CR-2024-007540

Neutral Citation Number: [2025] EWHC 338 (Ch)

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INSOLVENCY AND COMPANIES LIST (ChD)

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

18 February 2025

Before:

MR JUSTICE LEECH

- -

IN THE MATTER OF THAMES WATER UTILITIES HOLDINGS LIMITED AND IN THE MATTER OF THE COMPANIES ACT 2006

- -

MR TOM SMITH KC, MR PHILIP MOSER KC, MS CHARLOTTE COOKE, MR ANDREW SHAW and **MR HUGH WHELAN** (instructed by **Linklaters LLP**) appeared on behalf of the Applicant Company
MR ADAM AL-ATTAR KC and **MR EDOARDO LUPI** (instructed by **Akin Gump LLP**) appeared on behalf of an ad hoc group of Class A supporting creditors
MR STEPHEN ROBINS KC (instructed by **Allen Overy Shearman Sterling LLP**) appeared on behalf of a group of bank supporting creditors
MR MARK PHILLIPS KC, MR TONY SINGLA KC, MS CHARLOTTE THOMAS, MR MATTHEW ABRAHAM, MR JAMIL MUSTAFA and **MS IMOGEN BELTRAMI** (instructed by **Quinn Emanuel Urquhart & Sullivan UK LLP**) appeared on behalf of an ad hoc group of Class B opposing creditors
MR ANDREW THORNTON KC and **MS GEORGINA PETERS** (instructed by **Freshfields LLP**) appeared on behalf of Thames Water Limited
MR WILLIAM DAY, **MR LUCAS JONES** and **MS NIAMH DAVIS** (instructed by **Marriott Harrison LLP**) appeared on behalf of Mr Charlie Maynard MP

Hearing dates: 31 January, 3-7 February 2025

- -

APPROVED JUDGMENT

- -

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

Table of Contents

Mr Justice Leech:

I. The Application

1. By Claim Form dated 10 December 2024 the Claimant, Thames Water Utilities Holdings Ltd (the "**Plan Company**"), applied for an order permitting it to convene and conduct seven meetings (the "**Plan Meetings**") of the Plan Company's principal creditors (the "**Plan Creditors**" or "**Creditors**") for the purpose of considering and, if thought fit, to approve a restructuring plan (the "**Plan**") under Part 26A of the Companies Act 2006 (the "**CA 2006**"). The Plan Company also applied for an order to sanction the Plan.

2. The Thames Water group of companies (the "**Thames Water Group**" or the "**Group**") is the largest provider of water and sewerage services by number of customers in the UK providing services to 24% of the population. On 19 December 2024 the final determination of OfWat's price review process was published (subject to any reference to the Competition and Markets Authority (the "**CMA**")). The Plan Company is unable to give effect to that determination without putting in place a long-term restructuring plan. However, it will run out of money before it can do so and, in particular, on 24 March 2025. The parties described the period in the run-up to that date as the "**liquidity runway**" and I will adopt that term.

3. The Plan Company proposes, therefore, to implement an interim solution which the parties have named the "**Interim Platform Transaction**" to extend the liquidity runway for a further two years to provide, so the Plan Company contends, a stable platform to raise capital and put in place a long-term restructuring plan. It should be understood, therefore, that the Court has only been asked to sanction an interim plan on this application. The Interim Platform Transaction will extend the final maturity dates and scheduled amortisation payments of all classes of debt by two years and cancel all currently undrawn commitments under its existing liquidity facilities, Class A Debt and Class B Debt. The Plan will also result in £1.5 billion of new super senior funding being injected into the Group with capacity to inject a further £1.5 billion.

4. On 17 December 2024 the convening hearing took place before Trower J (the "**Convening Hearing**") and he made an order (the "**Convening Order**") giving the Plan Company liberty to convene seven Plan Meetings to consider and, if thought fit, approve the Plan. Trower J also gave a judgment in which he explained his reasons for making the Convening Order and giving the directions in the Convening Order (the "**Convening Judgment**"): see [2024] EWHC 3310 (Ch). On 21 January 2025 Trower J refused permission to adduce expert economic evidence in relation to competition law: see [2025] EWHC 84 (Ch).

5. On 21 January 2025 the Plan Meetings took place and the Plan was approved by over 75% in value of most classes of the Plan Creditors including almost all of the creditors holding Class A debt (the "**Class A Creditors**"). At the meeting of the Creditors holding Class B junior debt (the "**Class B Creditors**") the Plan was only approved by 15.5% of those present and voting. The Plan Company is a wholly owned direct subsidiary of Thames Water Ltd ("**TWL**"), which is indirectly owned by Kemble Water Holdings Ltd (the "**Kemble Group**"). TWL is also a creditor of the Plan Company and the only Plan Creditor in a separate class of subordinated creditors (the "**Subordinated Creditor**"). It did not approve the Plan at its Plan Meeting either.

