Car Park (land adjoining 31 Bloomfield Road), Blackpool FY1 63] (LA879093);

(c) L-shaped land at West Stand, Football Stadium (east side of Seasiders Way), Blackpool, FY1 6JJ (LAN65276);

(d) 32 Henry Street, Blackpool FY1 5JG (LA741121);

(e) 34 Henry Street, Blackpool FY1 5JG (LA446630); and

2.1.4 VBFA's 7,500 ordinary shares in BFC.

together as part of one transaction (the 'Proposed Sale')."

"Segesta", as referred to there, is a reference to Denaxe by a former name, and "VBFA" is VB. The properties listed by Mr Cooper are the same properties as those listed in the schedule to the draft order, though in a different order.

32. Mr Cooper explained in his first statement the Receivers' experience of the receivership to date and progress towards a sale of the footballing assets. He said that he was in detailed discussions with a small number of interested purchasers and that all of them had told him that a sale without the VB 20% shareholding was impossible, and that it was for that reason that the Receivers were making the Sanction Application. The negotiations were still going on with the interested purchasers and were not disclosed in detail at that stage.

33. The confidential exhibit contained financial details about the performance of the Club and the value of its assets, as identified in para 2 of the witness statement. It pointed out that LSH's valuation of the Stadium itself at £3,250,000 was premised on the Club paying an annual rent of £274,000 odd, and said that the Club could not in fact afford such a rent. It also said that the rent from the leases of the offices and hotel in the Stadium complex were "integral" to the funding of the Club's operation, so that selling the offices and hotel separately would destroy the value of the Stadium and the value of the shares in the Club. The Club was said to be losing money at the rate of £20,000 to £25,000 per week.

34. The Receivers then applied to the Court without notice to Denaxe and Mr Oyston for directions for the urgent hearing of the Sanction Application. It was said to be urgent because any purchaser of the Club and the footballing assets needed to take control of the Club during the close season and invest in playing staff before (or by shortly after) the start of the next season.

35. On 14 May 2019, Marcus Smith J gave directions for the hearing of the application. At that hearing, VB indicated its intention to issue an application to vary the Buy-out Order. The Judge made directions that required VB to issue its application and he gave the Receivers until 22 May to file further evidence in support of the Sanction Application. The respondents, including Denaxe and Mr Oyston, were given until 28 May to file evidence in response. The hearing was directed to take place between 3 and 5 June 2019.

36. In his confidential second witness statement dated 22 May 2019, Mr Cooper set out details about the marketing efforts that had been made on behalf of the Receivers, identified all interest that had been registered (including four persons who had not been granted access to the data room for various reasons, one of whom was recorded as being "not interested in the football club"). It then summarised in some detail the rival bids (including the prices) that the Receivers had received to that date, a "final and best bids" process that was undertaken, the terms of the offer made by Mr Sadler (and the other bidders), and why the Receivers considered that Mr Sadler's bid was the best bid. The witness statement exhibited Mr Sadler's letter of intent. Mr Cooper concluded:

> "For the reasons set out above and those contained in the First Witness Statement together with its Confidential Exhibit, we consider that the assets must be sold together to facilitate a global sale of all football assets as a going concern. Following the marketing process that we have undertaken and significant due diligence of prospective bidders, we consider Bid 1 to be the best currently achievable."

That was clearly therefore a statement making clear that, by the Sanction Application, the Receivers were seeking the Court's sanction for the sale of all the identified footballing assets and VB's shares together to Mr Sadler for £8,200,000.

37. Mr Oyston made a witness statement in response to the Sanction Application; Denaxe did not. Mr Oyston said that he could well understand that the Receivers had difficulty selling the Club without the 20% shareholding of VB because he had had the same difficulty when he had attempted to sell the Club and the football related assets following the judgment in November 2017. His attempt to raise loan finance to pay the debt was also impeded by the existence of the substantial minority shareholding. At para 8, Mr Oyston said:

> "I understand the present applications to be limited to the issue of being able to include VBFA'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."

38. The Receivers' solicitors responded to that suggestion in a letter to Mr Oyston's solicitors dated 29 May 2019, which said:

> "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. We will also be submitting a short additional witness statement this week to update the Court and the parties on the transaction regarding matters which have occurred since 22 May 2019".

Mr Oyston was therefore on notice that the Receivers did not agree that they were asking only for approval of the inclusion of the VB shares in a sale.

39. Mr Cooper made a further witness statement dated 31 May 2019 to which it is unnecessary to refer. It related to the late bid that the Receivers discounted and nothing turns on that bid.

The Sanction Order

40. The Sanction Application was heard by Marcus Smith J on 5 June 2019. Mr Oyston was represented by Mr Collings QC and Mr Darbyshire, as Denaxe is before me. Denaxe was not represented at the hearing: it did not oppose the relief sought. There was a vague suggestion floated by Mr Collings in argument that Denaxe possibly did not have notice of the Sanction Application.

41. I do not accept that Denaxe did not have notice. First, as Denaxe itself pointed out, its board at the time was closely involved in the proposed sale. Second, if it was thought that Denaxe did not have notice, its current directors or Mr Oyston would have been able to investigate that for this hearing and provide evidence of it. No such evidential case was made in Mr Austin's witness statement in opposition to the Receivers' application. The right conclusion to draw, which I do draw, is that at the time Denaxe knew of the Sanction Application and supported it (passively).

42. At the hearing of the Sanction Application on 5 June 2019, the principal objection raised on behalf of Mr Oyston was to the ability of the Court to change the terms of the Buy-out Order. He argued that the judgment was final and could only be varied by an appeal. The Judge rejected that argument, holding that the relevant part of the Order was an interlocutory order rather than a final order, and that the change in circumstances since the Order was made justified varying the Order.

43. No argument was made on behalf of Mr Oyston that a sale of the Club as a going concern was likely to reduce the price that could be obtained for the property assets. Mr Collings submitted then that Mr Oyston did not address those matters

because the application was only "mechanics" to enable the Receivers to sell assets that they did not control, namely the VB shareholding.

