Jersey & Guernsey Law Review – June 2013

JERSEY COMPANY LAW: THE DEVELOPING PRACTICE OF SCHEMES OF ARRANGEMENT

Paul J. Omar

This article outlines the scheme of arrangement provisions in the Companies (Jersey) Law 1991 and deals with recent trends in the jurisprudence with respect to the operations of the scheme framework as a method of restructuring companies in Jersey.

Introduction[1]

1 The Companies (Jersey) Law 1991 is now of some vintage,[2] although the consensus amongst corporate practitioners is that its framework, updated reasonably frequently by various regulations and amendment laws,[3] continues to work reasonably well in providing a useful basis for the conduct of corporate operations in Jersey. The law is based on the Companies Act 1985 (United Kingdom), which is descended from earlier models going back as far as 1844.[4] It was in the

---

[1] This article is based on a CPD Lecture given on 5 June 2013 as part of a series organised by the Jersey Institute of Law, St Helier. The author acknowledges the number of useful criticisms and feedback provided by members of the audience. Any errors or omissions remain, however, the author's own.

[2] References below to articles and parts are to the Companies (Jersey) Law 1991 unless otherwise specified.

[3] In the last few years alone, amendments have been made directly to the text by the Companies (Amendment No 5) Regulations 2011 (in force 23 February 2011), the Companies (Amendment No 6) Regulations 2011 (in force 20 July 2011) and the Companies (Amendment No 7) Regulations 2013 (in force 27 March 2013), not to mention amendments made consequent to the adoption of the Separate Limited Partnerships (Jersey) Law 2011 (in force 20 April 2011), the Civil Partnerships (Jersey) Law 2012 (in force 2 April 2012) and the Security Interests (Jersey) Law 2012 (not yet in force).

[4] The Joint Stock Companies Act 1844 (United Kingdom), introducing the statutory (or registered) company into law following the

mid-19th century that scheme of arrangement provisions were first seen, permitting a compromise or other arrangement with creditors,[5] although it was not until the early 20th century that schemes were made available to govern restructurings of members' interests.[6]

2 In the period since the framework was first introduced, the flexibility and versatility of the scheme has seen its use extend from its original scope as a method of compromising or settling creditors' claims. Thus, the scheme of arrangements provisions now allow for the court-directed procedure to produce a plan with a number of possible outcomes, including the sale or disposal of the business, the merger or demerger of companies, the restructuring of capital, debt and other obligations, including the injection of new capital, to effect changes in management and also to carry out takeovers. In the insurance industry in particular, schemes have enabled distributions to take place as an alternative to liquidation as well as the estimation and pay-off of classes of claims. The cram-down available in scheme procedures also means that schemes offer a better opportunity than consensual restructurings, particularly where there may be minority dissenting creditors who may otherwise impede an arrangement.

3 The main advantage of the scheme of arrangements, apart from its overall outcome-oriented flexibility, is to avoid the formality of insolvency procedures, even those that might be considered light-touch, such as the corporate voluntary arrangement ("CVA") in the United Kingdom, which was in fact designed to resemble the scheme.[7] In fact, in jurisdictions inheriting versions of the United Kingdom

---

recommendations of the Gladstone Commission 1841. It was inspired in part by the Commercial Code 1808 (France), which is also at the origins of the *Loi (1861) sur les sociétés à responsabilité limitée* (Jersey).

[5] Section 136, Companies Act 1862 (United Kingdom) and s 411, Joint Stock Companies Arrangement Act 1870 (United Kingdom).

[6] Section 120, Companies (Consolidation) Act 1908 (United Kingdom).

[7] The Report of the Review Committee of Insolvency Law and Practice (Cmnd 8558, 1982) ("Cork Report"), at para 204, states the intention behind this procedure to be to provide a cheap, quick, efficient method of dealing with financial difficulties without engaging formal procedures in a process akin to that contained in s 210, Companies Act 1948 (United Kingdom), subsequently readopted as ss 425–427, Companies Act 1985 (United Kingdom) and s 895 *et seq.*, Companies Act 2006 (United Kingdom).

Companies Acts, but where insolvency procedures have not been developed for some time, the scheme procedure has undergone a renaissance as a method for restructuring companies, especially in the Commonwealth Caribbean.[8] In Jersey, given views on the absence of serious competition from bankruptcy/insolvency procedures,[9] except perhaps the art 155 framework,[10] this means that schemes have potentially a strong role to play in restructuring operations.[11]

4 Some disadvantages, though, exist in relation to schemes. They are really designed to work with solvent companies, although schemes are also available in Jersey, and elsewhere, as a possibility within the context of a winding up,[12] while recent moves in practice have pushed the envelope for schemes to encompass companies near the insolvency threshold.[13] Furthermore, schemes require a very elaborate procedure

---

[8] See Kawaley, "Cross-Border Insolvency in the British Atlantic and Caribbean World: Challenges and Opportunities", Chapter 14 in Wessels & Omar (eds), *Insolvency and Groups of Companies* (2011, INSOL Europe, Nottingham).

