[2022] JMCA Civ 44

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MR JUSTICE BROOKS P
THE HON MISS JUSTICE SIMMONS JA
THE HON MRS JUSTICE V HARRIS JA

SUPREME COURT CIVIL APPEAL NO COA2019CV00029

BETWEEN	**CABLE & WIRELESS JAMAICA LIMITED**	**APPELLANT**
AND	**ERIC JASON ABRAHAMS**	**RESPONDENT**

Mrs Sandra Minott-Phillips QC and Miss Hilary Reid instructed by Peter Goldson of Myers Fletcher & Gordon for the appellant

Conrad George instructed by Andre Sheckleford of Hart Muirhead Fatta for the respondent

7, 8, 9 December 2021 and 20 December 2022

BROOKS P

[1] I have read the draft judgment of my learned sister, V Harris JA. I agree with her reasoning and conclusion and have nothing to add.

SIMMONS JA

[2] I, too, have read the draft judgment of my learned sister and agree with her reasoning and conclusion.

V HARRIS JA

Introduction

[3] Section 206 of the Companies Act, 2004 ('the Act'), which falls under the heading "Arrangements and Reconstructions", provides the mechanism by which a compromise

or arrangement (termed 'scheme of arrangement') may be reached between a company and its members (or any class of them) even though some of the members who are affected by the scheme of arrangement may disagree. A scheme of arrangement is approved and binds the company and all its members when a majority representing 75% in number and value, having been notified of a meeting to consider it, votes, whether in person or by proxy, in favour of the scheme of arrangement.

[4] The appellant, Cable & Wireless Jamaica Limited ('CWJ'), is appealing the decision of Batts J ('the learned judge') given on 15 March 2019 in the Commercial Division of the Supreme Court, whereby he refused to sanction an approved scheme of arrangement advanced by CWJ ('the scheme'). The scheme, which is a members' scheme proposed pursuant to sections 206 and 208 of the Act, was approved by the requisite majority of CWJ's ordinary shareholders at their extraordinary general meeting on 21 November 2018 ('the meeting').

[5] This appeal is primarily concerned with the approach that should be taken when considering the classification of shareholders (or members) of the same class (in this case, the holders of ordinary shares) where the majority shareholders are subsidiaries (or affiliates) of a parent company seeking to "voluntarily" acquire another of its indirect subsidiaries. The critical issue on the appeal is whether the rights and interests of the majority shareholders, in these circumstances, were not closely aligned with those of the minority shareholders, so separate meetings of the same class of members ought to have been convened to consider and approve the scheme. Another important question to be determined is whether it would be unfair, particularly to the minority shareholders, to sanction the scheme before a decision was given by the court below on a pending application to commence a derivative claim initiated by the respondent, Mr Eric Jason Abrahams. These were the reasons that the learned judge advanced for refusing to sanction the scheme. Ultimately, therefore, this court will have to decide whether or not he correctly exercised his discretion. But first, a brief outline of the factual background is necessary to provide the context of the appeal.

Factual background

[6] CWJ, the claimant in the court below, provides telecommunications services in this jurisdiction and is an indirect subsidiary of Cable & Wireless Communications Limited ('C&WC'). C&WC is a wholly-owned indirect subsidiary of Liberty Latin America Limited ('Liberty'). The parent company, Liberty, is a telecommunications company which operates in Latin America and the Caribbean. CWC Cala Holding Limited ('CWC Cala') and Kelfenora Limited ('Kelfenora') are also subsidiaries of Liberty and substantial shareholders in CWJ.

[7] As at 30 June 2018, CWC Cala and its affiliate, Kelfenora, held and still hold 92.27% (of which CWC Cala has 87.40% and Kelfenora holds 4.87%) of the existing ordinary shares issued and fully paid up in CWJ. Mr Abrahams, an investment banker and a minority shareholder in CWJ, holds 0.24% of the existing shares. Together with Casa Corporation Limited (which holds 0.14% in trust for him), Mr Abrahams holds 0.38% of the existing shares in CWJ. Mr Abrahams and Casa Corporation Limited are two of the ten largest shareholders in CWJ. However, they still hold less than 25% of the total existing ordinary shares that would be required to prevent the approval of the scheme.

[8] The dispute which led to this appeal originated on 7 September 2018, with the filing of a fixed date claim form by CWJ in the court below. CWJ sought orders for, among other things, permission to convene a meeting on 21 November 2018 of the holders of its ordinary shares to consider and approve the scheme, with or without modification, for its reconstruction.

[9] Once approved and sanctioned, the scheme would essentially enable Liberty, through its subsidiaries CWC Cala and Kelfenora, to compulsorily acquire the remaining shares in CWJ by way of a "voluntary takeover offer" from CWC Cala. The remaining shares (those not held by CWC Cala and Kelfenora, which represent 7.73% of the existing shares) would be cancelled and reissued to CWC Cala. The members eligible under the scheme would receive $1.45 per cancelled share. CWJ would then effectively become a wholly-owned subsidiary of Liberty.

[10] In objection to the scheme, Mr Abrahams pursued an application for leave to bring a derivative action in the state of Florida, in the United States of America (where C&WC has its operational headquarters). That derivative action would be on behalf of CWJ and against Liberty, as well as directors and shadow directors of CWJ, for breach of fiduciary duties and losses. It is perhaps helpful to mention here that on 17 July 2020, Laing J granted Mr Abrahams leave to file a derivative claim in Jamaica (see **Jason Abrahams v Cable & Wireless Jamaica Limited** [2020] JMCC Comm 18).

[11] On 1 October 2018, there was an *ex parte* hearing before the learned judge in which he granted permission for CWJ to convene the meeting on 21 November 2018 at 3:00 pm with one class of its ordinary shareholders for the purpose of considering and approving the scheme ('*ex parte* order'). Approximately one month later, on 8 November 2018, Mr Abrahams filed and served a notice of appearance in CWJ's claim.

[12] Subsequently, on 15 November 2018, Mr Abrahams filed a notice of application for court orders to set aside the learned judge's *ex parte* order on the premise that (1) the court lacked jurisdiction since the proposed scheme did not raise any section 206 issues because no creditor was involved in the process; (2) the proposed scheme sought to undermine a pending application for leave to bring a derivative action; and (3) the proposed scheme also sought to subvert the operation of section 209 of the Act since it would allow approval of the scheme without the requisite vote of the majority of the shareholders and would adversely impact the rights of the minority. Further to that application, an *inter partes* hearing was held on 19 November 2018.

[13] The learned judge, at the *inter partes* hearing, in agreement with counsel representing CWJ, took the view that the issues raised by Mr Abrahams concerning the derivative action and the oppression of minority rights were non-jurisdictional matters that raised fairness issues that should first be discussed at the meeting called to approve the scheme and could also be "urged" at the hearing to sanction the scheme ('the sanction hearing'). He then addressed what he found to be the jurisdictional point and dismissed Mr Abraham's application to set aside the *ex parte* order ('*inter partes* order').

[14] On account of that *inter partes* order, CWJ proceeded to convene a single meeting of its ordinary shareholders on 21 November 2018, at which the majority of shareholders (members holding 15,328,273,433 issued and fully paid up ordinary shares and representing 75.58% of the shareholders) voted in favour of the scheme. Accordingly, having acquired the approval of the requisite statutory majority of the members with ordinary shares, CWJ applied to the court below to have the scheme sanctioned. However, Mr Abrahams, along with other minority shareholders, opposed the sanctioning of the scheme.

[15] At the sanction hearing, which took place in January and March 2019, the learned judge refused to sanction the scheme on two bases. Firstly, the class meeting was not properly constituted as separate meetings of the ordinary shareholders should have been convened. This was because the majority shareholders (CWC Cala and Kelfenora), being both "intended" purchasers (or affiliates of them) and vendors, could not reasonably be expected to vote in the best interest of the company or the minority shareholders who were vendors only. Secondly, it would be unfair to sanction the scheme before a decision was made concerning the proposed derivative action because all the shareholders, in considering the scheme, should have the opportunity to deliberate about the efficacy of those proceedings if leave were granted to bring the claim. As a result, the learned judge made the following orders:

> "1. The application to approve the Scheme of Arrangement, voted on by shareholders at a meeting held on the 21st day of November 2018, is refused.
>
> 2. The Claimant is permitted, if so advised, to reconvene meetings for consideration of the Scheme of Arrangement at a time and in a manner consistent with this judgment.
>
> 3. Costs to [Mr Abrahams] to be taxed, if not agreed. Leave granted, if necessary, to commence taxation.
>
> 4. [CWJ] is granted leave to appeal if necessary."

