IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE COMMERCIAL DIVISION

CLAIM NO. 2018CD00526

IN THE MATTER OF CABLE & WIRELESS JAMAICA LTD.

AND

IN THE MATTER OF THE COMPANIES ACT 2004

Application to set aside order – Section 206 of the Companies Act –Scheme of arrangement - Whether court has jurisdiction to permit meeting – Whether meeting with creditors a prerequisite to permission.

Conrad George, Andre Sheckleford for Applicant Eric Jason Abrahams instructed by Hart Muirhead & Fatta

Sandra Minott-Phillips QC, Hillary Reid, Gabrielle Grant, Kerri-Anne Mayne for Cable & Wireless Jamaica Ltd. instructed by Myers Fletcher & Gordon.

Heard: 18th November, 2018.

In Chambers

Coram: Batts J.

[1] In this matter, having heard submissions and considered the authorities, I made the following orders:

1. The application to set aside is dismissed
2. No Order as to Costs

I promised then to put my reasons in writing and this judgment fulfills that promise.

[2] There were two applications before me. In the first the Applicant, Mr. Jason Abrahams, sought leave to intervene in the suit and be named a party. Mr. George indicated that an acknowledgement of service had been filed as his client was a shareholder and had a right to be heard. Mrs. Minott Phillips QC took no serious issue with that position and was content to point out that the Applicant had not filed an affidavit. I agreed with Mr. George that the nature of the suit is such that all members of the Company have a right to be heard and to participate if they so chose. On the matter of the affidavit, although he had not sworn one, the applicant's attorney had filed an affidavit on his behalf. In my view, there being no contest on the facts therein alleged, the affidavit suffices. In those circumstances I invited Mr. George to withdraw the application to intervene, he did so, and his acknowledgement of service was allowed to stand.

[3] The second application was more substantive. In it the Applicant, Mr. Jason Abrahams, sought to set aside an ex parte Order made pursuant to Section 206 (1) of the Companies Act. I made that Order on the 1st day of October 2018. It gave permission for the shareholders of the company to meet and approve a Scheme of Arrangement. Three reasons were advanced for the application to set aside:

a. The court lacked jurisdiction because no creditor was involved in the process.

b. The proposed scheme of arrangement will undermine the Applicant's pending application for permission to bring a derivative action.

c. The effect of the order is to allow approval without the requisite vote by a majority of the shareholders. It will adversely impact the minority rights.

[4] In stating my reasons it is convenient to address firstly the issues raised at (a) and (b) above. These are non-jurisdictional. I agree with learned Queen's Counsel that they speak to the fairness and/or prudence of the scheme of arrangement. These are matters which should first be raised and discussed at the meeting called to consider the scheme. They may also be urged before the court when approval of the scheme is being considered. In this regard I am moved by the words of Chadwick JA in ***Re BTR plc [2000] BCLC 740 @747 (g):***

> *"The way in which Parliament's intention is to be given effect – as it seems to me and as it has seemed to judges over the century or so since Bowen LJ considered the matter in 1892 – is that the court is not bound by the decision of the meeting. A favourable resolution at the meeting represents a threshold which must be surmounted before the sanction of the court can be sought. But if the court is satisfied that the meeting have done so with a special interest to promote which differs from the interest of the ordinary independent and objective shareholder, then the vote in favour of the resolution is not to be given effect by the sanction of the court."*

[5] I do not regard the example stated by Lord Chadwick, to be exhaustive of the circumstances in which the court may refuse to approve an arrangement. Whether or not, and how, a pending derivative action is adversely affected may be a relevant consideration. So too, is the question whether the value of the minority's shareholding will be adversely affected or whether their ability to participate in the meeting, called to approve the compromise, was adversely impacted. It is clear to me, the eloquence of Mr. George notwithstanding, that those non-jurisdictional issues are not appropriately dealt with at this stage of the process.