6. The Plan Company, therefore, applied to the Court to sanction the Plan and to order a "cross-class cram down" in relation to the Class B Creditors and the Subordinated Creditor. At the hearing Mr Tom Smith KC, Mr Philip Moser KC, Ms Charlotte Cooke, Mr Andrew Shaw and Mr Hugh Whelan appeared on behalf of the Plan Company instructed by Linklaters LLP ("**Linklaters**"). An ad hoc group of Class A Creditors (the "**Class A AHG**") supported the sanction of the Plan. That group appeared by Mr Adam Al-Attar KC and Mr Edoardo Lupi instructed by Akin Gump LLP ("**Akin Gump**"). A group of bank creditors also supported the sanction of the Plan and they were represented by Mr Stephen Robins KC instructed by Allen Overy Shearman Sterling LLP. Finally, Squire Patton Boggs (UK) LLP represent Thames Water Pension Trustee Ltd and Thames Water Pension Trustees (MIS) Ltd, the trustees of the Thames Water pension schemes. By letter dated 4 February 2025 they also wrote to the Court

stating that the trustees were in favour of a viable restructuring of the Thames Water Group.

7. An ad hoc group of Class B Creditors (the "**Class B AHG**") opposed the sanction of the Plan. That group was represented by Mr Mark Phillips KC, Mr Tony Singla KC, Mr Matthew Abraham, Ms Charlotte Thomas, Mr Jamil Mustafa and Ms Imogen Beltrami instructed by Quinn Emanuel Urquhart & Sullivan UK LLP ("**QE**"). TWL also opposed the sanction of the Plan. It was represented by Mr Andrew Thornton KC and Ms Georgina Peters instructed by Freshfields LLP ("**Freshfields**"). Finally, Mr William Day, Mr Lucas Jones and Ms Niamh Davis appeared on behalf of Mr Charlie Maynard MP to represent the public interest and the interest of customers. He also opposed the sanction of the Plan.

8. Many of the terms which I use in this judgment are set out and defined in the draft version of the Plan annexed to the Explanatory Statement published on the Thames Water Plan website by the Plan Company on 17 December 2024. For clarity I define many of those terms myself in the descriptive sections of this judgment. However, where it can be understood clearly without a working definition being needed in the text, I adopt the terms used in the draft Plan. I take all of the background details set out below from the Explanatory Statement unless I refer to specific documents to which I refer or quote directly.

II. Background

A. The Existing Financial Arrangements

(1) The Group structure

9. The Plan Company is incorporated in England and Wales. It is the parent company of the Thames Water Group and its principal activities are to hold the shares in its principal operating and finance subsidiaries and to guarantee certain of their obligations. It has no employees and no material assets of its own (other than shares in its subsidiary). The Plan Company is also the borrower in respect of the Subordinated Loans (as I define them below).

10. The Group owns a network of over 32,000 km of water mains and 109,000 km of sewers that cover London, the Thames Valley and the home counties and approximately 354 wastewater and treatment sites and 88 water treatment works. It employs approximately 8,000 people. The services which the Group supplies are provided by Thames Water Utilities Ltd ("**TWUL**"), a direct subsidiary of the Plan Company. TWUL and Thames Water Utilities Finance plc ("**TWUF**"), which is an indirect subsidiary of the Plan Company, are issuers, borrowers or hedge counterparties of much of the Group's debt.

(2) The Debt structure

11. The Thames Water Group operates under a "whole business securitisation" or "**WBS**" financing structure, which involves the issue of debt secured against all or substantially all of its assets. The Group's external, non-hedging debt principally consists of "**Liquidity Facilities**", the "**Class A Debt**", the "**Class B Debt**" and "**Subordinated Loans**" all of which I describe briefly below. As at 28 November 2024 the total of this debt was approximately £19 billion.

12. The terms on which the debt was issued is governed by about 60 different instruments and, in addition, by a "**Master Definitions Agreement**" or "**MDA**" made between the Plan Company, TWUL, TWUF and Deutsche Trustee Co Ltd as the "**Security Trustee**". It is also governed by a "**Security Trust and Intercreditor Deed**" or "**STID**", a "**Security Agreement**" and a "**Common Terms Agreement**" or "**CTA**". These are the principal "**Finance Documents**" (which are defined in the MDA to include all of the loan agreements, instruments and security documents).

<u>(i) The Liquidity Facilities</u>

13. The Group's first ranking debt consists of the Class A DSR Liquidity Facility (which was issued on 18 July 2006 for a nominal value of £253,264,273.13), the Class B DSR Liquidity Facility (which was also issued on 18 July 2006 for a nominal value of £44,156,641.51) and the O&M Reserve Facility (which was also issued on 18 July 2006 for a nominal value of £252,821,993.05). All of these facilities mature on 6 August 2025 although all of them remain undrawn. Mr Alastair Cochran, who is the CFO and a director of TWUL, gave evidence that

these facilities are undrawn because they provide a safety net for the Plan Company and the Group if there is an Event of Default and the Company enters into a "**Standstill**" under clause 13 of the STID (below).

