[2025] UKPC 44
Privy Council Appeal No 0080 of 2023

JUDGMENT

Cable & Wireless Jamaica Ltd (Appellant) *v* Eric Jason Abrahams (Respondent) (Jamaica)

From the Court of Appeal of Jamaica

before

Lord Hodge
Lord Lloyd-Jones
Lord Burrows
Lord Richards
Lord Doherty

JUDGMENT GIVEN ON
25 September 2025

Heard on 20 May 2025

Appellant
Sandra Minott-Phillips KC
Matthew Royal
(Instructed by Myers, Fletcher and Gordon (London))

Respondent
Conrad George
André Sheckleford
(Instructed by Hart Muirhead Fatta (Jamaica))

LORD RICHARDS AND LORD DOHERTY:

Introduction

1. This appeal from a judgment of the Court of Appeal of Jamaica concerns a scheme of arrangement ("the Scheme") under section 206 of the (Jamaican) Companies Act 2004 ("the 2004 Act"). It raises three issues. The first is whether the minority shareholders, whose shares were to be cancelled under the Scheme, constituted a separate class for the purposes of the Scheme, so that there ought to have been a separate meeting of that class. The second is whether the Scheme involved a reduction of capital and, if so, whether the reduction was authorised. The third is whether, if Batts J (the judge at first instance) had jurisdiction to sanction the Scheme, he ought to have exercised his discretion in favour of sanctioning it.

2. The appellant is Cable & Wireless Jamaica Ltd ("CWJ"). The respondent, Eric Jason Abrahams, is a minority shareholder. In 2018, when the Scheme was proposed, CWJ was a partly owned indirect subsidiary of Liberty Latin America Ltd ("Liberty"). As at 30 June 2018 Liberty, through its subsidiaries CWC Cala Holdings Ltd ("CWC Cala") and Kelfenora Ltd ("Kelfenora"), held 92.27% of the issued ordinary shares of CWJ. The remaining shares ("the minority shares") were held by 20,585 shareholders. The respondent held 0.38% (0.24% in his name and 0.14% through a trust for him). No shares of any other class have been issued.

3. The purpose of the Scheme was to enable CWJ to become a wholly owned subsidiary of Liberty, by cancelling the minority shares in consideration of the payment by CWC Cala of J$1.45 per share. The shares of CWJ had been listed on the Jamaica Stock Exchange since October 1988 and remained listed until April 2018. The cancellation of the listing followed a voluntary take-over offer by CWC Cala pursuant to which it increased its majority shareholding in CWJ.

Section 206

4. Section 206 of the 2004 Act provides (in terms which are almost identical to sections 206 and 425 of the UK Companies Acts 1948 and 1985 respectively):

> "(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 trustee, 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 trustee and contributories of the company."

5. As with many provisions for schemes of arrangement across common law jurisdictions, the purpose is to enable an arrangement or compromise to be made binding on members or creditors of a company in circumstances which would otherwise need individual and unanimous consent of the members or creditors concerned. In order to achieve that, a meeting or meetings of the members or creditors, or classes of members or creditors, must be convened, the proposed scheme must be approved at the meeting(s) by the majorities in number and value specified in section 206(2), and the court must exercise its discretion to sanction the scheme at a hearing at which members or creditors affected may attend and oppose the grant of sanction. Originating in section 2 of the UK Joint Stock Companies Arrangement Act 1870, these provisions have proved to be a durable, flexible and highly effective jurisdiction as regards arrangements with both members and creditors.

The Scheme

6. The Scheme defined "the Scheme Shares" so as to comprise the minority shares. Clauses 3.1 and 4.1 of the Scheme provided for the cancellation of the Scheme Shares and the payment of consideration to their holders (defined as the "Eligible Persons"):

> "3.1 The capital of CWJ shall be reduced by the cancellation of all of the Scheme Shares resulting in the reduction of its capital by the amount represented by those shares.
>
> 4.1 In consideration of the cancellation of the Scheme Shares, CWC Cala shall pay the sum of $1.45 per share in cash to each Eligible Person in respect of each Scheme Share."

7. Clause 3.2 provided for an increase in the issued share capital following the cancellation of the Scheme Shares:

> "The reduction in capital of CWJ is not permanent. Immediately after the reduction of capital, the stated capital will be restored to the original amount by the application of the reserve that will arise in its books of account as a result of the reduction of capital in paying up in full new CWJ Shares and shall allot the said new CWJ Shares, credited as fully paid, to CWC Cala."