[6] The jurisdictional issue however needs to be carefully considered. Mr George submits that any compromise or arrangement must involve creditors. He relies on a literal construction of Section 206 (1) of the Companies Act, which reads:

> *"206(1) Where a compromise or arrangement is proposed between a company and its creditors or any class of them, or with creditors between the company and its members or any class of them the Court may, on the application in a summary way of the company or of any creditor or member of the company, or, in the case of a company being wound up, of the 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."

[7] Mr George bolsters the submission with references to the equivalent sections in the Companies Act of 1948 (UK) and Section 192 (1) in the 1965 Companies Act of Jamaica. They are identical to each other and read as follows:

> *"Where a compromise or arrangement is proposed between a company and its creditors or any class of them or between the company and its members or any class of them, the court may, on the application in a summary way of the company or of any creditor or member of the company, or, in the case of a company being wound up, of the liquidator, order a meeting of the creditors or class of creditors, or of the members of the company or class of members, as the case may be, to be summoned in such manner as the court directs."*

[8] Mr. George also pointed to the Companies Bill of 2001 which, in Section 204 (1), contained wording identical to section 192(1) of the Companies Act of 1965. He demonstrated that, the Companies Act 1948 (UK), the Companies Act (1965) Jamaica and the Companies Bill laid in 2001 all omitted the phrase "or with creditors" before the words "between the company and its members." Mr. George submits that the insertion of the words "or with creditors" in the Companies Act of 2004 demonstrates that Parliament intended to change the Bill. Parliament therefore intended to change the Companies Act of 1965. The insertion of these words means that Section 206 (1) applies only in a situation where creditors are party to the compromise or arrangement.

[9] Learned Queen's Counsel, in reply, referred to the Hansard record of the debate on the Companies Act which was passed in 2004. She indicates that there was

no discussion of a change to Section 206. She also demonstrated that the construction suggested would render redundant Section 206 (5)

> *"Arrangement" includes a reorganization of the share capital of the company by the consolidation of shares of different classes or by the division of shares of different classes or by both those methods."*

[10] Mrs. Minott Phillips QC, also indicated that the literal construction of Section 206 (1) ,advocated for by the Applicant, would be inconsistent with a literal reading of Section 206 (2) –

> "*If a majority in number representing three-fourths in value of the 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 member 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." [emphasis added]*

[11] Learned Queen's Counsel buttressed her purposive approach to the construction of Section 206(1) by indicating, with reference to examples, that since the passing of the Act in 2004 several compromises by shareholders have been approved by the Court.

[12] It seems to me that learned Queen's Counsel is correct. Section 206 (1), if construed in the manner suggested by the Applicant, will result in an absurdity. It would mean that shareholders of a company could not enter into arrangements or reorganize its shareholding unless a creditor was involved. Debt rescheduling or satisfaction is not the only reason shareholders may wish to reorganise. Such a construction of the section would also run counter to over 50 years of practice in these courts. It also runs counter to the law in the common law jurisdictions with which we are most familiar. If creditors' participation is essential, or a

prerequisite, then Section 206(2) and the phrase “as the case may be” would be inexplicable.

[13] I am satisfied that Parliament did not intend so absurd a result. I strongly suspect the printer’s devil may have had a hand. It is therefore necessary to so construe the Act as to avoid the absurdity and effect the purpose. This is achieved by reading a comma after the words “or with creditors” in the second line of Section 206 (1). The Section can therefore sensibly be understood to mean:

> “*Where a compromise or arrangement is proposed between the company and its creditors or any class of them or... between the company and its members or any class of them...”*

[14] This manifestly renders the Section consistent with Section 206 (2) and with established corporate law and governance. I am fortified in this purposive interpretation of the Act by the fact that this Supreme Court has , since the passage of the statute, made orders at the behest only of members of companies without the involvement of creditors.

[15] I therefore made the orders outlined in paragraph one of this judgment.

David Batts
Puisne Judge