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ARTICLE

Down the Rabbit Hole and through the Looking Glass: The Cayman Islands Scheme of Arrangement under the Magnifying Glass

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Synopsis

The Cayman Islands has long established itself as a leading offshore financial centre which offers a sophisticated and flexible restructuring toolkit by which to implement cross-border restructurings. With a robust common law legal system based on English law (with ultimate recourse to the Privy Council of the United Kingdom) providing legal certainty and predictability, a highly sophisticated, dedicated financial services division of the Grand Court of the Cayman Islands (the 'Cayman Court') and an experienced network of judges, practitioners and advisors in the insolvency and restructuring sector, it is not surprising that the jurisdiction has a proven track record for constantly delivering complex and high-value restructurings.

Although the Cayman Islands has no formal rehabilitation process for companies in financial distress similar to US Chapter 11 proceedings or English administration, the Cayman Islands scheme of arrangement is often utilised to deliver not only debt restructurings but also corporate reorganisations, acquisitions, mergers and takeovers in circumstances where it is not possible or practical to obtain the consent from all affected stakeholders. Accordingly, a Cayman scheme is not a formal insolvency process as such but where it is utilised in connection with a protective provisional liquidation wrapper or official liquidation, the Cayman scheme company[1] would have the benefit of an automatic stay on any unsecured creditor action.

One aspect of the Cayman Islands' scheme of arrangement – the headcount test – which is the statutory requirement that a Cayman Islands scheme of arrangement has to be approved by a majority in number in addition to being approved by at least 75% in value of those voting at the scheme meeting(s) before the Cayman Court has jurisdiction to sanction such scheme – has however been the subject of much debate. Many commentators query its relevance in the context of modern restructurings.

Whilst originally implemented as a minority protection mechanism aimed at protecting smaller shareholders from decisions pushed through by larger shareholders with more significant stakes (and more significant financial resources), there is an argument that in today's world, the headcount test is no longer fit for purpose.

This article examines the concerns with respect to the continued application of the headcount test and considers whether, in comparing the approaches taken in certain other jurisdictions, it is now time for reform in the Cayman Islands.

Cayman Islands scheme of arrangement

The Cayman Islands legislation for schemes of arrangement is derived from 19th century English legislation. The concept of the scheme of arrangement (together with the requisite approval thresholds to be attained) was first introduced into the Cayman Islands by the Companies Law in 1961 (replicating Section 206 of the English Companies Act 1948).[2]

A Cayman Islands scheme of arrangement is a court-sanctioned compromise or arrangement between a company and its creditors and/or shareholders (or any class of them) which binds all affected stakeholders (including any dissenting creditors and/or shareholders) provided that: (i) a majority in number; and (ii) 75% in value of each class of stakeholder present and voting at the court ordered meeting, vote to approve the Cayman scheme.[3] Cayman Islands schemes of arrangement are frequently used to implement cross-border and multi-level debt restructurings by varying or cramming down the rights of the relevant creditors and/or shareholders of a company and have become the restructuring tool

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1 For these purposes, 'Cayman scheme company' refers to any company subject to a Cayman Islands scheme of arrangement. The Cayman Court has broad jurisdiction in relation to Cayman schemes and can consider a scheme in relation to any company (including foreign companies) liable to be wound up in the Cayman Islands including if it has property, carries on business or is registered in the Cayman Islands.

2 Section 83 of the Companies Law 1961.

3 Section 86 of the Companies Law (2018 Revision).

of choice in the Cayman Islands given its flexibility and predictability.

A Cayman Islands scheme enables a company to enter into a binding compromise or arrangement with its creditors and/or shareholders without the need to enter into an individual and separate contract with each and every affected stakeholder and provides companies with a tried and tested mechanism to implement an arrangement where it is not possible or practical to obtain a fully consensual deal. A Cayman Islands scheme will only become effective in accordance with its terms and binding on the company and all members of the relevant classes (including any dissenting stakeholder and regardless of whether or not they voted) once the Cayman Court has sanctioned the scheme and the court sanction order has been filed with the Cayman Islands Registrar of Companies.