[9] See Omar, "Finding Rescue: Creative Alternatives to the Classic Insolvency Procedures in Jersey", (2012) 16 JGLR 248.

[10] See Omar, "Insolvency Practice in Jersey: The Novelty of Pre-Packs", (2013) 6 CRI (forthcoming), a comment on the recent case of *Re Collections Group* [2013] JRC 039 (20 May 2013).

[11] With one caveat: the absence of any cross-border impact. In the United Kingdom, the Companies Act 2006 definition of what companies are eligible for schemes refers to "companies liable to be wound up under the Insolvency Act 1986", which includes companies formed in the United Kingdom as well as "unregistered companies" (defined to mean foreign companies), giving the provisions an extra-territorial scope, witness the schemes involving major European companies seen in *Re La Seda de Barcelona SA* [2010] EWHC 1364 (Ch); *Re Rodenstock GmbH* [2011] EWHC 1104 (Ch) and the Cortifiel and NEF Telecom Schemes in 2012. See Seelinger & Daehnert, "International Jurisdiction for Schemes of Arrangement", (2012) 9 ICR 243.

[12] Article 167. In the United Kingdom, the equivalent provision is s 110, Insolvency Act 1986 (United Kingdom), whose advantage is that court approval is not required, but creditors' claims must be met in full and it may be difficult to achieve a cram-down on dissentients.

[13] *Re Drax Holdings Ltd; Re Inpower Ltd* [2004] 1 BCLC 10 (in part a Jersey case).

demanding the close attention of directors and extensive (not to mention expensive) documentation drafted by legal advisers. A particular difficulty of the process is the necessity to define the classes of persons who may be affected and the need to summon them separately to deliberate on the terms of the proposal. The role of mediated holders, such as trusts or depositaries, representing multiple beneficiaries with possibly competing interests, may also need to be determined.[14] There may also be delays in summoning meetings and between all the stages, including the two court orders required as part of the process, rendering it difficult to telescope the procedure into anything less than 8–10 weeks.[15] Lastly, in the absence of a moratorium, this makes it difficult to prevent rogue creditors from pursuing courses of action that might undermine the purpose of the scheme.[16]

Scheme framework and procedure

The first (application) phase

5 Part 18A on "compromises and arrangements" sets out the scheme framework, which enables the court to order a meeting of the creditors (or class of creditors) or of the members of the company (or class of members) in any manner it may direct in order to consider a compromise or arrangement proposed between a company and its creditors or members. The application is usually made by the company or by one of its creditors or members, although, where the company is being wound up, the liquidator may also act.[17] Schemes may be member-only, creditor-only or involve both members and creditors. The object of the application hearing is not to consider the merits or fairness of the scheme, as this will be done at the hearing to sanction the scheme of arrangement, but simply to determine the procedure by

---

[14] See, for example, *Re Polyus Gold International Ltd* [2011] JRC 230.

[15] However, in the United Kingdom, the Chancery Court Practice Statement [2002] 3 All ER 96 dealing with such applications contains reasonably clear guidelines enabling proposers of schemes to prepare the application and documentation with some certainty.

[16] This explains the introduction, by the Insolvency Act 2000 (United Kingdom) of the CVA with moratorium procedure for small companies now in Schedule A1, Insolvency Act 1986 (United Kingdom), which was designed to avoid some of the difficulties experienced in the insolvency context.

[17] Article 125(1).

which the meetings of the relevant classes of creditors and/or shareholders will be held.[18] The purpose of this phase of the procedure is simply to determine whether the proposal is, *prima facie*, a scheme of arrangement that could be properly put to the meetings that are proposed to be called and whether the determination of the relevant classes for the purposes of the meetings is correct.

