TRANSCRIPT OF PROCEEDINGS

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IN THE ROLLS BUILDING AT THE HIGH COURTS OF JUSTICE

Fetter Lane
London

[2019] EWHC 857 (Ch)

Before MR JUSTICE ZACAROLI

TONSTATE GROUP LTD & OTHERS
-v-
EDWARD WOJAKOVSKI

EDWARD WOJAKOVSKI
-v-
ARTHUR MATYAS & OTHERS

ARTHUR MATYAS & RENATE MATYAS
-v-
EDWARD WOJAKOVSKI

MR MICHAEL TODD QC and ANDREW BLAKE instructed by Rosling King LLP for Arthur and Renate Matyas and companies in the Tonstate Group
MR NEIL KITCHENER QC and PATRICK HARTY instructed by Mischon De Reya LLP for Edward Wojakovski
MS RUTH DEN BESTEN instructed by [**] for the [**] Respondent

JUDGMENT
28th MARCH 2019

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MR JUSTICE ZACAROLI:

1. By a combination of applications made by, respectively claimants (by which I mean Mr and Mrs Matyas and companies in the Tonstate Group) and the defendant (Mr Wojakovski), I'm asked to determine a number of issues concerning the continuation or commencement of certain parts of these proceedings as derivative actions and the extent to which one or more of the relevant companies' assets may be used to fund the prosecution or defence of the various proceedings.

2. I will address first the application by Mr Matyas, for permission to continue the claims by three companies in the hotels groups – that is TH Holdings Limited, Summer Hill Cardiff Limited and Tonstate Metropole Hotels Limited (the yellow companies, being identified as yellow in the plan attached to the claimant's skeleton). He seeks permission to continue the action as a derivative action by him, as the beneficial owner of 50 per cent of the shares in the ultimate holding company of the group, Overseas Holdings Capital Group Limited, a company incorporated in the British Virgin Islands.

3. The claims were properly commenced by the yellow companies due to the presence on the board of each company of a third director, a Mrs Robertson, who voted in favour of the actions being commenced. However, she has now resigned, so each of the companies is deadlocked and unable to give instructions in relation to the claims. This is an application at common law for what is called a double derivative action, necessitated by the fact that each of the companies in the group is deadlocked, being 50 per cent owned and controlled by each of Mr Matyas and Mr Wojakovski. Mr Wojakovski makes no objection to this application, other than in relation to the funding issues which I will come onto later. Given that, I do not propose to deal in any detail with this issue. In short, for the reasons which are set out in some detail at paragraphs 95 to 116 of the claimants' skeleton, I am satisfied this is an appropriate case in which to make the order sought.

4. The second application is for permission to bring claims by five companies in the TGL group, being Glasgow Airport Hotels Holdings Limited and four other companies (the red companies, being identified as red on the same plan I referred to earlier) as a derivative action by TGL. Each of those companies is deadlocked because Mr Wojakovski is in a position to exert negative control due to holding shares which, albeit in a minority, carry weighted voting rights. Here, too, Mr Wojakovski does not object in principle to the claims

continuing by a derivative action, but he says they should be continued by Mr Matyas, pursuant to a common law derivative action – a double derivative action – as opposed to by TGL via a statutory derivative action. The sole reason is because if carried on by TGL, then the only way to prevent TGL using its own assets to fund the pursuit of the claims is via an injunction. Whereas if Mr Matyas was required to be the derivative claimant, then TGL's assets could only be used if Mr Matyas succeeded in obtaining an indemnity from the court. Mr Wojakovski recognises that his chances of preventing TGL's assets being so used are increased if Mr Matyas has the burden of having to continue the claims pursuant to a common law derivative action and apply for an indemnity. Again, given that the essential question of the appropriateness of a derivative action, per se, is not in issue, I need not give lengthy reasons. I am satisfied, for the reasons set out in paragraph 73 to 94 of the claimants' skeleton, that, subject to the question of which sort of derivative claim it should be, this is an appropriate case in which to order the action to continue as a derivative one. The relevant requirements, whether of a statutory or a common law claim, are satisfied. Given that the question as to which sort of claim is appropriate is intimately wrapped up with the question of funding, I will come back to that in the context of the funding issues.

5. Turning to those funding issues, I will start with Mr Matyas' application for an indemnity out of the assets of the yellow companies. It is first important to identify precisely what the claimants seek. By their application, they seek a simple indemnity out of the assets of the companies for their own and any adverse costs. Mr Wojakovski and his counsel have understood that as an application for a right, at the end of the proceedings, to be indemnified out of the assets, whatever the result of the proceedings.