When schemes of arrangement were first introduced in England over 100 years ago, shareholders and creditors typically held their interests both beneficially and legally so there was little difference between the persons whose name was entered onto the register of shareholders (or equivalent) and the person beneficially entitled to those interests. In its historical context, the statutory majority test operated as an appropriate check and balance – the headcount test prevented a minority with a large stake prevailing over a majority with a smaller stake; and the value test prevented a numerical majority with a small stake prevailing over the minority with a large stake. As summarised by Brooking J, the dual majority test ensures that 'mere numbers on a count of heads will not carry the day at the expense of the amount invested and on the other hand that the weight of invested money may not prevail against the desires of a sizeable number of investors.'[4]

However, this is no longer the case – stakeholders' interests are now often held beneficially though nominees, custodians (such as The Depositary Trust Company in the United States or HKSCC Nominees Limited in Hong Kong), clearing houses or other third parties (this is often more of an issue with shareholder interests). If only registered legal holders of debt and/or registered shareholders are considered for the purposes of the headcount test, then any headcount is unlikely to accurately reflect the wishes of the underlying stakeholders who ultimately hold the real economic interest in the debt instrument or equity.

Importantly, Cayman Islands law provides a unique feature in this regard in that the Cayman Court, in determining whether the relevant statutory majorities have been met, must 'look through the register.'[5]

'Looking through the register': the Cayman Court's approach in *Little Sheep*[6] and *Alibaba*[7]

Section 86 of the Cayman Islands Companies Law (2018 Revision) (the 'Companies Law') is widely drafted and provides that the Cayman Court has the power to order a scheme meeting be carried out in such manner 'as the Court directs' including any directions as to how voting is carried out and how votes are to be counted. Importantly, Section 86 does not stipulate the mechanism by which the Cayman Court should determine whether the headcount test has been met[8]; this is 'a matter for the court to fix the mechanism in accordance with the [Grand Court] Rules, having regard to the circumstances of the case ...'.[9] The Cayman Court may be guided in this process by the Grand Court Rules and related Practice Directions.

Order 102, rule 20 of the Cayman Islands Grand Court Rules 1995 (Revised Edition) (the 'Grand Court Rules') provides that:

> 'the [Cayman] Court shall give *such directions as may be necessary for the purpose of enabling it to determine whether or not the statutory majorities will have been achieved*. If all or substantially all of the shares or debt instruments to which the proposed scheme relates are registered in the name of one or more custodians of clearing houses, the [Cayman] Court may direct that ... (b) *such custodian or clearing house shall specify the number of votes cast in favour of the scheme and the number of clients or members on whose instructions they are cast and the number of votes cast against the proposed scheme and the number of clients or members on whose instructions they are cast*' [emphasis added].

Practice Direction 2/2010 sets out the manner in which the votes of shareholders will be counted, and provides that the Cayman Court will 'look through the register' for the purposes of determining whether or not the statutory majorities have been met stating that 'the majority in number will be calculated on the basis of the number of clients or members giving instructions to the custodian or clearing house.'

Until the decision in *Little Sheep*, the Cayman Court adopted the traditional approach (applied in all

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4 *ANZ Executors and Trustees Ltd. v Humes Ltd* [1990] VR 615 at paragraph 622.
5 Cayman Islands Grand Court Rules 1995 (Revised Edition) (the 'Grand Court Rules', Order 102, r.20(6) and see also Practice Direction No. 2 of 2010, paragraph 4.
6 *In re Little Sheep* (Unreported, Jones J, 20 January 2012).
7 *In re Alibaba.com Ltd,* Unreported, 20 April 2012.
8 See *per* Jones J in *Little Sheep;* and approved in *Alibaba.*
9 See *per* Jones J in *Little Sheep.*

common law jurisdictions)[10] to the position of a custodian. Namely, assuming the custodian is instructed to vote some of the shares it holds on behalf of beneficiaries in favour of the scheme and others against the scheme, to treat the custodian for the headcount test as one vote 'for' the scheme and one vote 'against' the scheme. The effect being that if the custodian received only one vote to approve the scheme by a shareholder holding a minimal percentage of the shares in the company and a greater number of shareholders holding a far higher percentage of the shares in the company voted against the scheme, the votes counted by the Cayman Court (that is, one vote for and one vote against) would cancel each other out. Following this traditional approach, the registered holders of shares in a Cayman scheme company was relevant for the purposes of the headcount test, not those with the beneficial interest in such shares.