44. Marcus Smith J was unimpressed by that stance. At [70] in his judgment ([2019] EWHC 1599 (Ch)), he said:

> "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 concerning 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 transasction that the Receviers propose."

45. Marcus Smith J therefore rejected the argument that the Sanction Application was of more limited ambit and considered that it was appropriate for Mr Oyston, if he objected to the proposed sale, to raise his objection at the hearing.

46. Mr Collings, on the hearing of the application before me, suggested that the timescale in which Mr Oyston had a chance to respond was very restricted and that it was unrealistic to expect that he could have engaged with the detail of the proposed sale in the time available. I reject this argument for two reasons.

    i) Mr Oyston knew that the sale was a sale of the Club and the footballing assets as a going concern; knew of the values ascribed to the property assets in the Colliers valuation and the LSH valuation, and knew about the finances of the Club. He was also told in Mr Cooper's second witness statement on 22 May 2019 the price at which the footballing assets were intended to be sold and that the sale would proceed imminently, if the Court acceded to the applications before it. That was all that Mr Oyston needed to know in order to object to a sale as a going concern. He could simply have pointed to the higher values in the Colliers and LSH valuations and to the fact that the Club was making significant losses.

    ii) Second, if there were further evidence that Mr Oyston wished to adduce in support of a case that the Court should not approve the sale of a package of footballing assets, he could and should have requested time and explained what further evidence he wished to adduce, and why the court needed to have it before it reached its decision.

    The same conclusions would have applied to Denaxe, were it minded to oppose the Sanction Application.

47. The question of what was to be decided on the Sanction Application and whether Mr Oyston was entitled to reserve his rights as regards the appropriateness of the proposed sale was decided by Marcus Smith J. It was not permissible for Mr

Oyston to say that he did not have to raise any substantial objection relating to marketing or price at the hearing. No appeal was brought against the decision on the Sanction Application (though Mr Oyston did try unsuccessfully to appeal the decision of the Judge on VB's application to vary the buy out Order).

48. The Court acceded to VB's application to vary the Buy-out Order so that Denaxe and Mr Oyston were no longer obliged to purchase VB's shares in BFCL.

49. On the Sanction Application itself, Mr Collings argued that the Court should not entertain it because what the Receivers were proposing was a commercial transaction, which was indubitably within their powers, and so the Court should leave completion of the proposed sale to the judgment of the Receivers. Mr Collings also argued, in the alternative, that the Court should not sanction the proposed sale because the Sanction Application was only concerned with a question of "mechanics" relating to whether VB's shares could be sold together with the Denaxe assets.

50. It is clear to me that Mr Oyston, with the benefit of expert legal advice, carefully picked his fights on the hearing of the Sanction Application. He sought to dissuade the Court from facilitating the proposed sale, by contesting VB's variation application, and then to persuade the Court that the sale should not be sanctioned but left to the discretion of the Receivers. No argument was raised about the sale being of a package of footballing assets. The obvious inference, and one that I draw, is that Mr Oyston, as a life-long supporter of Blackpool F.C. and the majority owner of it, did not want to see the Club's future put at risk by its assets being broken up.

51. In his judgment, Marcus Smith J explained that he considered that the sale of the footballing assets required court scrutiny. He rejected the argument of Mr Collings that the Court should decline to give directions on the Sanction Application:

> "For the present, I consider that the decision and question of whether, and on what terms, to sell the Club, is a momentous decision, one that is enormously important both for Mr Oyston and for [VB]. Therefore, the Receivers have acted, in my judgment, entirely appropriately in making this application. So, I conclude then in answer to question 1 [whether the Receivers actually need the approval of the Court to proceed with the sale to Mr Sadler] the receivers both have the right to seek the court's approval for this transaction, and that they have, in this particular case, acted appropriately in bringing this matter before the court. This is an application that I can and should entertain."

52. The expression "momentous decision" is derived from a decision of Hart J, Public Trustee v Cooper [2001] WTLR 901, where the judge referred to four categories of cases in which a trustees can seek directions from the Court:

> "The second category is where the issue is whether the proposed course of action is a proper exercise of the trustees' powers where there is no real doubt as to the nature of the trustees' powers and the trustees have decided how they want to exercise them but, because

> the decision is particularly momentous, the trustees wish to obtain the blessing of the court for the action on which they have resolved and which is within their powers. Obvious examples of that, which are very familiar in the Chancery Division, are a decision by trustees to sell a family estate or to sell a controlling holding in a family company. In such circumstances there is no doubt at all as to the extent of the trustees' powers nor is there any doubt as to what the trustees want to do but they think it prudent, and the court will give them their costs of doing so, to obtain the court's blessing on a momentous decision. In a case like that, there is no question of surrender of discretion and indeed it is most unlikely that the court will be persuaded in the absence of special circumstances to accept the surrender of discretion on a question of that sort, where the trustees are prima facie in a much better position than the court to know what is in the best interests of the beneficiaries."

53. The function of the Court in such cases was considered by David Richards J in In re MF Global UK Ltd (No.5) [2014] Bus LR 1156 at [32], where the judge cited with approval a passage from Lewin on Trusts (18th ed) (2008) at para 29-299 of that edition. The equivalent passage, in the new 20th edition (2020), together with a further passage on which Denaxe now relies, is as follows:

> "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, that the proposed exercise of their powers is untainted by any collateral purpose such as might amount to a fraud on the power, 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 approach of the court has been summarised, both in England and overseas, as requiring the court to be satisfied, after proper consideration of the evidence, that:
> (1) The trustees have in fact formed the opinion that they should act in the way for which they seek approval;
> (2) The opinion of the trustees was one which a reasonable body of trustees, correctly instructed as to the meaning of the relevant clause, could properly have arrived at; and
> (3) The opinion was not vitiated by any conflict of interest under which any of the trustees was labouring.
>
> ……

> 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). …. If the court blesses the trustees' decision, that does not preclude the beneficiaries from alleging that the decision (for example, to sell the trust asset) should have been taken sooner, and that the delay itself constitutes a breach of trust.
>
> Hence, as when the trustees 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."