[16] CWJ is appealing orders 1 and 3. We note that no submissions were advanced before us on the issue of costs. However, it is understood that if CWJ is successful on the appeal, they will be seeking to have their costs both here and in the court below.

The preliminary application

[17] A counter notice of appeal was filed on behalf of Mr Abrahams on 12 April 2019 against the learned judge's second order. CWJ objected to that counter notice of appeal by way of notice of application for court orders filed on 17 April 2019, arguing, among other things, that Mr Abrahams did not seek nor was he granted leave to pursue such an appeal and further that the stipulated time for the application for permission to appeal had expired. Subsequently, following a case management conference on 20 April 2021, the counter notice of appeal and corresponding application were withdrawn, and paras. 26 and 27 of Mr Abrahams' skeleton arguments concerning the counter notice of appeal were struck out.

[18] Before us, CWJ raised a preliminary issue regarding the paragraphs that were struck out. It was submitted that the content of paras. 26 and 27 were reintroduced in Mr Abrahams' written submissions. Upon hearing the submissions of counsel, we ordered (1) that the application to debar the respondent from being heard on the appeal or alternatively to strike out paras. 46 to 57, 71 and 73 of the respondent's written submissions is refused; and (2) costs to the respondent on the application to be agreed or taxed.

[19] Paras. 46 to 57, 71 and 73 of Mr Abraham's written submissions concerned the reduction of CWJ's share capital. Those submissions advanced the position that this court, if it allowed CWJ's appeal, should not, in any event, sanction the scheme on the basis that CWJ was attempting to reduce its share capital without complying with section 71 of the Act, which is contrary to law. However, in the light of the reasons for the disposition of the appeal, the resolution of this issue was unnecessary. The substantive appeal will now be addressed.

The appeal

[20] The notice and grounds of appeal filed on behalf of CWJ on 28 March 2019 contained the following seven grounds of appeal:

> "1. The learned Judge below erred in failing to regard the question whether separate classes were appropriate as having been:
>
> a. raised on the Respondent's application filed on November 15, 2018 that sought to set aside his order of 1 October, 2018 authorizing the convening of the EGM of the holders of the ordinary shares of CWJ; and
>
> b. considered and determined by him at the *inter partes* hearing that took place before him on 19 November, 2018.
>
> Accordingly, the learned Judge erred in considering that he was subsequently at liberty to reverse himself on that jurisdictional issue.
>
> 2. The learned Judge below erred in treating "class" as meaning common interest.
>
> 3. The learned judge erred in failing to appreciate that the interest of the Liberty Group in acquiring the Scheme Shares was a private interest not deriving from any legal right against CWJ which did not entitle the Respondent to demand a separate meeting of himself and others in a similar position (i.e. having a different private interest).
>
> 4. The learned Judge below erred in holding that the class meeting was not properly constituted and in failing to conclude that:
>
> a. The objective of CWJ in putting forward the Scheme of Arrangement was to enter into a single composite arrangement with all its members affected by the scheme.
>
> b. There was no dissimilarity of legal rights among the holders of the ordinary shares in CWJ; and
>
> c. The holders of the ordinary shares in CWJ were persons whose rights in and to the ordinary shares in CWJ were the same. These persons with the same rights against CWJ could, therefore, consult together in a single meeting to consider whether CWJ should become a wholly-owned subsidiary of the Liberty Group. They would all share a common interest in ensuring that the

compensation of $1.45 per share to be paid to exiting [sic] shareholders was equivalent to the value of the shares being issued to CWC Cala.

5. The learned Judge below erred in regarding the effect of the Scheme of Arrangement as making the companies within the Liberty group indistinguishable for all practical purposes.

6. The learned Judge below erred in failing to appreciate at all, or sufficiently, that the unfairness complained of by the objector must arise from the scheme of arrangement. Specifically in that regard he failed to appreciate the significance of the fact that majority control by CWC Cala and Kelfenora of CWJ (to the extent of 92.27% ownership of its shares) predated the presentation by CWJ of the scheme of arrangement for approval.

7. The learned Judge below failed to sufficiently appreciate that the entity that is the object of a derivative claim has little, if any, control of the prosecution of the derivative action.

8. The learned Judge below erred in appearing, on occasion, to conflate a claim to a remedy for oppression pursuant to the Companies Act (not sought by the Respondent) with a derivative action brought on behalf of the company under the Companies Act (permission for which was being sought by the Respondent in a separate process)."

[21] In the event that we find favour with the grounds propounded by CWJ, they are seeking orders for the appeal to be allowed, for the learned judge's order at the sanction hearing to be set aside and for this court to sanction the scheme.

Discussion

[22] In addressing the concerns raised by CWJ, we will adopt their approach of consolidating the grounds of appeal into the following three issues:

"a. Was the learned Judge below, on the occasion of the sanctions [sic] hearing, at liberty, on his stated bases, to reverse his prior order dismissing [Mr Abrahams'] application to set aside his order permitting [CWJ] to convene a single meeting of its ordinary shareholders? ['Reversal of the *ex parte* order']

> b. If so, was he correct in deciding that [CWJ's] ordinary shareholders should have been divided into two separate classes for the purpose of considering and, if thought fit, approving [the scheme]? ['Separate classes and meetings']
>
> c. If not, did the learned Judge below correctly conclude that an assessment of the fairness of [the scheme] must await the determination of the separate proceedings initiated by the Respondent for permission to bring a derivative action for the benefit of the Appellant? ['Fairness of the scheme']"

The relevant law

[23] The court was referred to several authorities by learned counsel for the parties. These will be set out below for ease of reference and convenience. We wish to express our gratitude for their industry and assistance, given that so far, despite extensive research, no authorities emanating from this court have been located that address the issues raised on this appeal.

[24] Section 206 of the Act, as stated before, makes provision for compromises or arrangements with creditors or members of a company. It provides:

> "206.- (1) Where a compromise or arrangement is proposed between a company and its creditors or any class of them, or with creditors between the company and its members or any class of them, the Court may, on the application in a summary way of the company or of any creditor or member of the company, or, in the case of a company being wound up, of the liquidator, order a meeting of the creditors or class of creditors, or of the members of the company or class of members, as the case may be, to be summoned in such manner as the Court directs.
>
> (2) If a majority in number representing three-fourths in value of the creditors or class of creditors, or members or class of members, as the case may be, present and voting either in person or by proxy at the meeting agree to any compromise or arrangement, the compromise or arrangement shall, if sanctioned by the Court, be binding on all the creditors or the class of creditors, or on the members or class of members, as the case may be, and also on the company or, in the case of a company in the course of being wound up, on the liquidator and contributories of the company.

> (3) An order made under subsection (2) shall have no effect until a copy of the order has been delivered to the Registrar for registration, and a copy of every such order shall be annexed to every copy of the articles of the company issued after the order has been made.
>
> (4) If a company makes default in complying with subsection (3) the company and every officer of the company who is in default shall be liable to a fine not exceeding one thousand dollars for each copy in respect of which default is made.
>
> (5) In this section and in section 207-
>
> 'arrangement' includes a reorganization of the share capital of the company by the consolidation of shares of different classes or by the division of shares of different classes or by both those methods;
>
> 'company' means any company liable to be wound up under this Act."

[25] Section 207 of the Act mandates the information that is required to be disclosed to creditors or members when a meeting is summoned under section 206.

[26] Section 208 of the Act makes several provisions that facilitate the reconstruction and amalgamation of companies under a scheme of arrangement that the court has sanctioned (for example, the transfer of the whole or any part of the undertaking or property and liabilities of one company (the transferor company) to another (the transferee company), the allotment or appropriation of shares, debentures, policies and like interests by the transferee company, as well as any "incidental, consequential and supplemental matters" that are necessary to secure the effective reconstruction and amalgamation of the companies, among other things).

