IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE COMMERCIAL DIVISION

CLAIM NO. 2018CD000526

IN THE MATTER OF CABLE & WIRELESS JAMAICA LIMITED

AND

IN THE MATTER OF THE COMPANIES ACT

BETWEEN	**CABLE & WIRELESS JAMAICA LIMITED**	**CLAIMANT**
AND	**ERIC JASON ABRAHAMS**	**DEFENDANT**

Company Law – Section 206 of the Companies Act - Scheme of Arrangement- Duty of court - Whether the Scheme of Arrangement is fair –Whether meeting to consider scheme properly constituted – Whether class or interest of shareholders relevant - Pending application to bring derivative action - Whether court should sanction the Scheme of Arrangement- Whether application to approve scheme should be stayed until after application for permission to bring derivative action is heard-Whether attorney who filed affidavit should appear as counsel.

Sandra Minott-Phillips Q.C., Peter Goldson, Hilary Reid, Gabrielle Grant and Kerri-Anne Mayne instructed by Myers, Fletcher and Gordon for the Claimant.

Conrad George instructed by Hart Muirhead and Fatta for the Defendant.

Heard: 7th, 10th January and 15th March, 2019.

IN CHAMBERS

COR: BATTS J

[1] On the 1st day of October 2018 this Court granted permission for the Claimant company to convene a meeting of shareholders, for the purpose of considering and approving a Scheme of Arrangement, pursuant to section 206 of the Companies Act. The Defendant, Eric Jason Abrahams, filed a Notice of Application seeking to set aside the Order granting permission. On the 19th November 2018, I dismissed the Defendant's application, see ***In Re Cable and Wireless Jamaica Ltd [2018] JMSC Comm 40*** (unreported judgment delivered on the 19th November 2018).

[2] The Claimant convened a meeting of shareholders on the 21st November 2018. At that meeting shareholders, holding 15,328,273,433 issued and fully paid up ordinary shares, voted for the Scheme of Arrangement. That represented 75.58% of the shareholders. The Claimant has now applied to have the Scheme of Arrangement approved and sanctioned. The Defendant opposes the application and has applied to have the Court either not approve the scheme or defer consideration of the matter. These are the applications before me today.

[3] Prior to commencement of the hearing Mr Conrad George, the Defendant's Counsel, indicated he would not be relying on the affidavit of Mr. Andre Sheckleford which was filed on the 10th December 2018. This was because, when the matter came before me on the 11th December, 2018 (but was adjourned), I indicated that as Mr. Sheckleford had sworn an affidavit I would not recognise his appearance as counsel. In the event however the Defendant relied heavily on another affidavit, sworn by Mr. Andre Sheckleford and, filed on the 15th November 2018. Consistently with my stated position I will not recognize Mr. Sheckleford as appearing as counsel in this matter. My reason for adopting this position has to do with the well recognised rule of practice that, save for matters of a purely formal nature, an attorney at law ought not to give evidence in a matter in which he appears. If circumstances arise where it becomes necessary,

or desirable, for him or her to give evidence then other counsel ought to be briefed. This practice finds support in Canon V (p) of the Legal Profession (Canons of Professional Ethics) Rules. The practice or convention is obviously designed to maintain that degree of dispassion, desirable for proper representation, and to avoid the prospect of an attorney being cross-examined by opposing counsel in the same case; how, for example, will the attorney be re-examined? It has been my recent experience that this laudable practice is, far too often, being honoured in the breach rather than in its observance. There is, be it noted, no sanction for breach of this rule as its non observance does not constitute misconduct in a professional respect. I observed, and appreciated, the valuable and professional input of Mr Sheckleford in this matter, that is not in question . However, I think a court has a duty to take a stand, particularly where warnings have gone unheeded.

[4] The Claimant is an indirect subsidiary of Cable & Wireless Communications Limited (hereinafter referred to as C&WC). C&WC is a wholly owned indirect subsidiary of Liberty Latin America Limited (hereinafter referred to as Liberty). CWC Cala Holdings Limited (hereinafter referred to as CWC Cala) and Kelfenora Limited (hereinafter referred to as Kelfenora) are both substantial shareholders in the Claimant. They are also subsidiaries of Liberty. CWC Cala and Kelfenora owned 82% of the existing shares in the Claimant. They, by way of a voluntary takeover offer which closed on the 28th February 2018, acquired a further 10.27% of the Claimant's existing shares. It means therefore that Liberty through its subsidiaries (CWC Cala and Kelfenora) now owns or controls 92.27% of the Claimant's existing shares. The Scheme of Arrangement is intended to enable them to acquire the remaining shares compulsorily and therefore obtain 100% control of the Claimant. These facts are gleaned from, a letter dated the 2nd October 2018 from the Chairman to the Shareholders and an explanatory statement issued to shareholders ,both attached as exhibit as AS3 to the affidavit of Andre Sheckleford filed on the 15th November 2018.