6. Mr Todd QC for the claimants has made it clear however, that he is seeking an order that would lead to the companies paying on a 'pay-as-you-go' basis, for all costs incurred to date and hereafter in relation to those proceedings. As to one part of the application, namely the costs incurred to date, that clearly sought an order on such a pay-as-you-go basis, as it sought an order for payment of those costs now, not only after the trial. As to the remainder, it depends on whether the word 'indemnity' is to be construed as including a right to payment as and when costs are incurred, or only a right to be indemnified after the trial.

Irrespective of that slightly esoteric point, Mr Kitchener QC for the Mr Wojakovski makes the point that the evidence necessary to support such a claim – evidence, that is, going to the relative financial strength of Mr Matyas on the one hand and the companies on the other hand – is simply missing. So far as the main claim is concerned, by which I mean the

claim by the companies for breach of duty by Mr Wojakovski, the estimated costs, on the basis that 25 per cent of the costs of the claim as a whole are apportioned to the claims by the yellow companies, are said to be in the region of £1.5m, going forward.

7. The jurisdiction for awarding an indemnity is now to be found in CPR 19.9E, but its foundation goes back to the case of *Wallersteiner v Moir (No.2)* [1975] QB 373, at pp.403-404, per Buckley LJ:

> "Nevertheless, where a shareholder has in good faith and on reasonable grounds sued as plaintiff in a minority shareholder's action, the benefit of which, if successful, will accrue to the company and only indirectly to the plaintiff as a member of the company, and which it would have been reasonable for an independent board of directors to bring in the company's name, it would, I think, clearly be a proper exercise of judicial discretion to order the company to pay the plaintiff's costs. This would extend to the plaintiff's costs down to judgment, if it would have been reasonable for an independent board exercising the standard of care which a prudent business man would exercise in his own affairs to continue the action to judgment. If, however, an independent board exercising that standard of care would have discontinued the action at an earlier stage, it is probable that the plaintiff should only be awarded his costs against the company down to that stage"

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8. I note that he was there considering only the question of awarding costs after the event. However, in other cases, a pre-emptive from of indemnity has clearly been permitted. The claimants refer in particular to the case of *Iesini v Westrip Holdings* [2009] EWHC 2526 (Ch), per Lewison J at [125], referring to an earlier decision of Michael Wheeler QC sitting as a deputy in *Jaybird Group Ltd v Greenwood* [1986] BCLC 319 at 327:

> "Thus in my judgment Mr Michael Wheeler QC was right in Jaybird Group Ltd v Greenwood [1986] B.C.L.C. 319, 327 to say that an indemnity as to costs in a derivative claim is not limited to impecunious claimants. The justification for the indemnity is that the claimant brings his claim for the benefit of the company (and ex hypothesi under the new law the court has allowed it to proceed). Once the court has reached the conclusion that the claim ought to proceed for the benefit of the company, it ought normally to order the company to indemnify the claimant against his costs."

9. The claimants also rely upon *Wishart v Castle Crofts Securities Ltd* [2010] BCC 161, a decision of the Court of Session, per Lord Reid at [71]:

> "As we have explained, the rationale of indemnification in respect of the expenses of litigation, as between trustees and the trust estate, or other fiduciaries and those on whose behalf they are acting, is that the party who has incurred the expense has not been acting for his own benefit but for the benefit of the estate or person in question. A minority shareholder who brings derivative proceedings on behalf of the company is ordinarily entitled to indemnification because the same rationale applies. We can understand that, on the facts of cases such as *Mumbray v Lapper* or *Halle v Trax BW Ltd* , the view may be taken that derivative proceedings are inappropriate, on the basis that the shareholder is in substance acting for his own benefit rather than for the benefit of the company and should therefore pursue an alternative remedy. Where however the court has decided that a shareholder should be allowed to bring proceedings in the interests of the company and on its behalf, it appears to us to follow that the shareholder is in principle entitled to be indemnified by the company in respect of his expenses and liabilities (subject to the qualifications which we have previously mentioned), and that his personal interest in the outcome, as a shareholder, is not a good reason for denying him that indemnity."

10. In essence the claimants contend that the normal rule is that an indemnity is justified wherever the action is for the benefit of the company. Insofar as the pay-as-you-go aspect of the application is concerned, the claimants rely on the form of order in fact granted in the *Jaybird Group v Greenwood* case, which appears from page 329 to have involved payment of costs on a pay-as-you-go basis. Mr Kitchener refers me however to two cases which emphasise the caution to be exercised before making a pre-emptive costs order. The first case is *Halle v Trax* [2000] BCC 1020. This involved a company that was deadlocked, each of the two shareholders and directors holding 50 per cent of the shares. One accused the other of breaches of duty and brought a derivative action. He sought an indemnity out of the company's assets. Sir Richard Scott V-C held as follows at page 1023F-H:

> "I can see no difference in substance, bar one point that I will mention in a moment and that is relied on by Miss Nicholson, in the action that is now being brought in the derivative form and a straightforward action by a partner against his co-partner, complaining of breaches by the defendant partner of duties he owed the joint venture and his joint venture partner. Miss Nicholson emphasised, rightly, that BWM is a separate corporate entity. It is not the same as an unincorporated partnership enterprise. That is right; it is not. But in considering where the equity lies between Mr Halle and Mr Bressington, I am bound to say I can see no difference of substance at all. It would be unfair to

> Mr Halle if, having successfully brought his action against Mr Bressington, and having obtained an order for the payment of some sum of damages to BWM, he were to find himself obliged to bear some part of his properly incurred costs of that exercise. But he is very unlikely to be in that position. First of all, he can expect to obtain an order for costs against the unsuccessful defendant, Mr Bressington. Secondly, he would, in my view, be entitled to a lien to recover his costs out of the fund, namely the damages, produced by his expenditure of those costs. But if the action should fail, it seems to me that it would be quite unfair to Mr Bressington that his investment in BWM should have to bear one half of the costs of Mr Halle's unsuccessful action. That seems to me to be quite wrong."

11. The second case is *Bhullar v Bhullar* [2016] 1 BCLC 106. This was an action by a minority shareholder as a double derivative common law claim. Morgan J reviewed all the authorities including *Wallersteiner v Moir, Iesini*, *Wishart* and *Halle and Trax*. His conclusion is accurately summarised at paragraph 5 of the headnote:

> "The claimant was granted permission to continue the derivative claim in relation to the payments made to Torex, but not in relation to the transfer of the property. However, he was not entitled to a pre-emptive order granting him an indemnity as to costs. The court's power to make such an order was established by Wallersteiner v Moir (No 2) [1975] 1 All ER 849, [1975] QB 373 but the later authorities showed that the court should exercise considerable care when deciding whether to order a pre-emptive indemnity. The court should have a high degree of assurance that such an indemnity would be the proper order to make following a trial on the merits of the claim. In the present case, it could not. Furthermore, the derivative proceedings were a stepping stone towards a negotiation for a formal split between the parties or s 994 proceedings. The costs position in relation to the derivative proceedings should be the same as the costs position in relation to s 994 proceedings generally, when both the claimant and the first defendant would be on risk as to costs. The claimant should not have a pre-emptive indemnity which gave him a considerable advantage at the possible expense of the first defendant."

12. So far as the pay-as-you-go aspect is concerned Mr Kitchener relies on *Smith v Croft* [1986] 1 WLR 580, at 597D-H, per Walton J:

> "The appeal and cross-appeal on the second summons thus become completely academic, but as this matter has not previously, so far as I am aware, received any judicial consideration, I think I should add how the matter strikes me. The rationale for a Wallersteiner v.

> Moir (No. 2) [1975] Q.B. 373 order is to ensure that the plaintiff in a minority shareholders' action should not be prevented from pursuing an obviously just case through lack of funds, or fear that he may, for some reason, fail at the end of the day and be at risk as to costs which he cannot possibly pay. It has to be acknowledged that the making of such an order may turn out to have imposed on the company a liability which ought never to have been imposed upon it. Therefore, one should be very careful not to extend that liability. Early payment — i.e. before the conclusion of the trial — does indeed impose an additional liability. That may become necessary: if, for example, the plaintiff is a person who literally has no resources of his own, then it may well be that an order for interim payment should be made in order to ensure that the action proceeds at all. Without the supplementary order, the original order may stand in danger of being stultified. It therefore appears to me that in order to hold the balance as fairly as may be in the circumstances between plaintiffs and defendants, it will be incumbent on the plaintiffs applying for such an order to show that it is genuinely needed, i.e. that they do not have sufficient resources to finance the action in the meantime. If they have, I see no reason at all why this extra burden should be placed upon the company. And in this connection I think the master ought to take a very broad view. The present action is as much for the benefit of Mr. Hill's company as it is for the nominal plaintiffs, and I think the master ought to have taken their resources into consideration as well."

13. In the light of these authorities, Mr Todd submits that the claim in this case is clearly brought for the benefit of the companies, each of which is on the claimants' case the victim of Mr Wojakovski's misappropriation of funds. It is, he says, demonstrably a case that would have been, and indeed was, authorised by an independent director. Once that is accepted, he submits that it follows that it is appropriate that the companies' funds are used to pay for the action. For Mr Wojakovski, Mr Kitchener contends that that is an oversimplification. This is, he says, in substance a shareholder dispute, because it is Mr Wojakovski's case that Mr Matyas not only consented to the extractions made by Mr Wojakovski but also indemnified Mr Wojakovski against any claims that may be made in relation to those extractions.