The Scheme meeting

8. In September 2018 CWJ made an ex parte application under section 206(1) of the 2004 Act to the Commercial Division of the Supreme Court of Judicature of Jamaica for permission to convene a meeting of its ordinary shareholders to consider and, if thought fit, approve the Scheme. On 1 October 2018 the court granted CWJ permission to convene a scheme meeting of all ordinary shareholders to be held on 21 November 2018. The respondent attended the meeting and opposed the resolution to approve the Scheme. However, the Scheme was approved by the required statutory majorities (a majority in number and at least 75% in value: section 206(2) of the 2004 Act). 260 out of 344 shareholders present in person or by proxy representing 98.48% in value of the shares voted in favour. However, of the minority shares voted at the meeting (19.26% of the total number of minority shares), 94.3% were voted against the Scheme and 5.7% were voted in favour of it.

The sanction hearing

9. A hearing to sanction the Scheme took place before Batts J on 7 and 10 January and 15 and 18 March 2019. The respondent opposed the grant of sanction. His counsel raised two jurisdictional issues. First, he submitted that the Scheme meeting had not been properly constituted because there should have been a separate meeting of the minority shareholders. (It should be noted that, if there had been such a meeting, it would have been unnecessary to hold a separate meeting of CWC Cala and Kelfenora, as they could appear by counsel at the sanction hearing to consent to the Scheme and undertake to be bound by it.) Secondly, he submitted that the Scheme involved an unauthorised reduction of capital. He also submitted that in the whole circumstances, including the fact that a derivative action against CWJ's parent company was proposed, the court should refuse to sanction the Scheme.

10. Batts J refused to approve the Scheme. He issued a written judgment (*Cable & Wireless Jamaica Ltd v Abrahams* [2019] JMCC Comm 7). On the first jurisdictional

issue, he held (paras 20-26) that the Scheme meeting was not properly constituted. He said that the situation was similar to that in *In re Hellenic & General Trust Ltd* [1976] 1 WLR 123 ("*Re Hellenic & General*"). In that case M, a subsidiary of the acquiring company, had effectively been in the position of being both seller and purchaser. Here, the majority shareholders were effectively the intended purchasers of the shares of the minority (para 22). Batts J continued:

> "22. ... I agree with Lord Millett in [*UDL Argos Engineering & Heavy Industries Co Ltd v Li Oi Lin* [2001] 3 HKLRD 634] … 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 …:
>
> '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. …"

He concluded that the majority and minority shareholders formed separate classes.

11. On the second jurisdictional issue, Batts J decided (para 27) that the Scheme did not involve a reduction of capital. He elaborated at para 31:

> "…The scheme, if approved, will result in the cancellation of shares held by shareholders other than CWC Cala Holdings and Kelfenora Ltd 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 (sic) 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. …"

12. Even if, contrary to his view, the meeting had been properly constituted, Batts J would have refused to sanction the Scheme (paras 35-37). In his view fairness would have required that the application for permission to bring the derivative action be heard and determined before the Scheme was approved. He refused to approve the Scheme but permitted CWJ to reconvene meetings for consideration of the Scheme at a time and in a manner consistent with his judgment. He granted leave to appeal.

The proceedings in the Court of Appeal

13. The appeal was heard on 7, 8 and 9 December 2021 by Brooks P, Simmons JA and V Harris JA: [2022] JMCA Civ 44. On 17 July 2020 the respondent had been granted leave to file a derivative claim (*Abrahams v Cable & Wireless Jamaica limited* [2020] JMCC Comm 18).

14. On behalf of CWJ it was submitted that Batts J erred in law in holding that the class of shareholders for the purposes of the Scheme was not properly constituted. All of the shareholders' legal rights against CWJ were identical. There was no dissimilarity of rights, let alone a dissimilarity which made it impossible for them to consult together with a view to their common interest. Batts J also erred in law in concluding that an assessment of the fairness of the Scheme should await the determination of the application for permission to bring a derivative action. The shareholders were fully aware of the application at the time of the meeting but chose nevertheless to approve the Scheme.

15. V Harris JA delivered the leading judgment with which the other members of the court agreed. On the class constitution issue, she agreed with and followed the principles stated by Lord Millett NPJ at para 27 in *UDL Argos Engineering & Heavy Industries Co Ltd v Li Oi Lin* [2001] HKCFA 19; (2001) 4 HKCFAR 358 ("*UDL Argos*"). She also concurred with his analysis of *Re Hellenic & General*. She concluded:

> "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 (sic) 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 (sic) 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 [*In re Hawk Insurance Co Ltd* [2001] 2 BCLC 480] and *UDL Argos* respectively)."

16. V Harris JA held that that was dispositive of the appeal. In relation to Batts J's decision on the fairness issue, she said:

> "82. … 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, (sic) 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."

17. In light of the reasons for the disposition of the appeal the court considered it to be unnecessary to resolve the reduction of capital issue (para 19).

