Under this type of reorganisation, the company resolves, first, to go into voluntary liquidation (members' or creditors'), and, secondly, to authorise by special resolution the transfer by the liquidator of the whole or part of the company's business or assets to another company (or limited liability partnership (LLP)) in consideration of shares in that company (or membership of the LLP).

The procedure provides a relatively simple method for reconstructing a single company or effecting a simple merger or takeover. Its advantage is that court approval is not generally required.[4] But its use is limited. The liquidator must ensure that the creditors' proved claims are met, and cannot rely on any indemnity given by the acquiring company.[5] And in a members' voluntary liquidation, dissenting members have a right to veto the scheme, or to be bought out at a price determined by agreement or arbitration (*an appraisal right*).[6]

A company cannot by a provision in its constitution authorise a scheme of reconstruction which disregards the rights of dissentients under IA 1986 s 111.

[15.01] Bisgood v Henderson's Transvaal Estates Ltd [1908] 1 Ch 743 (Court of Appeal)

The company in general meeting resolved to carry out a scheme whereby each fully paid £1 share was to be exchanged for one £1 share in a new company, to be credited as paid up to an amount of 87½p. Under the scheme, the 'new' shares of those who dissented were to be sold en bloc for what they would fetch, and the proceeds distributed pro rata amongst them. **(p. 742)** The company's memorandum and articles purported to authorise such a transaction; but it was held to be unlawful.

> The judgment of the court (COZENS-HARDY MR and FLETCHER MOULTON and BUCKLEY LJJ) was delivered by BUCKLEY LJ: The question involved is whether by clauses even in the memorandum of association of a company limited by shares the limit upon the shareholder's liability can be raised—whether the constitution of the company can provide that the majority may impose upon the minority a scheme under which the member must either come under an increased liability or accept such compensation as the scheme offers him. Section 161 of the Companies Act 1862 [IA 1986 s 111] protects the dissentient member by securing him the value of his interest to be determined by arbitration or agreement. The purpose of schemes such as that here in question is to evade or escape the provisions of that section. Their object is to impose upon the shareholders what is generally called an assessment—to require that in a limited company after the shares are fully paid the shareholder must either come under liability to make further contributions to capital or submit to take, not the value of his interest to be determined by arbitration or agreement, but such satisfaction as the scheme offers him. That satisfaction commonly means, and in substance means in this case, the surrender of his interest in the company …
>
> The question is whether the reorganisation scheme contained in the agreement and resolutions is intra vires. The argument is that it is because it is justified by clauses in the memorandum of association …
>
> The purpose of the memorandum and articles … is not confined to defining and limiting the purposes of the corporation; it extends also within proper limits to defining and ascertaining the rights of the corporators. I have no doubt that within proper limits the memorandum and articles may provide how, as between the corporators, the corporate assets shall be dealt with after liquidation. But in this, as in many matters, there are limits imposed by the statutes. There are matters in respect of which the constitution of the company cannot provide that the corporator shall not enjoy rights and immunities which the statute gives him. For instance, s 82 of the Companies Act 1862 [IA 1986 s 124] empowers a contributory to present a winding-up petition. His right in that respect cannot be excluded by the articles: *Re Peveril Gold Mines* **[16.07]**… Upon a like principle the articles cannot exclude a shareholder from his right of dissent under s 161 of the Companies Act 1862… It is, therefore, not necessarily true that, because there are found in the memorandum and articles clauses such as those upon which the question here arises, the corporators as individuals are contractually bound by them. The question is not whether each individual corporator can bind himself in respect of his distributive share in the assets. The question is whether, consistently with the statutes, the constitution of the corporation can be such that every corporator shall in the matter of distribution—or a fortiori of distribution and further liability—be bound by the vote of the majority …

In the matter of liability upon his shares the statute provides in plain terms by s 38(4) [IA 1986 s 74(2)(d)], that in the case of a company limited by shares no contribution shall be required from any member exceeding the amount unpaid on his shares. In my opinion, any attempt so to define the constitution of the company as that the member shall in any event be liable for a larger sum is in breach of the statute and is ultra vires. Any clauses which can be used to maintain a scheme which imposes upon the member the alternative of accepting liability for a larger sum or of being dispossessed of his status as shareholder upon terms which he is not bound to accept are, I think, ultra vires …

The company, it is true, have issued the allotment letters in such form as that the shareholder could sell his right to an allotment and put forward the name of a purchaser if he found one. And the old company could within the language of the agreement sell the shares which are not applied for, and under the fifth resolution the proceeds would be distributable among the non-assenting members. Shortly stated, the scheme is one under which the shareholder is told that he may take the share in the new company with its liability or sell the share in the new company with its liability, but **(p. 743)** he shall have nothing but the share in the new company or its proceeds; that he must be assessed or find some one who will take the new share with the assessment or take his chance that the liquidator may find someone who will do so, but that he shall have nothing else. In my opinion this is ultra vires. The plaintiff is, in my judgment, entitled to an injunction to restrain the defendants from carrying out the reorganisation scheme.