[27] It is clear from the provisions of section 206 of the Act that there are three procedural requirements to be met for the scheme to be binding on the company and all its members or creditors (or any class of members or creditors with whom the scheme is made). In **Re Hawk Insurance Co Ltd** [2001] 2 BCLC 480 ('**Re Hawk**'), Chadwick LJ

at pages 510 to 511 (applying **Re BTR plc** [2000] 1 BCLC 740) stated, in reference to a provision similar to section 206 of the Act, the applicable procedure as follows:

> "[11] … First, there must be an application to the court under s 425(1) of the 1985 [Companies] Act [UK] for an order that a meeting or meetings be summoned. It is at that stage that a decision needs to be taken as to whether or not to summon more than one meeting; and, if so, who should be summoned to which meeting. Second, the scheme proposals are put to the meeting or meetings held in accordance with the order that has been made; and are approved (or not) by the requisite majority in number and value (section 206(2) stipulates that this is required to be three-fourths in number and value) of those present and voting in person or by proxy. Third, if approved at the meeting or meetings, there must be a further application to the court under s 425(2) of the 1985 Act (section 206(2) of the Act) to obtain the court's sanction to the compromise or arrangement."

[28] Chadwick LJ further elaborated on the purpose of each procedural requirement and what the court's concerns are at each stage:

> "[12] It can be seen that each of those stages serves a distinct purpose. At the first stage the court directs how the meeting or meetings are to be summoned. It is concerned, at that stage, to ensure that those who are to be affected by the compromise or arrangement proposed have a proper opportunity of being present (in person or by proxy) at the meeting or meetings at which the proposals are to be considered and voted upon. The second stage ensures that the proposals are acceptable to at least a majority in number, representing three-fourths in value, of those who take the opportunity of being present (in person or by proxy) at the meeting or meetings. At the third stage the court is concerned (i) to ensure that the meeting or meetings have been summoned and held in accordance with its previous order, (ii) to ensure that the proposals have been approved by the requisite majority of those present at the meeting or meetings and (iii) to ensure that the views and interests of those who have not approved the proposals at the meeting or meetings (either because they were not present or, being present, did not vote in favour of the proposals) receive impartial consideration. As it was put in the *BTR* case ([2000] 1 BCLC 740 at 747):

> '… the court is not bound by the decision of the meeting. A favourable resolution at the meeting represents a threshold which must be surmounted before the sanction of the court can be sought. But if the court is satisfied that the meeting is unrepresentative, or that those voting at the meeting have done so with a special interest to promote which differs from the interest of the ordinary independent and objective shareholder, then the vote in favour of the resolution is not to be given effect by the sanction of the court.'"

[29] In essence, this extract confirms that the court is not a "rubber stamp" at the stage where its sanction is sought. His Lordship went on to indicate that it is at the first stage the decision to summon separate class meetings and who should be summoned to which meeting is to be made. Naturally, this decision depends on with whom the proposed compromise or arrangement will be made (see para. [13] of **Re Hawk**). While stating that the basis upon which this decision is to be taken ought to be "self-evident", Chadwick LJ acknowledged that there are cases where at "first sight", a single meeting may be required to approve the compromise or arrangement, but on "a true analysis" more than one meeting is needed to do so for a variety of reasons (see para. [16] of **Re Hawk**).

[30] The authorities are clear that the responsibility for determining what creditors or members are "to be summoned to any meeting, as constituting a class, is the applicant's, and if the meetings are incorrectly convened or constituted, or an objection is taken to the presence of any particular creditors (or members) as having interests competing with the others; the objection must be taken at [the sanction hearing], and the applicant must take the risk of having it dismissed" (see the Practice Note issued by Eve J found at [1934] WN 142 and **UDL Argos Engineering & Heavy Industries Co Ltd & Others v Li Oi Lin & Others** [2001] 3 HKLRD 634 ('**UDL Argos**') at page 647D–E). Therefore, the applicant has a duty to provide the court with all the relevant information so that the requisite directions can be given concerning the number and constitution of the meetings to sanction a scheme of arrangement.

[31] As observed by Barker J in the New Zealand case of **Re Stewart & Sullivan Farms Ltd** [1981] 1 NZLR 712 at 719:

> "When … an application for convening meetings of creditors [or members] is before it, the Court must be given full information to enable a decision to be made; the cases indicate that the Court will err on the side of calling separate meetings and will err on giving a liberal meaning to the word "class" of creditor or shareholder."

[32] What, then, is a possible consequence of an applicant's failure to provide the court at the first stage with the requisite or "full" information? Chadwick LJ answers this question at para. [17] in **Re Hawk**, which is quoted in part below:

> "[17] If the correct decision is not made at the first stage, the court may find, at the third stage, that it is without jurisdiction. The reason is that the court's jurisdiction under s 425(2) of the 1985 Act [equivalent to section 206(2) of the Act] is limited to sanctioning a compromise or arrangement between the company and its creditors [or members] or any class of creditors [or members] (as the case may be) which has been approved by the requisite majority at a meeting of the creditors [or members] or that class of creditors [or members] (as the case may be). So, if what has been put forward at the first stage as a single compromise between the company and all its members, or all of a single class of members, is seen by the court, at the third stage, to be (on a true analysis) a number of linked compromises or arrangements with creditors [or members] whose rights put them in several and distinct classes, the court will find that the condition which gives rise to its power to sanction is absent; none of the linked compromises or arrangements will have been approved by the requisite majority at a relevant meeting because there will have been no meetings of the distinct classes. …"

[33] This principle is based on the fact that although the court made an order for the applicant to convene a meeting or meetings, this does not mean that it had fully addressed its mind as to whether, in fact, those were the meetings which the proposed scheme required before sanction can be given. Accordingly, that decision is left for the third stage, which in our jurisdiction is the sanction hearing. Therefore, the court is bound to consider challenges to its jurisdiction raised by an objector(s) at the sanction hearing (as was done in the present case).

[34] An important consideration in making the determination to convene more than one meeting is whether the members of the same class (for example, the ordinary

shareholders) who, although having the same legal rights against the company in respect of the shares they hold, and under the proposed scheme of arrangement, may nonetheless be motivated by different considerations making it impossible for them to consult together with a view to their common interest in deciding to sanction the scheme. In such circumstances, it will be necessary for there to be separate meetings of the same class of members. According to Chadwick LJ in **Re Hawk**, this situation would be representative of "(on a true analysis) a number of linked compromises or arrangements with creditors [or members] whose rights put them in several and distinct classes", which would render a single meeting improperly constituted.

[35] One of the first cases to consider this issue was **Sovereign Life Assurance Company v Dodd** [1892] 2 QB 573 ('**Dodd**'). The facts of that case were that Sovereign Life Assurance Co (referred to as 'Sovereign') owed Mr Dodd £2000.00 on policies that had matured. Mr Dodd had borrowed £1200.00 from Sovereign before the policies had matured. Under an arrangement approved in accordance with legislation broadly similar to section 206 of the Act, his entitlement to the £2000.00 from Sovereign was replaced with an entitlement to receive £535.00 from another insurance company. When Sovereign sued him for the loan, Mr Dodd successfully claimed a set-off of the money payable to him under the matured policies. On appeal, one of the issues was whether he was bound by the arrangement. It was held that policyholders whose claims had matured must be divided into a separate class from policyholders whose claims had not matured because "the creditors composing the different classes have different interests; and, therefore, **if we find a different state of facts existing among different creditors which may differently affect their minds and their judgment, they must be divided into different classes**" (emphasis added). The court viewed Mr Dodd's cause of action, which had accrued against Sovereign, as distinguishing his position from policyholders whose policies had not yet matured. Consequently, he was not bound by the arrangement since, in the strictest sense, he was not a policyholder but a creditor with a "vested cause of action" while the other policyholders had none.

[36] Bowen LJ, writing for the court in **Dodd**, stated at page 583 of the judgment:

> "The word 'class' is vague, and to find out what is meant by it we must look at the scope of the section, which is a section enabling the Court to order a meeting of a class of creditors to be called. It seems plain that we must give such a meaning to the term 'class' as will prevent the section being so worked as to result in confiscation and injustice, and that it must be confined to those persons whose rights are not so dissimilar as to make it impossible for them to consult together with a view to their common interest. …"

[37] The following observations were noted by William Young, Glazebrook and O'Regan JJ in **Trends Publishing International Limited v Advicewise People Limited and others** [2018] NZSC 62 at para. [44] of the judgment:

> "[44] It will be noted that Lord Esher [in **Dodd**] referred to the 'interests' of the policyholders whereas Bowen LJ referred to their 'rights'. As we will see, this has prompted some debate – albeit primarily in other jurisdictions – whether classes of creditors [or members] should be defined by reference to their interests or their rights. This debate has arisen most commonly in respect of two particular situations. In the first, the issue has been whether those who are closely associated with the control of the company (insiders) should be permitted to vote with those whose legal rights (whether as creditors or members) are the same but who are not closely connected to the company. In the other, the issue has been whether those who have two different relationships with the company should be separately classed, for instance whether shareholders who are also debenture holders should be classed separately from those who are only shareholders or debenture holders."