[5] The Defendant is an investment banker, business analyst, and a longstanding minority shareholder in the Claimant company. He holds shares in the Claimant through CASA Corporation Limited as well as directly. His combined shareholding in the company amounts to 64,661,056 ordinary shares. The Defendant along with some other minority shareholders (see the affidavits of George Desmond Levy filed 11th December 2018, and Radcliff Knibbs filed 4th January 2019) are opposed to the Scheme of Arrangement.

[6] The Companies Act provides, in Section 206, for the manner in which a compromise or scheme of arrangement is to be effected. Section 206 states:

> *"(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." [Emphasis Added]*

[7] The Scheme of Arrangement, for my consideration, is summarized in an explanatory statement provided to the Claimant's shareholders, see exhibit AS3 to the affidavit of Andre Sheckleford filed on the 15th November 2018, (Judges Bundle page 200-202). In that explanatory statement the Claimant outlined, among other things, the fact that a voluntary offer to purchase had been made, the reasons for the proposed scheme, the fact that there was a pending application to bring a derivative action, the intended defence if such an action were to be brought and the fact that the proposed scheme of arrangement was considered and approved by a committee of the Claimant's directors who had no connection to Liberty. Paragraphs 3.2 and 4.1 of the explanatory statement are as follows:

> *"3.2 CWC Cala had indicated in the Offer Circular its desire to simplify the structure of the international group and more fully integrated CWJ, from an operational standpoint, into the group of companies so that greater operational synergies can be extracted from the relationship with the Liberty Latin America Group and, to that end, wished to undertake a share cancellation scheme of arrangement whereby the CWJ Shares held by third party shareholders (being shareholders other than CWC Cala and Kelfenora) will be cancelled resulting in CWJ becoming a wholly-owned subsidiary of Liberty Latin America."*

> *"4.1 The low trading volumes and volatile share price of the CWJ Shares indicate eroded shareholder value. The share price of J$1.45 per CWJ Share (the price offered in the Offer and to be paid to CWJ Shareholders as compensation if the Scheme becomes effective) (the "Compensation Price") represents a premium of 40% over the volume weighted average closing price ("VWAP") over the five (5) days immediately prior to the opening of the Offer and a 35% premium over the six (6) month VWAP immediately prior to the opening of the Offer. This continues to represent an attractive alternative for CWJ Shareholders to gain an improved return on their CWJ Shares compared to the current market trading position. In addition, the Compensation Price of J$1.45 per CWJ Share presents CWJ Shareholders the benefit of liquidity and certainty of value particularly given that the extent of the number of CWJ Shares held by the Liberty Latin America Group means that it is therefore most unlikely that there will be competitive bidding for the CWJ Shares at any point."*

[8] The Defendant opposes the sanctioning, or granting of final approval, for the Scheme of Arrangement on the following grounds:

a) The scheme does not fall within the power to compromise or come to an arrangement within section 206 of the Companies Act;

b) The scheme amounts to an act of oppression upon the minority shareholders; and

c) There has been material non-disclosure and/ or a failure to give fair presentment in relation to pending proceedings in which the Defendant, in Claim number 2017CD000594, has applied for permission to bring a derivative action.

[9] Queen's Counsel, appearing for the Claimant, submitted that a statutory scheme of arrangement is a construct, between a company and its creditors or between a company and its members, which allows a specified majority of its creditors or

members as the case may be to bind the apathetic or dissentient minority. The scheme proposed in the case at bar is a members' scheme of arrangement. She submits further that section 206(2) of the Companies Act sets out the third stage of a three stage process by which a statutory scheme of arrangement is entered into. The first stage is to obtain permission to call the relevant meeting. The second stage is to call the meeting. In the third stage another application is made to the court at which the court is asked to sanction the scheme. Chadwick LJ, in ***Re BTR plc [2000] 1 BCLC 740 at 742 c***, supports that submission:

> *"It can be seen that there are three stages in the process. First, an application to the court under s 425 (1) for an order that a meeting or meetings of members be summoned. It is at that stage that a decision needs to be made as to whether or not to summon separate class meetings. Second, the holding of the meeting or meetings at which the scheme proposals are put to those present in person or by proxy and at which they vote upon them. Third, a further application to the court under s 425 (2) to obtain the court's sanction to the scheme of compromise or arrangement."*

[10] Queens Counsel further submitted that at the third stage the court, in order to approve the scheme, need only be satisfied that:

a) The meeting has been summoned and held in accordance with its previous order;

b) The proposed scheme of arrangement has been approved by the requisite majority of those present at the meeting; and

c) The views and interest 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 accepting the scheme) received impartial consideration.