18. On 7 July 2023 the Court of Appeal granted the CWJ leave to appeal to the Board.

The appeal to the Board

19. Sandra Minott-Phillips KC, for CWJ, submitted that the authorities are clear that rights, not interests, are the governing factor when it comes to class composition. Reference was made to *Sovereign Life Assurance Company v Dodd* [1892] 2 QB 573, Bowen LJ at p 583; *In re Hawk Insurance Co Ltd* [2001] 2 BCLC 480 ("*Re Hawk*"), Chadwick LJ at para 26 (p 516D-E); *UDL Argos,* Lord Millett NPJ at para 27, principle (3)*; In re Telewest Communications plc (No 1)* [2005] 1 BCLC 752, David Richards J at paras 19-22; *Gore-Browne on Companies* (45^{th} ed)*,* Issue 183, Chapter 46, para 14). Even if shareholders' rights are dissimilar, the dissimilarity may not be sufficient to prevent them from consulting together with a view to their common interest (*Re Hawk).* Separate meetings are not practical or required where shareholders have the same rights but different interests or motives in relation to a scheme (see eg *In re BTR plc* [2000] 1 BCLC 740 ("*Re BTR*"), Chadwick LJ at pp 747D-749B; *In re Industrial Equity (Pacific) Ltd* [1991] 2 HKLR 614 ("*Re Industrial Equity*"), Nazareth J at pp 619I-624H). In so far as *Re Hellenic & General* suggested otherwise, it is erroneous. Lord Millett NPJ's attempt to reconcile *Re Hellenic & General* with the legal rights approach to class constitution (paras 21-23 of *UDL Argos*) is obiter and unconvincing. Further support for that view may be found at para 130 of the dissenting joint judgment of Elias CJ and Ellen France J in the New Zealand Supreme Court case, *Trends Publishing International Ltd v Advicewise People Ltd* [2018] NZSC 62; [2018] 1 NZLR 903 ("*Trends Publishing*").

20. Mrs Minott-Phillips submitted that where, as here, shareholder rights are identical before the scheme, the shareholders constitute a single class. On a proper analysis, the fact that a scheme treats shareholders differently does not result in them having different

rights. Rather, they have different interests. The proper time and place to consider whether unfairness results from a scheme and those different interests is at the sanction hearing. Even if, contrary to the appellant's view, there is a dissimilarity of rights here, the dissimilarity is not such as to make it impossible for the shareholders to consult together with a view to their common interest.

21. In relation to the second jurisdictional issue, Mrs Minott-Phillips submitted that Batts J was correct to hold that the Scheme did not involve a reduction of capital. There was no reduction because the minority shares were cancelled but immediately reissued to CWJ Cala.

22. Further, she submitted that Batts J erred in law in refusing to sanction the Scheme if he was wrong about the first jurisdictional issue. There is no unfairness to the minority. J$1.45 per share represents a premium of 35%-40% according to the independent valuation report prepared by PWC. A majority in number of those voting – 260 out of 344 – representing 98.48% in value voted in favour of the Scheme. The will of the majority is being thwarted by a very small minority who ought not to be permitted to veto the arrangement. It would not have been premature to sanction the Scheme while the application to bring a derivative action was pending. The meeting had been fully informed about the possibility of a derivative action. The shareholders were well placed to, and did, take that factor into account. If the derivative action is prosecuted to a successful conclusion, former shareholders of the company are among those who could benefit from any damages recovered (2004 Act, section 213(1)(c)). The fact that since Batts J's decision and prior to the Court of Appeal's decision the application had been granted does not materially change the position.

23. The Board adjourned for a short period to consider whether, in light of both parties' written cases and Mrs Minott-Phillips' oral submissions, the respondent should be called upon. When the Board reconvened, it indicated that the respondent need only address it on the reduction of capital issue.

24. On behalf of the respondent, André Sheckleford submitted that it had been an error of law for Batts J to hold that the Scheme does not involve a reduction of capital. Plainly, it does. Share capital is to be reduced. The fact that further shares are then to be issued is neither here nor there. The powers in articles 48 and 49 of the company's articles to reduce capital are all subject to section 71 of the 2004 Act. The proposed reduction does not fall within any of the grounds for reduction permitted by the section 71(1)(a), (b) or (c), and there has been no special resolution (section 71(1)) for reduction. There has been no declaration in terms of section 71(3)(a) and no publication of the appropriate notices in terms of section 71(5).