In *Little Sheep* it was argued that, for the purposes of the headcount test, a custodian shareholder should be counted as one person having voted either for or against the scheme depending on its net voting position (i.e. to ensure that only one vote was counted in respect of each custodian). This was ultimately rejected by the Cayman Court which held that treating HKSCC Nominees as one shareholder would be inconsistent with the purpose of Section 86 and Order 102, rule 20(6). Jones J stated that 'the effect of allowing [HKSCC Nominees] to vote for and against the scheme is that the outcome as regards the "majority in value" will be determined, almost inevitably, by the instructions received from its participants. This is the common sense approach' and one which produces 'a commercially acceptable result which will be readily understood by investors'. By contrast, Jones J found that the effect of treating HKSCC Nominees as one shareholder (with one vote) for the purpose of ascertaining the 'majority in number' without regard to the number of participants from whom instructions are received is not only 'inconsistent' with the purpose of Section 86, but would also be 'highly artificial' and could produce a result which is commercially unacceptable.[11] Jones J also noted that such an approach could 'make it easier for an opponent of the scheme to defeat it by the simple mechanism of having a nominal number of its shares registered in the names of the requisite number of individuals who agree to vote against it … it would be possible for someone having a minimal economic interest in the company to hold it to ransom.'

The Cayman Court found that Section 86 (together with Order 20 of the Grand Court Rules) gave the Cayman Court wide discretion; and that for the purposes of the headcount test, it was appropriate to count the parties from whom the clearing house (in that case, HKSCC Nominees) received instructions. Jones J held that a clearing house could be considered a 'multi headed member' such that the number of clearing system participants for whom instructions were received (both for and against) would determine the votes attributable to the nominee for the purpose of the headcount test.

The issue of how to count votes later arose in *Alibaba.* In that case, Cresswell J indicated that he 'would be inclined' to follow Jones J decision in *Little Sheep.* Cresswell J noted that the decision in *Little Sheep* 'is consistent with and reflects [Practice Direction] 2/2010'.

Ultimately, Cresswell J did not make any order as to how the votes in the scheme would be counted, but ordered that 'to the extent that the shares … are registered in the name of one or more custodians or clearing houses … such custodian or clearing house … may cast votes both for and against the proposed scheme in accordance with the instructions of its clients … shall specify the number of votes cast in favour of the scheme and the number of clients or members on whose instructions they are cast …'.

Given the complex arrangements in which shares and debt instruments are held today (particularly in the case of shares of a listed company which may be traded throughout the scheme process), looking through a single layer of ownership – usually to a custodian or nominee – may not necessarily be sufficient and there have been calls for the practice of 'looking through the register' to be re-considered.[12] Below we consider the criticisms raised regarding the practice of looking through the register and the headcount test more generally.

The headcount test – no longer fit for purpose?

The debate regarding the appropriateness of the headcount test centres on the following points:

(1) The headcount test gives minority creditors and/or shareholders too much power to reject a Cayman scheme, whatever its merits.

It is currently the position, as a matter of Cayman Islands law, that within one class of creditors (who must have 'rights not so dissimilar as to make it impossible for them to consult together with a view to their common

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10 See for example *Re Equitable Life Assurance Society* [2002] BCC 319.
11 *Per* Jones J, in *Little Sheep.*
12 See *per* Cresswell J in *re Alibaba.com Ltd*, Unreported, 20 April 2012.

interest'[13] to form a class) a few small creditors holding a minimal percentage of the relevant debt could vote against a Cayman Islands scheme of arrangement, causing the scheme to fail (as the relevant headcount test threshold may not be met) and thereby preventing the implementation of an otherwise commercially reasonable scheme of arrangement approved by larger creditors holding a more significant portion of the relevant debt.

It is not clear why minority shareholders and/or creditors with the same rights (forming part of the same class) should be granted additional control over the outcome of any vote which is tantamount to a right of veto.

The circumstances are in direct contrast to the protections afforded to shareholders and/or creditors with different rights who form a separate class – in that scenario, rightly, if the relevant class of shareholders and/or creditors reject the Cayman scheme then the Cayman Court does not have the appropriate jurisdiction to sanction the Cayman scheme and the Cayman scheme will therefore fail.

(2) Minority creditors and/or shareholders are already effectively protected by the statutory process for a Cayman Islands schemes of arrangement.

The Cayman statutory procedure for schemes of arrangement provides minority shareholders and creditors with sufficient protections.