In a reconstruction under IA 1986 ss 110–111, the general meeting has no power to decide that the consideration received shall be distributed among the members otherwise than in accordance with their rights in a winding up.

[15.02] Griffith v Paget (1877) 5 Ch D 894 (Chancery Division)

The capital of the Argentine Tramways Co Ltd was divided into preferred shares and deferred shares each of a nominal value of £ 10, the former being entitled to a cumulative 12% preferential dividend. There was no provision as to the relative rights of the classes in a winding up. The preferred dividend had not been paid in full for many years. A scheme of reconstruction was proposed under which the shares in the existing company should be exchanged for shares, all of one class, in a new company, on a basis which gave the preferred shareholders approximately the par value of their existing holdings, but the deferred shareholders only about 15% of such value. The plaintiff, a preferred shareholder, who considered that this scheme gave the deferred shareholders more than the market value of their shares, objected that the general meeting had no power to fix the mode of distribution of the new shares; and the court upheld his view.

JESSEL MR: The question which is now raised, as far as I know for the first time, is this, whether in the case of a limited liability company, when there are two or more classes of shareholders having different rights inter se, and the powers conferred by the Companies Act 1862, s 161 [IA 1986 s 110], are exercised, the company can do more than decide on the nature of the consideration to be accepted, or whether it can, at the same time, by the statutory majority, decide as to the mode of distribution of the consideration so accepted between the two classes of shareholders. In my opinion it cannot do the latter at all.

I think the meaning of s 161, stated broadly, was this, that instead of disposing of the assets of the company, wound up under a voluntary winding up, for money, you may dispose of them for shares in any other company, or policies, or any like interest, or future profits or other benefit from the purchasing company, but that whatever the benefit was, in whatever shape it was taken, it was to be given, or paid, or handed over to the liquidators for the benefit of the contributories, if I may call them so, of the company wound up—of course subject to the payment of their debts; and that there was no authority conferred by the Act of Parliament on the general meeting, or rather the statutory majority, to direct a distribution as between those contributories otherwise than according to their rights inter se. I think that is tolerably plain from the nature of the case.

First, what is to become of the assets of the company when wound up voluntarily in the ordinary way? In

that case we find, by s 133 [IA 1986 s 107], the property, after being applied in satisfaction of the liabilities, is to 'be distributed among the members according to their rights and interests in the company'. Therefore, if the liquidator sells the assets for money, there is no power given to a general meeting to alter the rights of the contributories inter se. They are to share according to their rights and interests …

➢ Note

There is an obvious advantage to a company in proceeding under CA 2006 Pts 26 and 27 (see 'Arrangements and reconstructions under CA 2006 ss 895–901', pp 744ff) rather than IA 1986 s 110, in that dissenting shareholders can be forced to accept a scheme under the **(p. 744)** former section, rather than being allowed to insist on their right under IA 1986 s 111 to be paid out in cash. In the next case cited, an attempt was made to formulate rules governing the freedom of a company to choose between the two forms of procedure.

Choosing between IA 1986 and CA 2006 procedures.

[15.03] Re Anglo-Continental Supply Co Ltd [1922] 2 Ch 723 (Chancery Division)

The facts are immaterial.

ASTBURY J: As a result of his researches, Mr Maugham [counsel for the company] has formulated three propositions which, when expressed as follows, are in my judgment sound: (1) When a so-called scheme is really and truly a sale, etc under s 192 [IA 1986 s 110] simpliciter, that section must be complied with and cannot be evaded by calling it a scheme of arrangement under s 120 [CA 2006 Pt 26]: see per Warrington LJ in *Re Guardian Assurance Co.*[7] (2) Where a scheme of arrangement cannot be carried through under s 192, though it involves (inter alia) a sale to a company within that section for 'shares, policies and other like interests', and for liquidation and distribution of the proceeds, the court can sanction it under s 120 if it is fair and reasonable in accordance with the principles upon which the court acts in these cases, and it may, but only if it thinks fit, insist as a term of its sanction on the dissentient shareholders being protected in manner similar to that provided for in s 192. (3) Where a scheme of arrangement is one outside s 192 entirely, the court can also and a fortiori act as in proposition (2), subject to the conditions therein mentioned …