14. At this stage it is clearly impossible for me to conclude whether Mr Matyas or Mr Wojakovski will succeed at the end of trial. Each side has shown me evidence which, on its face, provides support for their position. I accept in the first place these are claims which properly belong to the companies. If Mr Wojakovski is correct, that all the extractions were authorised, then that might constitute a defence to the companies' claims, but it does not in itself turn the issue into a shareholder dispute. On any view, given the nature of Mr

Wojakovski's defence - which is in essence that the extractions were structured in the way they were in order to evade tax and deceive investors, all of which was approved by Mr Matyas - it is possible that his actions constituted a breach of duty to the companies irrespective of any question of authority. Equally however, if that is right, then Mr Matyas' actions (which he admits) in extracting substantial sums for himself via his own companies in a similar way, at least so far as evading tax is concerned, would also constitute a breach of duty to the companies by him, although I emphasise that Mr Matyas has recently made voluntary disclosure to HMRC in an effort to remedy the tax position. But while the actions are properly brought by the companies, it is in the context of this case appropriate to consider the economic reality that these companies are essentially in wind-down, with a view to the remaining assets being distributed to the shareholders. The only substantial asset in the Hotels Group is a single remaining hotel in Cardiff and some cash balances. The only evidence I have in relation to the hotel is that the secured lenders, as a condition to extending the term of lending, have imposed a timetable for its early sale.

15. In other words, the companies here have no substantive continuing purpose other than to be wound down for the benefit of their shareholders. In these circumstances, while it is true that the claims are for the benefit of the companies, the dividing line between benefit to the companies and benefit to Mr Matyas as a shareholder is far less obvious that it might be in other cases. I consider the approach to be followed is that identified in *Halle v Trax* and *Bhullar v Bhullar*: can I be confident that the court would at the end of the proceedings – and whatever the outcome – burden the companies and thus, to the extent that he is a 50 per cent shareholder, Mr Wojakovski with the costs of pursuing them? As to this, if Mr Wojakovski were to succeed, I find it virtually impossible to conceive the court would consider burdening any part of his interest in the companies with the costs of pursuing the claims against him. It would, to adopt the language of the Vice-chancellor in *Halle v Trax*, be quite wrong.

16. That, however, is not an end of the matter because Mr Todd stressed that any order he seeks would not be intended to operate that way. It would be without prejudice to the court adjusting the rights of the shareholders in such a way that, if he won, Mr Wojakovski's economic interests in the companies would not be burdened with any part of the claimants' costs. In other words, in reality the claimants are not seeking an irrevocable undertaking that the companies bear the costs at all, rather that Mr Matyas' economic share in the companies' assets, using that term in a colloquial not a legal sense, should be used to fund the costs of the proceedings in the interim on an ongoing basis. Mr Matyas' real problem is that, because of

the deadlock in the companies, it is impossible for him to access any part of his 'share', for example through a distribution of profits. If it were clearly the case that Mr Matyas' share of the companies' assets was sufficient to cover the costs between now and the end of the proceedings, then the approach advocated by the Vice Chancellor in *Halle v Trax* and by Morgan J in *Bhullar* could be said to be irrelevant. There would be no unfairness in Mr Matyas' own share of the assets being used to fund the proceedings even if they were in substance for his and not the companies' benefit.

17. But I do not think the financial position of the Hotels Group, as disclosed by such evidence as there is, enables me to reach that conclusion. There was no evidence adduced as to the ability of Mr Matyas to fund the action without an indemnity. I accept that such evidence is not a precondition to an indemnity, but it is a relevant consideration to put into the balance when considering the potential unfairness of burdening Mr Wojakovski's interest in the companies with the claimants' costs.

So far as the financial position of the companies is concerned, evidence was served only at the very end of the hearing of the application. This demonstrated that the only company in the hotel group with any significant assets is Summerhill Properties Ltd, a subsidiary of Summerhill Cardiff Ltd, which owns a hotel said to be worth approximately £25 million and cash assets of approximately £3.7 million.

As against this, there is secured lending of just under £10 million, a debt due to TGL of £10 million, a potential substantial costs liability arising out of earlier proceedings and other known indebtedness of over £1.2 million. In addition, there is the possibility of further liability due to HMRC and investors arising out of the extractions by both Mr Wojakovski and Mr Matyas over the years.

18. Taking the claimants' evidence at its highest, and recognising that Mr Wojakovski has not had the opportunity to challenge it, assuming the hotel was sold at its full anticipated value and minimal costs or other debts, there would be headroom of just over £5 million. It seems to me that there is more than a minimal risk that the unknown potential liabilities to HMRC and investors would reduce this sum substantially further. When combined with the risk that the sum realised on the sale of the hotel, taking into account costs of sale in particular, may be less than £25 million and the risk that further running costs will dissipate the available cash further, then I can have no confidence that anything other than a relatively small sum would remain by the time of the trial of this action.

