Briefing

Corporate Turnaround and Insolvency

BURGES SALMON

Administration and TUPE: ETO reason

Can an administrator rely on an economic, technical or organisational (ETO) reason for dismissals it makes before a sale?

Provided the dismissals are made to enable the company to continue to trade then yes, according to the Court of Appeal in *Crystal Palace FC Limited v Kavanagh and others.*

The background

The Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) provide protection for employees where the business in which they work is transferred to another employer by virtue of a relevant transfer. Where the sole or principal reason for a dismissal of employees is either:

- the relevant transfer itself; or
- a reason connected with the transfer but one that is not an ETO reason entailing changes in the workforce;

that dismissal will be automatically unfair.

What does, or does not, amount to an ETO reason where the employer is in administration has been the subject of some debate. The Court of Appeal in *Spaceright Europe Ltd v Baillavoine and another* held that, for there to be an ETO reason in such a case, the reason for the dismissal must be to enable the business to continue trading rather than making it more attractive to achieve a sale - an analysis that has been further considered by the Court of Appeal in this case.

The issues

Crystal Palace Football Club Limited went into administration in January 2010. An administrator was appointed with the aim of selling the business as a going concern. In May 2010, negotiations with a potential buyer stalled. The administrator declared that the club had severe cash-flow difficulties and so would be 'mothballed' over the closed season with the hope of achieving a sale at a later date. As a result, a number of administrative staff were made redundant.

Shortly after these redundancies were made, the commercial barriers preventing the sale were resolved and the club was sold. The claimants argued that their dismissals had been connected to the transfer and that there had been no ETO reason to rely upon. As such, they argued that their dismissals were automatically unfair and that liability for those dismissals transferred to the buyer of the club.

What did the court decide?

The Court of Appeal found that the administrator had dismissed the employees in order to keep the club running, so it might achieve a sale at some point in the future. The negotiations had stalled for commercial reasons which had nothing to do with the continued employment of the claimants. Further, the administrator could not have known that these negotiations would conclude swiftly after the redundancies took effect.

The Court of Appeal held that the dismissals had been made for an economic reason with the aim of enabling the business to continue to trade and therefore were not automatically unfair and liability did not transfer to the buyer.

What does this mean for practitioners?

This case offers some comfort to administrators as it is a partial retreat from the *Spaceright* decision we had last year.

Here, the Court of Appeal recognised that an administrator will often have the ultimate aim of achieving a business sale. However, this does not mean that all of its decisions will be taken to make the business more attractive for sale. Whilst dismissals made by an administrator will be fact specific, this case strengthens the possibility of relying on an ETO reason where the immediate aim is to keep the company trading.

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