6 The courts in Jersey have also held that, as art 125 of the Jersey law was in identical terms to its United Kingdom counterpart, the court would have the fullest regard to the interpretation given by the courts in that jurisdiction when dealing with the equivalent sections to the legislation. The framework set out in art 125 would be broadly construed to enable a wide variety of schemes to be put forward.[19] Furthermore, the court approves and applies the principles set out by the United Kingdom courts in a practice statement,[20] which requires a number of matters to occur in this phase. First, the applicant for a scheme should bring to the attention at the earliest possible time anything affecting the constitution or conduct of creditors' meetings. Next, the court should consider the composition and number of meetings and should also consider giving directions for the resolution of any creditor issues brought to its attention. Furthermore, unless there is a good reason for not doing so, the applicant should take all reasonable steps to notify any person affected by the scheme as to the purpose of the scheme, the creditor meetings which the application considers will be necessary and their composition. Notice should normally be given of a proposed scheme before the initial hearing unless there are good reasons to the contrary. Lastly, where notice has been given, then creditors will need to manifest any objections, although allegations of unfair treatment may still be raised in the sanctions hearing, but will be subject to the court's view on whether these objections could have been raised earlier. The Jersey court also holds that these principles apply equally to members' meetings and issues.[21]

7 Nevertheless, in not all cases will a meeting be necessary. In *Re China Real Estate*,[22] where the scheme would affect a class who had

---

[18] *Re Telewest Finance (Jersey) Ltd* [2004] JRC 109.

[19] *Re TSB Bank* 1992 JLR 160.

[20] Above note 15.

[21] *Re Vallar plc* [2011] JRC 051.

[22] *Re China Real Estate Opportunities* [2010] JRC 114; [2010] JRC 115.

no voting rights, the applicant proposed that the shareholders affected should simply be sent a copy of the scheme for information as they could not in any event vote on the proposals. Although the court agreed that a class meeting of the affected shareholders was not necessary, it did require the information to be made available to the shareholders concerned and to include mention of their right to be heard when the court convened to hear the scheme post-approval.

Second (meeting) phase

8 The formal requirements here relate to the procedure for summoning the requisite meetings as well as the information that will be necessary to circulate prior to the meetings taking place. A scheme of arrangement is normally binding on the creditors and/or members (or any class of these groups) as well as on the company. It is also binding on the liquidator and contributories of the company where the company is in the course of being wound up. This is subject to two conditions, the first being that a majority in number representing three quarters in value of the creditors (or class of creditors) or three quarters of the voting rights of the members (or class of members), whichever is the case, agreeing to the compromise or arrangement at a meeting, where they are present and voting either in person or by proxy.[23] Secondly, the scheme must be sanctioned by the court, whose order is deemed not to have effect until a copy of the relevant Act of the court has been delivered to the Registrar for registration.[24] The Act of the court must also be annexed to every copy of the company's memorandum issued after the order has been made, in default of which an offence has been committed.[25]

9 For the purposes of this phase of the procedure, the court normally determines what may be necessary in order to enable the meetings to occur, including such aspects of meeting procedure as the quorum requirements, timings of the various meetings, prior notices to be issued, the circulation or availability otherwise of scheme information and the appointment of meeting chairs. The court has held that its role is to direct the manner in which the meeting(s) is/are to be held, to require that a particular person be appointed to chair the meeting and that the person should be directed to report the results of the meeting

---

[23] Article 125(2).

[24] Article 125(3).

[25] Article 125(4).

to the court.[26] In fact, the court's ability to select the chairman of the meeting and to require a report on proceedings to be made is deemed to be an important aspect of court control over the process.[27] The court may also determine its own notice periods and is not bound to align these with those ordinarily stipulated for shareholder meetings in art 90(1). As there are, in any event, no notice periods stipulated in the case of creditors' meetings under the law, this matter will require determination and possible alignment with what is decided in the case of members' meetings.

10 As far as the information requirements are concerned, the law requires information as to a compromise to be circulated prior to the meeting of creditors or members.[28] There is also a stipulation that the notice calling the meeting given to a creditor or member must include a statement explaining the effect of the compromise or arrangement. In particular, it must state any material interests of the directors of the company (whether as directors or as members or creditors of the company or otherwise) and the effect on those interests of the compromise or arrangement where the effect is materially different from the effect on the interests of other persons.[29] Where the compromise or arrangement affects the rights of debenture holders of the company, the statement is required to give the same explanation with respect to trustees of the deed for securing the issue of the debentures as is given in respect of the company's directors.[30] Where the notice calling the meeting is made by advertisement, it must include either the statement noted above or information about where and how those creditors or members entitled to attend the meeting may obtain copies of the statement.[31] Where an indication is given that copies may be obtained by application, every creditor or member making the application is entitled to a copy of the statement free of charge.[32]

---

[26] *Re Royal Bree's Hotel Ltd* 1994 JLR *N*–6a.

[27] *Re Plus 500 Emerging Markets High Yield Fund Ltd* (1996) (unreported).

[28] Article 126(1).

[29] Article 126(2).

[30] Article 126(4).

[31] Article 126(3).

[32] Article 126(5).