At present, therefore, the information on the companies' financial position is such that I

cannot be confident that a pay-as-you-go order would not diminish ultimately Mr Wojakovski's economic interest in the companies.

19. For those reasons, I consider the words of the Vice Chancellor in *Halle v Trax* are apposite. If the action fails, it would be unfair to Mr Wojakovski that his investment in the company should be burdened with any part of the companies' costs of the unsuccessful action. Accordingly, I refuse the application for an indemnity in relation to the yellow companies.

20. Turning to the red companies, the financial position here is somewhat different. It is common ground that the TGL Group holds a substantial amount of cash. Mr Wojakovski's own position has for some time been that his share of TGL is worth more than the value of the claim against him, ie it is worth more than £15 million. It necessarily follows that Mr Matyas' share is of at least that value. This is corroborated by recently filed evidence indicating that TGL has very substantial liquid assets, including approximately £24 million om deposit with RBS, plus other assets in excess of £13 million, including the debt owed by the Hotels Group, and has only relatively minor known liabilities. Even accounting for the potential liabilities to HMRC and potential liability to investors, it would appear that Mr Matyas' share of the assets is well in excess of the highest possible estimate of TGL's costs for the whole proceedings, which is approximately £4.5 million.

21. Accordingly, if the action were to continue as a double derivative action and Mr Matyas was required to seek an indemnity, then given, as Mr Todd made clear, the indemnity sought would not be such as to prejudice Mr Wojakovski's right, if he was to succeed, to have all the costs apportioned against Mr Matyas' beneficial interest in the group, unfairness of the kind envisaged in *Halle v Trax* should be avoided.

22. In any event, I consider that where, as here, TGL as a member is capable of pursuing its statutory derivative claim, there is no basis for ordering a double derivative claim. Mr Kitchener contends that derivative actions are merely procedural devices, designed to ensure that practical justice can be done and to avoid the risk that the form of corporate control of companies leads to an inability of the victims of injustice to obtain relief. Accordingly, he contends the court has a broad discretion as to which form of derivative action should be permitted.

23. There was no authority cited for that proposition. In fact, the authorities point firmly in the opposite direction. In each of *Burland v Earle* [1902] AC 83 at 93-94, *Universal Project Management Services v Fort Gilkicker* [2013] EWHC 348 (Ch) and *Prudential Assurance v*

Newman Industries No 2 [1982] Ch 204, at 211, the rationale for the derivative action is stated as being that "otherwise a grievance could never reach the court". In *Gilkicker* for example the right to bring the claim was extended at common law to shareholders of a parent company "where the parent company itself is in the same wrongdoer control".

24. The common law derivative action is available only where the exceptions to the rule in *Foss v Harbottle* are established. These include the company being in control of the wrongdoers. In other words, where a company has a claim which it is able to bring because it is not in the control of the wrongdoers then a common law derivative claim is not available. It makes no difference whether the company's claim is a direct one or is itself a derivative claim in respect of one or more of its subsidiaries. Accordingly, I conclude that in relation to TGL the availability of a statutory remedy means there is simply no basis for a double derivative common law claim.

25. That conclusion disposes of Mr Wojakovski's argument that TGL's directors have a conflict of interest which precludes them making the decision that the action should be brought as a statutory derivative claim as opposed to a common law derivative.

Mr Kitchener suggested that the very existence of the conflict, precluding Mr and Mrs Matyas from voting on behalf of TGL to pursue the proceedings, creates deadlock within TGL so the double derivative claim a necessary. That however, it seems to me, is a bootstraps argument. Given that TGL is a member with a right to bring the claim, it is, as Mr Todd submitted, the proper claimant and there is no decision to be made. In other words, if there is no choice, there is no conflict.

26. Even if I am wrong, however, for the reasons I have already outlined in considering whether it would have been appropriate to grant an indemnity to Mr Matyas in relation to the assets of TGL I conclude as a matter of discretion that a statutory derivative action is the appropriate course here. In this context, Mr Wojakovski's argument that the directors of TGL have a conflict of interest does fall to be dealt with. Given, however, the fact that permitting TGL to bring the action as a statutory derivative claim is without prejudice to the question as to whether any part of the costs fall on Mr Wojakovski's economic share of the assets, and it is clear that the assets of TGL are sufficient to ensure that, if it be appropriate, the entirety of the companies' cost could be borne by Mr Matyas' share of the assets, then I do not consider there is any relevant conflict of interest in fact.

27. The potential for conflict arises in relation to the question as to whether the costs should ultimately be borne by the company so as to fall to any extent on Mr Wojakovski's

share or only on Mr Matyas' share. But for the reasons I have already given that question would not be determined by any order I make permitting TGL to continue the action.