[11] The Defendant's counsel, on the other hand, submitted that at the 3rd stage there are five questions to be asked by the Court before sanctioning the scheme of arrangement. The five questions are:

a) Have the provisions of the Companies Act and/or the Company's articles of incorporation been complied with?

b) Is the majority acting bona fide?

c) Is the minority being overridden by a majority having interests of its own clashing with those of the minority whom they seek to coerce?

d) Is the scheme a reasonable one?

e) Is there a reasonable objection, or such an objection to it as that any reasonable man might say that he could not approve of it?

[12] It is the Claimant's case that there has been full compliance with the court's order, made on the 1st October 2018, granting permission to convene a meeting of shareholders. The meeting was convened and held in accordance with that order. The second affidavit of Sola Hines filed on the 16th November 2018 (page 269 of Judges Bundle), provides evidence that notice of the meeting set for 21st November 2018 was given to the holders of the ordinary shares of the Claimant, in accordance with the requirements for such meetings and, in accordance with article 57 of its Articles of Incorporation. The Articles of Incorporation may be found at exhibit MKJ 2 to the affidavit of Mark Kerr-Jarret filed on the 7th September 2018, (page 37 of Judge's Bundle).

[13] It is reported by the Chairman of the Board of the Claimant, Mr Mark Kerr-Jarrett, that the proposed Scheme of Arrangement was approved by the requisite majority of those present at the meeting and voting by proxy, see paragraph 9 of Chairman's Report to the Court, exhibit MKJ 5 to the affidavit of Mark Kerr-Jarrett dated 30th November 2018 (page 319 to 321 of the Judge's Bundle). Queen's

Counsel submits that a detailed breakdown of the vote shows that 98.48% (in value) of the shares voted in person or by proxy for the scheme. This amounted to 75.58% of shareholders, voting in person or by proxy, who voted for the resolution. The evidence of the scrutineers certified that the statutorily required majority in number, representing three quarters in value of the members present, and voting in person or by proxy, voted to approve the Scheme of Arrangement.

[14] The Defendant's counsel argued that the court should disaggregate the votes of the shareholders into those affiliated with Liberty, being CWC Cala and Kelfenora on one hand, and those not affiliated with Liberty, on the other. He conceded that every member of the class, that considered the Scheme of Arrangement, is an ordinary shareholder and therefore has the same shareholder rights. However, Mr George submitted that, members of the same class may have different interests. The meetings, he submitted, should have been called for those members with the same interests. He therefore asserts that the provisions of the Companies Act have not been complied with since separate class meetings were not held in circumstances where such were required. The intended purchaser of the shares and its affiliates were not in the same class, by virtue of their differing interests, as the minority constitutes the intended vendors of the shares. It was submitted that where a shareholder, especially a prospective vendor, does not have a community of interest with the prospective purchaser they are considered to be in a different class. As such, counsel submitted, the court has no jurisdiction to sanction the scheme because separate meetings were required due to the differing classes. Mr George relied on ***Re Hellenic & General Trust Ltd [1975] 3 ALL ER 382*** per Templeman J at 385g-386d:

> *"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 share 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.*** *Counsel for the company submitted that since the parent and subsidiary were separate corporations with separate directors, and since MIT were ordinary shareholders in the company, it followed that MIT had the same interests as the other shareholders.* ***The directors of MIT were under a duty to consider whether the arrangement was beneficial to the whole class of ordinary shareholders, and they were capable of forming an independent and unbiased judgment, irrespective of the interests of the parent company. This seems to me to be unreal. Hambros are purchasers making an offer. When the vendors meet to discuss and vote whether or not to accept the offer, it is congruous 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. Of course this does not mean that MIT should not have considered at a separate class meeting whether to accept the arrangement. But their consideration will be different from the considerations given to the matter by the other shareholders. Only MIT could say, within limits, that what was good for Hambros must be good for MIT." [Emphasis Added]***

[15] Defendant's Counsel relied also on dicta of Ramly Ali J in the Malaysian High Court in ***Re Sateras Resources (Malaysia) Bhd [2005] 6 CLJ 194 at 209g*** who, whilst considering a creditor's scheme of arrangement, stated:

> *"It is undeniable that the petitioner having full control of the subsidiaries would cause the subsidiaries to vote in support of the scheme. There is no community of interests such in so far as the subsidiaries and the other creditors are concerned.*

By lumping the subsidiaries with the other creditors, the petitioner had effectively deprived the other creditors of a meaningful voice in the voting for the Proposed Scheme depriving the other creditors of their legitimate rights against the petitioner, (In re Hellenic & General Trust (supra) it was held by Templeman J at p386 that "if the parent controls 50% or more of the shares of the subsidiary company it can be assumed that they have a community of interest"

[16] The Defendant referred also to Lord Millet, in ***UDL Argos Engineering & Heavy Industries Co Limited & Ors v Li Oi Lin & Ors [2001] 3 HKLRD 634,*** who set out the following principles at page 647 (paragraph 27):