[38] The issue of whether creditors or members of a company are to be classed separately according to their "rights" or "interests" when seeking to approve a scheme of arrangement also emerged in the case of **Re Hellenic & General Trust Ltd** [1975] 3 All ER 382 ('**Re Hellenic**'). In that case, a company that carried on business as an investment trust was to be reconstructed by way of a scheme of arrangement. Under the proposed scheme, the company's ordinary shares were to be cancelled, and new ordinary shares were to be issued to Hambros Limited. A little over 53% of the shares in the company were owned by Merchandise & Investment Trust Limited (MIT), a subsidiary of Hambros Limited. Only one meeting of shareholders was convened. At that meeting, the scheme was approved. MIT's votes were integral in securing the approval of the scheme,

and had it not voted, the requisite majority would not have been achieved. When the scheme returned to the court to be sanctioned, the dissenting shareholders contended that there should have been two meetings, one for MIT and one for the other shareholders. It was held that since MIT was a wholly owned subsidiary of Hambros Limited, it should have been treated as having a community of interest with the purchasers and was to be regarded as being "in the purchasers' camp" rather than in the vendors. That interest, the court determined, was different from the other ordinary shareholders, and as such, they would have different approaches to the consideration of the scheme of arrangement. On this basis, the court found that MIT was in a different class from the other shareholders. Consequently, the court also found that the meeting was not properly constituted, and it had no jurisdiction to sanction the scheme of arrangement.

[39] Templeman J stated the following at pages 385f-h and 386a-c of the judgment:

> "… Vendors consulting together with a view to their common interest in an offer made by a purchaser would look askance at the presence among them of a wholly owned subsidiary of the purchaser.
>
> In the present case on analysis Hambros are acquiring the outside shares for 48p. So far as the MIT shares are concerned it does not matter very much to Hambros whether they are acquired or not. If the shares are acquired a sum of money moves from parent to wholly owned subsidiary and shares move from the subsidiary to the parent. The overall financial position of the parent and the subsidiary remains the same. The shares and the money could remain or be moved to suit Hambros before or after the arrangement. From the point of MIT, provided MIT is solvent, the directors of MIT do not have to question whether the price is exactly right. Before and after the arrangement the directors of the parent company and the subsidiary could have been made the same persons with the same outlook and the same judgment. … **Hambros are purchasers making an offer. When the vendors meet to discuss and vote whether or not to accept the offer, it is incongruous that the loudest voice in theory and the most significant vote in practice should come from the wholly owned subsidiary of the purchaser. No one can be both a vendor and a purchaser and, in my judgment for the purpose**

of the class meetings in the present case, MIT were in the camp of the purchaser. …" (Emphasis added)

[40] Similarly, in **UDL Argos**, the "rights-based" and "interests-based" approaches were highlighted, as well as explained. That case was concerned with "identical and interlinking" schemes of arrangement, which creditors had approved in respect of 25 companies. There was only one meeting of creditors held for each company. At the sanction hearing, an objection to the approval of the schemes was made by former employees of seven of the companies on the basis that the class of creditors had been improperly constituted. It was advanced that there should have been separate class meetings of creditors owed preferential debts associated with employment (for example, unpaid wages); and creditors who were members of the same group of companies. The schemes were sanctioned at first instance. On appeal to the Hong Kong Court of Appeal, Lord Millett writing for the court distilled the relevant principles from what was described as a "consistent line of authority". It was held, dismissing the appeal (as encapsulated in the headnotes):

> "(1) The rationale for summoning one or more meetings was whether it could be said that the company was entering into a single composite arrangement with all the creditors or members affected by the scheme or whether it was in reality entering into separate but interdependent arrangements with different classes of its creditors or members (*Re Hawk Insurance Co Ltd* [2001] EWCA Civ 241 applied) (See p.641 C–E.)
>
> (2) It was the responsibility of the company putting forward the scheme to decide whether to summon a single meeting or more than one meeting. If the meeting or meetings were improperly constituted, objection should be taken on the application for sanction and the company bore the risk that the application would be dismissed. (See p.647D–E.)
>
> (3) Persons whose rights were so dissimilar that they could not sensibly consult together with a view to their common interest must be given separate meetings. Persons whose rights were sufficiently similar that they could consult together with a view

to their common interest should be given a single meeting. (See p.647E–F.)

(4) The test was based on similarity or dissimilarity of legal rights against the company, not on similarity or dissimilarity of interests not derived from such legal rights. The fact that individuals might hold divergent views based on their private interests not derived from their legal rights against the company was not a ground for calling separate meetings (*Sovereign Life Assurance Co (in liquidation) v Dodd* [1892] 2 QB 573 applied). (See p.647F–G.)

(5) The question was whether the rights which were to be released or varied under the scheme or the new rights which the scheme gave in their place were so different that the scheme must be treated as a compromise or arrangement with more than one class (*Re Hellenic & General Trust Ltd* [1976] 1 WLR 123 explained). (See p.647G–H.)

(6) The court did not have jurisdiction to sanction a scheme which did not have the approval of the requisite majority of creditors voting at meetings properly constituted. (See p.647H–I.)

(7) Even where it had jurisdiction, it was not bound to do so. The court would decline to sanction a scheme unless the result of each meeting fairly reflected the views of the creditors concerned. To this end it might discount or disregard altogether the votes of those who, though entitled to vote at a meeting as a member of the class concerned, had such personal or special interests in supporting the proposals that their views could not be regarded as fairly representative of the class in question (*Re Alabama, New Orleans, Texas and Pacific Junction Railway Co* [1891] 1 Ch 213, *Re English, Scottish & Australian Chartered Bank* [1893] 3 Ch 385 applied). (See pp.671I–648A.)

Application to present case

(8) Here, the class of creditors had been properly constituted. First, the status of preferential creditors was preserved by the schemes and with respect to the ways that they were affected by the scheme, they were in the same position as every other creditor. [The former employees'] special interest in opposing the schemes was that they believed that under the schemes, there was likely to be a delay in obtaining payment of their

> claims. On the other hand, if their respective employers were put into liquidation, they could then expect to receive *ex gratia* payments out of the Protection of Wages on Insolvency Fund and the Board would bear the burden of any delay in payment. This was exactly the kind of private interest which might properly influence a creditor to vote against a scheme but did not entitle him to demand a separate meeting. Secondly, the internal creditors undoubtedly had a special interest in promoting the schemes, but this did not disqualify them from being treated as ordinary creditors. The court was bound to take their presence into account when considering whether to exercise its discretion to sanction the scheme (*Re Jax Marine Pty Ltd* [1967] 1 NSWR 145, *Re Landmark Corp Ltd* [1968 1 NSWR 759 applied). (See pp.648B–649I.)" (Italics as in the original)

[41] Interestingly, Lord Millett, in his analysis of **Re Hellenic**, did not find that case to be inconsistent with his "rights-based" approach. He observed at paras. 22, 23 and 26 of the judgment:

> "22. … [I]t is true that Templeman J consistently referred to the parties' respective 'interests' rather than their 'rights'. But it is important not to be distracted by mere terminology. Judges frequently use imprecise language when precision is not material to the question to be decided, and in many contexts the words 'interests' and 'rights' are interchangeable**. The key to the decision [in Re Hellenic] is that [MIT] was effectively identified with [Hambros]. It would plainly have been inappropriate to include [MIT] in the same class as the other shareholders if it had been buying their shares;** it should not make a difference that the purchaser was its parent company.
>
> 23. **But this was not because [MIT] and the other shareholders had conflicting interests, nor because they had different rights to start with. [MIT]'s legal rights at the outset were the same as those of the other shareholders. What put [MIT] into a different category from the other shareholders was the different treatment it was to receive under the Scheme. The other shareholders were being bought out. In commercial terms [MIT] was transferring its shares to its own parent company and obtaining for its parent company the right to acquire the remainder of the shares from the other shareholders. The rights proposed to**