(ii) The Class A Debt

14. The "**Class A Debt**" consists of loans totalling approximately £16 billion made under 53 different instruments divided up into the "**Class A Accretion Agreements**", the "**Class A RCFs**", the "**Class A TLs**", the "**Class A Private Notes**" and the "**Class A Public Bonds**" (all as defined in the Master Definitions Agreement). I will refer to the holders of the Class A RCFs, the Class A TLs and the Class A Private Notes as the "**Class A Private Noteholders**" and the holders of the Class A Public Bonds as the "**Class A Public Bondholders**" and together as the "**Class A Creditors**".

15. The earliest Class A notes or bonds to mature are the US $285 million Class A senior notes described in evidence as the "**US PPNs**" issued by TWUL. They mature on 22 March 2025. TWUL's most recent cashflow forecast shows that £209 million has to be repaid on 24 March 2025 (i.e. the first business day after maturity) together with interest of £15 million. It is these immediate repayments which determine the end of the Plan Company's liquidity runway. Between 19 June 2025 and 18 April 2027 a further seven notes or bonds mature totalling £3,552 million. The remainder of the Class A Debt is longer-dated and matures between 2027 and 2062.

(ii) The Class B Debt

16. The "**Class B Debt**" consists of loans totalling approximately £1 billion made under 12 different instruments divided up into the "**Class B RCFs**", the "**Class B TLs**" and the "**Class B Public Bonds**" (all as defined in the Master Definitions Agreement). I will refer to the holders of the Class B RCFs and the Class B TLs as the "**Class B Private Noteholders**" and the holders of the Class B Public Bonds as the "**Class B Bondholders**" and together as the "**Class B Creditors**". All of the Class B Debt matures in the next two to three years.

(iii) The Subordinated Debt

17. The “**Subordinated Debt**” principally consists of a loan totalling £4.25 billion of which £1.98 billion of principal and £1.25 billion of accrued unpaid interest remain outstanding but does not mature until 21 June 2056. It also consists of four additional loans totalling £331 million all of which are payable on demand and three of which have term dates which expire between 23 July 2027 and 14 August 2028.

(iv) The Hedging Facilities

18. In addition, TWUL and TWUF have entered into a series of bilateral interest rate, index-linked and cross-currency swap arrangements under a number of “**Hedging Facilities**”. They would have the right to veto a consensual change in the maturity dates of the Plan Debt and this is one of the reasons why the Plan is necessary. But even if the Plan is sanctioned, payments arising under the Hedging Agreements will continue to be made in the ordinary course. It is unnecessary, therefore, to set out any detailed terms of these agreements.

(v) Ranking

19. In very broad terms, the Liquidity Facilities rank first in priority, the Hedging Agreements rank second, the Class A Debt ranks third and the Class B Debt ranks fourth. The Subordinated Debt is junior and subordinated to all of the rights and claims of the Class A and Class B Creditors. However, the precise order of priorities is much more complex than this and I gratefully adopt the summary set out in the Plan Company’s Skeleton Argument:

> “first, on a pro-rata basis according to the respective amounts thereof, all amounts of fees, interest and principal under the Liquidity Facilities;
>
> second, on a pro-rata basis according to the respective amounts thereof, all scheduled amounts under the Interest Rate and Index Hedging Agreements;
>
> third, on a pro-rata basis according to the respective amounts thereof: (i) all amounts of interest, Recurring Fees and commitment commissions under the Class A Debt; (ii) all unscheduled and termination amounts under the Interest Rate and Index Hedging Agreements; (iii) all scheduled amounts (other than principal exchange or final exchange amounts) under the Currency Hedging Agreements in respect of Class A

> Debt and, provided the Standstill Period has terminated (other than in certain limited circumstances), all other amounts payable under the Currency Hedging Agreements in respect of Class A Debt; and (iv) all amounts of underwriting commissions under the Class A Debt;
>
> fourth, on a pro-rata basis according to the respective amounts thereof, (i) all principal amounts under the Class A Debt; (ii) all principal or final exchange amounts under the Currency Hedging Agreements; and (iii) any termination amounts or other unscheduled sums under the Currency Hedging Agreements;
>
> fifth, any Make-Whole Amount under the Class A Debt;
>
> sixth, on a pro-rata basis according to the respective amounts thereof: (i) all interest and commitment commissions under the Class B Debt; and (ii) all amounts of underwriting commission under the Class B Debt;
>
> seventh, on a pro-rata basis, all amounts of principal under the Class B Debt; and
>
> eighth, any Make-Whole Amount under the Class B Debt."

(vi) The Subordinated Promissory Note

20. On 31 August 2018 TWUL issued a split promissory note to TWUL, the Subordinated Creditor (the "**Subordinated Promissory Note**"). The principal amount outstanding is £269,000 and it is repayable on 31 July 2043. It is unsecured, it is not guaranteed by the Plan Company or TWUF and it does not form part of the Plan Debt.