11 A particular onus is placed on the directors or debenture deed trustees, who are required to give notice of any matters having an impact on the making of a statement for the purposes of this provision, in default of which an offence is committed.[33] Furthermore, if the company fails to comply with any requirement of this provision, it and every defaulting officer is liable to conviction for an offence. For these purposes only, a trustee of a deed for securing the issue of debentures of the company is also deemed to be an officer of the company. However, any other person is not liable if she/he can show that their default was due to another person's refusal (for example a director or trustee) to furnish particulars of their interests.[34] In a recent case,[35] the non-disclosure of matters arising subsequent to the production of the explanatory statement, on the basis of which the scheme is to be approved, did not affect the decisions taken at the meetings if minor in nature. The court held that its role is to decide whether any reasonable shareholder or creditor would change their decision had the information been available and, if so satisfied, to sanction the scheme. However, failure to disclose matters in the explanatory statement, even if not made in bad faith, that would have affected the shareholder's or creditor's decision would be unlikely to result in the court sanctioning the scheme.[36]

Third (sanction) phase

12 It is in the sanctions phase that the court making the order is effectively binding dissenting creditors and members of the company.[37] Therefore, the case-law has imposed additional requirements to ensure the fairness and equity of the process. The elements are variously termed in the jurisprudence, but may be fairly described as including compliance with the procedural requirements of the law and the need to ensure that there is fair representation of any class summoned to a meeting so that meetings may be deemed to be

---

[33] Article 126(7).

[34] Article 126(6).

[35] *Re George Topco* [2012] JRC 059.

[36] Applying *Re Jessel Trust Ltd* [1985] BCLC 119; *Re MB Group Ltd* [1989] BCLC 672.

[37] The orders that may be made in furtherance of the court's sanction are enumerated in art 127.

truly representative of that particular class.[38] In Jersey, the court has stated that it has a discretion as to whether or not to sanction the compromise or arrangement, having regard to what has occurred at the relevant meetings.[39] This echoes the *dictum* in *Re Altitude*,[40] where in considering whether or not to sanction the compromise or arrangement, the court will consider the numbers attending at the meeting. There must be more than one person present, although low turnout alone is not a valid reason for refusing to sanction a scheme but will be considered in the context of other factors which may affect the vote.

13 Mere procedural compliance, though, is insufficient. A number of substantive concerns exist, most notably that in casting a vote in any particular class, the majority must do so in the best interests of the class as a whole. In its application to shareholders, the principle is of some vintage, being seen in cases such as *Allen*[41] and *Greenhalgh*,[42] which have stated that shareholders in a majority must vote *bona fide* in the interests of the company as a whole, what these interests are being determined by reference to a "hypothetical shareholder" test, under which the courts essentially test the fairness of the decision by the impact it has on that shareholder. The test is not without its difficulties, especially where, as in *Peters*,[43] inconsistent drafting in the articles made it possible to determine that dividends were payable either on the entire value of capital held by the shareholders or solely in function of the amount of paid up shares. In that case, the court held that alteration of the articles often involved adjustment of the rights of shareholders *inter se*, so to put forward a test of "*bona fide* for the benefit of the company as a whole" in some situations would be meaningless as there could not be a hypothetical shareholder.

14 In that light, it may be more difficult to apply this test to creditors, who ordinarily would not be expected to be altruistically concerned with the impact on creditors other than themselves, but the courts have

---

[38] This is a very old principle indeed, dating back to at least the case of *Re Alabama, New Orleans, Texas & Pacific Junction Railway Co* [1891] 1 Ch 213.

[39] *Re Royal Bree's Hotel*, above note 26.

[40] *Re Altitude Scaffolding Ltd* [2006] EWHC 1401.

[41] *Allen v Gold Reefs of West Africa Ltd* [1900] Ch 656.

[42] *Greenhalgh v Arderne Cinemas* [1951] Ch 286.

[43] *Peters American Delicacy Co Ltd v Heath* (1939) 61 CLR 457.

applied the principle by analogy with shareholder situations. However, it is here that the idea of commercial probity or reasonableness has been brought into play, to provide an objective method for assessing whether the creditors have in fact voted as they should have. The courts in Jersey have adopted the views expressed in *Re English Scottish & Australian Chartered Bank*,[44] where the court held that the creditors are better judges of what is to their "commercial advantage", provided the creditors do so in full possession of necessary information and with sufficient time to have properly considered matters. Furthermore, the court should not be free to depart from the creditors' decisions unless "some material oversight or miscarriage" has occurred, which will not be the case where creditors have been properly convened and have considered matters from the point of view and interest of the class to which they belong.[45]

15 In *Re Vallar*,[46] the court considered the background and context of the proposed scheme, including any consequences (also known as the "(no-)blot" test). The court would have regard to the interests of creditors, even though there was no formal requirement to do so, although it may be queried how far this could extend when there may be creditors with diametrically opposed views as in *Peters*.[47] One way of determining what the position may be is perhaps to use the "honest and intelligent man" test that appears in the case-law. However, meeting this test does not mean that the scheme has to be the only scheme available to the best in all circumstances, merely a fair scheme that could appeal to such a person.[48]

16 The jurisprudence in Jersey has reiterated a summary of these principles on a constant basis since at least *Re Andsberg*,[49] where the court considered whether the provisions of the statute had been complied with, whether the class was fairly represented by those attending the meeting, whether the statutory majorities were acting

---

[44] *Re English Scottish & Australian Chartered Bank* (1893) Ch 385.