The English authorities cited for the three requirements numbered in the passage cited are Public Trustee v Cooper, as followed and distilled in the judgment of Vos LJ in Cotton v Brudenell-Bruce [2014] EWCA Civ 1312 ("Cotton") at [12].

54. The passage in Lewin emphasising that the court acts with caution and explaining why that is so derives from a *dictum* of Millett J in Richard v Mackay [2008] WTLR 1667:

> "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 that 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 is appropriate in particular circumstances."

55. In Re Nortel Networks UK Ltd [2016] EWHC 2769 (Ch); [2017] Bus LR 590, Snowden J held that the same principles applied to a "momentous" compromise agreement that a company administrator proposed to make:

> "49. For my part, whilst noting that the position of an administrator seeking directions under the Insolvency Act 1986, and a trustee seeking directions under the Trustee Act 1925 are not identical, I see no obvious reason why most of the same considerations should not apply when the court considers giving directions to an administrator who wishes to enter into a compromise which is particularly momentous. 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 eg 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.

56. It is likely that Millett J and the editors of Lewin refer to immunity from allegations of breach of trust because they were addressing the case of trustees applying for directions in relation to a transaction; they were not distinguishing a claim for breach of trust from other types of claim. Applying the principles from trust cases by analogy, one would expect that the immunity conferred on the administrators in Re Nortel, as held by Snowden J, would not be (or not only be) against a claim for breach of trust but extend to liability for the types of claim that might otherwise be brought against them (whether under statute, at common law or in equity) for causing the company in administration to enter into the approved transaction.

57. Marcus Smith J decided that the principles explained in Re Nortel apply equally where a receiver by way of equitable execution applies to the court for sanction of a momentous decision and, as already noted, he held that the proposed sale of the footballing assets by the Receivers was such a decision requiring scrutiny by the court:

> "42. …. Mr Phillips' point was that, whilst this case did not concern either trustees or administrators, the position of receivers by way of equitable execution is very similar. He contended that the analogy sought to be drawn by Snowden J as between administrators and trustees ought also to extend to receivers by way of equitable execution.
>
> 43. I consider that to be right. The position of the Receivers is very similar to that of trustees and administrators, and I find the analogy drawn by Mr Phillips to be an apt one. I consider that the law as stated by Snowden J in [45] to [49] of Re Nortel to hold good here, both in terms of the analogy Snowden J drew between administrators and trustees (which I find also holds good for receivers by way of equitable execution) and in terms of his description of how the court approves (or does not approve) the transactions that come before it for approval.

58. The Judge noted that applying by analogy the position explained in Re Nortel would seem logically to carry with it the consequence that immunity conferred on the office-holder would necessarily follow, in favour of the Receivers, if the Court sanctioned the proposed sale. But the point did not require a decision:

> "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.

59. The Judge then expressed his final conclusion in the following terms:

> "73. It seems to me that the transaction is one that I should approve. The price that has been obtained in agreement with Bidder 1 has been achieved after a competitive process. I am satisfied that the price is a reasonable one and I am satisfied that Bidder 1 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 Bidder 1 occurs, the Fourth Respondent 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 Bidder 1 is one that is a proper one that should be sanctioned by this court, and I do so."

60. The Order made following the judgment was in the following terms, so far as material:

> "1. The Applicants [the Receivers] and the Petitioner [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 ….."

The Receivers' Application to strike out Denaxe's claim

61. The Particulars of Claim allege that the Receivers owed Denaxe a duty of care to:

    a) act as a competent, experienced receiver should act;

    b) obtain the best price for the assets reasonably available in the market;

    c) undertake proper marketing; and

    d) act within their powers (para 32).

    They plead that valuations that the Receivers were given by Denaxe valued the training ground at £1.5 million, the Stadium at £25 million and the shares in BFCL at £59.7 million.

62. The Particulars of Claim allege that the Receivers failed to: exercise reasonable care and skill; undertake proper marketing of the assets or obtain adequate expert advice or valuations before selling; consider selling the shares in BFCL separately from the Stadium and other assets; and, as a result, failed to obtain the best price available in the market (para 63). The loss and damage caused was alleged to be £78 million (the amount by which the market price for these assets exceeded the amount realised by the Receivers), alternatively the amount by which the aggregate market values of the individual assets exceeded the amount realised.

63. The draft Amended Particulars of Claim abandon the claim that the shares in BFCL were worth £59.7 million and all claims of loss and damage other than the alternative based on the aggregate sum that would have been realised had the property assets been sold separately from the shares. The measure of loss claimed therefore depends on an allegation that the Receivers should have considered and then entered into a different transaction (or transactions) from the one that the Court approved.

64. The Receivers' application to strike out the claim form advances essentially the following arguments on Denaxe's principal claim:

    a) By reason of the Order dated 5 June 2019, the Receivers have immunity against a claim that alleges that the footballing assets were wrongly sold by them as a single package of assets in a single transaction ("the Immunity Ground");

    b) The judgment and Order dated 5 June 2019 give rise to an issue estoppel in that:

        (i) The Court decided that the sale was a proper exercise of the powers of the Receivers and so Denaxe cannot now re-litigate that question, which it is doing by alleging that the Receivers sold the footballing assets in breach of a duty owed to Denaxe and Mr Oyston ("Res Judicata Ground");

        (ii) Under the principle in Henderson v Henderson, as explained in recent decisions, Mr Oyston and Denaxe could and should have

raised any challenge to whether the Receivers had used reasonable endeavours to obtain the best market price for the assets at the hearing on 5 June 2019, as indicated by the Judge in his judgment, and it would be an abuse of process for Denaxe to be allowed to do so in a claim for damages against the Receivers for breach of that duty now ("Abuse of Process Ground")

c) On the merits, the suggestion now made that the sale of the shares in the Club with the property assets reduced the price that could reasonably have been obtained in aggregate for separate sales of the Stadium, training ground and the other real property assets has no reasonable prospect of success, as the Colliers valuation is seriously flawed and the LSH valuation does not, properly analysed, support such a claim ("the Merits Ground")

65. There are also secondary claims by Denaxe of wrongdoing by the Receivers, now much reduced in significance in the draft Amended Particulars of Claim, and I will address these after considering the issues arising on the principal claim.