> **be conferred by the Scheme on [MIT] and the other shareholders were commercially so dissimilar as to make it impossible for [MIT] and the other shareholders to consult together with a view to their common interest** [sic]**, for they had none**.
>
> 24. …
>
> 25. …
>
> 26. Why, it may be asked, should persons with divergent interests be allowed to vote as members of the same class for the purpose of ascertaining whether the Scheme has been approved by the necessary 75% majority, if their votes are only to be discounted or disregarded by the Court when considering whether to sanction it? There seem to be three reasons. The first is the impracticality in many cases of constituting classes based on similarity of interest as distinct from similarity of rights. *Re Alabama, New Orleans, Texas & Pacific Junction Railway Co* [1891] 1 Ch 213 (CA), is an example of this; *Re BTR Plc (leave to appeal)* [2000] 1 BCLC 740 (CA), is another. A second is that the risk of empowering the majority to oppress the minority to which Bowen LJ referred in *Sovereign Life Assurance Co (in liquidation) v Dodd* [1892] 2 QB 573 (CA), is not the only danger. It must be balanced against the opposite risk of enabling a small minority to thwart the wishes of the majority. Fragmenting creditors into different classes gives each class the power to veto the Scheme and would deprive a beneficent procedure of much of its value. The former danger is averted by requiring those whose rights are so dissimilar that they cannot consult together with a view to their common interest to have their own separate meetings; the latter by requiring those whose rights are sufficiently similar that they can properly consult together to do so. The third reason is that this is mandated by the rationale which underlies the calling of separate meetings. A company can be regarded as entering into separate but linked arrangements with groups whose members have different rights or who are to receive different treatment. It cannot sensibly be regarded as entering into a separate arrangement with every person or group of persons with his or their own private motives or extraneous interests to consider." (Italics as in the original) (Emphasis added)

[42] Therefore, it would seem to me that the overarching principle is that the classification of creditors or members to approve a scheme is to be regarded as a mechanism for ensuring that they should be bound only by the votes of other members

of their respective classes where such votes were fairly or reasonably reflective of their rights and interests. In other words, the meeting and subsequent votes should be "a fair test" of their respective rights and interests. As refined by Lord Millett in **UDL Argos**, this entails considering if members of the same class (whether creditors or shareholders) are to receive different treatment under the scheme. If this is so, it will amount to what Chadwick LJ described in **Re Hawk** as "a number of linked compromises or arrangements", which would render one meeting improperly constituted (see para. [34] above).

[43] Finally, although well settled, the remit of this court when considering the exercise of a discretion by a judge at first instance will be briefly mentioned. For the court to set aside the order made by the learned judge below, the appellant must demonstrate that he either misdirected himself on the applicable legal principles or misinterpreted the facts or that his decision was "so aberrant that it must be set aside on the ground that no judge regardful of his duty to act judicially could have reached it" (see **Hadmor Productions Ltd v Hamilton** [1982] 1 All ER 1042 and **Attorney General of Jamaica v John Mackay** [2012] JMCA App 1). Accordingly, to make this determination, the issues raised by the grounds of appeal will now be examined.

Issue a - Reversal of the *ex parte* order

[44] As it concerns this issue, the criticism directed at the learned judge was that he was not at liberty to reverse his *inter partes* order, which effectively set aside his previous *ex parte* order for the single meeting of the shareholders to be held on 21 November 2018. At the centre of those proceedings was whether the Supreme Court had the jurisdiction to consider CWJ's application for the sanctioning of the scheme.

The learned judge's findings

[45] As already established, it was at the sanction hearing that the learned judge reconsidered his prior orders. He articulated in his reasons that, at the *ex parte* hearing, he did not recall being asked to consider whether separate meetings were appropriate, nor was he aware of arguments against it. Consequently, he found that he was at liberty

at "this inter partes stage" (that being the sanction hearing) to "reverse" himself (at paras. [25] and [26] of the judgment, which are set out in full below):

> "[25] It has been suggested that I ordered one meeting when permission was granted on the 1st October 2018. The application for approval was ex parte. I do not recall, either being asked to or, considering the question whether separate meetings were appropriate. In any event I had not the benefit of argument or urging towards a contrary position. **I therefore consider myself at liberty, at this inter partes stage, to reverse myself**. **In this regard the question of meetings and class composition is one to be determined by the company in the first instance and, as per Chadwick LJ, any issues in that regard brought to the court's attention**…
>
> [26] I therefore hold that the class meeting was not properly constituted. The company's application for approval of the Scheme of Arrangement cannot therefore be granted. The meeting of the shareholders should allow for separate deliberation, and voting, according to two classes. One class being the affiliates of C&WC and Liberty (CWC Cala and Kelfenora) and the other class being the shareholders whose shares they intend to acquire. The finding that there has not been a proper meeting is fatal, and I cannot sanction the scheme. In the event I am wrong however, I will consider the other objections to the sanctioning of the scheme raised by counsel for the Defendant." (Emphasis added)

The appellant's submissions

[46] Queen's Counsel, Mrs Sandra Minott-Phillips, submitted on behalf of CWJ that the learned judge, at the point of the sanction hearing, was no longer at liberty to reverse himself, having already dismissed Mr Abrahams' application to set aside his *ex parte* order. She contended that the learned judge erred in doing so, mainly because he did not recall being asked to consider whether separate meetings were appropriate, and he did not have the benefit of arguments or urging towards a contrary position. She argued that, on the contrary, Mr Abrahams raised the issue of class composition at the *inter partes* hearing, and the learned judge acknowledged this in his written reasons for that decision.

[47] It was also submitted that if the learned judge regarded it as a jurisdictional issue, he erred in finding that the issue of class composition could not be appropriately dealt with at the *inter partes* hearing. Counsel posited that his statement to that effect could be considered a "tacit acknowledgement of the issue". As such, it was CWJ's position that the learned judge, having heard the arguments of both parties and refused the application to set aside his order permitting the single meeting, was no longer at liberty to reverse himself on the bases of jurisdictional issues during the sanction hearing. In which case, he erred at the sanction hearing when he sought to depart from his previous decision to refuse to set aside the *ex parte* order.

The respondent's submissions

[48] Counsel for Mr Abrahams, Mr Conrad George, submitted that the learned judge's prior determination of one of the jurisdictional issues did not prevent him from considering the additional jurisdiction points reserved for the sanction hearing.

[49] The jurisdiction issue at the *inter partes* hearing concerned whether the court lacked jurisdiction because no creditors were involved. This was by virtue of the words "with creditors" in section 206(1) of the Act which, counsel argued, means that the scheme must contemplate "some credit situation". At the sanction hearing, however, the jurisdictional issues related to whether different class meetings should have been convened and whether the scheme involved a reduction in share capital in accordance with the Act and CWJ's Articles. Those matters, counsel contended, were appropriately raised at the sanction hearing for the learned judge's determination.

Analysis

[50] I agree with Mr Abraham's position for the reasons that follow.

[51] At the *ex parte* hearing, the learned judge directed, on CWJ's application, that there should be a single meeting of the ordinary shareholders. At the *inter partes* hearing that followed, Mr Abrahams sought to have the *ex parte* order set aside on the following bases. These were that the scheme:

a) did not fall within section 206 of the Act;

b) amounted to an act of oppression on the minority shareholders as it would undermine Mr Abraham's pending application for permission to bring a derivative claim (and CWJ did not disclose or give "fair presentment" concerning the pending derivative action); and

c) was an attempt to circumvent the operation of section 209 of the Act.

[52] The learned judge, relying on **Re BTR plc**, agreed with counsel for CWJ that the issues raised at b) and c) above were non-jurisdictional and were concerned with the "fairness and/or prudence" of the scheme. Specifically, he found that those matters "should first be raised and discussed at the meeting called to consider the scheme" and that they may "also be urged before the court when the approval of the scheme is being considered". The learned judge also gave examples of other matters that could be raised at the sanction hearing. These included the effect that the scheme could have on a pending derivative action and the value of the minority's shareholding, as well as whether the ability of the minority to participate in the meeting to consider the approval of the scheme was adversely affected (see **In the matter of Cable & Wireless Jamaica Ltd** [2018] JMSC Comm 40 at paras. [4] and [5]).