As noted above, at the first court hearing, the Cayman Court will consider whether it is appropriate to convene class meeting(s) at which stakeholders can vote on the proposed scheme and if so, the composition of classes so as to ensure that each meeting consists of the relevant classes of shareholders and/or creditors whose rights against the company are 'not so dissimilar as to make it impossible for them to consult together with a view to their common interest.'[14] It is therefore right that shareholders and/or creditors with different rights against a Cayman scheme company should fall into separate classes; such rights may for example be employee incentive rights or interests arising as a result of the relevant stakeholder being part of the management of the scheme company contrasted against the rights an ordinary shareholder might have against the same scheme company.

In the context of take private and management buy-out schemes, shareholders who are part of the management or bidding consortium (as appropriate) are highly unlikely to form a single class with independent minority shareholders. Therefore, even in the absence of the headcount test, if the minority shareholders do not vote to approve the Cayman scheme of arrangement, the scheme will not go before the Cayman Court for sanction and the management or bidding consortium are not able to cram-down independent minority shareholders.

Minority shareholders and/or creditors are protected by virtue of the classes formed under Cayman schemes – as each class of shareholder and/or creditor must approve the proposed scheme at the scheme meetings in order for the sanction hearing to proceed otherwise the scheme of arrangement will fail.

This is in contrast to the position under US Chapter 11 proceedings, where a reorganisation plan can be confirmed in circumstances where there is a non-accepting class (subject to certain controls, such as the 'absolute priority' rule) with the effect of effecting a cross-class cram down. In Cayman Islands schemes of arrangement, there is no ability to cram down dissenting whole classes of shareholders and/or creditors (although it is possible to cram down dissenting creditors within a class).

Additionally, the value threshold for approving the Cayman scheme (being shareholders and/or creditors representing 75% in value of each class) is also higher than under other restructuring proceedings in other jurisdictions. For example, the applicable threshold for approval under US Chapter 11 proceedings a reorganisation plan is 66⅔%.

Moreover, the Cayman Court has broad discretion to sanction (or not to sanction) a Cayman Islands scheme of arrangement notwithstanding that it has been approved by each class of shareholders and/or creditors. The Cayman Court retains discretion to refuse to sanction any Cayman scheme where there is (or may be) abuse of the minority and furthermore, may even impose conditions on its sanction of the Cayman Islands scheme of arrangement (for example, where it is concerned that the terms of the Cayman scheme are not in the best interests of the shareholders and/or creditors). As noted by Chadwick L.J. in *Re Hawk Insurance*, 'the safeguard against minority oppression … is that the court is not bound by the decision of the [scheme] meeting …' and the Cayman Court retains the

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13 *Per* Bowen LJ in *Sovereign Life Assurance Co v Dodd* [1892] 2 QB 573; and, in the Cayman Islands, *In Re Euro Bank Corporation (In Liquidation)* [2003] CILR 205 adopting the test set out by the Hong Kong Court of Final Appeal in *UDL Argos Engr. & Heavy Indus. Co. Ltd v Li Oi Lin.* See also the recent Cayman Court case of *Ocean Rig UDW Inc. & Others* Cause No. FSD 100, 101, 102 and 103 of 2017 *per* Parker J at paragraph 44: 'In every case the court will consider whether it is appropriate to convene class meetings and, if so, the composition of the classes so as to ensure that each meeting consists of the shareholders or creditors whose rights against the company which are to be released or varied under the scheme, or the new rights which the scheme gives in their place, are not so dissimilar as to make it impossible for them to consult together with a view to their common interest.'

14 *Per* Bowen LJ in *Sovereign Life Assurance Co v Dodd* [1892] 2 QB 573.

ultimate discretion as to whether or not to sanction the Cayman scheme at the sanction or fairness hearing.

The Cayman Court's approach to sanction was most recently summarised by Parker J in *Re Ocean Rig UDW Inc.* as follows: the Cayman Court 'should be slow to differ from the vote [of the scheme creditors] recognising that it is the creditors who are clearly the best judges of what is in their commercial interests' but that 'the [Cayman] court is not a rubber stamp ... [and] even where the scheme has the support of an overwhelming majority of the creditors ... the court can differ from the vote, but only if it is satisfied that an honest, intelligent and reasonable member of the class could not have voted for the scheme ...'[15]

Furthermore, dissenting shareholders and/or creditors are further protected by Order 102, rule 20(10) which provides that all affected stakeholders (including any dissenting stakeholders) have the right to attend the sanction hearing and have their objections to the Cayman scheme heard by the Cayman Court.