(3) Security

21. The Liquidity Facilities, the Hedging Agreements, the Class A Debt and Class B Debt are all secured by first fixed charges over (i) the shares in TWUL and TWUF, (ii) the Group's land and real property, (iii) plant, machinery, office equipment, computers, vehicles and other chattels, (iv) credit balances in the Group's bank accounts, (v) IP rights, (vi) investments, (vii) shares, dividends, interest and other funds owned by Group companies, (viii) book debts and (ix) insurance benefits. The Group has also assigned to the secured creditors (the "**Secured Creditors**") the benefit of the Transaction Documents (as defined in the Master Definitions Agreement) and granted a first floating charge over the whole undertaking of each Group company. The Plan Company has guaranteed

all of the obligations of TWUL and TWUF. TWUL and TWUF have also given cross-guarantees of all of their respective obligations under the Finance Documents.

(4) The STID

22. On 31 August 2018 the Thames Water Group and its creditors entered into a third deed of restatement and amendment to the STID. Clause 8 contains the procedure for various modifications, consents and waivers to be given subject to certain "entrenched" rights which prevent them being effective if they would increase or adversely modify the obligations or liabilities of the individual Creditors under the Finance Documents. Clause 8.2 sets out the procedure for modifications, consents and waivers and clause 8.2.2 provides that the Security Trustee:

> "shall, subject to Clause 9 (Voting, Instructions and Notification of Outstanding Principal Amount of Qualifying Debt), following receipt of a STID Proposal from a Proposer, and in accordance with and subject to the votes of the Majority Creditors in favour of such STID Proposal, concur with TWUL, TWUF or the Issuer (as applicable) in making any modification to, or give any consent or grant any waiver under or in respect of, any term of this Deed and/or the other Finance Documents as set out in such STID Proposal;…"

23. Clauses 8.3 and 8.4 set out the "Entrenched Rights" of the Class A Creditors and Class B Creditors respectively. Clause 9 sets out the agreed voting procedure for amendments and waivers to the Finance Documents. Clause 9.1 is headed "Instigation of STID Proposal" and it provides as follows:

> "Any Secured Creditor (or, where applicable (and in the case of Bondholders or Secured TWUF Bondholders), its Secured Creditor Representative, provided that it is acting on the direction or request of the relevant Secured Creditors in accordance with the provisions of the relevant Finance Document), Secondary Market Guarantor or any Obligor will be entitled by notice to the Security Trustee to propose or request:
>
> 9.1.1 any change or modification to the Finance Documents to which it (or, in the case of any Secured Creditor, the Security Trustee) is party or, in the case of a Secondary Market

> Guarantor, is the subject of its secondary market guarantee arrangements;
>
> 9.1.2 the giving of any consent or waiver under or in respect of the Finance Documents to which it (or in the case of any Secured Creditor, the Security Trustee) is party;
>
> 9.1.3 the substitution of the Issuer (or any Substituted Issuer) in accordance with Clause 22 (Substitution of the Issuer) of the Bond Trust Deed or, as the case may be, the substitution of TWUF (or any Substituted TWUF) in accordance with Clause 13 (Modification and Substitution) of the relevant secured TWUF Bond Trust Deed; or
>
> 9.1.4 the taking of any Enforcement Action under any of the Finance Documents or any other action in respect of any of the transactions contemplated by the Finance Documents to which it (or, in the case of any Secured Creditor, the Security Trustee) is a party or, in the case of a Secondary Market Guarantor, is the subject of its secondary market guarantee arrangements.
>
> Any such proposal or request will constitute a "STID Proposal" and the person serving such STID Proposal is referred to in this Deed as the "Proposer"."

24. Clause 9.5 is headed "Effective Time of Majority Creditor Decisions on STID Proposal" and deals with the detailed procedure for communication of the decisions of the "Majority Creditors". In particular, clause 9.6 deals with the making of a "DIG Directions Request":

> "9.6.1 The Security Trustee may, and will if requested by notice in writing from any DIG Representative, solicit directions of the Class A DIG Representatives, or following the repayment in full of the Class A Debt, the Class B DIG Representatives in relation to: (i) any matter expressly requiring the consent, approval or agreement of, or directions or instructions from, or waiver by the Majority Creditors pursuant to Clause 19.6 (Resignation of Security Trustee) of this Deed, and such directions or instructions shall not be subject to Entrenched Rights or Reserved Matters provided that they deal solely with matters requiring the consent, approval or agreement of, or directions or instructions from, or waiver by the Majority Creditors pursuant to Clause 19.6 (Resignation of Security Trustee) of this Deed; or (ii) any vote to terminate or extend Standstill pursuant to Clause 13.4 (Termination of Standstill) or Clause 13.5 (Extension of Standstill), as applicable. Any such solicitation will constitute a "DIG Proposal".
>
> 9.6.2 The Security Trustee will send a notice of each DIG Proposal (such notice, a "DIG Directions Request") only to the

relevant DIG Representatives, which must be in writing, dated and contain reasonable detail of the consent, approval or agreement of, or directions or instructions from, or waiver by the Majority Creditors or, in respect of any vote to terminate Standstill pursuant to Clause 13.4 (Termination of Standstill) or Clause 13.5 (Extension of Standstill), by DIG Representatives representing the requisite percentage of the Outstanding Principal Amount of (i) the Qualifying Class A Debt or (ii) following the repayment of the Class A Debt in full, the Qualifying Class B Debt set out therein, which the Security Trustee is soliciting from the Majority Creditors or, in respect of any vote to terminate a Standstill pursuant to Clause 13.4 (Termination of Standstill) or Clause 13.5 (Extension of Standstill), Class A DIG Representatives or, as the case may be, Class B DIG Representatives representing the requisite percentage of the Outstanding Principal Amount of the relevant Qualifying Debt set out therein, setting out the relevant Exchange Rate and requesting the following from each relevant DIG Representative:

(a) a vote in writing on the DIG Proposal from the relevant DIG Representative no later than a specified date (which date shall be not (i) less than 5 Business Days after the date that the DIG Directions Request is deemed to be given in accordance with Clause 17.3 (Effectiveness) of the Common Terms Agreement or (ii) where the Bond Trustee or the relevant TWUF Bond Trustee is a DIG Representative and a Default Situation is subsisting, subject to Clause 9.13 (Emergency Instruction Procedure) such later date (being not more than 2 months after the date that the DIG Directions Request is deemed to be given in accordance with Clause 17.3 (Effectiveness) of the Common Terms Agreement) as may be notified to the Security Trustee by the Bond Trustee or, as the case may be, the relevant TWUF Bond Trustee should the Bond Trustee or, as the case may be, the relevant TWUF Bond Trustee have given notice to convene a meeting of any one or more Sub-Classes of Bondholders or, as the case may be, Classes of Secured TWUF Bondholders to consider the DIG Directions Request) (the "DIG Voting Date"); and

(b) a certificate from the relevant DIG Representative that it is entitled under the terms of this Deed to vote on the DIG Proposal and stating the Outstanding Principal Amount of its Voted Qualifying Debt (in the case of Qualifying Debt denominated in a currency other than the Base Currency, expressed in the Base Currency on the basis of the Exchange Rate set out in the DIG Directions Request).

9.6.3 Subject to Clause 9.6.4 below, the Security Trustee is duly authorised and must promptly act in accordance with the votes from Majority Creditors, in respect of the DIG Proposal following the earlier of:

(a) the date on which the Security Trustee has received votes in favour of the DIG Proposal from DIG Representatives representing more than 50 per cent of the Outstanding Principal Amount of (i) the Qualifying Class A Debt or (ii) following the repayment of the Class A Debt in full the Qualifying Class B Debt; and (b) if the Majority Creditors have voted in favour of the DIG Proposal, the DIG Voting Date.

9.6.4 For the purposes of Clause 13.4 (Termination of Standstill) and Clause 13.5 (Extension of Standstill), the Security Trustee is duly authorised and must promptly act in accordance with the votes from Class A DIG Representatives or, following the repayment in full of the Class A Debt, the Class B DIG Representatives representing the requisite percentages of Outstanding Principal Amount of the Qualifying Class A Debt or, if no Class A Debt is outstanding, Qualifying Class B Debt who have voted in respect of the DIG Proposal to terminate Standstill.

9.6.5 As soon as the Security Trustee has received votes on a DIG Proposal from DIG Representatives representing more than 50 per cent of the Outstanding Principal Amount of (i) the Qualifying Class A Debt or (ii) following the repayment of the Class A Debt in full the Qualifying Class B Debt in respect of any vote to terminate Standstill pursuant to Clause 13.4 (Termination of Standstill) or Clause 13.5 (Extension of Standstill), from DIG Representatives representing the requisite percentage of the Outstanding Principal Amount of (i) the Qualifying Class A Debt or (ii) following the repayment of the Class A Debt in full the Qualifying Class B Debt set out therein, no further votes will be counted by the Security Trustee or taken into account notwithstanding the fact that the Security Trustee has yet to receive votes from all DIG Representatives in respect of the Qualifying Class A Debt or, if no Class A Debt is outstanding, Qualifying Class B Debt.

9.6.6 The Security Trustee must notify each Secured Creditor (or, where applicable, its Secured Creditor Representative) and each Secondary Market Guarantor of the decision of the Majority Creditors or, in respect of any vote to terminate a Standstill pursuant to Clause 13.4 (Termination of Standstill) or Clause 13.5 (Extension of Standstill), of DIG Representatives representing the requisite percentages of the Outstanding Principal Amount of the Qualifying Class A Debt or, if no Class A Debt is outstanding, Qualifying Class B Debt set out therein on a DIG Proposal promptly following the DIG Voting Date or (if earlier) the date on which the Security Trustee has received votes in favour of the DIG Proposal from DIG Representatives representing more than 50 per cent of the Outstanding Principal Amount of the relevant Qualifying Debt or, in respect of any vote to terminate a Standstill pursuant to

> Clause 13.4 (Termination of Standstill) or Clause 13.5 (Extension of Standstill), from DIG Representatives representing the requisite percentages of the Outstanding Principal Amount of the relevant Qualifying Debt set out therein."