"The following principles can be derived from this consistent line of authority:

(1) ***It is 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 are improperly constituted, objection should be taken on the application for sanction and the company bears the risk that the application will be dismissed.***

(2) ***Persons whose rights are so dissimilar that they cannot sensibly consult together with a view to their common interest must be given separate meetings. Persons whose rights are sufficiently similar that they can consult together with a view to their common interest should be summoned to a single meeting.***

(3) ***The test is 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 may hold divergent views based on their private interests not derived from their legal rights against the company is not a ground for calling separate meetings.***

(4) The question is whether the rights which are to be released or varied under the Scheme or the new rights which the Scheme gives in their place are so different that the Scheme must be treated as a compromise or arrangement with more than one class.

(5) ***The Court has no jurisdiction to sanction a Scheme which does not have the approval of the requisite majority of creditors voting at meetings properly constituted in accordance with these principles. Even if it has jurisdiction to sanction a Scheme, however, the Court is not bound to do so.***

(6) *The Court will decline to sanction a Scheme unless it is satisfied, not only that the meetings were properly constituted and that the proposals were approved by the requisite majorities, but that the result of each meeting fairly reflected the views of the creditors concerned.* ***To this end it may discount or disregard altogether the votes of those who, though entitled to vote at a meeting as a member of the class concerned, have such personal or special interests in supporting the proposals that their views cannot be regarded as fairly representative of the class in question." [Emphasis Added]***

[17] Counsel for the Defendant further submitted that the nature of legal rights that a purchaser has against a company are necessarily dissimilar from the nature of the legal rights the vendor of shares has against the company. Therefore having CWC Cala, which is the prospective purchaser and current holder of over 87.40% of the Company's shares, vote on the scheme within the same class as the minority shareholders is exactly the type of circumstance described as "inappropriate" by Lord Millet in the ***UDL Argos case.*** The involvement of Kelfenora which has been expressly referenced as an "affiliate" of CWC Cala, both being subsidiaries of Liberty, is the type of community of interest referenced by Templeman J in ***Re Hellenic***. Counsel for the Defendant referred to another approach in ***Trends Publishing International Limited v Advicewise People Ltd et al [2018] NZSC 62.*** That case concerned a creditor's scheme and legislation which was designed to make arrangements easier to approve. The Court considered whether the relevant vote would pass if the shares voted, by the party with conflicting rights or interests, were disregarded. Counsel submitted that if the votes of CWC Cala, Kelfenora (majority purchaser) and its affiliates are disregarded only 5.70% of the minority shares voted in favour of the scheme; on the other hand 94.3% of the minority shares voted against the scheme .He relied

on paragraph 9 of the affidavit of Eric Jason Abrahams (the Defendant) filed on the 4th January 2019 in this regard. Therefore, counsel submitted, but for the enormous shareholding of CWC Cala and Kelfenora the scheme would have failed dramatically. It is quite plausible therefore that, had a separate class meeting been held, where the shareholders had the opportunity to consult together with a view to their common interest, the vote by value in favour of the scheme would have been even smaller.

[18] Queen's Counsel for the Claimant submits that the meeting held was consistent with the Companies Act and the court's order. The meeting was appropriate as the shareholders were all of the same class even if their interests diverged. Mrs Minott-Phillips again referenced **Re BTR, (cited at paragraph 9 above) ,** per Chadwick LJ at 746 i:

> *"Shareholders with the same rights in respect of the shares which they hold may be subject to an infinite number of different interests and may therefore, assessing their own personal interests (as they are perfectly entitled to do), vote their shares in the light of those interests. But that in itself, in my judgment, is simply a fact of life: it does not lead to the conclusion that shareholders who propose to vote differently are in some way a separate class of shareholders entitled to a separate class meeting. Indeed a journey down that road would in my judgment, lead to impracticality and unworkability."*

[19] Queen's Counsel further submitted that the Companies Act provides the required protection for shareholders by stipulating that for approval by the meeting a majority in number and representing three quarters in value of the shares is necessary. This guarantees an equitable balance between the majority and minority. It is required that there be a majority in number of shareholders. A majority in value alone will not get the job done, both must be achieved. A majority in number of shareholders is more than 50%. In this case that majority was achieved although those affiliated with Liberty were only 2 of the 344 shareholders who voted at the meeting. More than 75% of the number of shareholders voted for the resolution being 266 of the 344 shareholders present.

Only 24.42% of the shareholders voted against it (84 of the 344 shareholders present).