28. That leaves Mr Wojakovski's application for an injunction to restrain TGL from using its assets to fund the proceedings. This is put on two bases: first, that TGL be injuncted against using its assets to fund its own claims, including its own direct claims and the derivative claims it holds; secondly, that TGL be injuncted against using its assets to fund the shareholders' separate claims and defences.

29. It is accepted that the principles of American Cyanamid apply. First, is there a serious issue to be tried? If so, second, would damages be an adequate remedy? If so, third, where does the balance of convenience lie?

30. I will deal first with the issue whether TGL should be prevented from using its assets to fund its own claims. Mr Wojakovski claims there are three serious issues to be tried. First, that there is a breach of contract - the contract being an indemnity provided by Mr Matyas against claims being brought against Mr Wojakovski. Secondly, the contention in the section 994 petition that bringing the proceedings is itself unfairly prejudicial conduct. Thirdly, bringing this claim is a breach of fiduciary duty, it being brought in bad faith. Mr Todd contends that there is no basis for saying that the proceedings are brought in bad faith, or breach of fiduciary duty, particularly when Mr Wojakovski admits to the extractions. It seems to me, however, that if Mr Wojakovski is correct, that all the extractions were authorised and agreed to by Mr Matyas, then there is at least an arguable claim that the proceedings are in breach of the indemnity and or in breach of the alleged understanding that the extractions were permitted, subject to a final reckoning to be undertaken.

31. As to the second and third question, Mr Kitchener relies on *Jones v Jones* [2002] EWCA Civ 961. In that case, somewhat similar to this case, there were two 50 per cent shareholders/directors. The company brought a claim for breach of duty against one of them, who had started a competing business. This was procured by the vote of the other shareholder/director and his wife. The defendant director alleged that the agreement between the two shareholders was that there was an intentional deadlock, so the wife's vote could not validly be relied upon to authorise commencement of the proceedings. He commenced unfair prejudice proceedings and sought an injunction to restrain the company's assets being used to fund its claim. Having concluded that there was a serious issue to be tried, the Court of Appeal does not appear to have addressed, separately, the question whether damages were an adequate remedy. At [31] Arden LJ simply noted that the appellant argued that "Damages is

not an adequate remedy and Edward cannot be compensated in money terms for the unfair advantage, obtained by William, using the resources of the company in this litigation".

32. At [45] Arden LJ turned straight from considering the serious issue to be tried to the question of balance of convenience. As to that, she concluded as follows:

> "In accordance with the principles applicable to interim injunctions, I turn to consider the balance of convenience. There is no question of Incasep's creditors being prejudiced by the grant or withholding of the interim injunction, and so their position can be put on one side. For the respondents, it can be said that, if Edward were to win at trial, the costs which Incasep ought not to have paid can be 'credited' to Edward and thereby taken into account in ascertaining the fair value of whosever shares are to be purchased. Moreover, Edward's position is reinforced by the undertaking which William offers. On Edward's side, a number of points emerge. First, William's means are not in evidence. They would appear to be quite limited and while he has shares in Incasep, and those shares have considerable value, they are not readily realisable. Secondly, if an injunction is not granted, the process (described above) of apportioning costs which Incasep (or the respondents) incurs but which are referable to work which is useful to the respondents (or Incasep) will continue. This is unsatisfactory because the apportionment is being effected by the solicitors for the respondents in such manner as they think fit. Of course, if it is found at the end of the apportionment has not been carried out correctly, it can be remedied. But, in the meantime, there is unlikely to be any satisfactory way of monitoring this apportionment. Thirdly, if an injunction is granted, Edward will have to give a cross-undertaking in damages to Incasep, and no doubts have been raised as to his financial position. Accordingly, Incasep will be protected against (say) any loss of interest as a result of not being able to pursue the Chancery action (if not settled) until after the s.459 proceedings have been disposed of. No one has suggested that findings made in those proceedings (to which Incasep is a party) will not bind the parties in the Chancery action, so that matters have to be relitigated. Fourthly, and importantly, there is a fair possibility that the parties will reach a compromise. Incasep cannot continue with two warring parties like Edward and William. As a practical matter, the Chancery action will have to be settled at the same time. Fifthly, and again importantly, not to grant an injunction would put William and Susan in a strong position to defend the s.459 proceedings. It would save them raising the costs, which Incasep otherwise funds, by means of a commercial loan which it may indeed be difficult for them to raise. Putting aside possible objections under s.151 of the Companies Act 1985 (to which I return briefly below), there is no corporate benefit suggested to flow from helping William and

> Susan in this way, and there have to be compelling reasons for the court to exercise its discretion in such a way as to confer an advantage (that is, something the party would not otherwise have) on one side or the other in a shareholders' dispute."

