Squandered chances: administrators' duties and losing a chance to sell

Joint Liquidators of RFC 2012 Plc, Noters[1]

[1][2021] CSOH 99; 2022 SLT 9
Court of Session – Outer House
Lord Tyre
6 October 2021

Introduction

Recovery for the loss of a chance is a difficult concept in law. Two main problems arise. The first issue is definitional: what ought to be considered a chance? The second issue is one of quantification: if we accept the definition given to chance, how do we work out what was lost? In the recent case of *Joint Liquidators of RFC 2012 Plc, Noters*,[1] the Outer House of the Court of Session was asked to consider these questions in turn.

Facts

The case arose from complex circumstances surrounding the financial difficulties faced by RFC 2012 plc, the company which at the relevant time owned Scottish football club Rangers FC. RFC 2012 plc faced uncertainty as a result of presumed taxation debts which Her Majesty's Revenue and Customs were pursuing, including those in relation to an historic scheme of the company to pay its employees through employee benefit trusts. The anticipation of this large outstanding debt had made the company an unattractive prospect to potential buyers, exemplified by the low consideration of £1 received by the previous owner for the transfer of 85% of the company's shares to Mr Craig Whyte of Liberty Capital Ltd in 2011. Under Mr Whyte's leadership, the company was unable to secure a more stable financial position. In addition to the looming tax cases, an outstanding bank loan due to Lloyds Bank proved a troubling financial hurdle, contributing to uncertainty around the company's future, limited investment opportunities, and increased pressure on the company to set out a clear strategy for its sustainability. The financial situation was compounded by poor sporting performances by Rangers FC, which failed to qualify for European competition, and, consequently, did not yield the rewards of prize and sponsorship money, television payments, and sell-out crowds. After discussions with creditors, Mr White placed the company into administration on 14 February 2012.

[1] [2021] CSOH 99; 2022 SLT 99 (*RFC 2012*).

The respondents, David Whitehouse and Paul Clark, were appointed as joint administrators of the company. Several business decisions were taken which affected the company's position, but none prevented the company's entry into liquidation on 31 October 2012.[2] The noters were appointed as liquidators, and subsequently raised an action against the respondents for a breach of their statutory duty, impugning several decisions taken during the company's administration.

A notable decision was taken by the respondents in March 2012, when they received an offer of £1 million from English Premier League club West Bromwich Albion (WBA) for the player Steven Naismith. Mr Naismith was regarded as one of Rangers' most sellable assets and his market value had been assessed at around £4 to £5 million.[3] The respondents rejected WBA's offer as too low. Nonetheless, Rangers's financial difficulties had led to a weakened bargaining position – both in settling contracts with players and in dealing with other clubs. This had resulted in Mr Naismith's renegotiated contract of March 2012, which now contained a £2 million release clause. WBA made three further bids for Steven Naismith: first, on 29 March, of £1.25 million; secondly, on 7 April, of £1.5 million; and, lastly, on 13 April, of £1.7 million. Each of these was rejected by the respondents as insufficient. Mr Naismith was not sold by Rangers.[4] Instead, on the entry into liquidation of the "OldCo", Mr Naismith elected not to transfer his contract to the "NewCo" company, as was his right,[5] and left the club for no fee, eventually joining English Premier League club Everton FC as a free agent in July 2012.[6]

In addition to the decision not to sell Steven Naismith, further decisions taken by the respondents were questioned by the noters. A number of marketable members of the playing staff at Rangers FC were not sold nor made available for sale. The club's home ground, Ibrox Stadium, was not sold nor made available for lease. The club's training facility, then known as Murray Park, was not made available for sale. Valuations for these properties were carried out, but separately from one another and divorced from their context within the footballing business as a whole, therefore allegedly not reflecting their true value. Other claims centred around the failure to manage costs during the administration and a failure to obtain the best possible price for the business considering the variety of differently structured offers received from several parties for the company during administration.

The noters sought damages totalling £47,690,410 on these points,[7] alleging that they constituted breaches of the respondents' statutory duty as administrators under the Insolvency Act 1986.

[2] *Ibid*.
[3] *Ibid* at [86].
[4] *Ibid* at [26].
[5] Transfer of Undertakings (Protection of Employment) Regulations 2006 (SI 2006/246), reg 4.
[6] *RFC 2012* at [91].
[7] The claim being brought in terms of Insolvency Act 1986, Schedule B1, paragraph 75.