The Immunity Ground

66. Mr Collings was initially inclined to accept, realistically, that he could not seek to go behind Marcus Smith J's decision that the principles that apply in the second category of cases discussed in Public Trustee v Cooper could be "read across" to the position of a receiver by way of equitable execution, just as much as administrator, and that the court's supervisory jurisdiction was engaged by the proposed sale of the Club as a going concern. The Judge's decision was made on an application to which Denaxe and Mr Oyston were both respondents and they are therefore bound by it.

67. He then argued that the Judge's reference to Re Nortel was strictly *obiter* because the Judge did not go on to decide the question of whether immunity for the Receivers followed, if the Court sanctioned the sale, which he said was the whole point of exercise of the jurisdiction to sanction a transaction.

68. I do not understand that argument. Marcus Smith J did decide that the circumstances of the Sanction Application were equivalent to an application by a trustee in the second category of cases discussed by Hart J, and that the Court could and should entertain the application on that basis. The fact that Marcus Smith J did not decide whether immunity followed the Court's approval (although he seemed to recognise that that would logically be the case) does not mean that he did not decide that the same principles as explained in Re Nortel applied in this case. There was no appeal against the decision to approve the sale on that basis.

69. Mr Collings then suggested that what the Receivers were seeking to do, by the Sanction Application, was to ensure that the proposed sale was within their powers, or alternatively to obtain power from the Court (which is the only source of a court-appointed receiver's powers) to enter into the sale, and that accordingly the effect of the Order should be construed in that limited way.

70. I am unable to accept that the Sanction Application was made, or that the Court considered that it was made, only for the purpose of conferring power on the Receivers to do something that they otherwise had no power to do. VB's application was made to enable the Receivers to sell the VB shares together with Denaxe's shares, freed from the constraints of the Buy-out Order. The Sanction Application – which on the Receivers' own evidence would not have proceeded if VB's application had failed – was not so limited, nor did the Receivers (see letter dated 29 May 2019) or the Judge consider that it was. The Sanction Application was in terms for a direction that the Receivers might sell the footballing assets together as part of a single transaction. It was not an application only to obtain power to sell the VB shares with the Denaxe shares. In rejecting Mr Oyston's attempt to reserve his position on the marketing and value of the assets, Marcus Smith J held that it was inappropriate for him to do so (i.e. if Mr Oyston had any criticism of the marketing and value to be realised, he should raise it at the hearing); and he considered that it was significant that Mr Oyston had raised no substantive point against the sale.

71. Further, the decision in para 73 of the judgment, set out above, shows that Marcus Smith J had reviewed and was approving the decision to sell the footballing assets and the VB shares together in one transaction, to a specific person, at a specific price. Mr Collings suggested that this was not a case of seeking approval to enter into a specific transaction (he gave as an example of this a contract of sale where the negotiated contract itself was put before the court). I disagree. It was clear from the second confidential witness statement of Mr Cooper that there was a specific transaction of sale and purchase of identified assets between the Receivers on behalf of Denaxe and Mr Sadler as purchaser at an agreed price of £8.2 million that was ready immediately to be completed. It is not necessary for the Court in such circumstances to see and review every term of the contract before it can be said that the Court is approving a specific transaction. It is clear beyond doubt that Marcus Smith J was asked to and did approve that specific transaction.

72. Mr Collings' principal argument on the immunity issue was that there was no proper analogy with the principles in Public Trustee v Cooper, in the case of an application by a receiver by way of equitable execution, or that if there was the analogy had to be precise. He explained that he meant that the Receivers would at best be immune to a claim brought on the basis that they had no power to enter into a transaction or had exercised the power in breach of a fiduciary duty, but that no immunity was conferred against a claim that the Receivers breached a duty of care by failing to obtain the best price reasonably obtainable.

73. Dealing first with the argument that there was no proper analogy with Re Nortel, this appeared to depend on one or both of the arguments that I have already addressed and rejected, namely that there was no precise transaction that the Court approved or that Marcus Smith J did not decide that immunity would be the consequence of his approval of the proposed sale and so did not decide that there was a full analogy. The Judge did not express any doubt about whether immunity followed. It must logically be the case that immunity follows if, as the Judge held, the position of a receiver by way of equitable execution is comparable to that of a trustee or administrator seeking the court's directions.

74. As for the argument that the analogy has to be precise, Mr Collings' weightier argument was that if there is an analogy with the position of a trustee, immunity for a receiver cannot be more extensive than a trustee's immunity would be. He submitted that the principles explained in Lewin on Trusts and exemplified by Public Trustee v Cooper and Richard v Mackay are concerned only with the proper exercise of a fiduciary power, and that approval by the court should only protect against an allegation of breach of trust or fiduciary duty, or an allegation that the transaction that was approved was invalid.

75. In particular, Mr Collings submitted that an order that the Receivers' power to sell could properly be exercised on or shortly after 5 June 2019 should not confer immunity in relation to a claim that the Receivers breached a duty of care owed to Denaxe to take reasonable steps to obtain the best market price. That, he submitted, was a very different kind of claim from a claim of improper exercise of a fiduciary power or breach of trust. In this respect, he referred to the warning of Millett LJ in Bristol and West Building Society v Mothew [1998] Ch 1 that a fiduciary obligation is different from a general duty owed by a fiduciary to use proper skill and care: see at pp. 16-18 of the report.

76. If the Court's approval of a transaction conferred immunity to a claim for breach of a duty of care, Mr Collings submitted, authorising the exercise of a power would amount to granting advance summary judgment on any allegation of breach of duty, without the allegation having been heard and investigated and without the putative claimant having had the opportunity to formulate its claim and obtain disclosure before a trial. Further, a decision by the Court to approve or not must depend heavily on full and appropriate disclosure of relevant material having been made by the Receivers (which he said was not the case here), and so there is a risk of the court being misled and a legitimate claim being stifled in consequence, if immunity were broadly conferred.