33. In my judgement, the single most important distinction between this case and *Jones v Jones*, is the financial position and state of TGL. As I have already described, it has no continuing business, but is in the process of being wound down for the sole purpose of distributing the remaining cash to its shareholders. It is, as Mr Todd put it, essentially, a cash shell, holding well over £24 million in liquid assets and substantial further assets. On any view, one-half of its net assets will, in due course, be returned to Mr and Mrs Matyas. For the moment, however, the cash is trapped in the corporate structure. As a result, in large part, of the fact that Mr Wojakovski's extractions have not been fully accounted for, TGL is not in a position to produce accounts and accounts are an essential pre-requisite to any dividend being declared and paid.

34. As I have already explained, I am satisfied on the evidence that there is more than sufficient headroom in the available cash within TGL to ensure that any costs paid between now and the trial will fall comfortably on Mr and Mrs Matyas's ultimate share of the assets, on any eventual distribution. Importantly, any arguments that Mr Wojakovski has, on the assumption that he succeeds in these proceedings, that none of the company's costs should be apportioned against his share of the assets, are preserved. If I were to refuse the injunction, that would be wholly without prejudice to such arguments as he may have in that respect at the end of the trial. Thus if it turns out that it was wrong not to grant an injunction, the prejudice suffered by Mr Wojakovski can be remedied by something akin to damages, that is by adjustment after trial as to which assets of TGL should be burdened with its and with his costs. In other words, damages, or an appropriate equivalent remedy, are a sufficient remedy in the circumstances of this case.

35. Mr Kitchener points to the fact that TGL may itself be subject to further claims by HMRC and investors, arising out of the extractions. Such claims would have to be in an enormous amount to leave insufficient assets within Mr Matyas's share, to fund the company's pursuit of these claims. Even if they were, then the fact is that it is in the company's interests, taking into account the interests of all its stakeholders including its creditors, that the claim against Mr Wojakovski is pursued. Of course, if there is a risk that creditors' claims may not be met, then it may be that the company ought to be considering

pursuing Mr Matyas as well, in relation to the extractions he admits to have taken. At the moment however, neither side is contending that there is such a risk.

36. Finally, Mr Kitchener also contends that there is a form of damage which Mr Wojakovski will suffer, if an injunction is not granted, which cannot be adequately compensated by damages. That is, that Mr Matyas will be afforded an unfair advantage by having access to the company's resources to fund the litigation. This appears to be the argument which found favour with the Court of Appeal in *Jones v Jones*. Translated to the facts of this case, however, I think the point loses much of its force. That is because, on the basis that TGL is, in substance, a cash shell in wind-down, with substantial liquid assets to which Mr and Mrs Matyas would be entitled on a distribution, an injunction here would in effect be to deprive Mr and Mrs Matyas of access to what will ultimately be their own share of the assets.

37. As against this, Mr Wojakovski admits that he has extracted many millions of pounds from the company. While Mr Kitchener has made clear on instructions that his solicitors are not accepting payment from the extracted funds, to a large extent those funds were extracted many years ago, such that it is likely now to be difficult to distinguish, in relation to Mr Wojakovski's general wealth, which part derives from the extracted funds and which does not. There is no, and has never been any, formal restriction on Mr Wojakovski against using the extracted funds or their proceeds for his own purposes. Accordingly, there is force in Mr Todd's point that, even if his solicitors are not being paid from the extracted funds, the fact that he has and has had use of them for some years enables him to use other assets to pay ongoing legal expenses.

38. For those reasons, I decline to order the wider form of injunction sought by Mr Wojakovski. There are, however, certain additional safeguards which have been offered, and I think ought to be imposed. Mr Todd offered undertakings on behalf of Mr and Mrs Matyas, and I believe, each of the companies that: first, Mr and Mrs Matyas would not dispose of or encumber their shares in TGL, pending trial; and second, they and the companies would ensure that no dispositions are made out of the assets of TGL or its subsidiaries, otherwise than in the ordinary course of business, pending trial.

39. Second, I do consider it would be appropriate to impose some limited restriction on the quantum of funds of TGL which may be used to fund its claims. This arises more properly, however, in the context of the narrower form of injunction sought, to which I now turn.

40. The narrower form of injunction would prohibit TGL from using its assets to fund the shareholders' own legal expenses. The principal objection to it is that the company and, more importantly, its solicitors, have stated in clear terms that they have not and will not use the company's assets to pay any part of the personal costs of Mr and Mrs Matyas. Mr Wojakovski says that the refusal by TGL to give an undertaking to the court that it will not do so constitutes, in itself, sufficient evidence of risk to justify an injunction. I disagree. An injunction can only be granted if there is: "Concrete, strong and tangible risk that an injunction is required in order to do justice in all the circumstances", see *Merck Sharp Dohme Corporation and Teva Pharma*, [2013] EWHC 1958, at [56]-[57]. A party is only entitled to demand undertakings in lieu of an injunction in the same circumstances.