[45] *Ibid*, at 409 (*per* Lord Lindlay, MR).

[46] Above note 21.

[47] Above note 43.

[48] *Re Telewest* [2004] BCC 342, the United Kingdom end of a parallel scheme-based restructuring of the Jersey company in the case mentioned (above note 18).

[49] *Re Andsberg Ltd* 2007 JLR *N* [53]. The substance of the formulation was repeated in the same year in *Re CI Traders Ltd* [2007] JRC 149A.

bona fide and not coercing the minority in order to promote interests adverse to those of the class they represented. Furthermore, the arrangement was such as an intelligent and honest man, a member of the class concerned and acting in his interests, might reasonably approve.[50] Some tailoring of the application of these principles depending on the facts peculiar to each case has also taken place. In *Re Rambler Media*,[51] the refinement in this case was in relation to the *cause* (consideration) at which the company's shares were to be transferred to the successful bidder, particularly in light of an objection received from one of the shareholders. The court was of the view that it was important to note that the shares to be subject to the scheme were no longer available for sale on the listed market and that there was therefore a very limited market indeed in those shares. In light of the fact that share value in the company had fluctuated in the period preceding the case and submissions to the effect that a number of shares had in fact been acquired at the offer price, the court was of the view that the offer price was not unrealistic in all the circumstances. This was despite the fact that share value was undoubtedly a matter upon which different shareholders might take a different view.

17 As noted earlier,[52] the issue of intermediated interests has received some attention in Jersey. In *Re CPA*,[53] the court reiterated its duty to consider the same broad points of principle as in the previous cases. It had also, in an earlier hearing, given directions as to the counting of votes at the court meeting so as to ensure that it was the views of the beneficial owners which were counted rather than the views of the registered shareholders who were simply nominees. In light of full disclosure to the registered shareholders and, *via* them, to the beneficial owners of opinions both for and against, the court was satisfied that a majority was obtained according to the requirements in the law and in the articles of association, while the majority that was obtained was representative of the shareholders concerned, no evidence of coercion by the majority being forthcoming. However, in *Re Polyus Gold*,[54] it is noteworthy that the court was of the view that a single meeting could be held with the depositary present and that it would be sufficient for the holders of the global depositary receipts to

---

[50] Following *Re Telewest*, above note 18.

[51] Re *Rambler Media Ltd* [2010] JRC 034.

[52] Above note 14.

[53] *Re Computer Patent Annuities Holdings Ltd* 2010 JLR *N* [11].

[54] Above note 14.

indicate to the depositary their wishes in the matter of the proposed scheme and ancillary reduction of shares under the procedure contained in art 63 of the law.

Developments in the recent case-law

18 Recent case-law in 2012–2013 has further refined the application of the principles, showing the jurisprudence developing to take into account the specificities in each case, while remaining wedded to the broad base of the principles outlined in the case-law to date. In *Re Investkredit*,[55] the company was of a type essentially used for raising finance on international capital markets for Austrian institutions, such as its parent bank. It had issued €50 million's worth of bonds, which were supported by an undertaking from its parent, in the form of a single global note held by a central securities depository. There were major financial institutions participating in the bonds directly, as investors in the bonds, but the same institutions could also be holding these interests for others, either ultimate beneficiaries or for the same *via* other intermediaries, of whom there might be many layers before reaching the ultimate beneficiary. The company expressed its wish to have the ultimate beneficiaries (and not just the unique bondholder) vote on the scheme proposal, a request the court was able to agree to. It did so, using the persuasive precedent set in *Re Castle*,[56] which involved a debt restructuring featuring a number of global notes and in which the court accepted that the ultimate beneficiaries were properly to be regarded as the company's contingent creditors and that their votes that were to count for the purposes of voting on the scheme. In the instant case, the scheme involved amendments to the terms and conditions under which the bonds were issued, which had become necessary in light of a merger between its parent and another financial institution and ancillary changes to the capital requirements for such institutions owing to new European Union rules.

19 The difficulty in the case was that the company had no means of knowing the identity of the vast majority of bondholders or the ultimate beneficiaries. Reciting the principles established in *Re CPA*[57] and the strictures of the Practice Statement[58] with respect to the need

---

[55] *Re Investkredit Funding Ltd* [2012] JRC 121.