Decision of the Outer House of the Court of Session

Lord Tyre's opinion gives a clear statement of the standard of care owed by an administrator. While the administrator will have substantial leeway in deciding which of the 'statutory purposes'[8] are to be pursued,[9] that decision must be kept under constant review.[10] Moreover, they will owe a duty of skill and care in respect of any actions taken pursuant to their chosen purpose,[11] which may involve a duty to seek specialist advice where necessary.[12] The standard of care here will vary: where the administrator's decision does not involve the exercise of a 'specialist skill', then the ordinary standard of care will apply.[13] But where the decision does involve such a skill, the standard will be heightened to the standard of care expected from a professional: what must be established is a deviation from an established practice in favour of one which 'no professional man of ordinary skill would have taken …'[14] But, given the multifaceted decisions undertaken by an administrator on a day-to-day basis, it was recognised that these different standards were not sharply divided but rather at different ends of a fact-sensitive continuum.[15]

The Outer House concluded that there had a breach of duty in relation to the loss of a chance of the sale of marketable players, the loss of the chance to sell the specific player Steven Naismith, and the loss of the chance sell heritable property, namely Ibrox Stadium and Murray Park. In total, £3,404,500 plus interest was awarded by the court.

Analysis

While the decision raises several points of interest relating to the conduct of administrators in relation to their duties, the issue on which a specific analysis is most merited is around the loss of a chance of the sale of Steven Naismith. This is particularly interesting given the concrete offers which had been made for the player by WBA. With the other claims relating to the loss of a chance, the appraisal of the loss was not clouded by the existence of tendered offers, as none was made for other marketable players, Ibrox Stadium, or Murray Park. The question then is whether the loss incurred as a result of the failure to sell Steven Naismith ought to be considered the loss of a chance to sell, or, as the noters argued, the loss of a sum actually offered, resulting from the rejection of an offer which ought to have been accepted under the statutory duty imposed on the respondents.

[8] As set out in the Insolvency Act 1986, Schedule B1, paragraph 3.
[9] *RFC 2012* at [33], citing *Davey v Money* [2018] EWHC 766 (Ch); [2018] Bus LR 1903 at [255]
[10] *Ibid* at [34], citing *Re One Blackfriars Ltd* [2021] EWHC 684 (Ch) at [200].
[11] *Ibid* at [35], citing *Re Charnley Davis (No 2)* [1990] BCC 605 at 618.
[12] *Ibid* at [36].
[13] *Ibid* at [35].
[14] *Hunter v Hanley* 1955 SC 200 (IH) at 206, referred to generally in *RFC 2012* at [35].
[15] *RFC 2012* at [35].

The law surrounding the recovery of damages on the loss of a chance is necessarily uncertain, given the varying difficulties that emerge in quantifying exactly what has been lost and thus what ought to be recovered. Lord Tyre's encapsulation of the assessment of the loss of a chance as "more than speculative, less than certain" is fitting.[16] The law, in appreciation of the difficulties involved in this quantification has altered the burden of proof in such circumstances, moving away from the ordinary requirement for the pursuer to establish the facts on the balance of probabilities. The Outer House was persuaded in this regard by English authority, not least Lord Hoffmann's appraisal of the unique circumstances in *Gregg* v *Scott*:[17]

> The law distinguishes between cases in which the outcome depends upon what the claimant himself … or someone for whom the defendant is responsible … would have done, and cases in which it depends upon what some third party would have done. In the first class of cases the claimant must prove on a balance of probability that he or the defendant would have acted so as to produce a favourable outcome. In the latter class, he may recover for loss of the chance that the third party would have so acted …

The scope of the position set out by Lord Hoffmann was followed and clarified by Lord Briggs in *Perry* v *Raleys Solicitors*, in which he notes that where 'the supposed beneficial outcome depends upon what others would have done, this depends upon a loss of chance evaluation'.[18] Lord Briggs's view depended upon the earlier authority of *Allied Maples Group Ltd* v *Simmons & Simmons*.[19] In this case, it was decided that damages ought to be available for the failure to take the chance of a sale to the benefit of the company and its creditors, but only when there is a "real or substantial chance as opposed to a speculative one".[20]