25. It is clear from these provisions that either the Majority Creditors or the DIG Representative representing the Creditors who own 50% of the Qualifying Class A Debt are entitled to take the decision whether to waive compliance with individual obligations. This is also made clear by clause 9.7 which is headed "Binding Decisions of Majority Creditors" and clause 9.8 which is headed "Binding Vote of DIG Representatives":

> "9.7.1 Subject to Clause 9.3 (Notice to Secured Creditors and Secondary Market Guarantors of STID Proposal), Clause 9.4 (Notice of Entrenched Rights or Reserved Matters Procedure) and Clause 9.10 (Disputes), decisions of the Majority Creditors in relation to STID Proposals will bind the Secured Creditors and the Secondary Market Guarantors in all circumstances.
>
> 9.7.2 Subject to Clause 9.6 (DIG Directions Request), decisions of: (a) the Majority Creditors in relation to any DIG Proposal; and (b) the DIG Representatives representing the requisite percentage of the Outstanding Principal Amount of the Qualifying Class A Debt or, if no Class A Debt is outstanding, Qualifying Class B Debt set out in Clause 13.4 (Termination of Standstill) and Clause 13.5 (Extension of Standstill) in respect of any vote to terminate Standstill, will bind the Secured Creditors and the Secondary Market Guarantors in all circumstances.
>
> 9.8 The Voted Qualifying Debt held or represented by a DIG Representative for the purposes of a decision of the Majority Creditors, or, in respect of any vote to terminate Standstill pursuant to Clause 13.4 (Termination of Standstill) or Clause 13.5 (Extension of Standstill) a decision of Class A DIG representatives or, as the case may be, Class B DIG Representatives representing the requisite percentage of the Outstanding Principal Amount of the relevant Qualifying Debt set out therein shall be the total Qualifying Debt which it has voted and for which it is DIG Representative, notwithstanding that not all the Qualifying Debt Providers which it represents voted under the voting procedures in the Finance Document under which the Qualifying Debt Providers have made the Qualifying Debt available to TWUL, TWUF or the Issuer (as applicable) consistently with the DIG Representative's vote, provided that the DIG Representative voted in accordance with

a decision binding on all Qualifying Debt Providers under such Finance Document."

26. Clause 13 is headed "**Standstill**" and it provides for the commencement, duration and effect of a Standstill once an Event of Default has taken place. It provides as follows:

> "**13.1 Commencement of Standstill**
>
> Immediately upon notification to the Security Trustee of an Event of Default occurring (other than, for the avoidance of doubt, an Event of Default as defined in any Hedging Agreement with respect to a Hedge Counterparty) in accordance with Clause 12 (Notification of Default) and for so long as any Class A Debt and/or Class B Debt is outstanding, a Standstill Period will commence (unless one is already in existence) and each of the following provisions of this Clause 13 (other than Clause 13.4.3) will apply in relation to any Event of Default set out in Part 2 (Events of Default of TWUL, TWUF and Issuer) of Schedule 6 (Events of Default) to the Common Terms Agreement occurring and the provisions of Clauses 13.2 (Restrictions during Standstill), 13.3 (Cash Management during Standstill), 13.4 (Termination of Standstill) and 13.6 (No Waiver of Rights for Obligors) will apply in relation to any Event of Default set out in Part 1 (Events of Default of TWH) of Schedule 6 (Events of Default) to the Common Terms Agreement occurring.
>
> **13.2 Restrictions during Standstill**
>
> Each Secured Creditor agrees that during a Standstill Period:
>
> 13.2.1 (other than any action taken in relation to Permitted Share Pledge Accelerations in accordance with Clause 13.2.2 and, for the avoidance of doubt, Permitted Lease Terminations, Permitted Hedge Terminations and Permitted EIB Compulsory Prepayment Events), no instructions may be given by or on behalf of any Secured Creditor to instruct the Security Trustee to take any Enforcement Action (but without prejudice to the ability of the Secured Creditors to demand payment) in relation to all or any part of the Security granted by TWUL, TWUF or the Issuer;
>
> 13.2.2 the Security granted by TWH under or pursuant to the Security Documents may be enforced at any time by the Security Trustee at the direction of the Majority Creditors; and
>
> 13.2.3 save as provided in Clauses 13.2.1 and 13.2.2 and other than Permitted Share Pledge Accelerations and, for the avoidance of doubt, Permitted Lease Terminations, Permitted Hedge Terminations and Permitted EIB Compulsory Prepayment Events, no Enforcement Action may be taken.

13.3 **Cash Management during Standstill**

Notwithstanding Clause 13.2 (Restrictions during Standstill), (i) during a Standstill Period, any monies received by TWUL, TWUF or the Issuer and all monies credited to the Accounts, will be applied in accordance with Schedule 11 (Cash Management) to the Common Terms Agreement and, upon application in the discharge of the Secured Liabilities, in accordance with the Payment Priorities and (ii) each of the Issuer and TWUF will continue to be entitled to make drawings under the Liquidity Facilities subject to Paragraph 3 of Schedule 13 (DSR Liquidity Facility/O&M Reserve Facility Terms) to the Common Terms Agreement.