[56] *Re Castle Holdco 4 Ltd* (23 March 2009) (unreported) (*coram* Hart, J).

[57] Above note 53.

[58] Above note 15.

to bring to the court's attention any issues with respect to the identification of creditor classes, the court determined that the bondholders had the same economic interest. Therefore, they could constitute a single class, there being no other creditors whose interests needed to be ascertained. As such, the court held that a single meeting would be held at which the bondholders would be given the chance to vote with the appropriate notice being provided by means established by the court. This would include direct notice *via* the depositary to known bondholders and by advertisements in newspapers in Austria, Germany and across Europe as well as through the communications mechanisms established by the Vienna and Frankfurt Stock Exchanges. The voting framework for the meeting was also agreed by the court to enable the bondholders to communicate their intentions to an information agent with the bonds themselves being frozen (not subject to trading or transferral) until released post-voting.[59] Although the proposed communication to the bondholders, *via* the same information agent, did not contain a summary of the scheme as the court expected, the information that was provided enabling the bondholders to access the explanatory statement was deemed sufficient, given the difficulties that might arise in having a summary agreed and provided within the timeframe that was to govern the voting process.

20 In *Re FRM*,[60] the company concerned was a Jersey incorporation and parent company of a group specialising in hedge fund research and investment specialists, managing *circa* US$8 billion in assets. As the group required greater scale, a broader international reach and additional platforms for growth, it approached the MAN Group, which had *circa* US$59 billion under management. There was a single class of shares held largely by the company chairman's family trust (with an additional golden share to enable the passing of special resolutions), the Sumitomo Bank, which was also a source for business referrals, and current and past employees. The company was not listed and the acquisition could have taken place *via* a contract for a transfer of the shares in the company. However, the MAN Group wanted the certainty that all shares would be acquired and proposed this occur through a scheme. In light of the principles in *Re CPA*,[61] the court was

---

[59] The observation is made that these procedures are similar to those used in the United Kingdom in comparable schemes where the bondholders may be remote from the original investment vehicle.

[60] *Re FRM Holdings Ltd* [2012] JRC 120; [2012] JRC 138A.

[61] Above note 53.

concerned to determine the appropriate classes. As the Sumitomo Bank was to transfer its shares on different terms and for different consideration, receiving preference shares in the purchasing entity, it fell outside the ordinary shareholder class anyway and did not have to be dealt with together with members of that group. However, there was also a distinction between the remainder of the ordinary shareholders, those who had been lent money, chiefly the employees, to acquire shares and those who had not. The loan terms required payment out of proceeds of sale. It transpired that from the first tranche of consideration, all but 31 shareholders would receive sufficient sums to repay amounts. Nevertheless, the purchaser would only proceed if the remainder were given a loan waiver by the company. The scheme was to be put to the fund recipients on the basis of either bearing a proportion of the cost of the waiver or, the default option, to receive all of the first tranche moneys but no cost to be borne. The difficulty was that while the first tranche moneys was certain, the payment of subsequent tranches was performance-based, hence less certain for the shareholders overall.

21 As it turned out, the non-loanholders had indicated support for the scheme by giving undertakings to vote in favour of bearing a proportion of the costs. The issue for the court was, however, whether the divergent interests (within what would otherwise be a single class) between loanholders and non-loanholders constituted a sufficient difference for summoning separate meetings of the two "classes". The court was mindful of the observation in *Re Vallar*[62] of the test for class identification propounded in *Sovereign Life*,[63] where the court applied a plain meaning test to enable it to prevent the statutory provision "result[ing] in confiscation and injustice", while also ensuring that the class is 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".[64] The court agreed, holding that separate meetings were required where there were significant differences in the rights of members that determined their constitution into separate classes. However, the concern should also be that "artificial distinctions" should not be made that might perpetuate the type of confiscation and injustice mentioned in *Sovereign Life*.[65]

---

[62] Above note 21.

[63] *Sovereign Life Assurance v Dodd* [1892] 2 QB 573.

[64] *Ibid*, at 583 (*per* Bowen, LJ).

[65] *Idem*.