[20] I agree that the Companies Act speaks to class and does not specifically mention the interest of shareholders. The ***Re Hellenic case,*** (cited at Paragraph 14 above), states that the directors are under a duty to consider whether the arrangement was beneficial to the "whole class of ordinary shareholders". However I am unable to see how all the ordinary shareholders in the case before me, given their separate interests, would be capable of fairly deliberating. The Scheme of Arrangement was described as necessary due to the need for Liberty to extract synergies from a more closely integrated Claimant. The synergies which Liberty hopes to achieve can only be achieved if it is the 100% owner of the Claimant. The existence of minority shareholders creates governance restrictions and minority protection considerations, see the letter to shareholders from the Chairman dated 2nd October 2018 at paragraph 14 (exhibit AS3 to the affidavit of Andre Sheckleford, page 197 of Judges Bundle), which states:

> *"In informing their view that the Scheme is in the best interest of the minority CWJ Shareholders, your Directors also took account of the fact that the ability of the Liberty Latin America Group to extract synergies from more closely integrating CWJ into the Liberty Latin America Group is mutually exclusive with the minority CWJ Shareholders remaining in the Company. In other words, the synergies which the Liberty Latin America Group hopes to achieve can only be realized if it is 100% beneficial owner of CWJ and are therefore not synergies which the minority CWJ Shareholders can possibly enjoy for as long as CWJ has outside minority shareholders given that the degree to which it can operationally integrate within the Liberty Latin America Group is strictly limited by governance restrictions and other minority protection considerations."*

[21] **Re BTR** (cited at Paragraph 9 above) involved, not unlike the matter before me, a takeover attempt. When considering the decision of Templeman J, in **Re Hellenic (cited at paragraph 14 above)** to order separate class meetings, Chadwick LJ said at page 746 g-h :

> *"The judge referred also to the decision of Templeman J in Re Hellenic & General Trust Ltd. [1975] 3 All ER 382, [1976] 1 WLR 123. Templeman J had refused to sanction a scheme of arrangement under S. 206 of the Companies Act 1948 – the forerunner of S. 425 of the 1985 Act – on the ground that there should have been a separate class meeting in relation to the shares held by a company known as Merchandise & Investment Trust Ltd. (MIT) MIT was a wholly owned subsidiary of Hambros, the petitioner under the scheme and the purchaser. The objectors took the view – rightly, as Templeman J held – that MIT were in a position where they were both seller and purchaser, by virtue of the direction that Hambros could exercise over the way in which their votes were cast. Accordingly, it was plain that they ought to have been included in a separate class. Mr. Northgate relies on that decision. "*

Chadwick LJ did not, when deciding that separate meetings were not required, either disapprove of or overrule Templeman J's decision. The court recognised, it seems to me, a distinction where a clear conflict of interest was apparent. In the case Lord Justice Chadwick had to consider the objector sought to argue that, not only was the section 425 (the equivalent of our section 206) procedure inappropriate, but that in deciding upon relevant classes all interests were to be considered so that for example, staff members who owned shares, shareholders such as charities with different tax considerations and even those with smaller as against large shareholdings should be separately classed. This could, as the court observed, result in the need for up to 40 separate meetings, an entirely unworkable situation (see per Chadwick LJ at page 747 (i) of the report and quoted at paragraph 18 above). It is in this context that the Court of Appeal came to the decision it did. The court held that the check and balance was ultimately provided by the court at the application to sanction.

[22] I find that in the circumstances of this case, as in **Re Hellenic** (see paragraph 14 above), the best option would and should have been to have separate meetings. The majority shareholders are effectively the intended purchasers of the shares of the minority. They made the offer of $1.45 per share. When therefore the

meeting of shareholders includes both the minority and majority, the majority of the votes would, regardless of class, be the ones in control of the Claimant. I agree with Lord Millet in the ***UDL Argos case,*** cited at paragraph 16 above, 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. In this case the interests which differ stem from the fact of the minority shareholding, that is, from their rights as shareholders.

[23] On the facts before me, the shareholders must be divided into different classes. The majority being the intended purchasers or those affiliated with them in one class; and the minority shareholders, being the intended sellers, in another class. In this regard I concur with Bowen LJ in ***Sovereign Life Assurance Co v Dodd [1892] 2 QB*** **573 at 583, [1891-94] All ER Rep 246 at 251**:

> *"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."*

[24] Treating 'class' as meaning common interest, the category of class for voting should have been based on the common interest of the shareholders. The majority shareholders being the intended purchasers under the scheme, when allowed to vote in the same meeting, are in effect both the seller and the purchaser. It is the seller that ought to make a decision whether or not to accept the offer of the purchaser. The intended purchaser could not be reasonably expected to vote in the best interest of the company or of the intended sellers. It is therefore right that the minority (or non Liberty affiliated) shareholders vote separately from the majority (affiliated with Liberty). In this case the minority form a separate class from the majority shareholders for the purpose of the meeting to consider this scheme under section 206 of the Companies Act. If the Defendant's analysis, outlined at paragraph 17 above, of the returns of the voting is accurate (see Poll Results Table at exhibit MKJ5 to affidavit of Mark Kerr-Jarrett dated 30th

November 2018), it is a further reason to suggest that separate meetings may have led to a different result. However the statistical information available does not allow me to be definitive on this.