[53] Considering the relevant authorities, it is clear that it was CWJ's responsibility, at the application stage, to determine the number of meetings required to approve the scheme. Separate meetings may have been necessary (an issue that will be further explored later in the judgment) because CWC Cala and Kelfenora were not only majority shareholders of CWJ but also subsidiaries of Liberty. CWC Cala, as a majority shareholder, was acquiring the shares of the minority by virtue of the cancellation of those shares, which would be immediately reissued to CWC Cala, resulting in CWJ becoming a wholly-owned subsidiary of Liberty. It is also apparent that Mr Abrahams did not raise the issue of separate class meetings on this specific premise at the *inter partes* hearing.

[54] Therefore, in the light of these circumstances, I entirely disagree with Mrs Minott-Phillips' submissions that the learned judge was "reversing himself" and not at liberty to do so, having dismissed Mr Abrahams' application to set aside his *ex parte* order; and that if he had regarded class composition as a jurisdictional issue, he erred in finding that this could not have been appropriately dealt with at the *inter partes* hearing.

[55] It appears evident from the context of the learned judge's opinion, which is quoted at para. [45] above, he stated that at the application stage, he was not asked by CWJ to consider the issue of separate meetings, and neither would he have had any argument "or urging" to do so since the application was heard *ex parte*. He also pointed out, and correctly so, that "the question of meetings and class composition (and any issues in that regard) is one to be determined by [CWJ] in the first instance…" (at the time CWJ was making the application).

[56] Additionally, the reference made by the learned judge that he was "at liberty, at this inter partes stage [the sanction hearing], to reverse [himself]" must also be viewed against the background of what he said concerning the absence of any application by CWJ for separate meetings of the ordinary shareholders to approve the scheme, in circumstances where Mr Abrahams was, at the sanction hearing, objecting to the court's approval of the scheme on the basis that the meeting was not properly convened. I am unable to agree with the proposition that the learned judge was reversing his prior orders permitting the convening of a single meeting. It seems crystalline to me, on a holistic perspective of the learned judge's decision, that what he actually did, for the reasons he gave (which will be discussed below), was to agree with Mr Abraham's position that two separate meetings of CWJ's ordinary shareholders were required to approve the scheme. Consequently, he refused to sanction it.

[57] Concerning the submission that the subjects of class composition and separate meetings were raised at the *inter partes* hearing and the learned judge erred in not addressing them at that point, it is worth setting out in full the issues that he grappled

with at that hearing. These can be found at para. [3] of **In the matter of Cable & Wireless Jamaica Ltd** [2018] JMSC Comm 40, and were identified as being:

> "a. The court lacked jurisdiction because no creditor was involved the process.
>
> b. The proposed scheme of arrangement will undermine the Applicant's pending application for permission to bring a derivative action.
>
> c. The effect of the order is to allow approval without the requisite vote by a majority of the shareholders. It will adversely impact minority rights."

[58] In addressing these issues, the learned judge was not required to consider the questions of class composition and separate meetings because the parties did not raise them. As indicated earlier (see para. [51] above), the question that arose for the learned judge's determination at the *inter partes* hearing regarding the third issue (c), based on the evidence in the affidavits of Mr Abrahams and Mr Andre Sheckleford, attorney-at-law, was whether the scheme was an attempt to oppress the rights of the minority shareholders and subvert the operation of section 209 of the Act by allowing the transfer of shares from one company to another without the approval of the requisite majority of the shareholders (being not less than 90% of the holders of shares to be transferred). The learned judge found that these were non-jurisdictional matters that concerned the fairness of the scheme and should first be discussed at the meeting and, if necessary, could again be raised at the sanction hearing. He then resolved what he determined to be the only jurisdictional point presented by the first issue (a). It is worth emphasising that the learned judge pronounced that he had arrived at this decision having agreed with the submissions made by counsel for CWJ. Therefore, the criticism now being levelled at him is startling and, in my judgment, entirely unmeritorious.

[59] In any event, even if it could be advanced, as it has been, that Mr Abrahams raised the issues of class composition and separate meetings in his arguments (whether directly or obliquely) in relation to section 209 of the Act at the *inter partes* hearing (and I am not accepting that he did), this would have been hinged on an entirely different rationale

than what was canvassed by him at the sanction hearing. It would be entirely a matter for the learned judge, at that stage, to either accede to Mr Abraham's application or dismiss it. It is pellucid that he did the latter for the reasons stated in his written decision (see paras. [52] and [58] above). I believe the exercise of his discretion was correct, given the nature of the application before him.

[60] Additionally, having dismissed Mr Abraham's application at that stage, this certainly could not operate as a bar to prevent either Mr Abrahams from objecting to the approval of the scheme by the court at the sanction hearing for the reason that the meeting of CWJ's ordinary shareholders to consider the scheme was improperly constituted, or the learned judge from considering such an objection. Therefore, I agree with the submission made on behalf of Mr Abrahams that the learned judge's prior determination of one of the jurisdictional issues did not prevent him from considering the additional jurisdiction points reserved for the sanction hearing.

[61] The authorities strongly support this position (as well as the learned judge's stance articulated at paras. [52] and [55] above). For example, in **UDL Argos**, it was held that it was "the responsibility of the company putting forward the scheme to decide whether to summon a single meeting or more than one meeting. If the meeting or meetings were improperly constituted, objection should be taken on the application for sanction and the company bore the risk that the application would be dismissed" (emphasis added) (see also **Re BTR plc** at page 742c and **Re Hawk** (above at paras. [27] and [28])).

[62] It bears repeating that this principle is based on the fact that although the learned judge made an order for CWJ to convene a meeting, this does not mean that he had fully addressed his mind as to whether, in fact, this was the only meeting that the proposed scheme required before the court's sanction could be given. That decision is left for the third stage/sanction hearing. Therefore, at the sanction hearing, Mr Abrahams had every right to make an objection that could call into question the court's jurisdiction to approve the scheme, and the learned judge was obliged to consider it, even when, as in this case,

there had been an *inter partes* hearing prior to the sanction hearing. This is especially so where the particular objection being taken at the sanction hearing was never raised at the *inter partes* hearing.

[63] In disposing of this issue, it is my view that the learned judge did not "reverse" or set aside the prior orders he made at the *ex parte* and *inter partes* hearings as contended. He made no order setting aside his decision permitting CWJ to convene one meeting to approve the scheme. While the language he used may be considered imprecise, it is clear that he was simply expressing that, in the circumstances, he no longer found the single meeting to be appropriate. He, in fact, refused to sanction the scheme, which was a matter entirely within his discretion. As opined by Chadwick LJ at page 747g-h in **Re BTR plc**, "… the court is not bound by the decision of the meeting. A favourable resolution at the meeting represents a threshold which must be surmounted before the sanction of the court can be sought. But if the court is satisfied that the meeting is unrepresentative, or that those voting in favour at the meeting have done so with a special interest to promote which differs from the interest of the ordinary independent and objective shareholder, then the vote in favour of the resolution is not to be given effect by the sanction of the court. …" (see also **Re Alabama, New Orleans, Texas and Pacific Junction Railway Co** [1891] 1 Ch 213, 238 – 239) and **Re Anglo-Continental Supply Company Ltd** [1922] 2 Ch 723, 736).

[64] I now turn to the issue of whether the learned judge correctly decided that CWJ's ordinary shareholders should have been divided into two separate classes to consider and approve the scheme.

Issue b - Separate classes and meetings

[65] CWJ has propounded that even if this court finds that the learned judge was at liberty to reverse his *inter partes* order, consideration must still be given to the correctness of his decision that the shareholders should be separated into different classes and that separate meetings should be held for each class. I agree.

The learned judge's findings

[66] The learned judge relied on the case of **Re Hellenic** in concluding that CWJ should have had separate meetings since the majority shareholders were effectively the intended purchasers of the minority shareholders' shares. He agreed with Lord Millet in the case of **UDL Argos** that "the test is based on similarity or dissimilarity of legal rights against the company and not on similarity or dissimilarity of interests not derived from such legal rights". He found that in this case, the disparity in the interests of the shareholders stemmed from "the fact of the minority shareholding", that being their rights as shareholders. The learned judge reasoned that since the meeting included the majority and minority shareholders, the majority would control CWJ, irrespective of the class. In addition, since they voted in the same meeting, the majority shareholders acted as both sellers and purchasers. However, it was his view that the shareholders acting as the sellers should have been the ones to decide whether or not to accept the scheme from the shareholders acting as the purchasers. The purchasers, he opined, could not be reasonably expected to vote in the best interest of CWJ or the sellers. For that reason, since the majority shareholders represented the purchasers and the minority shareholders represented the intended sellers, they should be divided into different classes for the constitution of two different meetings, based on the similarity or dissimilarity of their legal rights or their common interest, not the class of shares.