25. Mr Sheckleford submitted that the requirements of section 71 could not be bypassed by making a reduction of capital part of a scheme of arrangement. Those requirements must be met as well as the requirements for a scheme (*In re Guardian Assurance Company* [1917] 1 Ch 431, per Younger J at pp 441-442). While the Court of Appeal had reversed Younger J on a different point, they had not questioned the correctness of this part of his judgment. That had been the accepted position since then; see eg Payne, *Schemes of Arrangement: Theory, Structure and Operation* (2014), pp 87-88. As presented to the court, the reduction is an integral part of the Scheme, and this is a second basis for concluding that Batts J did not have jurisdiction to sanction the Scheme.

26. In reply for the appellant, Matthew Royal submitted that Batts J had found that the Scheme does not include a reduction of capital. That finding is correct, because the total share capital immediately before and immediately after the Scheme takes effect will be the same.

27. Even if, contrary to Batts J's finding, the Scheme involves a reduction of capital, the requirements of section 71 need not be complied with because the ambit of the statutory power in section 206 to carry out a scheme of arrangement is a wide one (*In re National Bank Ltd* [1966] 1 WLR 819, Plowman J at p 829E-F; *Re BTR* , Chadwick LJ at p 747F-G) – wide enough to authorise a reduction of capital without the need to comply with the requirements of section 71. Younger J's observations in *In re Guardian Assurance Company* to different effect are incorrect and ought not to be followed.

28. Mr Royal also argued that a further reason that the Scheme does not involve a reduction of capital is that the true nature of the transaction is an acquisition by CWJ of its own shares. Section 71 does not apply to such a transaction (section 72(4)). While the provisions governing acquisitions by a company of its own shares are sections 58 and 59, and there had been no director's declaration in accordance with section 58(4), where an acquisition forms part of a scheme of arrangement the only authorisation which is required is under section 206. Ultimately, on being pressed on this point, the Board understood Mr Royal to accept that CWJ had not acquired its own shares. It had cancelled shares and new shares had been issued to CWC Cala for which CWC Cala had paid J$1.45 per share.

Class constitution

29. In *UDL Argos* Lord Millett NPJ discussed the principles governing the constitution of classes at paras 15-27. In para 16 he cited the principal decisions governing the issue in England and Wales and in several other common law jurisdictions, and continued:

> "17. There is a notable degree of consistency in this line of authority. The principle upon which the classes of creditors or

> members are to be constituted is that they should depend upon the similarity or dissimilarity of their rights against the company *and the way in which those rights are affected by the Scheme*, and not upon the similarity or dissimilarity of their private interests arising from matters extraneous to such rights." (Emphasis added.)

30. At para 18 Lord Millett repeated Bowen LJ's classic formulation in *Sovereign Life Assurance Company v Dodd,* emphasising the following sentence:

> "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."

31. At para 20 he observed that in *In re Alabama, New Orleans, Texas and Pacific Junction Railway Co* [1891] 1 Ch 213 ("*Re Alabama*") Bowen LJ had remarked on the difference between the rights "(or interests proceeding from rights)" which were relevant to the constitution of the classes and extraneous interests which were not. At paras 21-23 Lord Millett explained that, although in *Re Hellenic & General* Templeman J had referred to two groups of shareholders having conflicting interests, that was to use imprecise language. The key to the decision was that the subsidiary, M, was effectively identified with the parent company, which made it inappropriate for it to be in the same class as the other shareholders whose shares were being acquired:

> "23. But this was not because M and the other shareholders had conflicting interests, nor because they had different rights to start with. M's legal rights at the outset were the same as those of the other shareholders. *What put M 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 M 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 M and the other shareholders were commercially so dissimilar as to make it impossible for M and the other shareholders to consult together with a view to their common interest, for they had none*." (Emphasis added.)

32. At para 26 Lord Millett clarified the reasons for the test being rights based. It would be impracticable in many cases to constitute classes based upon similarity of interests as distinct from similarity of rights. Going down the former route would increase the risk, because of fragmentation of classes, of enabling a small minority to thwart the wishes of the majority. The rationale which underlies the calling of separate meetings supported a rights-based approach:

> "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."

33. At para 27 he concluded:

> "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.)

34. The Board agrees with Lord Millett's analysis and with the principles which he derived from the authorities, subject to three qualifications.

35. First, as regards the statement in principle (1) that, if the meeting or meetings are improperly constituted, objection should be taken at the sanction hearing, the courts in England and Wales have adopted the practice recommended by the Court of Appeal in *Re Hawk* of giving notice of the hearing to convene the meeting or meetings and seeking, so far as possible, to determine issues as to the constitution of classes at that hearing. In this way, the risk can be much reduced that the time, trouble and cost of proceeding with a scheme to a final hearing will be incurred, only for the scheme to fail at that stage because a wrongly constituted class deprived the court of jurisdiction to sanction it.