77. Rather inconsistently, it seemed to me, he then submitted that if there was a failure to make full disclosure, there would be no immunity, and referred to CPR 64 BPD at para 7.1, which provides:

> "The trustees' evidence should be given by witness statement. In order to ensure that, if directions are given, the trustees are properly protected by the order, they must ensure full disclosure of relevant matters, even if the case is to proceed with the participation of beneficiaries as defendants."

It was submitted that this direction implies that if full disclosure is not given protection may not ensue from the court's directions.

78. I am unable to accept Mr Collings' arguments on this issue. Although the principle of immunity derives from cases where the Court gave directions to trustees, where a claim might otherwise be brought for breach of trust, I do not consider that immunity in office-holder (or trustee) cases is limited to claims for breach of a fiduciary duty. There is no suggestion in the authorities that a trustee is only immune to such a claim and not to a claim for breach of a common law or statutory duty of care in making a decision to invest or sell.

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, 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 at p.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 [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.

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 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.

84. For a subsequent claim to be precluded by immunity, the wrong alleged against the office-holder must, however, be one relating to the decision-making process or the aspects of the transaction that the court has sanctioned. If the breach alleged relates to an unconnected decision or other conduct of the office-holder, there would be no immunity to such a claim.

85. The passage in Lewin (at the end of the penultimate paragraph cited in para 49 above) that immunity would not extend to an allegation of breach of trust for not having sold assets sooner is not supported by any English authority, but it was not disputed by the Receivers and I consider that it is sound. If the court is asked to approve a decision to sell an asset when the matter is before it, what is approved is the decision to sell at that time. There is no actual or implied endorsement of any decision taken previously not to sell the asset. Similarly, if an office-holder seeks and obtains approval of a decision to sell within a specified period, at the best price reasonably obtainable, there would be immunity to a claim that the property was sold too soon but no immunity to a claim that the office-holder failed to use reasonable endeavours to achieve the best price available.

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.

87. In that light, it is necessary to consider the exact allegations of breach of duty that Denaxe makes. The claim that it seeks to bring (following the intended amendment) is at para 54(f) of the draft Amended Particulars of Claim. It is that the Receivers "as a result of (a) to (e) above failed to obtain the best price for the [footballing assets] available in the market at the time". Sub-paras (a) to (e) read:

> "(a) failed to exercise reasonable care and skill when disposing of assets;
> (b) failed to undertake proper marketing of the assets before disposing of them;
> (c) failed to take proper or adequate expert advice before disposing of the assts;
> (d) failed to obtain sufficient expert valuations before disposing of the assets;

> (e) failed to consider selling the shares in [BFCL] separately to the Stadium or other assets;…"

88. The Receivers can only have failed to achieve the best price for the footballing assets if they should have sold the assets in a different way. What is therefore being alleged is that the sale was a wrongful exercise of the Receivers' powers. Sub-paras (a) to (e) are the reasons why the Receivers failed to achieve the best price. It is the allegation of failure to achieve the best price which is the substantive complaint that allegedly caused over £25 million of loss. The Receivers' decision to exercise their powers to sell the footballing assets and the VB shares to Mr Sadler at a price of £8.2 million was the very decision that the Court approved, and the Receivers have immunity to the allegation that they should have sold in a different way at a higher price.

89. The answer to Mr Collings' warning that, if the Receivers' argument is right, court approval becomes final judgment without investigation of claims for breach of duty is two-fold.

90. First, precisely because approval will "prevent subsequent challenge", the Court is cautious when asked to approve the exercise of a discretionary power of this kind, and will require to be satisfied that all material relevant to the decision is placed before it for review. That is made explicitly clear in the judgment of Sir Andrew Morritt C in Tamlin v Edgar [2011] EWHC 3949 (Ch) at [25]:

> "The very fact that the decision of the trustees is momentous, taking that word from the description of the second category, and that the decision is that of the trustees, not of the court, makes it all the more important that the court is put in possession of all relevant facts so that it may be satisfied that the decision of the trustees is both proper and for the benefit of the appointees and advancees. It is not enough that they were within the class of beneficiary and the relevant disposition within the scope of the power. It must be demonstrated that the exercise of their discretion is untainted by any collateral purpose such as might engage the doctrine misleadingly called a fraud on the power. They must satisfy the court that they considered and properly considered their proposals to be for the benefit of the advancees or appointees. All this requires the full and frank disclosure to the court of all relevant facts and documents."

91. Having referred to that decision among others, Vos LJ said in Cotton, at [61] of his judgment:

> "The trustees have the burden of proof and must, therefore, give the court all the information and disclosure that it requires to be satisfied that approval can be granted. If they fail to do so, they will not obtain the approval they seek. But the court may, in such a case, send the trustees away to produce more evidence. Whilst the process is not inquisitorial, it is part of the inherent jurisdiction of the court to supervise trustees. The court would be unwilling, I think, to countenance the refusal to approve a proper, and momentous,

> transaction on some technical ground based upon an incidental failure to produce adequate material to the court."

The risk that something more may emerge in time to put a different complexion on matters is a risk that the court feeds into its decision to exercise its power to approve, as Vos LJ explained:

> "…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" (Cotton at [87])

92. Second, at least where beneficiaries or interested parties are identifiable, the application will be on notice to them or a representative of them, so that they have the opportunity to object. If a credible suggestion is made by an objector that the Court does not have all relevant material before it, or that the proposed transaction is a breach of the applicant's duty of care, the Court will be unlikely to approve the transaction, at least at that stage. As Vos LJ observed in Cotton at [78], the court could order a trial of the allegations, though it would be unlikely to do so because the court's concern is not to find the facts but to be satisfied that the trustees have fulfilled their duties to the beneficiaries. That is why Marcus Smith J was critical of Mr Oyston's suggestion that he need not raise any objection that he had at the time.