If the headcount test were to be abolished, the Cayman Court may need to take on a more active role in considering the commercial benefits of any Cayman Islands scheme of arrangement as it would not, necessarily, be appropriate to take a view that the majority decision is appropriate in all circumstances.

Furthermore, under Cayman Islands law any person who voted at the scheme meeting(s) or gave voting instructions to a custodian or clearing house to vote at the scheme meeting(s) is entitled to appear and be heard at the sanction hearing.[16] This goes further towards protecting a minority group from an oppressive majority in ensuring that any person with an economic interest in the relevant Cayman scheme has an opportunity to bring to the Cayman Court's attention any issue relating to the Cayman scheme.

(3) The headcount test is not line with modern Cayman Islands company law policy/approach to voting.

In the context of shareholdings, Cayman Islands law historically required shareholder decisions to be made by way of numerosity and headcount approvals.[17] However, modern law has moved away from this approach and provides that, subject to a Cayman company's articles of association, the position in determining any shareholder decision is calculated on a 'one share one vote' basis (including, but not limited, to ordinary resolutions and special resolutions, and also, the approvals required for statutory mergers, the winding up of companies and capital regimes as set out under the Companies Law). From a policy perspective, it is not clear why Cayman Islands schemes of arrangement adopt a different approach. No similar comparison can be drawn for creditor decision-making.

(4) The headcount test does not reflect how shares/debt instruments are held in the modern context.

As noted above, whilst historically legal and beneficial interests were not divided, today nominees, custodians and trustees (or other financial institutions or vehicles) may hold debt instruments and intermediaries operating through clearing houses may hold uncertificated shares for a large number of beneficiaries. In many jurisdictions, each nominee, custodian, trustee or intermediary (as applicable) is either treated as a single head for the purposes of the headcount test, or is given a 'yes' and a 'no' vote which cancel each other out. Such an approach materially fails to reflect the number of persons and value of claims represented.

The Cayman Court's more nuanced approach in *Little Sheep* sought to adopt a 'middle ground' (and in doing so, expressly acknowledged the limitations of the headcount test). However, the approach only goes so far – looking through a single layer of legal ownership to the custodian/nominee does not operate to ensure that votes accurately reflect the views of underlying beneficiaries – this will only count those who hold accounts directly with the relevant stock exchange clearing house, themselves often custodians or brokers who hold shares on account of others. If the Cayman Court were to require a company to look further through the register (that is, to definitively identify the ultimate beneficial owners of a company's shares), this would place an impossible burden on companies seeking to effect a Cayman Islands scheme of arrangement. This is one of the reasons that, in almost every other shareholder decision context, Cayman Islands companies are only required to be concerned with their shareholders of record.

The Cayman approach has also been challenged on the following grounds: *first*, neither the chairman of the Cayman scheme meetings nor the Cayman Court is likely to be able to verify the validity of instructions. The approach requires the Cayman company, the chairman of the scheme meeting(s) and the Cayman Court to rely on the nominee for information as to how account holders have voted in connection with the Cayman scheme meeting. Generally, custodians will only provide details of the number of account holders who voted for or against the Cayman scheme, but will not be prepared to disclose copies of voting instructions. As such, it is not possible to independently verify the accuracy or

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15 *Per* Parker J in *Re Ocean Rig UDW Inc.* at paragraph 89.
16 Grand Court Rules, Order 102, r. 20(10)
17 See Section 57 of the Companies Law 1961.

validity of the votes at the scheme meeting; *second*, it may be difficult to apply in practice. Looking further through the register to apply the headcount test may require scheme companies to have an impossible level of understanding and knowledge of the structures (and arrangements) in which debt or share instruments are held. It may also cause issues with overseas nominees/custodians who may not be willing to disclose the level of information required (in particular, in the context of listed companies); and *third*, it is inconsistent (in the context of shares) with the Cayman Islands law approach in determining ownership of shares that is, persons entered onto the register of shareholders being *prima facie* evidence of ownership.[18]

(5) The headcount test is at risk of manipulation.

