

Al Jaber and Others v. Mitchell and Others [2021] EWCA Civ 1990

CIVIL WATCH – CASE NOTE

As part of Goldsmith Chambers' Civil Watch series, Shárin Diegan considers the recent case of *Al Jaber and Others v. Mitchell and Others* [2021] EWCA Civ 1990.

In this landmark ruling, the Court of Appeal hold that witnesses and participants in the examination procedure under section 236 of the Insolvency Act 1986 are entitled to immunity from suit.

BACKGROUND

1. On 31 July 2017, for a Company's former liquidator, Mrs Caulfield, applied for public examination of the Respondent, the Sheikh, and production of books, papers and other records pursuant to section 236 of the Insolvency Act 1986. The liquidator argued that the liquidation of the company had stalled due to a lack of information and co-operation by the Sheikh and his associates, particularly their failure to attend an interview.
2. By an order of 13 December 2017, the Deputy Registrar ordered (with the Sheikh's consent) that the Sheikh appear before the court by video for examination and to produce all books, papers and records in his possession or control in respect of the assets of the Company.
3. On 26 April 2018 the Sheikh's first oral examination took place via videoconference before the ICC. The Sheikh, on invitation of the ICC judge, gave an undertaking to produce witness statements setting out key information required by the liquidator. The examination was adjourned pending service of the witness statements. The examination, which was given under oath and was recorded, re-commenced on 1 November 2018.
4. The former liquidator, Mrs Caulfield, was replaced by the current Liquidators, shortly after the Sheikh's examination. The Liquidators took over proceedings as both the liquidator and foreign representative.
5. The Liquidators applied to re-re-amend their Re-Amended Points of Claim following the provision of a "list of corrections" on 9 February 2021 from the Sheikh in which he avers that the statements that he made during the course of his examination under section 236 and in the three witness statements he had previously served in the proceedings were incorrect. The Sheikh opposed the amendments to the Re-Amended Points of Claim and averred that the claims had no real prospect of success because the statements made in the section 236 examination attract the protection of immunity from suit.

6. On appeal, the issue that the Court of Appeal was asked to determine was whether statements made under oath and by witness statement by an examinee in a private examination conducted under section 236 of the Insolvency Act 1986, were afforded protection of immunity from suit.

JUDGMENT

7. The Court of Appeal allowed the appeal. Lady Justice Asplin gives the leading judgment with which Lady Justice Carr and Sir Nicholas Patten agree.

REASONS FOR THE JUDGMENT

8. The existence of immunity from suit must be approached on a context specific basis, conducted on a close examination of the particular circumstances of the case, together with the policy considerations, in order to determine whether the immunity applies [60]. “Whether the immunity provides protection in respect of a statement made by a person involved in proceedings may depend, amongst other things, upon: the role or function of the person who made the statement in those proceedings and the relevance of that role; whether the maker of the statement was in that role or exercising that function when the statement was made; the purpose of the statement; the nature of the proceedings in which it was made, or with which it was connected; how “judicial” those proceedings are; and the extent and nature of the connection between the statement itself and the proceedings.” [61]
9. Asplin LJ determined that the section 236 investigation is a “sui generis” process which bares obvious differences to witnesses of fact in a civil trial because the sole purpose of a section 236 investigation is to enable the liquidator to obtain information to facilitate the fulfilment of their statutory duties and the judge does not make any decision as to the parties’ rights [63-70].
10. Asplin LJ concluded that the fact that statements are made by examinees in a court before a judge is not determinative. Whilst it may be that most statements made in court will benefit from immunity, it does not follow that any statement made in court, regardless of the procedure or person making the statement, will automatically benefit from immunity. Statements made in court must be viewed in the context in which they are made. The section 236 examination is very far removed in nature and purpose from an ordinary civil trial and clearly merits its own analysis. The fact that the section 236 examination takes place in court, while not irrelevant, is not conclusive. The section 236 procedure must be looked at in a more holistic manner. [71-77].
11. Asplin LJ concluded that the section 236 examination should be considered in the wider context of the compulsory winding-up proceedings in which the procedure arises, which are commenced by an order of the court, and which are intended to

facilitate the provision of information to the liquidator under the broader umbrella of compulsory winding up proceedings [78-83, 97, 99-103]. Asplin LJ held that “*the section 236 examination, viewed in the context of the winding-up proceedings, as being the kind of judicial proceeding in which all participants are entitled to immunity*” [101].

12. The Court of Appeal did not consider that it was necessary to pinpoint whether an examinee is truly a witness or a party to the section 236 examination or whether the statements made by an examinee are information or evidence [104].

PUBLIC POLICY

13. At the conclusion of the Judgement, two public policy points were made. First, affording immunity to statements made by an examinee may encourage the examinee to speak freely and frankly, thereby facilitating the provision of information necessary to the winding-up process goes to a core principle of the purpose of immunity [106-107]. Second, affording immunity to a examinee would not undermine the right to a remedy available to the liquidator because the liquidator can still obtain a remedy via sections 237(1) and 433 of the Insolvency Act 1986 [108]. Lastly, giving immunity to examinees will not undermine the usefulness of the section 235 enquiry process and the concerns about pushing liquidator enquiries to the formal section 236 process are hypothetical and insufficient to outweigh countervailing public policy considerations [109].

SHÁRIN DIEGAN
GOLDSMITH CHAMBERS
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