Arrangements and reconstructions under CA 2006 ss 895–901

The procedures in CA 2006 Pts 26 (ss 895–901) and 27 (applying to specific types of mergers and divisions of public companies only[8]) can be used to effect compromises or arrangements of one company with its members or its creditors,[9] but can also be used to amalgamate two or more companies, or to achieve the equivalent of a takeover.[10] The procedure requires:

(i) a court order convening meetings of the appropriate classes of members or creditors who will be affected by the scheme;[11]
(ii) class meetings, seeking the approval of a majority in number *and* representing 75% in value of the groups affected by the proposal (ie members or classes of members, and creditors or classes of creditors[12]); and
(p. 745) **(iii)** sanction by the court of the approved scheme (CA 2006 s 899): the court must form its own judgement of the merits of the scheme, not simply confirm the view of the majority voters.[13]

The procedure has the advantage that, with court sanction, the proposed scheme is binding with only 75% approval, whereas a takeover leading to a compulsory buy-out requires 90% acceptance by the members being

made the offer. The difference may be justified on the basis that the scheme procedure also requires court approval before the dissentients are bound. On the other hand, because the scheme is not binding until the vote and court approval, competing proposals can be organised to defeat the objectives. By contrast, take-over bidders can solicit irrevocable commitments even before the formal takeover offer is made.

A 'compromise or arrangement' under ss 895 and 899.

[15.04] Re Uniq plc [2011] EWHC 749 (Ch) (Chancery Division, Companies Court)

For the facts, see Note 3 following *Brady v Brady* **[10.08]**.

> DAVID RICHARDS J:
>
> 24 Sections 895 and 899 require a scheme to constitute a compromise or arrangement between the company and its members or creditors, or classes of members or creditors. Where members or creditors give up all their rights and receive no benefit, there is no compromise or arrangement: *Re NFU Development Trust Ltd*[1972] 1 WLR 1548. If regard is had only to the terms of the scheme itself, the existing members see their 100% equity interest diluted to 9.8%, without any benefit to Uniq or themselves unless the restructuring as a whole is completed. If the restructuring is completed, a very substantial benefit is conferred on Uniq and, while the existing members' interests are reduced to 9.8%, they retain an interest in a viable company. It would, in my judgment, be artificial to confine the analysis to the terms of the scheme itself when the scheme forms an integral part of a restructuring which confers substantial benefit on the members bound by the scheme. I agree with the approach of Mann J in *Re Bluebrook Ltd* [2010] 1 BCLC 338 at [72] to [74].
>
> 25 It is true that it was possible for the scheme to come into effect but for the rest of the restructuring not to do so. This was neither intended nor likely, and it would not in my view be sensible or realistic to ignore the benefits flowing from the restructuring on the basis of this possibility.

Defining the classes for member or creditor meetings

The classic definition of a class is that of Bowen LJ in *Sovereign Life Assurance Co v Dodd*: a class consists of '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'.[14] This test sounds simple, but can be difficult to apply in practice, as the next extracts indicate. The practical consequences of different definitions of classes are also evident from these extracts—if two meetings need to give approval rather than only one, the scheme may founder.

(p. 746) ***Different classes—defined by different rights or different interests?***

[15.05] Re Hellenic & General Trust Ltd [1976] 1 WLR 123 (Chancery Division)

Hambros Ltd, through a wholly owned subsidiary (referred to in the judgment as 'MIT') held 53% of the ordinary shares of the company, Hellenic & General Trust Ltd. A scheme of arrangement was proposed under which Hambros would acquire all the ordinary shares for a cash consideration of 48p per share. At a meeting of ordinary members, over 80% approved the scheme. MIT voted in support, but the National Bank of Greece, a minority shareholder holding some 14% of the shares, opposed the scheme because it would be liable to pay heavy taxes under Greek law. Templeman J refused to sanction the scheme, first, because he ruled that there should have been a separate 'class' meeting of those ordinary members who were not already a wholly owned subsidiary of Hambros and, secondly, because, although the scheme was objectively fair, it was as a matter of discretion, not fairness, to allow the use of CA 1948 s 206 (CA 2006 ss 895ff) to achieve the compulsory purchase of shares which could not be acquired by the use of the takeover procedure now contained in CA 2006 ss 974ff.