The appellant's submissions

[67] Mrs Minott-Phillips outlined five reasons why the learned judge was incorrect in his finding that the ordinary shareholders should have been divided into two separate classes to consider the scheme. They are:

> "a. Classes are to be determined on the basis of commonality of the members' rights vis-à-vis the company, and not on the basis of the commonality of their interests;
>
> b. The ordinary shareholders of [CWJ] all had identical rights in the company;

> c. Separating the ordinary shareholders into classes according to their interests gives each class the power to veto the [scheme] and would serve to undermine the basic approach of decision by majority;
>
> d. The existing rights of [CWJ's] ordinary shareholders and their rights offered in replacement in the [scheme] were such as enabled them to properly consult together with a view to their common interest;
>
> e. The interest of CWC Cala and Kelfenora in approving the [scheme] is, in these circumstances, capable of also being considered a class promoting view in light of the evidence that the non-affiliated ordinary shareholders had a common interest with them in ensuring the payment of fair compensation to shareholders exiting [CWJ]."

[68] It was submitted that even though separate commercial or other interests among ordinary shareholders may be considered when seeking the court's sanction of the scheme following its approval by the shareholders, it is not relevant to the determination of classes. The learned judge, counsel said, failed to sufficiently appreciate that point. It was contended that the law has evolved since **Re Hellenic** and now embraces a "far more precise approach" in determining classes. That being, the separation of classes according to their rights vis-à-vis the company and scheme (their existing rights to the company and the rights they will have if the scheme is approved). The varying interests of the shareholders can be taken into account at the sanction hearing if there is a question of whether the majority acted *bona fide* or coerced the minority in order to promote interests adverse to those of the class they purported to represent.

[69] Counsel also contended that "[t]he cases contain clear guidance that classes should not be proliferated beyond necessity, 'lest by ordering separate meetings the court gives a veto to a minority group' [**Re Hawk**]". In this case, the holders of the ordinary shares have identical rights. So the dissimilarities did not make it impossible for them to consult together with a view to their common interests, it was argued. That common interest, counsel stated, was to ensure that all eligible persons would be fairly compensated for the cancellation of their shares. Further to that point, counsel pointed out that the share price offered was not in issue and was accepted by the learned judge

as a fair price. That price was a premium over the price the shares last traded on the Jamaica Stock Exchange.

[70] For those reasons, counsel submitted, the CWJ ordinary shareholders fall within the category of persons whose rights are not so dissimilar as to preclude them consulting together with a view to their common interests, in accordance with the post **Re Hellenic** approach. Therefore, they should be summoned to a single meeting. On that basis, she concluded that the learned judge erred in his finding that separate meetings should have been held.

The respondent's submissions

[71] Mr George, on the other hand, contended that the learned judge was correct in his findings that the majority shareholders (CWC Cala and Kelfenora) were in a different class from the minority shareholders. His argument was that where a majority shareholder, who is a seller, has a "community of interest" with a purchaser under a scheme of arrangement or is actually the purchaser, that shareholder is in a different class from the remaining shareholders. Accordingly, the court would have no jurisdiction to sanction a scheme of arrangement if the separate class meetings were not held, as was required in these circumstances. Therefore, Mr Abrahams' posture was that where one set of shareholders are sellers and the other purchasers, separate class meetings must be held with the requisite statutory majority at each meeting. Reliance was placed on the cases of **Re Hellenic**, **UDL Argos** and **Trends Publishing International Limited v Advicewise People Ltd** in support of counsel's submissions. The learned judge, it was argued, was correct in finding that the single class meeting for the scheme was not properly constituted.

Analysis

[72] For the reasons that will follow, I agree with the submissions made on Mr Abrahams' behalf and find that the learned judge correctly exercised his discretion when he found that the meeting of CWJ's ordinary shareholders to approve the scheme was

not properly constituted, with the result that he lacked the jurisdiction to sanction the scheme.

[73] The facts before the learned judge at the sanction hearing disclosed the following features:

> a. Liberty holds 92.27% of the issued shares in CWJ through its subsidiaries, CWC Cala and Kelfenora.
>
> b. CWJ's issued share capital is 16,817,541,024. CWC Cala holds 14,698,780,975 (87.4%), and Kelfenora 818,523,212 (4.87%) shares.
>
> c. The remaining shareholders hold 7.73% of the existing shares.
>
> d. Under the scheme, which is a share cancellation scheme, CWC Cala would acquire the minority shares (7.73%) at a value of $1.45 per share by way of those shares being cancelled and immediately re-issued to CWC Cala. The result would be that CWJ would become a wholly-owned subsidiary of Liberty. Therefore, CWC Cala, the holder of the majority ordinary shares in CWJ, and a subsidiary of Liberty, was the prospective purchaser of the minority shares.
>
> e. CWJ applied for a single meeting of the ordinary shareholders to approve the scheme. At that meeting, CWC Cala as majority shareholder and purchaser, along with its affiliate Kelfenora (both controlling 92.27% of the existing shares), voted with the minority shareholders who were the prospective sellers to approve the scheme.
>
> f. Mr Abrahams, one of the minority shareholders, had a pending application for permission to bring a derivative action. That derivative action would be on behalf of CWJ and against Liberty, as well as directors and shadow directors of CWJ, for breach of fiduciary duties and losses.

g. At the meeting, a total of 15,564,477,266 shares were voted. Of that sum, CWC Cala and Kelfenora voted all their shares in favour of the scheme (15,314,007,688). The remaining shares, unrelated to CWC Cala and Kelfenora, amounted to 250,469,678, of which 14,265,745 voted in favour, and 236,203,933 voted against the scheme. These figures confirm that only approximately 5.7% of the non-CWC Cala and Kelfenora shares voted in favour of the scheme, while 94.3% voted against it.

[74] In my judgment, the facts of **Re Hellenic** are somewhat similar to the present case, and I find the guidance given in that case to be instructive in disposing of this issue. However, I quickly add that I am also guided by the learning in **UDL Argos**. I believe that the principles adumbrated in both cases are not in conflict with each other and are equally applicable to the instant case. I also feel constrained to comment that the debate between "the rights-based" and "interests-based" approaches in determining class composition and separate meetings of members or creditors of a company to approve a scheme of arrangement has, to my mind, been fully laid to rest by Lord Millett in **UDL Argos** and is arguably now reduced to mere semantics. I agree with and gratefully adopt his elegant formulation of the relevant tenets encapsulated and set out at para. [40] above.

[75] It is indisputable that under the scheme, CWC Cala was purchasing or acquiring the shares of CWJ's minority shareholders. Kelfenora, its affiliate and Liberty's subsidiary, would be in "the purchaser's camp" (given that its shares were not being acquired or cancelled under the scheme) rather than that of the minority shareholders as sellers. The combined votes of CWC Cala and Kelfenora were crucial in securing the approval of the scheme, and without their votes, the requisite majority would not have been attained.

[76] It has been argued on CWJ's behalf that classes are to be determined on "the basis of commonality of the members' rights vis-à-vis the company and not on the basis of the commonality of their interests" and that all of CWJ's ordinary shareholders shared identical rights in the company. Additionally, it was contended that given their existing

rights and their rights under the scheme, these were such to enable them to consult together with a view to their common interests. Given the circumstances of this case, I cannot accept that contention.