93. The reason why no objection was raised in this case is because Mr Oyston chose not to raise at the Sanction hearing the point that is now pursued by Denaxe, which did not itself oppose the Sanction Application. Both could have done so if they believed that Colliers International's valuation was reliable. The suggestion that, in the short time allowed, Mr Oyston could not have presented the argument that Denaxe now pursues is wholly unconvincing: it required little more than the Colliers valuation and the accounts of BFCL, both of which were available to him and to Denaxe. The obvious inference to draw is that Mr Oyston did not take that step (and Denaxe would not have taken it, had it been in his control at the time) because he wanted the Club to survive as a going concern. This desirable outcome would have been imperilled had the court directed the Receivers to sell the Stadium and training ground separately, to maximise realisations.

94. As to CPR PD 64B, I accept that, in deciding whether to approve a decision to enter into a transaction, the court may have to rely on information that the trustee puts before it, if the application is unopposed (though the court will be scrupulous to ensure that full and frank disclosure has been provided). It may subsequently appear that the court was not fully informed. However, that is not a reason to conclude that there is no immunity against a claim for breach of duty. If it were, it would also be a reason for there being no immunity for breaches of trust. I am not persuaded that immunity is lost by the mere fact of failure fully to disclose all relevant circumstances. Mr Collings suggested that that should be the case, otherwise PD 64B would have "no teeth", but he accepted that there was no

authority or persuasive decision that his team had been able to find that supported such a conclusion. Nor was the Receivers' application resisted on the basis that there had in fact been a failure of disclosure such that immunity was lost.

95. In my judgment, PD 64B is concerned only to ensure that proper practice on applications of this nature is followed, and it should not be read as impliedly establishing a proposition of law in the way that Mr Collings attempts to do.

96. I therefore conclude that the Receivers enjoy immunity against the principal claim for breach of duty brought by Denaxe, by reason of the Sanction Order. As a result, the Receivers' application to strike out the principal claim under CPR rule 3.4(2)(a) or (b) as disclosing no reasonable grounds for bringing the claim and as an abuse of the court's process must succeed.

The Res Judicata Ground

97. The Receivers argued in the alternative that the issue of whether the transaction was a breach of their acknowledged duty to take reasonable steps to obtain the best price obtainable for the footballing assets was decided by Marcus Smith J. when he made the Sanction Order.

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.

The Abuse of Process Ground

101. The next argument of the Receivers was based on what used to be called Henderson v Henderson issue estoppel, which in the light of modern authorities such as Johnson v Gore Wood & Co [2002] 2 AC 1 and Virgin Atlantic Airways v Zodiac Seats UK Ltd [2014] AC 160 is now regarded as a question of abuse of process, as to which the court has a broad evaluative exercise to perform to give

effect to the wider interests of justice: see the summary in Takhar v Gracefield Developments Ltd [2020] AC 450 at 478B-E, per Lord Sumption. The essential question, in cases that do not engage the principles of res judicata, is whether in all the circumstances of the case a claimant is abusing the process of the court by bringing the claim, having regard to the opportunity that there was to raise the matter at an earlier stage and all the circumstances of the case.

102. My decision that the Receivers have immunity to Denaxe's claim means that the claim is an abuse of process for a different reason, namely that Denaxe is using the court process to bring a claim that is not legally possible. Had I reached the opposite conclusion and the Receivers did not enjoy immunity against Denaxe's claim, the question would nevertheless arise whether Denaxe "could and should" have raised its argument of breach of duty at the Sanction hearing, as it clearly could have done, and so in justice should be prevented from doing so in this claim.

103. Had Denaxe raised the argument before Marcus Smith J, it might have induced the Judge to decline to approve the Receivers' decision to sell the footballing assets, either without more or after receiving further evidence or disclosure. In that eventuality it is quite possible, even likely, that the Receivers would not have proceeded to sell the footballing assets to Mr Sadler at their own risk. There was, however, no possible claim for breach of duty for Denaxe to bring until the transaction had taken place: the only loss allegedly suffered was caused by completion of the transaction. It is therefore not a case in which it can be said that Denaxe should have pursued its claim at the Sanction hearing. Nevertheless, Denaxe could have raised the same argument on which it now founds its claim, namely that the Stadium and training ground, if sold separately, would have realised substantially more than £8.2 million, and it could have invited the court not to approve the intended sale for that reason.

104. Marcus Smith J considered that it was inappropriate for Mr Oyston to reserve his position at the Sanction hearing on the questions of value to be realised or the marketing process. The same would apply to Denaxe, as a respondent to the application, if it wished to raise any issue about the proposed sale. The Judge considered that if Mr Oyston had an objection he should make it before the Court decided to approve the intended sale: see para [70] of his judgment. The implication of this was that Mr Oyston could not properly raise an objection on grounds of value or marketing after the sale had been approved by the court and had taken place.

105. Denaxe too was aware of the proposed sale. It had the same access as Mr Oyston to the Colliers valuation and the accounts of BFCL. Those documents alone could have formed the basis of an argument that the Stadium and the training ground should be sold separately. The current directors of Denaxe argue that it was unable to do anything to object at the time because the Receivers had put new directors onto the board, who supported the proposed sale. I do not see how that enables Denaxe now to argue that it could not have objected at the Sanction hearing. Denaxe may have a complaint against the then directors, if its allegations are otherwise well founded, but the conduct of its own board of directors at the time is not an answer to the Receivers' argument that Denaxe could and should have raised the allegation of breach of duty at the Sanction hearing if it wished to object. In any event, for reasons that I have previously given, even if Denaxe had

then been in the Oyston side's control, it would not have done so, any more than Mr Oyston himself did.