> TEMPLEMAN J: The first objection put forward is that the necessary agreement by the appropriate class of members has not been obtained. The shareholders who were summoned to the meeting consisted, it is

submitted, of two classes. First there were the outside shareholders, that is to say the shareholders other than MIT; and secondly MIT, a subsidiary of Hambros. MIT were a separate class and should have been excluded from the meeting of outside shareholders. Although s 206 [CA 2006 s 896] provides that the court may order meetings, it is the responsibility of the petitioners to see that the class meetings are properly constituted, and if they fail then the necessary agreement is not obtained and the court has no jurisdiction to sanction the arrangement …

The question therefore is whether MIT, a wholly owned subsidiary of Hambros, formed part of the same class as the other ordinary shareholders.[15] What is an appropriate class must depend upon the circumstances but some general principles are to be found in the authorities. In *Sovereign Life Assurance Co v Dodd*,[16] the Court of Appeal held that for the purposes of an arrangement affecting the policyholders of an assurance company the holders of policies which had matured were creditors and were a different class from policyholders whose policies had not matured. Bowen LJ said: '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.' Vendors consulting together with a view to their common interest in an offer made by a purchaser would look askance at the presence among them of a wholly owned subsidiary of the purchaser … Mr Heyman, on behalf of the petitioners, submitted that since the parent and subsidiary were separate corporations with separate directors, and since MIT were ordinary shareholders in the company, it followed that MIT had the same interests as the other shareholders. The directors of MIT were under a duty to consider whether the arrangement was beneficial to the whole class of ordinary shareholders, and they were capable of forming an independent and unbiased judgment, irrespective of the interests of the parent company. This seems to me to be unreal. Hambros are purchasers making an offer. When the vendors meet to discuss and vote whether or not to accept the offer, it is incongruous that the loudest voice in theory and the most significant voice in practice should come from the wholly owned subsidiary of the purchaser. No one can be both a vendor and a purchaser and in my judgment, for the purpose of the class meetings in the present case, MIT were in the camp of the purchaser. Of course this does **(p. 747)** not mean that MIT should not have considered at a separate class meeting whether to accept the arrangement. But their consideration will be different from the considerations given to the matter by the other shareholders. Only MIT could say, within limits, that what was good for Hambros must be good for MIT …

Accordingly I uphold the first objection, which is fatal to the arrangement. But in view of the careful arguments put forward by both sides I will consider the other objections which are raised by Mr Wright and which are material if the class meeting in the present case, contrary to my view, was properly constituted.

The second objection is founded on the analysis of the arrangement as an offer by Hambros to acquire the ordinary shares for 48p. Section 209 [CA 2006 ss 974ff] provides safeguards for minority shareholders in the event of a takeover bid and in a proper case provides machinery for a small minority of shareholders to be obliged to accept a takeover against their wishes … If the present arrangement had been carried out under s 209, MIT as a subsidiary of Hambros would have been expressly forbidden to join in any approval for the purposes of s 209,[17] and in any event the objectors could not have been obliged to sell because they hold 10% of the ordinary shares of the company.

[It] seems to me that it is unfair to deprive the objectors of shares which they were entitled to assume were safe from compulsory purchase and with the effect of putting on the objectors a swingeing fiscal impost which, if the matter had proceeded under s 209, they could have avoided simply and quite properly by refusing to join in approving the scheme under that section.

Accordingly in the result, both as a matter of jurisdiction and as a matter of discretion, I am not prepared to make any order approving this scheme.

Different classes: rights and interests distinguished.

[15.06] Re BTR plc [1999] 2 BCLC 675 (Chancery Division)

A proposed scheme of arrangement, designed to effect a merger between BTR and another company, Siebe plc, had been carried by a 97% majority of BTR's ordinary shareholders at a single class meeting. Some dissenting shareholders contended that there should have been a separate class meeting for those BTR shareholders who already held shares in Siebe.