36. Secondly, the Board thinks it improbable that Templeman J was being imprecise with language. It is more likely that his analysis did indeed focus upon the different interests of the two groups of shareholders. That being so, it is better to acknowledge that Templeman J's reasoning in relation to class constitution is erroneous. Mrs Minott-Phillips drew our attention to para 130 of the joint dissenting judgment of Elias CJ and Ellen France J in *Trends Publishing* where they doubted Lord Millett's analysis of *Re Hellenic & General*. The Board shares those doubts. Lord Millett's attempt (at para 23)

to reconcile Templeman J's judgment with a rights-based analysis is not convincing: *viz* that the rights proposed to be conferred by the scheme upon M and the other shareholders were "commercially" so dissimilar as to make it impossible for them to consult together with a view to their common interest because they had none. The insertion of the word "commercially" is a strong indication that the scheme did not confer different legal rights on the two groups of shareholders. They clearly had very different interests, but their rights before the scheme were identical and the rights which the scheme proposed to confer on them were identical – their shares were to be cancelled. We agree with the following analysis by Nazareth J in *In Re Industrial Equity,* at p 624A-E, subject to one qualification (which is explained below):

> "I turn now to the authorities … First, *Re Hellenic and General Trust Ltd* ... in which Templeman, J (as he then was) dismissed the company's petition for the court's sanction holding that the interests of a wholly owned subsidiary were different from those of other ordinary shareholders. Templeman, J did not refer to the *Alabama* case, in which contrary to his approach, both Lindley, LJ (at pp 239, 240) and Bowen, LJ (at pp 243, 244), Fry, LJ concurring (at p 246) contemplated interests being addressed at the subsequent sanctioning stage and not in the constitution of classes. It is also of interest that the two authorities relied upon by Templeman, J immediately before, in the different context of the responsibility of the petitioner to properly constitute class meetings, also both contemplate the contrary; ie Swinfen Eady , J in [*In re United Provident Assurance Co Ltd* [1910] 2 Ch 477] proceeding upon rights, and Eve J in his Practice Note drawing a distinction between the constituting of classes and, after class meetings, the resolution of competing interests.
>
> Moreover, in the *Sovereign* case, … although Lord Esher did refer to interests in the passage Templeman, J quotes, as I have said, that reference in my view must be construed as a reference to interests arising out of rights in the company. But the passage from the judgment of Bowen, LJ also quoted does not in its reference to rights support the course adopted by Templeman, J. In truth, the significance of constituting classes by reference to rights as opposed to interests did not emerge and was not addressed."

37. Thirdly, the Board considers that there is a danger that the references in principle (3) to "interests not derived from … legal rights" may produce unnecessary confusion about the relevant distinction between rights and interests in this context. At para 20 of *UDL Argos* Lord Millett observed that in *Re Alabama* Bowen LJ remarked on the

difference between the rights "(or interests proceeding from rights)" which were relevant to the constitution of the classes and extraneous interests which were not. The words in parenthesis were not in fact used by Bowen LJ (see his judgment at pp 243-244), but appear to be a gloss or qualification by Lord Millett to explain the distinction made by Bowen LJ between some creditors who "have only interests as members of that class" and others who "may have interests of a predominant kind which they hold, not as members of that class, but because they belong also to some other class of creditors, or because they also belong to the body of shareholders of the company". The concept of "interests proceeding from rights" may have its origin in the judgment of Nazareth J in *In Re Industrial Equity* (at pp 622I and 624D). In *Re BTR* at first instance ([1999] 2 BCLC 675), Jonathan Parker J referred to the latter passage and observed that he found it difficult to understand the concept of an interest arising out of a right as being distinct from the right itself (p 682C-D). The Board agrees. It is fair to say that Nazareth J was attempting to reconcile the references to rights and interests in *Sovereign*, but his gloss, and Lord Millett's qualification of principle (3), are unnecessary and do not clarify the law. The focus ought to be on rights before the scheme and the effect of the scheme on those rights (be it removing, varying or conferring them). If members' or creditors' legal rights against the company before the scheme are so dissimilar that they cannot consult together on their common interest, or if 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 two groups cannot so consult, more than one class meeting will be required.

38. The emphasis on rights, as opposed to interests, as the determining factor for the composition of classes does not mean that differing interests are irrelevant to the decision whether to sanction a scheme. On the contrary, the existence of conflicting interests within the same class may be a highly relevant, and sometimes decisive, factor in the exercise of the court's discretion to give or to withhold its sanction to a scheme.