[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: see ***Fidelity Investment International plc v Mytravel Group plc (All England Official Transcripts*** **(1991- 2008), [2004] EWCA Civ 1734** at paragraphs [9] to [12].

[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.

[27] The Defendant raised two jurisdictional issues. Firstly, that as the scheme amounted to a reduction in share capital the required process under the Company's articles ought to be followed. I do not agree. On the evidence there will not be a reduction in share capital, see paragraph 31 below. Secondly, Defendant's counsel submitted that, section 206 of the Companies Act has the words "with creditors" and raised an objection to the scheme on the basis that it

involved shareholders not creditors. I have already considered, and rejected, this point; see my decision in ***Re Cable and Wireless Jamaica Ltd 2018 JMSC Comm 40*** (delivered on 18th November 2018). At paragraph 13 of the judgment I said:

> *"I am satisfied that Parliament did not intend so absurd a result. I strongly suspect the printer's devil may have had a hand. It is therefore necessary to so construe the Act as to avoid the absurdity and effect the purpose. This is achieved by reading a comma after the words "or with creditors" in the second line of Section 206 (1). The Section can therefore sensibly be understood to mean:*
>
> *"Where a compromise or arrangement is proposed between the company and its creditors or any class of them or…between the company and its members or any class of them…"*

[28] The Defendant's counsel submitted that the scheme was unfair. On the question of fairness Claimant's counsel submitted, and I agree, that the primary burden rests on those who allege that it is unfair. An assertion by the dissenting minority, of an absence of good faith on the part of the majority who supported the scheme, is not justified merely because the majority voted in keeping with their own interest. In this regard the following dicta in ***Re Abbey National [2005] 2 BCLC 15 at 21 letters c-f*** per Evans-Lombie J, was relied upon:

> *"I am satisfied that the statutory majority was obtained at the court meeting by what can be regarded as an overwhelming margin…*
>
> *There is no suggestion, and there has been no suggestion, that the, majority who voted their shares at the court meeting were other than acting bona fide in their own and their fellow shareholders' interest. It seems to me that the proposals of the scheme, which are at basis simple, are such that an intelligent and honest man, a holder of those shares acting in respect of his interest, might reasonably approve. It follows that, in my judgment, the scheme is fair…..It follows that, in my judgment, the sanction of the court should be given to the scheme."*

[29] Queen's Counsel submitted that the position of the majority, voting in large measure by proxy, bore out the Claimant's understanding that several shareholders, who were unable to take up the voluntary offer of CWC Cala, welcomed the opportunity to have their shares acquired in the Scheme of Arrangement. Their view (evidenced by their votes) prevailed at the meeting. A difference of views does not equate to an absence of good faith. Reliance was also placed on the case of ***Re English Scottish and Australian Chartered Bank [1891-4] All ER Rep. 775 at 778,*** per Lindley, LJ:

> *"It is quite obvious from the language of the Act and from the mode in which it has been interpreted that the court does not simply register the resolution come to by the creditors, or the shareholders, as the case may be. If the creditors are acting on sufficient information and with time to consider what they are about and are acting honestly, they are, I apprehend, much better judges of what is to their commercial advantage than the court can be. I do not say it is conclusive, because there might be some blot on the scheme which had passed unobserved and which might be pointed out later. But giving them the opportunity of observation, I repeat that I think they are much better judges of a commercial matter than any court, however constituted, can be. While therefore, I protest that we are not to register their decisions, but to see that they have been properly convened and have been properly consulted, and have considered the matter from a proper point of view—that is, with the view to the interest of the class to which they belong, and that they are empowered to bind –the court ought to be slow to differ from them. It should do so unhesitatingly if there is anything wrong about it. But it ought not to do so, in my judgment, unless something is brought to the attention of the court to show that there has been some great oversight or miscarriage."*

[30] Counsel for the Defendant submitted that the court does not 'rubber-stamp' a decision taken at the meeting. As per Chadwick LJ in ***Re BTR plc*** *(*cited at Paragraph 9 above) at page 747 g:

> *"…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 has 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." (Emphasis Added)***

Counsel submitted that the supervisory jurisdiction of the Court, in relation to schemes of arrangement at this stage, was accurately described by Lindley LJ in ***Re Alabama, New Orleans, Texas and Pacific Junction Rly Co [1891] 1 Ch 213,*** as follows ***(pages 238-39):***