13.4 **Termination of Standstill**

13.4.1 A Standstill Period which has commenced upon the occurrence of an Event of Default set out in Part 2 (Events of Default of TWUL, TWUF and Issuer) of Schedule 6 (Events of Default) to the Common Terms Agreement will terminate upon the earliest of:

(a) the date on which an order is made for the Special Administration of TWUL or any steps are taken to commence Insolvency Proceedings against the Issuer or TWUF other than proceedings that are commenced by the Security Trustee;

(b) (during the first 18 months of the Standstill Period) the date on which Class A DIG Representatives in respect of 662/3 per cent. or more of the aggregate Outstanding Principal Amount of the Qualifying Class A Debt or, following the repayment in full of the Class A Debt, Class B DIG Representatives in respect of 662/3 per cent. or more of the aggregate Outstanding Principal Amount of the Qualifying Class B Debt vote (pursuant to a DIG Proposal) to terminate the Standstill Period and (after such first 18 months) the date on which the Standstill Period terminates pursuant to Clause 13.5 (Extension of Standstill); and

(c) the date of waiver by the Majority Creditors and any other Secured Creditor whose consent is required to be obtained in respect of such waiver pursuant to the Entrenched Rights or the date of remedy (which in the case of an Event of Default caused solely by a TDC Breach, is the date that such TDC Breach is treated as no longer occurring pursuant to the Tax Deed of Covenant) of the Event of Default giving rise to the Standstill Period.

13.4.2 Upon termination of a Standstill Period in accordance with Clause 13.4.1 (except by virtue of Clause 13.4.1(c)), any Secured Creditor will be entitled to exercise all rights which may be available to it under any Finance Document (other than any Security Document) (including directing the Security Trustee to take any Enforcement Action) free of the

> restrictions imposed by Clause 11 (Undertakings) or Clause 13.2 (Restrictions during Standstill) (but subject to Clause 10 (Ranking of Secured Liabilities), Clause 11.6 (Receipts Held in Trust) and the Security Trustee will be entitled to enforce any Security Document in accordance with Clause 14.2 (Enforcement).
>
> 13.4.3 A Standstill Period which has commenced upon the occurrence of an Event of Default set out in Part 1 (Events of Default of TWH) of Schedule 6 (Events of Default) to the Common Terms Agreement will terminate upon the earlier of:
>
> (a) the date of waiver by the Majority Creditors and any other Secured Creditor whose consent is required to be obtained in respect of such waiver pursuant to the Entrenched Rights or the date of remedy of the Event of Default giving rise to the Standstill Period; and
>
> (b) the date on which the Security Trustee notifies TWUL and each Secured Creditor (or its DIG Representative) that notice by any Secured Creditor of the occurrence of the relevant Event of Default has been revoked, provided that the Standstill Period shall not terminate if on such a date an Event of Default is continuing in relation to TWUL and/or TWUF and/or the Issuer whereupon the Standstill Period shall terminate upon the earliest of the dates specified in Clause 13.4.1."

27. It was common ground that the failure to pay the US PPNs on their maturity date (or during any grace period) would amount to an Event of Default unless waived (and clause 13.1 expressly refers to relevant Events of Default set out in Schedule 6 to the CTA immediately below). It was also common ground that waiver of this Event of Default was an Entrenched Right.

(5) The CTA

28. On 26 June 2020 the Thames Water Group and its creditors entered into a third deed of restatement and amendment to the CTA. Schedule 4 contains the financial and other covenants which TWUL and other Thames Water companies have undertaken. Schedule 4, Part 1 is headed "Information Covenants" and it imposes a number of obligations upon each Obligor to provide detailed financial and operating information to the Security Trustee on behalf of the Secured Creditors. Further, in paragraph 6(vii) each Obligor covenanted to provide the following information:

> "so far as permitted by any binding confidentiality obligation that exists at the Initial Issue Date or any applicable law and without prejudicing the retention of legal privilege such material information about the business and financial condition of TWUL as a Secured Creditor may reasonably and properly request from time to time, on the request of the Security Trustee (as directed by such Secured Creditor)"

29. Schedule 11 contained very detailed provisions for cash management. Clause 15.3 also provided that upon notice that a Standstill had occurred, the "**Standstill Cash Manager**" would take over the operation of the Group's bank accounts and imposed limitations on the payments which could be made. NatWest Markets plc has been appointed as Standstill Cash Manager.

30. Mr Andrew Fraiser, the General Counsel and Company Secretary of the Plan Company, has made two witness statements dated 12 December 2024 and 24 January 2025 ("**Fraiser 1**" and "**Fraiser 2**" respectively). Mr Cochran also made a witness statement dated 24 January 2025 ("**Cochran 1**"). Both gave oral evidence and were cross-examined by both Mr Phillips and Mr Day.

31. Mr Fraiser and Mr Cochran both gave evidence that if TWUL failed to pay the US PPNs on 24 March 2025 an Event of Default would occur and the Group would enter into Standstill Period during which the NatWest would take over control of the Group's bank accounts. Mr Cochran also gave evidence that the Standstill Cash Manager would be able to pay for certain operating expenditure ("**Opex**") and certain capital expenditure ("**Capex**") but would be unable to make enhancement Capex payments. Mr Fraiser gave evidence that there was a five day grace period for payment of the US PPNs. But the evidence of both witnesses was that the entry into a Standstill Period on 24 March 2025 was the end of the Group's liquidity runway.