39. Turning to the appellant's submissions, the argument that the focus should only be on the shareholders' rights against the company prior to the scheme, and not also on the effects of the scheme in removing or varying those rights or conferring new rights is plainly wrong. There is a great deal of authority to the contrary. The Board has referred already to *UDL Argos*, para 27, principle (4). In *Re Hawk*, at para 30 Chadwick LJ observed (in the context of the question 'with whom is the compromise or arrangement made'):

> "In each case the answer to that question will depend upon analysis (i) of the rights which are to be released or varied under the scheme and (ii) of the new rights (if any) which the scheme gives, by way of compromise or arrangement, to those whose rights are to be released or varied. It is in the light of that analysis that the test formulated by Bowen LJ in order to determine which creditors fall into a separate class – that is to say, that a class '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' – has to be applied."

In *In re Apcoa Parking (UK) Ltd* [2014] EWHC 997 (Ch); [2014] Bus LR 1358, Hildyard J said at para 28:

> "The golden thread is that the proponent of the scheme and the court must be astute to ensure that a class should be comprised only of individuals who can commune and discuss the proposals together with a view to their common interest. If their rights (before and after the scheme) differ in such a way as to make it, in sensible and practical terms, impossible for them to consult together with a view to their common interest, then the class is improperly constituted."

See also to similar effect eg *In re T & N Ltd (No 4)* [2006] EWHC 1447 (Ch); [2007] Bus LR 1411, David Richards J at paras 85-86; *Premier Oil plc v Fund III Investment 1 (Cayman) Ltd* [2020] CSOH 39, Lady Wolffe at para 166; *Palmer's Company Law*, vol 3, paras 12-043 (reviewed September 2020), 12-046 (reviewed February 2025); *Gore-Browne on Companies* (45th ed), Chapter 46, para 14; Gower, *Principles of Modern Company Law* (11th ed), para 29-008; *Halsbury's Laws of England* (5th ed), vol 15, Company Law, para 1131.

40. In this context the Board also notes some further passages in the joint dissenting judgment of Elias CJ and Ellen France J in *Trends Publishing*. At para 105, they said:

> "Classes of creditors for the purposes of compromise must be differentiated according to whether their legal rights as creditors of the company and the new rights for which they are to be exchanged under a proposed compromise are materially similar."

At para 106, they explained that this approach would keep New Zealand law consistent with other jurisdictions in relation to court sanctioned compromises. The Board agrees. The majority judgment of William Young, Glazebrook and O'Regan JJ took a different view, which they described as a "restated approach" (paras 64-69). Creditors could be classed together where, despite differences in interests or rights, they could be expected to vote on the basis of a "class-promoting view" (para 66). However, even under the restated approach, the importance of different treatment under the scheme was recognised (para 67):

> "Where creditors whose pre-compromise rights and interests are materially the same are treated differently under the proposed compromise, however, separate classes will almost certainly be required."

41. Under the Scheme in the present case, the treatment of the minority shares and the shares held by CWC Cala and Kelfenora could hardly be more different. The minority shares would be cancelled in consideration of the payment of J$1.45 per share, while the other shares would remain unaffected, with the result that CWJ would become a wholly owned subsidiary of Liberty. The rights attached to the minority and the majority shares are the same before the Scheme takes effect, but the treatment of the minority and majority shareholders under the Scheme is completely different. In those circumstances, it is clear that they constituted separate classes for the purposes of the Scheme and that, without approval by the statutory majorities at a meeting of the minority shareholders and the separate consent of CWC Cala and Kelfenora, the court had no jurisdiction to sanction the Scheme. Accordingly, Batts J was right to refuse to sanction the Scheme and the Court of Appeal was right to affirm his decision.

Reduction of capital

42. Section 39(3) of the 2004 Act provides that a company "shall not reduce its stated capital…except in the manner provided by this Act". "Stated capital" is defined by section 2(1) so as to comprise the total amount paid or credited as paid on its issued shares. Sections 71 and 72 provide for the manner in which stated capital may be reduced.

43. Section 71 provides:

> "(1) Subject to subsection (3), a company may by special resolution-
>
> (a) extinguish or reduce a liability in respect of an amount unpaid on any shares;
>
> (b) reduce its stated capital by an amount that is not represented by realizable assets; or
>
> (c) return to its shareholders any of its assets which are in excess of the wants of the company.