> *"What the Court has to do is to see, first of all, that the provisions of that statute have been complied with; and, secondly, that the majority has been acting bona fide. The Court also has to see that the minority is not being overridden by a majority having interests of its own clashing with those of the minority whom they seek to coerce. Further than that, the Court has to look at the scheme and see whether it is one as to which persons acting honestly, and viewing the scheme laid before them in the interests of those whom they represent, take a view which can be reasonably taken by business men. The Court must look at the scheme, and see whether the Act has been complied with, whether the majority are acting bona fide, and whether they are coercing the minority in order to promote interests adverse to those of the class whom they purport to represent; and then see whether the scheme is a reasonable one or whether there is any reasonable objection to it, or such an objection to it as that any reasonable man might say that he could not approve of it".*

[31] I agree that the court has a duty to ensure that the minority is not 'bullied' into approving the scheme. I agree also that the court's duty, to consider the view and interest of those who have not approved the proposals and to ensure they have received impartial consideration, is not a licence for the court to substitute its own view for that of the shareholders. The court does however have a supervisory jurisdiction and is not bound by the decision of a majority which approves the scheme of arrangement. On the facts before me the majority of shareholders approved the Scheme of Arrangement. They had an opportunity and ability to properly judge what is to their commercial advantage. This scheme

of arrangement is simple; its terms are easily understood. The scheme, if approved, will result in the cancellation of shares held by shareholders other than CWC Cala Holdings and Kelfenora Limited in exchange for payment of J$1.45 per share. A share value supported by an expert valuation which has not been challenged. The resultant reduction in capital arising from the cancelation of the shares is not permanent. This is so because immediately after the reduction the stated capital will be restored to the original amount, by the application of the reserve in the books of the Claimant to pay for shares to be allotted, and credited as fully paid to CWC Cala. The note to shareholders outlined all this.

[32] There is however the matter of a proposed derivative action. The proposed claim will allege that C&WC (the parent Company) has, for its own benefit, been burdening the Claimant with loss making functions. It will also be alleged that the board of the Claimant was complicit. This is the essence of the Defendant's allegations in the pending application to bring derivative proceedings. The Defendant seeks permission to conduct proceedings, on behalf of the Claimant, for damages and to have returned to it the property and assets, which he alleges, have been improperly removed for the benefit of C&WC. The intended claim involves the legal and equitable process of tracing and following assets with a view to having the parent company compensate the Claimant. Directors of the Claimant are also intended defendants. The Defendant asserts that if the scheme is sanctioned and the company becomes a wholly owned subsidiary of C&WC or Liberty, it may have consequences for the derivative proceedings. This is because it would result in the Claimant, a subsidiary, being required to fund costly litigation against its holding company, see ***Wallensteiner v Moir (No. 2) [1975] QB 373 at 392***. It would also mean that the parent company , if found liable, would be required to compensate for the losses suffered. This, Defendant's counsel submitted, was 'artificial and conceptually unsound'. C&WC it was submitted is attempting the takeover of the Claimant, by way of a scheme of arrangement, in an attempt to reduce the practical effect of the pending derivative claim. If the parent company and the Claimant become

indistinguishable C&WC will be able, without interference from minority shareholders, to control the Claimant's assets and accounts and to render any relief sought in the derivative claim pointless. As such, Counsel submits that, if the scheme is sanctioned it will result in a frustration of the intended derivative proceedings. This, it is alleged, demonstrates the unfairness of the scheme and why no one acting reasonably would approve it.

[33] With regard to the derivative proceedings, Queen's Counsel relied on a letter dated 6th December 2018 sent by Hart, Muirhead & Fatta, on the Defendant's behalf, to the Claimant's Attorneys-at Law, see exhibit EJA1, attached to the affidavit of Eric Jason Abrahams filed 4th January 2019. In that letter it was accepted that the cancellation of his shareholding occasioned by the Scheme of Arrangement '*would not be a legal bar to the Abrahams Derivative Claim*'. To say otherwise would also be inconsistent with notices to the public which the Defendant published to the effect that: not only existing shareholders in the Claimant, but *'former shareholders of a company can benefit directly from a successful derivative action'.* Queen's Counsel stated that the conversion of an existing shareholder into a former shareholder does not exclude the latter from participation in the proposed derivative action. It also does not otherwise affect the Defendants' ability to bring the proposed derivative action. Therefore, submitted Queen's Counsel, approval of the Scheme of Arrangement will not affect or prejudice the proposed derivative action. There was neither unfairness nor unreasonableness.

[34] Counsel for the Defendant submits that it is no answer to say that the Companies Act allows for payment directly to former shareholders when a derivative action succeeds. If the scheme is approved the Defendant as a former shareholder would be seeking to bring proceedings for and on behalf of a wholly owned subsidiary against its holding company. Such litigation to be funded by the subsidiary which will now have become a single economic unit with the holding company against whom most allegations are made and against whom the bulk of the remedy is being sought. The scheme will, he submits, convert what exists as

a perfectly legitimate, particularized, and serious derivative action into a "conceptual absurdity."