106. In my judgment, it is in the circumstances an abuse of process for Denaxe, after the sale of the Club has taken place, to raise its claim alleging breach of duty to sell the footballing assets at the best price reasonably obtainable in the market. That is so even if, for the reasons advanced by Mr Collings, the Receivers do not have immunity to such a claim. I reach that conclusion for the following reasons:

a) The Sanction Application was properly made by the Receivers and the proposed transaction was one with which the court was right to engage. That was decided by Marcus Smith J.

b) The question for the Court was, therefore, whether the decision to sell the footballing assets was a proper exercise of the Receivers' powers, having regard to their duties, VB's rights and Denaxe's and Mr Oyston's interests, and one that a reasonable receiver could properly make.

c) The decision that the Court reviewed was not merely to sell the footballing assets together as a single transaction, but to sell them to an identified purchaser at a specific price shortly after the Sanction hearing. The Court was therefore being asked to review and approve a sale of the assets at a specified price at that time. That required the Court to review the decision of the Receivers and the reasons for it, the advice obtained by them and the nature of the marketing process that was undertaken. The court needed to be satisfied that the Receivers had addressed and weighed all relevant considerations before making their decision, and that they had not been influenced by an irrelevant consideration.

d) The hearing of the application on notice to Mr Oyston, his son and Denaxe had been fixed to give them the opportunity to bring forward any objection that they had to the proposed sale. The suggestion that they were practically unable to do so is unjustified. Mr Oyston and Denaxe had the knowledge and key documents that they needed to cause the Court to investigate in detail the propriety of the Receivers' decision.

e) Despite his claim to the contrary, Mr Oyston understood that the hearing was to seek approval of the specific transaction, not simply to authorise the sale of VB's shares in BFCL together with Denaxe's shares. Denaxe would have understood the same and did understand it, as one of its directors was closely involved in the sale strategy and supported the Sanction application. Denaxe chose not to oppose the Sanction application.

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.

g) The failure to raise an objection at that time was one of the factors that influenced the Court in approving the sale. As Marcus Smith J said at [70], it was significant that Mr Oyston had raised no substantive point against the transaction.

h) If the objection had been raised by Denaxe at the time, it might well have resulted in the sale not being approved by the Court. That is because the Colliers valuation and the financial state of the Club would, in my judgment, have provided a *prima facie* basis at least for an argument that more might be able to be realised if the property assets were sold separately from the shares in BFCL. The court would have had to be satisfied that, in compliance with their duties, the Receivers could properly reach the opposite conclusion before approving the proposed sale, otherwise it would have declined to approve the sale.

i) The opportunity for Denaxe to bring the claim that it issued on 30 January 2020 therefore arose as a consequence of its not having raised objections when it could have done.

j) The control of Denaxe at the time is not an answer to a failure by Denaxe to do what it could and should have done, but even so the position would in fact have been no different if the board of Denaxe was at the time in the control of the Oyston side.

k) Finally, the decision not to object to the proposed sale on that basis was a calculated one. Mr Oyston, as a long standing supporter of the Club, did not want to see it broken apart, which would have been the likely consequence of a sale of its Stadium and training ground separately from the Club.

The combination of h), i) and k) above in particular, in the context of the other factors, makes the attempt belatedly to allege that the Stadium and other property assets should have been sold separately from the shares in BFCL the clearest possible abuse of the process of the court.

107. Mr Collings then argued that two later orders of the Court, one made by Marcus Smith J on 17 December 2019 and the other by Snowden J on 15 April 2021, mean that the Receivers cannot contend that the claim that Denaxe now brings is an abuse of process.

108. First, he submitted that by making an order discharging the Receivers that permitted a claim to be brought against them by no later than 31 January 2020, Marcus Smith J was acknowledging the possibility of and therefore permitting a claim of the kind that Denaxe brought. That is plainly wrong. Para 5 of the Order of 17 December 2019 states:

> "Other than in respect of matters arising on the Final Account, the Receivers shall be released and discharged from all claims arising out of or in connection with the Receivership on 31 January 2020 unless such a claim is commenced by claim form before that date, or within such longer period as the Court may in its discretion on application allow."

"Such a claim" refers back to any claim arising out of or in connection with the receivership other than a claim in respect of the Final Account. Para 6 of the Order provides separately for a surcharge and falsification claim in relation to the state of the Receivers' Final Account.

109. Marcus Smith J did not have in mind any particular claim when he made his order: no particular kind of claim, and certainly none of the kind since brought by Denaxe, was suggested to him in argument about the terms of the discharge (see para 49 of the judgment of Snowden J at [2021] EWHC 910 (Ch)). The Order provided that there would be a release from all claims unless a claim relating to the receivership other than the Final Account was brought before 31 January 2020. It says nothing about whether any such claim would be treated as a valid claim or one properly brought. It was simply part of the machinery to discharge the Receivers.

110. Secondly, reliance was placed on the decision of Snowden J. Denaxe's claim was issued on 30 January 2020 and served on the Receivers on 29 May 2020. After correspondence about the claim, an application was made by Denaxe to Snowden J on 31 December 2020 to determine whether the permission of the Court was required for Denaxe to sue its former officers, the Receivers, or whether alternatively permission had already been granted by Marcus Smith J's Order of December 2019.

111. Snowden J held that no permission was required and that therefore the claim could proceed. The Order of 15 April 2021 gave directions. The decision on a discrete point about the need for permission to sue former officers of the Court has no bearing on the question of whether, by bringing its claim, Denaxe was abusing the process of the court in a different way, by basing a claim on an allegation that it could and should have raised before the Sanction Order was made. Snowden J did not decide that the claim was not an abuse of process, only that permission was not needed to bring a claim against a court appointed receiver after an order discharging them. The Order made no declaration about the validity of the claim. (His Lordship also held, *obiter*, that if permission was needed Marcus Smith J's order did not grant it.)

112. Had I not held that the Receivers enjoy immunity to Denaxe's claim, I would for the reasons given above have held that the principal part of the claim was an abuse of process in any event and struck it out for that reason.