> JONATHAN PARKER J [in rejecting the argument of the dissenting shareholders, said of *Re Hellenic & General Trust Ltd* **[15.05]** (at 682)]: For myself, I find it difficult to understand the concept of an interest arising out of a right as being something separate from the right itself. Nor do I think that such a process of analysis is necessary in relation to the *Hellenic* case where the majority of shares in the company the subject of the scheme were already held by a subsidiary of the intended purchaser. Templeman J effectively discounted the views of the registered holder of those shares and he did so, as I read the judgment, on the basis that in substance the scheme affected only the remainder of the shares. That is, in my judgment, the ratio of Templeman J's decision in so far as it addressed the question of separate classes …
>
> It does not, as I see it, involve any analysis of interests and rights, nor is it inconsistent with the submission made by Mr Sykes (which I accept) that the relevant test is that of differing rights rather than differing interests. Nor do I agree with Mr Northcote that 'interest' in this connection is synonymous with right. Shareholders with the same rights in respect of the shares which they hold may be subject to an infinite number of different interests and may therefore, assessing their own personal interests (as they are perfectly entitled to do), vote their shares in the light of those interests. But that in itself, in my judgment, is simply a fact of life: it does not lead to **(p. 748)** the conclusion that shareholders who propose to vote differently are in some way a separate class of shareholders entitled to a separate class meeting. Indeed a journey down that road would in my judgment lead to impracticability and unworkability. In the course of his submissions Mr Northcote accepted that in the instant case it may well be that (if he is right) a very large number of separate class meetings would be required in order properly to reflect the differing interests of shareholders. The question then arises how the company could possibly reach an informed decision as to the division of shareholders into separate classes without first requiring a considerable amount of personal information from individual shareholders; a wholly unworkable, and highly undesirable, situation.
>
> In my judgment, therefore, there was no warrant in this case for the convening of more than one meeting of the holders of the scheme shares, and I reject the submission that there are separate classes of holders of scheme shares for the purposes of this scheme …

Court intervention on its own motion.

[15.07] Re Hawk Insurance Co Ltd [2002] BCC 300 (Court of Appeal)

This was an appeal against a decision of the lower court refusing to sanction an unopposed scheme of arrangement under CA 1985 s 425 [CA 2006 s 895] on the ground that the court had no jurisdiction to do so because it was not satisfied that the creditors who had (without dissent) approved the scheme at a single meeting did, in fact, constitute a single class. The court allowed the appeal.

> CHADWICK LJ:
>
> *The decision whether to summon more than one meeting*
>
> 13 The decision whether to summon more than one meeting—and, if so, who should be summoned to which meeting—has to be made at the first stage [at the hearing for a court order summoning the meetings]. If the matter were free from authority, I would have regarded the basis upon which that decision has to be taken as self-evident. The relevant question is: between whom is the proposed compromise or arrangement to be made? There are, as it seems to me, three possible answers to that question. Which answer is correct in any particular case will depend upon the circumstances peculiar to that case.

14 First, there will be cases where it is plain that the compromise or arrangement proposed is between the company and all its creditors. In such a case [the Act] provides for the court to order a single meeting of all the creditors.

15 Secondly, there will be cases where it is plain that the compromise or arrangement proposed is between the company and one distinct class of creditors; for example, unsecured trade creditors whose debts accrued before (or after) a given date. Or it may be plain that there are two (or more) separate compromises or arrangements with two (or more) distinct classes of creditors; for example, one compromise with unsecured trade creditors whose debts accrued before a given date and a separate compromise (on different terms) with unsecured trade creditors whose debts accrued after that date. In such a case, the section provides for the court to order a meeting of each class of creditors with whom the compromise or arrangement is to be made. …

16 Cases which fall into the two categories which I have described above are likely to be recognised without difficulty. More difficult to recognise are cases in a third category. Those are cases where what appears at first sight to be a single compromise or arrangement between the company and all its creditors (or all creditors of a particular description, say, unsecured creditors) can be seen, on a true analysis, to be two or more linked compromises or arrangements with creditors whose rights put them in several and distinct classes. The compromises or arrangements are linked in the sense that each is conditional upon the other or others taking effect. In such a case [there should be] separate meetings of each of the distinct classes of creditors.

(p. 749) 17 If the correct decision is not made at the first stage [ordering the meetings], the court may find, at the third stage [sanctioning the scheme], that it is without jurisdiction. … That is what the judge [in the lower court] found to be the position in the present case.

18 It might be thought that the structure of the statutory provisions required the court to consider, at the first stage … whether the scheme proposed was a single compromise or arrangement … or was (on a true analysis) two or more linked compromises or arrangements … That has not been the practice in the Companies Court. [He then described, and criticised, the 65-year-old Practice Note, at [1934] WN 142, which set the approach taken. See later for the current revisions.]…

21 In my view an applicant is entitled to feel aggrieved if, in the absence of opposition from any creditor, the court holds, at the third stage and on its own motion, that the order which it made at the first stage was pointless. It is, to my mind, no answer to say that that is a risk which the applicant must accept. It may be inevitable that an applicant must accept the risk that a dissentient creditor will persuade the court at the third stage that the order which it made at the first stage (without hearing that creditor) was the wrong order. But that is not to say that the applicant must be required to accept that, when exercising what is plainly a judicial discretion at the first stage, the court will not address the question whether the order which it makes serves any useful purpose; or that, if it has addressed that question at the first stage, it will change its mind, of its own motion, at the third stage. …

How is it to be determined whether separate class meetings are required?