The distinction set out by Lord Hoffmann is crucial. In their submissions, the noters attempted to argue that the decision not to sell Mr Naismith amounted to a loss of an offered amount, not of a chance.[21] The intention here, presumably, was to substantiate a more certain standard of proof and to establish a recoverable figure which was lost – the amount being ascertained from the highest offer made by WBA in the Spring of 2012. The respondents argued in counter to this, correctly in the view of Lord Tyre, that the loss was in fact that of a chance, based upon the distinction set out in Lord Hoffmann's speech.[22] There are three variable factors which distinguished the loss in this case: first, the likelihood of regulatory footballing authorities agreeing to allow the player's transfer; secondly, the likelihood of Mr Naismith agreeing suitable transfer terms with WBA; thirdly, the likelihood of Mr

[16] *Ibid* at [45].
[17] [2005] 2 AC 176 at [83].
[18] [2019] UKSC 5; [2020] AC 352 at [21].
[19] [1995] 1 WLR 1602.
[20] *Ibid* at 1614.
[21] *RFC 2012* at [166].
[22] *Ibid* at [167].

Naismith, who had suffered an injury earlier in the season which had rendered him unable to play, passing his medical to join WBA.[23] In each of these cases, the question is not one of what the respondents would have done differently, but rather how a third party would have acted, be it the footballing authorities, Mr Naismith, the management of WBA, or WBA's medical staff. Lord Tyre was nevertheless satisfied that the footballing authorities would approve the switch and that the medical at WBA would not prove an issue given the buying club's acquaintance with Mr Naismith's injury.[24] However, he thought the chance that Mr Naismith might have been able to reach agreement with WBA fell within the second of Lord Hoffmann's categories for the loss of a chance to sell.[25]

Lord Tyre proceeded to assess the potential for a claim on the basis of loss of a chance on the failure to sell Steven Naismith. His Lordship opined that there was 'no good reason' for the respondents to have held out for a minimally larger sum.[26] Given that WBA had made a concrete offer of £1.7 million for Mr Naismith, it was incumbent upon the administrators to analyse the situation from the perspective of the likelihood of the third parties arriving at an agreement.[27] The keenness of WBA in offering substantial sums of money for Mr Naismith and the player's circumstances ought to have led the administrators to the view that the third parties were likely to reach an agreement and consequently the offer ought to have been accepted.[28] It was accepted that the sale of Mr Naismith, rather than his continuation as a member of the Rangers playing squad, was most beneficial to the company and the creditors as a whole, and the failure to sell the player constituted a breach of duty.

As the lost chance is compensable, the question becomes one of quantification. Lord Tyre ruled that, of the £1.7 million offered by WBA, various reductions could be made for ancillary costs. This left a total of £1,645,000. As the loss was of a chance, rather than of an agreed sum, a reduction by half was made. The total damages for the failure to take the chance to sell Mr Naismith consequently sat at £827,000.[29]

The approach adopted by Lord Tyre reveals a willingness on the part of the Scottish courts to scrutinise the administrators' actions thoroughly. In circumstances where the administrator acted in a manner which disregarded a likely financial benefit to the company, as in the case of the sale of Steven Naismith, the reduction to the damages awarded was limited to 50%. With the more speculative lost chances – in relation to the sale of the stadium and training ground - the reduction was as high as 90%.[30] While this does not suggest the courts will re-appraise all the decisions of administrators, it reveals a

[23] *Ibid* at [168].
[24] *Ibid* at [167]- [168].
[25] *Ibid* at [169].
[26] *Ibid* at [165].
[27] *Ibid* at [166].
[28] *Ibid* at [169].
[29] *Ibid* at [171].
[30] *Ibid* at [226].

desire to hold administrators accountable where, on the basis of the likelihood of the chance coming to a beneficial conclusion, decisions have fallen short of the standard required for the best course of conduct.

Conclusion

The case demonstrates the extent to which an examination of the conduct of administrators may result in potential breaches of duties. The Court decided that the degree to which administrators owe a duty extends to the failure to take account of the likelihood of third-party action benefiting the company through the chance that a transaction may be completed. The decision to award damages on this basis acts a caution to administrators about the scope of their duties in law and the range of evaluation they ought to consider in attaining the best outcome for the company's creditors. The case also provides welcome clarity on the standard of care owed by an administrator in Scots law, and how damages can be assessed on a 'loss of a chance' basis.

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