22 A further issue for the court was the distinction being made in the jurisprudence between rights and interests, with the cases tending to decide that normally only divergent rights, as opposed to the private interests of the affected shareholders, could ground the formation of different classes. However, in determining whether the statutory majority had been reached, a court could take into account whether the views of those voting truly represented the views of the class as a whole, thus taking into account the possibility of divergent interests motivating the decisions to which those shareholders had arrived. Although the retort might be to permit these groups to vote separately, it could often be impractical to determine the cleavage between groups on the basis of interests, thus requiring default to the basic position of class identification on the basis of rights. A further consideration is that risk of fragmentation that might allow an artificially determined class to hold others to ransom by effectively conferring on them a right of veto. This risk had to be balanced against the concomitant risk of allowing the majority to oppress the minority if groups with dissimilar interests were grouped together on the basis of rights.[66]

23 As such, the true test was to see whether the scheme constituted one arrangement or a number of interlinked arrangements, which in turn will depend on an analysis of the rights released or varied under the scheme and of any new rights to be given to those who have agreed to release or vary their pre-existing ties to the company.[67] In this case, a careful enumeration by the court of the characteristics of the shareholders by reference to their existing rights and to their prospective rights under the scheme, enabled the distinction to be made between two categories of interests: cost-bearers and non-cost-bearers. Other potential differences between shareholders in relation to transaction completion bonuses, new retention and service contracts (for employees taken on) and a consultancy with the purchaser were not treated as distinct enough an interest to allow for further classes to be determined. Two meetings were therefore convened, whose positive result allowed the court to sanction the scheme on the basis of the principles in *Re CPA*.[68]

---

[66] Citing *UDL Argos Engineering & Heavy Industries Co Ltd v Li Oi Lin* [2003] 3 HK LRD, itself citing, *inter alia*, *Re English Scottish & Australian Chartered Bank* (above note 44), *Re Chevron Sydney Ltd* [1963] VR 249 and *Re Alabama* (above note 38).

[67] Citing *Re Hawk Insurance Co Ltd* [2001] BCLC 480.

[68] Above note 53.

24 The case of *Re APIC*[69] involved the court having to determine the extent of the territorial bar on the application of the law.[70] The facts involved a Jersey company, Longreach, intent on acquiring APIC, a Canadian company, *via* a scheme. Upon the conclusion of the acquisition, APIC would amalgamate with Longreach with its undertaking, property and liabilities becoming those of the latter. A further consequence would be the dissolution of APIC and its de-listing from the Canadian TSX Venture Exchange. There was also a complication given the existence of a financing transaction based on subscription receipts convertible into shares worth some CN$30 million that was time sensitive and posed certain problems given the estimated time table likely to require 110–120 days to complete. The court was concerned that the application invited the court to exercise its jurisdiction in relation to a company that was a foreign entity. Although the Canadian company had a Jersey subsidiary that could arguably be entitled to apply for a meeting to be called, not of its own shareholders, but those of its parent, the court did not need to go down this route. The court held that, correctly, it could only sanction a scheme of arrangement in relation to a "company", being a company incorporated under Jersey law. However, although at the time of the application the company was still Canadian, as part of the amalgamation process, it was intended that the company effect a continuance into Jersey under Part 18C of the Law.

25 Once a continuance had taken place, the company would cease to be a company incorporated under the laws of its original country of incorporation and instead becomes a company incorporated under the laws of Jersey. Furthermore, it was intended that the meeting of its shareholders would only take place when APIC had continued into Jersey and was therefore a Jersey company amenable to the court's scheme jurisdiction under the law. As such, the court held it was perfectly able to order a meeting of the shareholders of a foreign company pursuant to a scheme application, but conditional on the foreign company having been registered as a Jersey company by the time the meeting took place. It would then be a meeting in relation to a scheme between a Jersey company and its members. The court was content to say that such a scheme dependent on a continuance is "but one example of the wide variety of arrangements that [the law] is

---

[69] *Re APIC Petroleum Corp & APIC (Petroleum) Jersey Ltd* [2012] JRC 228; [2013] JRC 034.

[70] Above note 11.

intended to cover and the court should be flexible in its approach".[71] However, it was also keen that the order was not viewed as being an exorbitant extension of the court's reach over non-Jersey companies, noting that the company was intent on becoming a Jersey incorporation over which the court was ordinarily able to exercise jurisdiction. As such, the prospective application of the order with its attendant condition was a perfectly proper order for the court to make.

26 Although in the normal case, there would need to be two separate shareholder meetings: one to approve the continuance of the foreign company into Jersey and then, once the company had been continued into Jersey, a separate meeting to approve the scheme, the court was able to order a single meeting to take place on the prospective basis of the order, thus saving significant time on the completion of the transaction. A single shareholder's meeting would thus be convened at which the shareholders would be asked to approve the continuance into Jersey, then being adjourned for a short period of time to enable the completion of the continuance into Jersey with the reconvened meeting, this time of a Jersey company, being asked to approve the scheme. On the class identification point, although there was single class of shareholders, the court simply noted that Canadian law required the beneficial owners of some of the shares, held on a "non-registration" basis (*i.e.* held through intermediaries), to have the opportunity to vote on the proposals, those dissenting from the continuance to have their shares cancelled and to receive the fair market value for those shares on completion of the scheme. As such, it had no need to further impose the requirement for consultation of the beneficial owners, as seen in *Re Investkredit*.[72]