23 As I have indicated, I would have regarded it as self-evident, in the absence of authority, that the relevant question at the outset is: between whom is it proposed that a compromise or arrangement is to be made? Are the rights of those who are to be affected by the scheme proposed such that the scheme can be seen as a single arrangement; or ought the scheme to be regarded, on a true analysis, as a number of linked arrangements? The question may be easy to state; but, as the cases show, it is not always easy to answer. Nor can it be said that, hitherto, the courts have posed the question in quite those terms.

24 The starting point, and (so far as I am aware) the only decision of this court on the point, is *Sovereign Life Assurance Co v Dodd* [1892] 2 QB 573. [He then discussed this case at some length and concluded that Bowen LJ's answer to his question was as follows:]

26… The scheme proposed may be regarded as a single arrangement with those creditors whom it is

intended to bind if, but only if, the rights of those creditors are not so dissimilar as to make it impossible for them to consult together with a view to their common interest. If the rights of those creditors whom the scheme is intended to bind are such as to make it impossible for them to consult together with a view to their common interest, then the scheme must be regarded as a number of linked arrangements. In the latter case it will be necessary to have a separate meeting of each class of creditors; a class being identified by the test that the rights of those creditors within it are not so dissimilar as to make it impossible for them to consult together with a view to their common interest. …

29 I have thought it right to examine the judgments in *Sovereign Life Assurance Co v Dodd* [1892] 2 QB 573 at some length, not only because the decision in that appeal is the only authority binding upon this court, but because the decision has been relied upon from time to time in later cases for the proposition that creditors whose rights have vested must, necessarily, be regarded as a different class from creditors whose rights are contingent … [and] that 'in the case of a life assurance company holders of matured policies are a different class from holders of current policies'… In my view, the *Sovereign Life* case is authority for neither of those propositions. …

30… it will not necessarily follow, in every case, that the treatment under the scheme of vested and contingent rights, or the rights under matured and current policies, will be so dissimilar that the holders of those rights must be regarded as persons in different classes 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 **(p. 750)** 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. …

33 When applying Bowen LJ's test to the question 'are the rights of those who are to be affected by the scheme proposed such that the scheme can be seen as a single arrangement; or ought it to be regarded, on a true analysis, as a number of linked arrangements?' it is necessary to ensure not only that those whose rights really are so dissimilar that they cannot consult together with a view to a common interest should be treated as parties to distinct arrangements—so that they should have their own separate meetings—but also that those whose rights are sufficiently similar to the rights of others that they can properly consult together should be required to do [so]; lest by ordering separate meetings the court gives a veto to a minority group. The safeguard against majority oppression … is that the court is not bound by the decision of the meeting. It is important Bowen LJ's test should not be applied in such a way that it becomes an instrument of oppression by a minority.

[He then continued his analysis and concluded that separate class meetings were not required in the present case, and therefore allowed the appeal.]

PILL LJ gave a concurring judgment and WRIGHT LJ concurred with both.

➢ Notes

1. The risk that the classes have not been correctly identified so that, at the later stages, the court will not sanction the scheme has been reduced by a change in practice: see Practice Statement [2002] 3 All ER 96. This requires greater attention to the issues at the convening hearing, where application is made to the court for an order convening the necessary meetings. In addition, courts have adopted the approach of Chadwick LJ in the previous extract that they should find, on their own motion and without the intervention of dissentient voices, that the initial selection of classes was inappropriate.

2. By analogy with creditors' meetings in insolvency law, it is possible for the court to direct at stage 1 that

split voting is possible at the creditors' meetings, particularly by nominee or trustee creditors, so that they might vote both for and against the scheme in relation to different parts of the value of that creditor's claim (*Re Equitable Life Assurance Society* [2002] BCC 319).

