

Dispute Resolution
Dispute Resolution Case Law Update
Rosling King LLP



Background

In this complex dispute, between Mr. Arthur and Mrs. Renate Matyas as shareholders in a number of the Tonstate Group of companies (collectively “**the Claimants**”) and the Group’s former chief-executive Mr. Wojakovski (“**the Defendant**”), who allegedly unlawfully extracted £14.5m from the Claimants, the High Court considered an application by Mr. Matyas and Tonstate Group Limited (“**TGL**”) to pursue proceedings as derivative actions..

Double Derivative under Common Law

Before the High Court, Mr. Matyas sought permission to continue claims brought by three companies in the Tonstate Hotels Group, namely TH Holdings Limited, Summerhill Cardiff Limited and Tonstate Metropole Hotels Limited (the “**Yellow Companies**”) as a double derivative action on his own behalf under common law. These claims had been properly commenced in the Yellow Companies due to the presence of a third director on the board, however they had since resigned, and the Yellow Companies had been deadlocked regarding the pursuit of the action which prevented any instructions as to the continuation of the claims being provided.

The need to pursue the claims derivatively arose in this case to enable the Yellow Companies access to justice, where the Defendant wrongdoer was jointly in control of the Yellow Companies with Mr. Matyas. The requisite conditions to pursue a double derivative action under common law were satisfied in that the Yellow Companies were entitled to relief and subject to wrongdoer control. Mr. Matyas therefore sought to pursue the claim on behalf of the Yellow Companies as they were in a situation of deadlock which prevented them from pursuing their own action.

In these circumstances and without any objection from the Defendant to the continuation aspect of the application, the Judge was satisfied that it was appropriate to allow Mr. Matyas to personally continue these claims as a double derivative action.

Derivative Action under the Companies Act 2006

TGL also brought an application seeking permission to bring claims by five subsidiary companies of Tonstate Group Limited (“**TGL**”) as a derivative action (the “**Red Companies**”) under the Companies Act 2006. In a similar position to the Yellow Companies, each of the Red Companies was deadlocked at shareholder level as the Defendant, albeit a minority shareholder, held sufficient voting rights of the companies to prevent any decisions in relation to the litigation being reached.

Whilst the Defendant did not oppose to a derivative action in principle, it was argued that Mr. Matyas should personally continue these claims pursuant to a double derivative action, as had been sought and obtained on behalf of the Yellow Companies. Indeed, the Defendant’s rationale behind this argument was the preservation of TGL’s assets, which could only be achieved by way of an injunction should a statutory derivative action be permitted by the Court. However, if Mr. Matyas were to appear as the derivative claimant, by way of double derivative action, TGL’s assets could only be used if an indemnity was successfully obtained from the Court, which would effectively increase the Defendant’s chances of preserving TGL’s assets

throughout the course of the litigation.

The Judge considered the basis for ordering a double derivative action under common law and the limited circumstances in which such an action may be permitted before concluding that the availability of a statutory remedy precluded any basis for a double derivative common law claim. As a member of the Red Companies, and in light of the alleged breaches of duties of the Defendant, director of the Red Companies, TGL was able to pursue these claims without the need for individual shareholder intervention, which differed from the position in respect of the Yellow Companies. Indeed, TGL itself was not deadlocked. Therefore, on this basis, the Claimants were entitled to pursue a derivative action on behalf of TGL under the Companies Act 2006 and, in absence of any injunction filed by the Defendant, TGL was rightfully permitted to use its own funds to cover the action.

A Question of Funding

In addition to the application for permission to pursue the claims brought by the Yellow Companies, the Claimants sought an indemnity out of the assets of the Yellow Companies to cover their own and any adverse costs. However, in light of the limited headroom and available assets, the Judge considered it unfair to burden the Defendant's investment in the Yellow Companies should the Claimants' action fail at trial, and accordingly refused to grant the indemnity.

On the other hand, a distinction was drawn between the financial position of the Red Companies. Indeed, the Judge held that had the claims brought by the Red Companies been pursued as a double derivative action, any application for an indemnity would not have been prejudicial to the Defendant's interest in those companies, as it was common ground that TGL held a substantial amount of cash and more than sufficient headroom in available costs to cover such an indemnity.

Commercial Considerations

This case serves as a reminder of the availability to pursue an action derivatively, by way of statute or common law, in the context of corporate dispute which involves one or more companies in a deadlocked situation which cannot otherwise be remedied. Interestingly, the availability of a statutory derivative action precluded any common law double derivative action, which could only be considered as a last resort and in limited circumstances. In considering whether or not to grant an indemnity for the Claimants' own and adverse costs, the Judge considered both the cause of action pursued and the financial situation of the corporate entity in question. The amount of available cash was a key factor in this analysis as was, interestingly, the Claimant's ability to fund the action without an indemnity, although the latter was held not to be a precondition to any grant of an indemnity.

For further information, please contact [Georgina Squire](#) or the Partner with whom you usually deal.



Dispute Resolution Case Law Update: Tonstate Group Ltd and Ors v Edward
Wojakowski [2019] EWHC 857 (Ch). Breaking the Deadlock: Derivative and double
derivative actions in the context of a deadlocked corporate structure
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