> (2) The stated capital of a company shall be reduced in accordance with any resolution under subsection (1) which reduces or has the effect of reducing the stated capital.
>
> (3) A company shall not reduce its stated capital under subsection (1)(a) or return assets pursuant to subsection (1)(c) unless a statutory declaration is made by the directors of the company to the effect that there were no reasonable grounds for believing—
>
> (a) that after the reduction or, as the case may be, return, the company would be unable to pay its liabilities as they become due; or
>
> (b) that the realizable value of the company's assets would thereby be less than the aggregate of its liabilities and the stated capital remaining after the reduction in accordance with subsection (2).
>
> (4)…
>
> (5) A company shall at two intervals at least seven days apart, give notice in a daily newspaper circulating in the Island of-
>
> (a) any reduction of its stated capital pursuant to subsection (1)(b); or
>
> (b) any intention to reduce its stated capital under subsection (1)(a) or (c)"

44. Section 72(4) provides that section 71 "shall not apply to a redemption, purchase, acquisition or forfeiture". Mr Royal's submission, which he did not ultimately press, that section 71 does not apply because the Scheme involves an acquisition by CWJ of its own shares rather than a reduction of capital, is untenable. Batts J did not treat the Scheme as involving an acquisition by the company of its own shares – it was not suggested to him by CWJ that it was. It is plain that is not the nature of what is proposed. Shares are to be cancelled and new shares are to be issued to and acquired by CWC Cala. This is not a purchase or acquisition, and section 72(4) does not disapply the application of section 71 to the Scheme. Moreover, if the Scheme had involved the acquisition by CWJ of its own

shares, it would not have complied with the requirements of sections 58 or 59 of the 2004 Act. Such compliance would have been necessary.

45. Batts J recognised that the Scheme involved "the cancellation of shares" with a "resultant reduction in capital" (para 31). However, he reasoned that the reduction of capital "is not permanent" because the issue of shares to CWC Cala would restore the company's capital to the previous amount, and that therefore it is not a reduction of capital (paras 27 and 31). This part of the judge's reasoning is clearly erroneous. The share cancellation would be a reduction of CWJ's stated capital. The proposed subsequent issue of shares to CWC Cala does not alter the fact that the share cancellation effects a reduction in stated capital.

46. The fact that a proposed reduction forms part of a scheme of arrangement does not relieve CWJ of the need to comply with the requirements for reduction in section 71. In *In re Guardian Assurance Company* [1917] 1 Ch 431, Younger J refused to sanction a scheme of arrangement because he was of the view that section 120 of the Companies (Consolidation) Act 1908 had to involve some kind of dispute or difficulty to be resolved by a compromise or agreement and that there was no such dispute or difficulty. Although the scheme in question did not involve a reduction of capital, Younger J said at pp 441-442:

> "…The section … has no application to an arrangement which is ultra vires the company, nor to an arrangement of a kind which can only be effected in a prescribed way, eg, a reduction of capital, or a reconstruction under section 192. If that which within Mr Clauson's definition would be an arrangement is in fact nothing but a reduction of capital, the appropriate statutory procedure must be resorted to: *In re Cooper, Cooper and Johnson* [1902] WN 199. Section 120 has no application… And there are frequently cases in which an arrangement involves a reduction of capital, and also some alteration in the rights which cannot be effected by the reduction procedure per se. In such a case the requirements both of the reduction procedure and this section must be observed."

47. The Court of Appeal allowed an appeal against the decision of Younger J, holding that the scheme, though not a "compromise", was an "arrangement" within section 120 of the 1908 Act: see [1917] 1 Ch 431, 445ff. However, none of the judgments in the Court of Appeal took issue with what Younger J said about schemes that included reductions of capital, reconstructions, or other procedures which, under the 1908 Act, could only be carried out in a prescribed way.

48. In one of the authorities mentioned by Younger J, *In re Cooper, Cooper & Johnson Ltd* [1902] WN 199, Sir Francis Gore-Browne KC sought approval of a scheme of arrangement which included a reduction of capital. The statutory requirements for the approval of a reduction of capital had not been complied with. Byrne J ruled that where a scheme of arrangement involved a reduction of capital the reduction should be carried out in accordance with the statutes specially dealing with a reduction of capital and he ordered the petition to be held over with liberty to amend once those requirements were satisfied.

49. In *In re White Pass and Yukon Railway Co Ltd* (1918) 63 Sol Jo 55, an application to sanction a scheme of arrangement involving a reduction of capital came before Younger J. A question was raised as to whether the reduction should have been advertised. Younger J ruled:

> "Where a scheme of arrangement involves a reduction of capital, all the requirements of the Companies (Consolidation) Act, 1908, with regard to cases of reduction of capital must be complied with. It is therefore necessary to advertise the petition for sanctioning the scheme, unless the Court has dispensed with advertisements."

50. In *In re St James' Court Estate Ltd* [1944] Ch 6, a company presented a scheme of arrangement which sought to convert issued preference shares into redeemable preference shares. Simonds J refused to sanction the scheme (p 8):

> "I am not prepared to sanction the scheme as it stands. The conversion of issued preference shares into redeemable preference shares seems to me to be clearly not within s. 46, sub-s. 1. A conversion of that kind can take place only if the steps appropriate to a reduction and simultaneous increase of capital have been taken, and the resolution of April 29, 1943, approving the scheme, was not a proper resolution for that reduction and increase. There ought not to be any difficulty in going before the registrar with proper resolutions for reduction and increase of capital. If the necessary resolutions are passed for the reduction of the capital by cancelling the 200,000 issued preference shares and for a simultaneous increase of it by creating 200,000 redeemable preference shares of 1l each, I will then consider whether I will sanction the scheme. Meanwhile, I will adjourn the petition so that the company may have an opportunity to submit resolutions of that kind to its members."