The Merits Ground

113. Mr Mohyuddin QC presented a well-sustained argument to the effect that there was in any event no evidence capable of supporting Denaxe's case that failing to sell the Stadium and training ground (and the other minor property assets) separately from the shares in BFCL was a breach of the Receivers' duty to obtain the best market price for them. The argument proceeded (in summary) as follows:

    a) There is no evidence that the Receivers' marketing of Denaxe's 76.3% of shares in BFCL with the property assets, rather than 96.3% (including VB's holding), made any difference to the bids that were received. The "teaser" produced by Hilco did not state that only 76.3% of the shares were offered and it was written to give the impression that more was included. Mr Cooper's evidence is that all those who engaged seriously in the bid process and who therefore discovered the true position indicated that they would only buy if VB's shares were included, but they only found out the true position after their expressions of interest and access to the data room was given to them. Bids and final and best bids were then secured on the basis of a 96.3% aggregate holding, at about the time when the Sanction Application was made; and Mr Cooper's second and third witness statement included an analysis of the three substantial bids that were made for 96.3% of the shares.

    b) The Receivers considered both the LSH valuation evidence and the Colliers valuation. There were fundamental flaws in the Colliers valuation which made it wholly unreliable as a basis for either a decision to sell the Stadium separately or a claim that much more than the price paid by Mr Sadler could reasonably have been obtained for the footballing assets. The LSH valuation too was prepared on a basis that the Club could afford to pay a specified rent for the Stadium, which it could not, so an adjustment was required to the LSH values that bring their figures much closer to the price that was in fact paid for all the footballing assets.

    c) Denaxe has adduced no other evidence in support of its case that significantly more could have been realised by a different approach. There is therefore no arguable case that any breach of duty caused loss.

114. Had the Receivers' application depended on it, I would have rejected their argument that it is possible to decide now that there is no reasonable prospect of the claim succeeding. The Receivers undoubtedly were of the opinion before they were appointed that the footballing assets needed to be sold together. They did not consider alternative strategies, in reliance on their own experience of conducting administrations of football clubs and on their understanding that it was desirable for the Club to be sold as a going concern. However, the Receivers' duties were not the same as those of administrators: their particular responsibility and duty was to sell the receivership assets in order to pay down the judgment

debt owed by Mr Oyston and Denaxe, and in doing so they owed a duty to maximise realisations.

115. The Receivers may well have been proved right in their judgment about how to maximise realisations from the footballing assets, but I cannot at this stage reach a conclusion that the contrary is not properly arguable. LSH were only instructed after the Receivers had decided to market the footballing assets together. LSH's report was provided after the marketing started and it assumes that the Club remains in situ as occupier of the Stadium. There are undoubtedly problems with the Colliers valuation, acknowledged by Denaxe, but that does not mean that a sale of the Stadium, training ground and other property assets separately from the shares in BFCL would not have raised more than the price of £8.2 million. It does appear that the income from the hotel and offices forming part of the Stadium were a way of adding substantial income to the ownership of the Club.

116. The Receivers do not appear to have considered any alternative realisation strategy. Hilco were appointed to advise how most effectively to market the footballing assets for sale together, as a package, and LSH were not instructed to advise on value of the Stadium and training ground separately from the Club. Such a course may well have left the Club unable to pay the rent that a new owner would have required, leading to its demise, and the question then would be about the prospects of obtaining planning permission for residential or commercial development of the Stadium. There are, I accept, real difficulties that Denaxe would need to surmount to prove its case, were the claim to proceed, and I think it is unlikely that it would succeed, but I cannot conclude on the basis of the evidence that is before me that the claim has no real prospect of succeeding on its merits.

The Secondary Claims

117. Denaxe claims that the Receivers wrongly intermeddled in the operation of its business before they changed the composition of its board, and so acted without authority or power, and that they unlawfully removed from the Stadium an accounts computer or its hard drive. The computer allegedly contained accounts files relating to all the companies in Mr Oyston's group of companies. It is not specifically alleged that the removal of the computer was during the period of the wrongful intermeddling.

118. What is claimed in relation to these matters is damages to be assessed in relation to the intermeddling, for a period of 5 days only between 21 and 25 February 2019, and damages to be assessed for unlawful copying of the computer hard drive and the loss of the computer, which it is alleged has not been returned. Denaxe accepts that the Receivers did provide a copy of the hard drive in April 2020, but pleads that it "remains concerned that this may not contain all the information that was on the accounts computer". No further particulars of loss or missing information have been provided.

119. The intermeddling alleged is itemised at para 33 of the draft amended Particulars of Claim. It includes entering offices, saying things to various people, and

attempting to obtain information and alter the board without proper process. It is very hard to see that any of the matters alleged can have caused Denaxe any substantial loss. Despite particulars of loss having been pursued by the Receivers in correspondence, none have been provided. In his skeleton and in oral argument, Mr Collings did not even address these matters beyond acknowledging that the claim may be limited to a few days' damages for trespass. It appears, therefore, that these allegations are not being pursued seriously by Denaxe.

120. Denaxe does, however, pursue the matter of the accounts computer. The Receivers' case is that the then directors of Denaxe took a copy of the hard drive of the computer in the offices of Denaxe at the Stadium, but did not (as far as they know) remove it from the offices, and that they do not have it and never received it. There has been detailed correspondence passing between the parties' solicitors that will undoubtedly have cost significantly more than the computer can be worth. Nevertheless, Denaxe considers that there is an important point of principle here that it is determined to pursue, and it says that it is a matter that must go to trial.

121. The Receivers argue that there is no evidence that they or their agent removed the computer from the offices. However, there is an allegation to that effect in the Particulars of Claim, which is supported by a statement of truth, and the disappearance of the computer is otherwise unexplained.

122. I consider that, however trivial the claim for damages for these matters is, when set alongside a claim originally for £78 million and in its amended form still for damages of many millions of pounds, it is not possible to say that the statement of case discloses no reasonable grounds for bringing this claim or that it is an abuse of process. Denaxe is however in breach of the requirements of the Civil Procedure Rules to provide particulars of its losses. It is not possible at this stage to conclude that there is no real prospect of Denaxe succeeding in recovering some damages.

123. I therefore decline to strike out those parts of the claim on condition that, within 28 days of the judgment being handed down, Denaxe files and serves particulars of any losses that it has suffered, together with an amended version of the Particulars of Claim containing only the secondary claims, as pleaded in the draft Amended Particulars of Claim, save that paras 33(h) and 54(l) of the draft are to be removed, as Denaxe accepted in argument. I decline to grant the Receivers summary judgment because it is not possible to say at this stage that there is no realistic prospect of the allegations being proved and some damages being recovered. Provided that the Amended Particulars of Claim and schedule of loss are filed and served in time, these remaining parts of Denaxe's claim will be transferred to the Manchester County Court for a District Judge there to consider to which track they should be allocated.