Shareholders and/or creditors may split their relevant holding across multiple entities or persons in order to acquire a disproportionate level of influence on the Cayman scheme. This can be very difficult to detect – for example, an objecting party may not have access to the register of shareholders. It is also not clear how far the chairman of a scheme meeting must go to ensure that vote-splitting has not occurred (in such a way as to inappropriately affect the outcome of a scheme meeting).

In the case of notes, 'splitting' may be more difficult to achieve. However, the trading of notes until the voting record date is not unusual, it is perfectly acceptable for a particular creditor to seek to acquire a controlling stake in a particular class.

Approaches in other jurisdictions

In some jurisdictions (including New Zealand, Canada, India and South Africa) that have imported the scheme of arrangement from English law, a headcount test is not a requirement for the purposes of shareholders schemes. However, the headcount test (in some form) is incorporated for the purposes of creditor schemes in Singapore, Hong Kong, Australia, BVI, Bermuda and South Africa. We outline below the approach taken in certain jurisdictions which have adopted a modified approach to the headcount test.

Hong Kong

In Hong Kong, for takeover offers and general offers, the headcount test was replaced in 2014 by a 10% objection test, which requires the votes cast against a scheme of arrangement to not exceed 10% of the total voting rights attached to all disinterested shares.[19] For all other arrangements or compromises, the headcount test is still required but the Hong Kong court has the discretion to dispense with the test.[20]

Singapore

In Singapore, which is a jurisdiction that has in recent years made a number of legal reforms in its bid to become a leading international debt restructuring centre, has also made certain changes to the headcount test for schemes of arrangement. In 2014, the Companies (Amendment) Act was passed in Singapore, modifying the language of the headcount test requirement, which now provides that while a 'majority in number' of creditors is required, this is now qualified by the caveat 'unless the court orders otherwise'.[21]

Australia

Similarly, in Australia, the headcount test has been retained, but the court has discretion to dispense with it. In other words, a scheme must still be approved by 75% of the votes cast on the resolution, but the courts in Australia can order for the majority in numbers of shareholders test to be dispensed with.[22]

New Zealand

As for New Zealand, the judiciary has perhaps been the most radical in terms of the headcount test, which was abolished altogether in 1993. The legislation of New Zealand now does not set out a specific test for approving a scheme of arrangement, and instead the shareholders are only required to approve the proposed arrangement, amalgamation or compromise in such manner and on such terms as the court may specify.[23] Although the headcount test was re-introduced in the context of certain listed entities by the 2014

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18 See Section 48 of the Companies Law (2018 Revision) and see also definition of 'registered shareholder'.
19 Section 673 of the Companies Ordinance No. 28 of 2012.
20 Section 674 of the Companies Ordinance No. 28 of 2012.
21 Section 210 (3AB) of the Companies (Amendment) Act.
22 Section 411 Part 5.1 of the Corporations Act 2001.
23 Section 236 of the Companies Act 1993.

amendment to the Companies Act[24], this statutory requirement only applied to 'code companies'.[25]

Time for reform?

England and Wales

In England and Wales, the question of whether the headcount test should be abolished was twice considered by UK Parliament when preparing the Companies Act 2006. The Company Law Review Steering Group recommended that the headcount test be abolished noting that 'the requirement for majorities in number as well as three-fourths in value has become irrelevant and burdensome, particularly in relation to shareholders and against the background of increasing use of nominees and possible artificial sub-division of nominal shareholdings to reach the requisite majority in number.' Parliament however, elected to continue to include the headcount test in the English Companies Act 2006.

On the first attempt, Lord Goldsmith (in his capacity as Attorney General) stated that whilst the proposed changes (to remove the headcount test) 'would facilitate schemes for companies and large creditors and [shareholders], [but] would do [so] at the expense of the interests of small minority [shareholders] and creditors [and that] therefore, the Government are not persuaded that the amendment strikes the right balance.'[26] The second attempt was put forward on the basis that 'the majority in number [test], focusing on a majority of registered holders is an anachronism, now that most retail holders hold through CREST nominees, where one registered holder may represent many thousands of beneficial owners. It is also open to abuse by shareholders who could subdivide their holding thought a number of nominee companies.'[27] However, the proposal was again rejected this time, largely on the basis that the 'theoretical possibility'[28] of potential abuse through share splitting was an inadequate basis for removing the protection.