3. In *In the Matter of Rodenstock GmbH (the 'Scheme Company')* [2011] EWHC 1104 (Ch), the court, on its own motion, undertook a detailed review of the jurisdiction and other issues arising from the fact that the company was located in Germany. Briggs J concluded that, analogous with the court's jurisdiction to wind up a foreign company, it must be demonstrated that the company whose scheme is subject to sanction has a sufficient connection with the English jurisdiction. Here, it was held that the Scheme Creditors' choice of English law and, for Senior Lenders, exclusive English jurisdiction, was a sufficient feature for establishing jurisdiction of the English court to sanction the scheme. Briggs J then considered whether such a sanction could be effectively enforced in German courts, and concluded in the affirmative. Finally, after reviewing the merits of the proposed scheme, he sanctioned the scheme.

The function of the courts in considering whether to sanction a scheme.

[15.08] Re Alabama, New Orleans, Texas and Pacific Junction Rly Co [1891] 1 Ch 213 (Court of Appeal)

The facts are immaterial.

> LINDLEY LJ: [What] the court has to do is to see, first of all, that the provisions of that statute have been complied with; and, secondly, that the majority has been acting bona fide. The court also has **(p. 751)** to see that the minority is not being overridden by a majority having interests of its own clashing with those of the minority whom they seek to coerce. Further than that, the court has to look at the scheme and see whether it is one as to which persons acting honestly, and viewing the scheme laid before them in the interests of those whom they represent, take a view which can be reasonably taken by businessmen …

➢ Notes

1. Also see *Re Hellenic & General Trust Ltd* **[15.05]**, and the observations of Maugham J in *Re Dorman Long & Co* **[4.14]**.

2. A scheme which is designed to deal with and potentially alter the property rights of people who also happen to be creditors of the scheme company does not constitute a compromise or arrangement within the scope of CA 2006 Pt 26: *Re T & N Ltd* [2006] EWHC 1447 (Ch); *Re Lehman Brothers International (Europe) (In Administration) (No 2)* [2009] EWHC 2141 (Ch), affd [2009] EWCA Civ 1161.

3. In *Re National Farmers' Union Development Trust Ltd* [1972] 1 WLR 1548, a non-profit-making company wished to write down its capital and reduce the number of its members from 94,000 to seven in order to reduce its administrative expenses. The proposal had the support of an 85% majority vote. But Brightman J held that he had no power to sanction the scheme under what is now CA 2006 s 899, since the statutory terms 'compromise' and 'arrangement' implied some element of accommodation on each side and were not appropriate to describe a scheme under which some members surrendered their rights altogether. Also see *Re Bluebrook Ltd* [2009] EWHC 2114 (Ch).

4. The court has extensive powers under CA 2006 s 900 to make such ancillary orders as are necessary to facilitate implementation of any sanctioned scheme.

5. In *In the Matter of Halcrow Holdings Ltd* [2011] EWHC 3662 (Ch), some 306 out of the 1,175 shareholders did not receive the scheme documents as a result of an accidental error in the printing process. Vos J held that the solicitors nonetheless had intended to notify all the shareholders and to provide all shareholders with

copies of the scheme documents; and that the company took all reasonable steps to inform the relevant shareholders as soon as it had become aware of the mistake. Thus, the learned judge opined that the accidental omission could and should be waived under both CA 2006 s 313 and an 'accidental omission provision' in the company's articles. Further, in this case, the learned judge found that there was no 'blot' on the proposed scheme and did not refuse to sanction the scheme, because the concerns raised by the pensioners (in relation to the purchaser's failure to respond to requests by the pensioners' fund trustees for some legally binding assurances as to injecting future funding) were 'not financial, but only the risk of a different cultural approach to the business in the pension scheme' [50].

6. In *Re La Seda De Barcelona SA* [2010] EWHC 1364 (Ch), [2011] 1 BCLC 555, Proudman J accepted that the court had jurisdiction to sanction a scheme which also provided for the release of liabilities on the part of a non-party to the scheme because the release fell within the 'requisite element of give and take between the scheme creditors and the company' [19].

Compulsory binding of dissentient minorities and the Human Rights Act 1998.

[15.09] Re Equitable Life Assurance Society [2002] EWHC 140 (Chancery Division)

Arguably the strength of Pt 26 lies in the ability to bind dissenting minorities. Lloyd J rejected the suggestion that compelling dissenting individuals to accept a scheme that alters their **(p. 752)** rights may be contrary to Art 1 of the First Protocol to the European Convention on Human Rights, as implemented by the Human Rights Act 1998:

> this type of rule, essential in a liberal society, cannot in principle be considered contrary to art 1 of the First Protocol, provided that the law does not create such inequality that one person could be arbitrarily and unjustly deprived of property in favour of another. It seems to me plain that, given the terms of s 425 [s 899] and the case law that has been established concerning its application, there is no possible argument for saying that the approval of a scheme under s 425, so as to bind dissentients among the relevant classes, breaches the rights afforded by art 1 of the First Protocol … [In order to be sanctioned by the court] the scheme does both in law and in fact [have to] involve exchange of rights and thus consideration. No arrangement capable of being approved under s 425 could, in my view, amount to a confiscation such that art 1 would be infringed.