[77] I will adopt and rephrase the words of Templeman J in **Re Hellenic**, "[v]endors consulting together with a view to their common interest in an offer made by a purchaser would look askance at the presence among them of a [purchaser and/or one of its affiliate or subsidiary]". Similarly, as Lord Millett observed in **UDL Argos** (which, in my view, is worth repeating in full):

> "22. … [I]t is true that Templeman J consistently referred to the parties' respective 'interests' rather than their 'rights'. But it is important not to be distracted by mere terminology. Judges frequently use imprecise language when precision is not material to the question to be decided, and in many contexts the words 'interests' and 'rights' are interchangeable**. The key to the decision [in Re Hellenic] is that [MIT] was effectively identified with [Hambros]. It would plainly have been inappropriate to include [MIT] in the same class as the other shareholders if it had been buying their shares;** it should not make a difference that the purchaser was its parent company.
>
> 23. **But this was not because [MIT] and the other shareholders had conflicting interests, nor because they had different rights to start with. [MIT]'s legal rights at the outset were the same as those of the other shareholders. What put [MIT] into a different category from the other shareholders was the different treatment it was to receive under the Scheme. The other shareholders were being bought out. In commercial terms [MIT] was transferring its shares to its own parent company and obtaining for its parent company the right to acquire the remainder of the shares from the other shareholders. The rights proposed to be conferred by the Scheme on [MIT] and the other shareholders were commercially so dissimilar as to make it impossible for [MIT] and the other shareholders to consult together with a view to their common interest** [sic]**, for they had none**." (Emphasis added)

[78] Applying these principles to the present case, it was inappropriate for CWC Cala and its affiliate Kelfenora to have been included in the same meeting as the other shareholders. I agree that CWC Cala, Kelfenora and the other minority shareholders had identical rights in relation to CWJ since they were all ordinary shareholders. However, even if it could be argued that there were no conflicting interests between them, it is beyond debate that CWC Cala's and Kelfenora's treatment under the scheme was in stark contrast (or different) to that of the minority shareholders. CWC Cala was buying out the minority. They were the purchasers. Kelfenora's shares (as CWC's Cala affiliate and Liberty's subsidiary) were not being acquired, cancelled or re-issued to CWC Cala. The minority were the sellers. Pursuant to the scheme, the minority's shares would be cancelled (in consideration for CWC Cala paying $1.45 per cancelled share) and re-issued to CWC Cala, paving the way for CWJ to become a wholly-owned subsidiary of Liberty. Therefore, the rights proposed to be conferred by the scheme on CWC Cala and Kelfenora and the other shareholders were commercially so dissimilar as to make it impossible for CWC Cala and Kelfenora and the other shareholders to consult together with a view to their common interests, because they had none. Accordingly, "on a true analysis", CWJ was in real terms entering into separate but interdependent arrangements with its ordinary shareholders whose rights or treatment under the scheme put them in two distinct classes, purchaser and its affiliate on the one hand, and sellers or vendors on the other.

[79] Therefore, I am in no doubt that the learned judge properly exercised his discretion when he refused to sanction the scheme on the bases that he had no jurisdiction to do so because the meeting convened to approve the scheme was improperly constituted and, as a result, the approval of the requisite majority had not been achieved (per Chadwick LJ and Lord Millett in **Re Hawk** and **UDL Argos**, respectively).

[80] The resolution of this issue is dispositive of the appeal. Therefore, I find it unnecessary to address in any great detail the remaining issue that sought to impugn the learned judge's conclusion that the assessment of the fairness of the scheme had to await the determination of Mr Abrahams' application for leave to bring the derivative action on

behalf of CWJ. However, in the light of the brief opinion I intend to express, I have taken the liberty of setting out below, for convenience, what I consider to be the critical findings of the learned judge on this issue.

Issue c – Fairness of the scheme

[81] The learned judge considered Mr Abrahams' submission that the scheme was unfair and recognised that he (Mr Abrahams) had the burden of proving the unfairness. He pronounced that a mere assertion that the majority was not acting in good faith is not justified simply because they voted in favour of their interest. At paras. [35] - [37] of his written judgment, he stated his reasons for ultimately finding that Mr Abraham's pending application to bring a derivative action on CWJ's behalf should be determined prior to the assessment of the fairness of the scheme:

> "[35] I agree with the Defendant's counsel that, as it pertains to the funding of the derivative action under ***Wallersteiner v Moir (No 2)*** (cited at paragraph 26 above), there is the obvious possibility that the parent company may hold the purse-string of the subsidiary company. It will be expected to fund litigation by a subsidiary against itself. It will therefore be able to implement various types of actions along the way that may prejudice the commencement or continuation of the derivative action. The parent company can ensure the company never has any cash, and may operate the company in such a manner that it has no ability to fund the litigation. Further the company may be stripped of its assets. So long as there are minority shareholders their rights would have to be considered. Indeed the Companies Act provides remedies to the minority shareholders. The absence of minority shareholders will allow things to be done that may render the proceedings unworkable from a costs point of view. The companies may be run in such a manner as to make the relief sought in the derivative proceedings of no practical benefit. I find that the effect of the Scheme of Arrangement will be full absorption of the Claimant into C&WC and therefore into the Liberty group. The companies, for all practical purposes, will become indistinguishable. C&WC, by being able to fully control the Claimant's assets and accounts, will be able to render the relief sought in the derivative claim pointless. I understand the Defendant's fear in this regard.

[36] Shareholders will, by the Scheme of Arrangement, be made former shareholders. It does appear to me that when considering the scheme shareholders would have reason to consider whether there is any merit in the proposed derivative action, whether permission to commence it will be granted, whether if granted the court, having conduct of the derivative claim, will take steps to protect their interest as former shareholders and whether success in such an action is likely to be rendered pyrrhic. These, to my mind, are all relevant considerations if the Scheme of Arrangement is to be fairly considered by a reasonably prudent shareholder. To sanction the scheme, and thereby compel the minority to sell their shares prior to a decision whether or not the derivative action is to be allowed and on what conditions if any, would not be fair.

[37] Therefore, even if the class meeting had been properly constituted, the application for approval would have been refused. Given the nature of the allegations it is only fair that all shareholders, when considering the proposed scheme, have before them information as to whether permission to bring the derivative action has been granted and, if so, for what reason and on what terms and conditions. Liberty and its affiliates are acquiring the shares of the minority for $1.45 per share. The overall financial position of the Claimant remains the same whether the shares are acquired or not. However, if the Scheme of Arrangement is approved, the directors of the Claimant, C&WC and the Liberty group can be considered the same persons with the same outlook and the same interests. They will then have no minority shareholders, or their appointees, on the Claimant's board to oppose any action on their part. The Claimant, in whose name a derivative action would be brought, will be able to cause the derivative action to become a lengthy and expensive process for the Defendant. These facts give some credibility to the suggestion that there is a want of bona fides or at the very least an absence of objective deliberation, in the majority which voted for the scheme. The answer to these questions however, as well as the question whether the scheme is so objectionable that no reasonable shareholder would vote for it, can only be determined after, not before, a court considers the proposed derivative action and whether permission to commence is granted and on what terms. Even had the meeting been properly constituted I would not, for these reasons, have sanctioned the Scheme of Arrangement at this time. Fairness demands that the pending application, for permission to bring the derivative action, be first heard and determined."

[82] Having examined the submissions made by the parties and the authority of **Wallersteiner v Moir (No 2)** [1975] QB 373, which the learned judge also considered, I am not of the view that his decision was based on a misapprehension of the applicable legal principles, a misinterpretation of the facts before him or was "so aberrant that it must be set aside on the ground that no judge regardful of his duty to act judicially could have reached it". Additionally, the fact that Mr Abrahams has now obtained leave of the court to bring the derivative claim on CWJ's behalf has provided added force to the learned judge's finding that all the shareholders (but in particular the minority) should, at a properly constituted meeting, consider the merits of the derivative claim and the possible effects, if any, the proposed scheme, could have on that claim before casting their votes. Consequently, there would have been no basis for interfering with the learned judge's decision on this issue.

Conclusion

[83] For the reasons I have sought to explain, the learned judge correctly exercised his discretion when he found that the single meeting of CWJ's ordinary shareholders convened on 21 November 2018 to approve the proposed scheme of arrangement was improperly constituted, and so, the court lacked the jurisdiction to sanction the scheme because the requisite majority required to approve it had not been achieved. Also, his finding that the scheme of arrangement should await the determination of Mr Abrahams' pending application to bring a derivative claim on CWJ's behalf (which has now been granted) to allow all shareholders to consider its efficacy and the possible effect the scheme could have on that claim cannot be faulted. Therefore, I would propose that the appeal be dismissed, and the orders of Batts J made on 15 March 2019 be affirmed with costs to Mr Abrahams to be taxed if not agreed.

BROOKS P

ORDER

1. The appeal is dismissed.

2. The orders of Batts J made on 15 March 2019 are affirmed.

3. Costs to the respondent to be taxed if not agreed.