41. Mr Kitchener also points to correspondence which he says demonstrates, at the very least, confusion on the part of TGL's solicitors, as to how the costs are properly apportioned. An inherent problem here, is that there is always room for reasonable disagreement as to how costs should be apportioned, between four sets of proceedings (the main claim, the part 20 claim, the petition and the shares claim, in which the Matyas's claim recovery of the shares that were gifted to Mr Wojakovski many years ago). That room for reasonable disagreement is enhanced where there are certain central issues, common to two or more of the claims. If I do not grant an injunction, then there is a risk that Rosling King's approach might turn out to be wrong, such that a part of the personal costs are paid by the companies. Equally, it is possible that a part of the company's costs would be paid by the shareholders. Mr Kitchener contends that Rosling King are in a hopeless position of conflict, because they can only determine how to apportion costs in discussion and agreement with Mr Matyas. I do not think that is right. The question as to which of the actions their work should be apportioned is an objective question on which they are bound to exercise their own professional judgement and not merely follow what Mr Matyas tells them.

42. But if I grant an injunction, the risk of errors in apportionment remains. It is just that there is a vastly increased sanction, including threat of imprisonment, for those who get the apportionment wrong. Mr Wojakovski has demonstrated, by issuing an application to commit Mr Matyas to prison, that he is fully capable of taking such steps. In my judgement, assuming that the risk of mistakes in apportionment is enough to constitute a serious issue to be tried, the injunction sought is not justified on the facts of this case for reasons similar to those I have given in relation to the wider form of injunction. That is, even if Rosling King get it wrong, there is sufficient headroom in Mr Matyas's share of the assets of the group on

any distribution to allow for adjustment at or after trial, so that no part of Mr Wojakovski's share is ultimately burdened with those costs.

43. Even if that is wrong as a complete answer, then as a matter of discretion, I would refuse the injunction in the circumstances where (1) it does not solve the problems of apportionment; (2) the apportionment has been undertaken by solicitors; (3) it is inherently inappropriate for the task of apportionment to be undertaken against the backdrop that a mistake could lead to accusations of contempt and risk of imprisonment; and (4) the financial consequences of any error can be dealt with through an adjustment at the end of the trial. Nevertheless, I think that, in addition to the undertakings already offered by the claimants, to which I have referred, there is a third level of protection which is warranted (returning to the point I left over, when dealing with the wide form of injunction).

44. The evidence educed by the claimants is that TGL's estimated costs of the main action, being the only aspect where it is entitled to use its assets to pay costs, is £4.5 million. That is, I am told by Mr Todd, however, on the assumption that none of the other proceedings continue. It is therefore before any consideration has been given to the extent to which those costs should be apportioned, as between the main action and any other of the actions.

45. A further layer of protection I intend to order is that TGL's ability to use its assets to fund the main action is limited to a specific amount. This is a bright line restriction, which it is easy to comply with and incorporates none of the risks of uncertainty of apportionment which the injunction sought would produce. Without some limitation on the amount which TGL can spend there is at least a theoretical risk that such amounts could exceed the Matyas's ultimate share in the company's assets, however unlikely that may be. Such a limitation precludes that possibility and also reinforces the conclusion as to the adequacy of damages, or an alternative remedy, in the event that I am wrong in not granting the injunction in the first place. I recognise this possibility was not raised or canvassed with counsel during the hearing, and I will hear them further on the amount of the limit, but I propose, in the first instance, it be fixed to the sum of £3 million on the basis that, if the costs of the main action are anticipated to be £4.5 million, then the conclusion that one-third of those costs are properly apportioned to one or other of the other three actions is likely to be in the right ballpark. It will, in any event, be without prejudice to TGL, returning to the court in the future for permission to raise the limit, at which point the court will be better placed to consider the actual apportionment which has taken place to that date. I have no doubt a

formal order could be arrived at to encapsulate this point, although by far the simplest approach would be if TGL were prepared to give an undertaking to that effect.

46. In conclusion therefore, the result on each of the various applications is as follows: (1) I give permission to Mr Matyas to continue the actions brought by the yellow companies, as double derivative actions; (2) I give permission to TGL to commence derivative actions on behalf of the red companies; (3) I refuse Mr Matyas' application for an indemnity out of the assets of the yellow companies, in respect of his costs of pursuing their claims as derivative actions; (4) I refuse Mr Wojakovski's application for an injunction restraining TGL from using its own assets to fund its own costs; and (5) I refuse Mr Wojakovski's application for an injunction restraining TGL from using its own assets to fund the personal costs of Mr and Mrs Matyas, save only that I will order a limit on TGL's ability to use its assets to fund the main action, that limit being, subject to further discussion with counsel, £3 million in the first instance.

(Proceedings continued – please see separate transcript)

We hereby certify that the above is an accurate and complete record of the proceedings or part thereof.