Compulsory binding of dissentient minorities and judicial review of majority determinations.

Re-read *Assénagon Asset Management SA v Irish Bank Resolution Corp Ltd (formerly Anglo Irish Bank Corp Ltd)* **[11.07]** and related cases.

➢ Question

You are consulted in advance of the meeting by the National Bank of Greece (in *Re Hellenic & General Trust Ltd* **[15.05]**), and asked to advise it whether it would be proper for the bank to consider its tax position in deciding how to cast its vote at the class meeting. What would your advice be? (See *Re Holders Investment Trust Ltd***[10.04]**.)

Proposals for reform of the law

1. The Cork Committee on Insolvency made the following observations about the procedure under ss 425–427A [now CA 2006 Pt 26] and its utility in corporate insolvencies (Cmnd 8558, 1982, paras 406ff):

> Because of the long and involved procedure, it is virtually impossible to shorten the period of time between initial formulation of a scheme of arrangement and its becoming effective by Court Order below eight weeks. During those eight weeks each individual creditor can exercise all the rights and remedies available to him against the company debtor …
>
> The insolvent company's inability—particularly if it is a trading company—to hold the position (that is to prevent winding up or the random seizure of assets by individual creditors) during the period necessary for the devising and processing of a scheme, makes it extremely difficult for even the most uncomplicated scheme of arrangement to be launched. A straightforward moratorium on the payment of debts to unsecured creditors for a limited period, or such a moratorium coupled with a composition, say the reduction of all debts by 25%, may be the plainest good sense for all concerned, but it often cannot be done …
>
> The Court is heavily involved in the procedure under section [425]. There are two distinct phases. First, the convening of the necessary meetings of creditors and contributories and, secondly, the petition to the Court for the sanctioning of the scheme as approved by the appropriate majorities at the meetings …
>
> [We] believe that the Court procedure could be substantially streamlined and greatly improved. We cannot believe that there is the need for quite so many applications to, or attendances on, the Court. We doubt whether painstaking perusal of documents by Court officials with little or no experience of commerce or finance provides any real protection for creditors or contributories.

(p. 753) **2.** The report of the Insolvency Service's Review Group on Company Rescue and Business Reconstruction Mechanisms (May 2000) proposed that consideration be given to augmenting what is now CA 2006 Pt 26 by introducing the option of a moratorium while a scheme for a composition between a company and its creditors is being put together. This idea has now been dropped. Is that wise?
3. The Company Law Review (CLR) queried whether there was any real point in preserving the distinction between the IA 1986 s 110 and the CA 2006 Pt 26[18] procedures, and suggested there might be a case for combining the two, giving the company the option of choosing between providing cash appraisal rights for dissenting members or seeking the sanction of the court.
4. The CLR doubted whether the IA 1986 s 111 system of cash appraisal which provides for compulsory arbitration without recourse to a court is compatible with the Human Rights Act.[19]
5. The CLR considered that there may be a case for introducing a statutory procedure (as is available in New Zealand) which would allow wholly owned companies within the same group to merge with each other or with their holding company without the need for court approval and with little more formality than the approval of all the directors, a declaration of solvency and appropriate notification to creditors.

There is no reform embedded in the new CA 2006 Pt 26 itself to meet these various criticisms. However, certain procedures introduced into IA 1986 over the years do meet some of the needs identified earlier. These measures include the statutory procedures for company voluntary arrangements (CVAs), with and without moratorium periods (IA 1986 Pt I and Sch A1), and also for administrations (IA 1986 Pt II): see 'General issues', pp 767ff.[20]

Takeovers

Where a company acquires control over another by buying all or a majority holding of its shares, this is termed a '*takeover*'.[21] A general offer to buy addressed to all the members of a company is called a '*takeover bid*'. This is by far the commonest method used in this country for merging one corporate business with another. The two companies are usually referred to respectively as the '*offeror*' company or '*bidder*' and the '*target*' or '*offeree*' company.

If the target is a private company, control can usually only be exercised by a group holding more than 50% of the voting shares. Moreover, the target will probably have a provision in its articles authorising the directors to refuse