Given recent attempts at share splitting in *Dee Valley*[29] and the reported intention (pre-dating Brexit) for radical insolvency reform in England and Wales, the issue may once more be considered.

Conclusion

The Cayman Court's ability to 'look through' the register of shareholders attempts to address the limitations of the headcount test in the context of modern share ownership structures (similar provisions do not apply in the context of creditor schemes).[30] However, it is akin to going 'down a rabbit hole'. Whilst arguably the ability to 'look through' the register seeks to uncover the intentions (for voting purposes) of those with the ultimate beneficial ownership of the Cayman scheme company's shares, in reality it only reveals those parties holding accounts with the relevant stock exchange (i.e. custodians, clearing houses and brokers) who, in turn, hold the shares on behalf of others, who potentially may hold on behalf of others, and so on and so forth. Any attempt to look *further* through the register places the Cayman scheme company under an impossible burden; it would be impractical and unworkable to require the Cayman scheme company (or the chairman of the scheme meeting(s)) to follow each and every rabbit hole through the warren and definitively identify the ultimate beneficial owner of the relevant shares of a Cayman scheme company.

Nevertheless, the Cayman Court is clearly willing, ready and able to take steps to address the problematic issues of determining the intention of underlying beneficiaries (see in particular, the suggestion by Cresswell J in *Alibaba* that the 'look through' be re-considered).[31] The Cayman Court and the jurisdiction's practitioners

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24 Section 236A of the Companies Act 1993.

25 Code companies being a listed issuer that has financial products that confer voting rights quoted on a licenced market, or has 50 or more shareholders and 50 or more share parcels (as defined by the Takeovers Act 1993).

26 *Per* Lord Goldsmith HL Deb 28 March 2006, GC326.

27 HL Deb 16 May 2006, col. 217.

28 *Per* Lord Goldsmith HL Deb 16 May 2006, vol. 682, cols. 216-217.

29 *Re Dee Valley Group Plc* [2017] EWHC 184 (Ch) – In *Dee Valley* a minority stakeholder sought to manipulate the headcount test by using a share splitting strategy to defeat a scheme of arrangement. In that case, a disgruntled employee sought to derail a takeover scheme by transferring single shares to hundreds of people for the purpose of manipulating the 'no' votes against the scheme. The company, aware of the changes made, by reference to its company books, sought (and obtained) a court order enabling the chairman of the scheme meetings to reject the votes of any person who acquired shares from the disgruntled employee. See also *Re PCCW Ltd.* [2009] 3HKC 292, a similar case involving share-splitting in Hong Kong. In *Re PCCW* a controlling shareholder sought to manipulate the outcome of a takeover (by way of scheme of arrangement) by distributing shares to individuals who would vote in favour of the takeover scheme. The Hong Kong court was not satisfied that the vote was a true reflection of the shareholders' will. The court disregarded (at the sanction stage) the votes of the shares subject to the share split and, as a result, the scheme failed. Note this decision pre-dates the changes to legislation detailed above.

30 The issues regarding the headcount test are less severe in the case of creditor schemes of arrangement given the accepted approach to treat the beneficial owners of debt as contingent creditors (and therefore entitled to vote in the scheme meeting in their own right).

31 See for example, Cresswell J in *re Alibaba.com Ltd*, Unreported, 20 April 2012 stated (in the context of the practice of 'looking through the register': 'in light of my ruling of 20 April 2012 the opportunity might be taken (if thought appropriate) to confirm or re-consider Practice Direction 2 of 2010.'

are committed to ensuring that the laws and the practices adopted in the Cayman Islands reflect best practice and remain so.

A practical compromise would be to remove the headcount test for Cayman shareholder schemes of arrangement, given amongst other things, that the current approach is inconsistent with modern Cayman company law. Shareholders would continue to have sufficient protection through, amongst other things, the Cayman Court's ultimate discretion to sanction Cayman schemes and the ability for affected shareholders to be heard at the sanction or fairness hearing.

In any event, the issues surrounding the headcount test in schemes of arrangement in the Cayman Islands are not insurmountable. The Cayman Islands scheme of arrangement remains a powerful, flexible and relevant restructuring tool: ensuring that a proper balance is struck between the effective compromise of claims and protection for both majority and minority stakeholders.

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