27 At the later sanction hearing, the court benchmarked the process against the *Re CPA*[73] three-fold test and the no-blot requirement. After an examination of compliance with the law and the *bona fide* aspects of the procedure, in relation to the honesty test, the court looked to the fact of the scheme being recommended by both APIC's and Longreach's boards, its being based on the prevailing market price of the companies' shares over a "significant" period of time as well as its compliance with the Canadian Statutory Provision Multilateral Instrument, essentially on the "Protection of Minority Shareholders in Certain Transactions". On the no-blot point, the court looked to the Jersey Financial Services Commission's approval of the continuation

---

[71] *Re APIC* [2012] JRC 228, at para 9.

[72] Above note 55.

[73] Above note 53.

on the basis of provision of solvency statement and there being no unfair prejudice to creditors. Evidence was heard as to the ability to discharge debts as they fell due and the court also accepted an undertaking to the effect that the company would use its "commercially reasonable efforts" to secure payments of trade payables prior to completion of the scheme and would, at the completion date, withhold sufficient funds to pay any outstanding amounts. The court sanctioned the scheme that had been approved.

28 Lastly, *Re WPP*[74] involved a debate on the issue of creditor protection under art 62 and the reduction of capital procedure as a prelude to the authorisation of a scheme to enable the company to change its tax residency. This was contemplated because changes in the taxation of foreign profits in the United Kingdom enabled the board to propose the return of WPP's HQ to that jurisdiction by means of a scheme following the reduction of capital that would see the creation of new shares and their allotment to paying up in full par shares to be issued to NewWPP, a company to be incorporated in Jersey, but which would then be tax-resident in the United Kingdom. The *Re CPA*[75] test was again applied at the sanction hearing, where the court held that there had been quite clearly compliance with the law and that there was no suggestion that the views of the majority at the single meeting which approved the scheme were not representative of the shareholder body as a whole. The turnout, 10% of the physical shareholders, but who had 75% in value of the rights in the shares, was representative in line with the rule in *Re Vallar*.[76] On the honesty point, not only had the scheme been approved by directors, but there was no reason to suggest the shareholders were not acting reasonably. In that light, the court found no blot to exist.

Summary

29 The developments in the jurisprudence in Jersey may be seen as pragmatic responses to the way in which alterations have taken place in the corporate environment. These changes include the way in which shares and other interests are held in companies, with these being held more and more on an intermediated basis, often in complex and many-layered arrangements. The consideration of beneficial interests as seen

---

[74] *Re WPP plc* [2013] JRC 031; [2013] JRC 035.

[75] Above note 53.

[76] Above note 21.

in cases, such as *Re Polyus Gold*,[77] *Re Investkredit*[78] and *Re APIC*[79] is now a standard feature of the case-law, even though courts are still required in many instances to define the framework to govern the consultation process. The consideration of how class identification takes place and the balance between rights and interests, as seen in *Re FRM*,[80] is symptomatic of a more holistic consideration of the relationship between corporate stakeholders and companies, where rights alone are an insufficient determinant of the impact of the schemes, with the need to consider the effect of alterations to those rights as well as occasionally, but only where properly relevant, the wider interests of these stakeholders. Further, the prospective approval of scheme procedures and their extension to continuing companies, seen in *Re APIC*,[81] is part of a wider concern to ensure the scheme process remains as flexible as possible and that the procedure is as efficient as it can be. All the cases, *Re WPP*[82] included, adhere to the tests outlined in, *inter alia*, *Re CPA*,[83] confirming the stability of this line of jurisprudence.

30 In this light, it may be appreciated that the evolution in scheme jurisprudence taking place in parallel across jurisdictions in which corporate practice is highly developed, as in Jersey and the United Kingdom, will quite often be used as templates for further developments in these and other jurisdictions. The recent cases featured here display elements of creativity and innovation on the part of the practitioners and courts involved, heralding a willingness to see the scheme jurisdiction evolve and to adapt it to novel situations. This appears to be, for many, a more palatable outcome for reconstruction and rescue attempts, especially as an alternative to other procedures, such as those that feature in the law of insolvency, which may be ill-adapted to the types of outcomes that would more usefully benefit from the scheme of arrangements process.

---

[77] Above note 14.

[78] Above note 55.

[79] Above note 69.

[80] Above note 60.

[81] Above note 69.

[82] Above note 74.

[83] Above note 53.

Paul J Omar, of Gray's Inn, Barrister, is a Visiting Professor at the Institute of Law, Jersey