[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.

[38] The Defendant also challenged the price offered for the shares. The Defendant's counsel relied on ***Puma Brandenburg Ltd v Aralon Resources and***

Investment Co. Ltd & Anor (Civil Division Appeal No. 508, decided 18 May 2017), per Bompas JA at paragraph 97:

> *"While the price offered by the Company may have been acceptable to a shareholder wanting an immediate exit (a "liquidity event") and despairing of otherwise ever having any return, it was not shown to be fair to impose on a shareholder who was willing to remain a member and to share with the fortunes of Mr and Mrs Shore. As to this, the Bailiff said (emphasis added) that "...the price was presented as being a price attractive to those who wished to sell. On the other hand the price was not attractive to those looking for a long-term investment as it was stated to be at a 43.6% discount to NAV." He went on to explain that having regard to the information in the Company's 2016 Accounts a shareholder could form a view as to value."*

And at paragraph 102, that:

> *"In our judgment the Bailiff's conclusion was open to him and his exercise of the Court's discretion in refusing to sanction the scheme is not to be faulted. More than that, it is one we wholly agree with: had it been for us to exercise the Court's discretion, we would have done so in the same way. As we see it, there is no good reason for the Company to support a scheme resulting in a takeover of the Company by Mr and Mrs Shore underpinned by the threat that, if the takeover does not succeed, there will be no returns whatsoever for dissentient shareholders."*

[39] Defendant's Counsel submitted that the claim, in the proposed derivative proceedings, is that the underlying value of the Company's shares have been materially altered. A valuation of the company's shares ought to have involved a proper consideration of the derivative proceedings. There ought to have been, at the very least, a statement in the scheme documentation that the outcome of the derivative proceedings may have an effect on the share value. Similar to the approach in the ***Puma Brandenburg case*** (above) a scheme, with an offer price which focuses on the shares' liquidity value and not on their underlying value, ought not to be sanctioned by the court. The purpose of the derivative action is to allow the complainant to pursue a remedy for wrongs done to the company. The

statutory derivative action is designed as a response to the potential unfairness caused by separate legal personality and, most relevant to the instant discussion, majority rule, see paragraph 18 of ***Rea v Wildeboer [2015] ONCA 373.*** Counsel submits therefore that the scheme is not a reasonable one, because the offer price has been set by reference to the share's liquidity value only, ignoring its underlying value and the pending derivative proceedings. These proceedings are expressly aimed at restoring value to the Claimant and therefore being tied to its underlying value. The scheme documentation fails to make mention of the fact that the possible derivative proceedings are linked to the shares underlying value.

[40] Queen's Counsel submitted that PricewaterhouseCoopers Tax and Advisory Services Limited ("PwC Advisory") provided the Fairness Opinion on the compensation price payable for the shares to be cancelled pursuant to the Scheme of Arrangement. That firm consists of professionals in the field. She submitted that they ought not to be criticized for not taking account of the derivative action because that is still highly speculative. It does not yet exist, it may never come into existence and, even if it does and then succeeds, it is brought for the benefit of the Claimant. In the absence of a finding of professional negligence, the Fairness Opinion of PwC Advisory is not to be disregarded. There is, submitted Queen's Counsel, no evidence of a superior compensation offer to that offered in the Scheme of Arrangement. The independent conclusion of PwC Advisory is that the compensation under the proposed Scheme of Arrangement is fair to the minority shareholders of the Claimant from a financial point of view, see exhibit SH 2 attached to the 2nd affidavit of Sola Hines (at page 301 of the Judges Bundle). Queen's Counsel further argued that, if the objector is contending that his criticism of PwC Advisory is tantamount to an allegation that they were professionally negligent in rendering their fairness opinion, his allegation is insufficient to establish that. The proposition that a court should be slow to find a professionally qualified person guilty of negligence, without expert evidence from those within the same profession as to the standard properly to be

expected in the relevant circumstances, is now also regarded as well settled, ***Sansom v Metcalf Hambleton & Co (1997)57ConLR 88.***

[41] I agree with learned Queens Counsel that the Defendant has failed to successfully challenge the opinion of the professionals as to the share value. PwC Advisory are professionals in the field who are able to provide a valuation of shares. There is no alternative opinion tendered before me. The fairness issue in this case does not turn on the price offered for the shares. There has not, as yet, been permission granted to bring a derivative action. It is unreasonable to expect the valuator to take into account the prospect of success of a claim which has not, and may never, be commenced. The Defendant's submission in this regard ought really to be treated as an extension of the "fairness" issue and is not a price issue.

[42] In the final analysis, and for the reasons stated above, my orders are as follows:

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 the Defendant to be taxed, if not agreed.

David Batts
Puisne Judge