51. The Board is in no doubt that these cases are an accurate statement of the law on this point, which is well-settled (see eg *Palmer's Company Law*, vol 3, para 12.015 (reviewed September 2020); Payne, *Schemes of Arrangement: Theory, Structure and Operation,* pp 87-88; *Halsbury's Laws of England* (5th ed), vol 15, Company Law, para 1135). Nothing said in *In re National Bank* or by the Court of Appeal in *Re BTR* contradicts the cases mentioned above. In both of those cases the court was asked to sanction a scheme of arrangement *and* to confirm a reduction of capital (*In re National Bank*, pp 822A-B and 830B; *Re BTR*, p 741F-G). There is nothing to suggest that in either case the statutory requirements for reduction were bypassed. Indeed, it is clear from Jonathan Parker J's judgment at first instance in *Re BTR* that the petition for sanction of the scheme was "coupled with" confirmation of a proposed reduction (p 676H), and that the scheme meeting to approve the arrangement was to be followed by an extraordinary general meeting to approve the reduction of capital (p 678C-E). There are numerous other examples of cases where petitions have proceeded on the basis that because the scheme includes a reduction of capital the requirements relating to a reduction must be complied with as well as those relating to a scheme of arrangement: for example, *In re Hoare & Co Ltd and Reduced* [1910] WN 87; *In re Stephen Walters & Sons Ltd* (1926) 70 Sol Jo 953; and *British & Commonwealth Holdings plc v Barclays Bank plc* [1996] 1 WLR 1.

52. It is not difficult to see why the prescribed procedure for reduction ought to be complied with. Whereas a scheme of arrangement may involve only the members of a company, it is possible that a reduction of capital may prejudice creditors.

53. In the present case, several requirements of section 71 have not been complied with. There has been no special resolution to reduce capital in terms of section 71(1), no statutory declaration in terms of section 71(3), and no notices in accordance with section 71(5).

54. However, there is a more fundamental difficulty with the proposed reduction of capital. It is not authorised by the terms of section 71 of the 2004 Act and, as noted above, section 72(3) provides that, subject to section 72, a company may not reduce its stated capital except as provided for in section 71. Section 71 specifies only three ways in which a company may by special resolution reduce its share capital, none of which applies to the reduction for which the Scheme makes provision.

55. The wording of section 71 is in marked contrast to the equivalent provisions of UK Companies Acts. The power of a company to reduce its share capital was introduced by the Companies Act 1867, which conferred the power in general terms. Section 9 simply provided that "[a]ny Company limited by Shares may, by special Resolution, so far modify the Conditions contained in its Memorandum of Association… as to reduce its Capital…". The House of Lords held in *British and American Trustee and Finance Corpn Ltd v Couper* [1894] AC 399 that section 9 (and amendments made by the Companies Act 1877) imposed no limit on the mode of any reduction of capital: see Lord Herschell

LC at p 406, Lord Watson at p 410 and Lord Macnaghten at pp 411-412. The power was re-cast in section 46 of the Companies (Consolidation) Act 1908 in a manner which made even clearer that, provided it was authorised by the company's articles, there was no limit on the mode of reduction. It provided that a company "if so authorised by its articles, may by special resolution reduce its share capital in any way, and in particular (without prejudice to the generality of the foregoing power) may" and there then followed in substance the three methods specified in section 71 of the 2004 Act. This remained substantially the statutory formula in subsequent Companies Acts, including the Companies Act 1948. The relevant provisions were redrafted in the current UK statute, the Companies Act 2006, but section 641 continues to make clear that, subject to specified exceptions, a company may reduce its share capital in any way. The 2004 Act appears to have been very largely based upon the Companies Act 1948, and it is perhaps surprising that section 71 did not replicate the wide general power contained in section 66 of that Act.

56. The proposed reduction is not authorised by, or in accordance with, section 71 of the 2004 Act. That is an additional reason why Batts J did not have jurisdiction to sanction the Scheme.

Discretion

57. Since the Board has decided that Batts J did not have jurisdiction to sanction the Scheme, it is neither necessary nor appropriate to consider whether he would have been entitled to refuse to approve the Scheme if he did have jurisdiction.

Conclusion

58. For all of these reasons, the Board will humbly advise His Majesty that this appeal be dismissed.