32. Appendix 1 to the Plan Company's Skeleton Argument sets out the detailed terms which have the effect which the witnesses described. In summary, Schedule 11 requires TWUL to maintain "**Operating Accounts**" and paragraph 6 requires that its revenues shall be paid into those Operating Accounts and provides for the use and application of those funds including the funding of "**Capital Maintenance Expenditure**". It also sets out a series of "**Payment**

Priorities" the first of which is the satisfaction of the Group's "operating and budgeted maintenance costs". Paragraphs 9.8 to 9.10 then provide as follows:

> "9.8 Following the commencement of a Standstill Period and for so long as it continues, and provided that no Enforcement Action (other than a Permitted Share Pledge Acceleration) has occurred:
>
> (a) TWUL shall cease to be the Cash Manager and will be replaced by the Standstill Cash Manager which shall control payments into and out of the Accounts in place of TWUL, the Issuer or TWUF;
>
> (b) the Standstill Cash Manager shall pay all operating expenditure as and when it falls due; and
>
> (c) the Standstill Cash Manager shall on a monthly basis calculate the aggregate of all payments falling to be made, or expected to fall to be made, during the next following period of 12 months and shall calculate all net revenues received and/or expected to be received over that 12 month period. To the extent that the forecast revenues are insufficient (after paying all relevant operating expenditure) to pay the aggregate of all payments falling to be made during the next 12 months, the Standstill Cash Manager shall notionally apply those forecast revenues to each category in accordance with the Payment Priorities until the revenue that is forecast to be available is insufficient to meet all of the payments falling to be made within such 12 month period in any sub-paragraph of the Payment Priorities (the "Shortfall Paragraph") and shall, in respect of those categories of payment falling within the Shortfall Paragraph, divide the anticipated revenues remaining pro rata between those amounts.
>
> 9.9 Throughout the Standstill Period, any payments falling to be made within a category of payment falling within a Shortfall Paragraph shall be satisfied by a payment of the pro rata share of that payment calculated in accordance with Paragraph 9.8 above and the balance of the payment not made shall remain outstanding.
>
> 9.10 Throughout the Standstill Period, no payments falling in a category which (in accordance with Paragraph 9.3 above) falls after a Shortfall Paragraph shall be mad but such payments shall remain outstanding."

33. Furthermore, the effect of a Standstill is that none of the Creditors providing the Liquidity Facilities are required to make those facilities available to TWUL once an Insolvency Event has occurred. Schedule 13, paragraph 3 provides as follows:

> “No Liquidity Facility Provider shall be obliged to make facilities available if (i) the Issuer or TWUF fails to pay any sum under the Liquidity Facility Agreement or any related fee letter at the time, in the currency and in the manner specified therein unless payment is made within three Business Days; (ii) an Insolvency Event has occurred in relation to the Issuer or TWUF; or (iii) an Acceleration of Liabilities (other than a Permitted Lease Termination, a Permitted Hedge Termination, a Permitted EIB Compulsory Prepayment Event or a Permitted Share Pledge Acceleration) pursuant to Clause 11.8 (Acceleration of Secured Liabilities) of the STID has occurred or a Standstill Period terminates other than pursuant to Clause 13.4.1(c) (Termination of Standstill) of the STID (each an "**LF Event of Default**"). For the avoidance of doubt, the Liquidity Facility Provider shall be obliged to continue to make facilities available if the Issuer or TWUF becomes insolvent as a result of a technical balance sheet insolvency arising out of a change in accounting and/or tax treatment.”

34. Schedule 6 contains a number of specified Events of Default. Part II, paragraph 5 is headed “Insolvency” and it provides as follows:

> "5.1 Any of the following occurs in respect of TWUL, TWUF or the Issuer: (a) it is, or is deemed for the purposes of any law to be, unable to pay its debts as they fall due or insolvent (other than (i) section 123(1)(a) to (d) of the Insolvency Act 1986, provided that for the purpose of this Paragraph 5, the words "to the satisfaction of the court" shall be deemed to be omitted from Section 123(1)(e) and Section 123(2) of the Insolvency Act and (ii) where TWUL's, TWUF's or the Issuer's insolvency arises solely as a result of a technical balance sheet insolvency howsoever caused); (b) it makes a general assignment for the benefit of or a composition of creditors; or (c) a moratorium is declared in respect of any of its indebtedness.
>
> 5.2 An Insolvency Event or Insolvency Proceedings occur(s) in relation to the Issuer or TWUF.”

35. It appeared to be common ground that the term “Insolvency Proceedings” extended to the issue of a Claim Form for the sanction of a restructuring plan under Part 26A. But in case there is any doubt, I am satisfied that it does. The term “**Insolvency Proceedings**” is defined to include proceedings for “reorganisation, dissolution, administration, arrangement, adjustment, protection or relief of debtors”.

B. The Regulatory Framework

36. The Plan Company's primary business is delivered through TWUL as a water and sewerage undertaker in accordance with a licence of appointment (the "**Licence**") issued by the Secretary of State for the Environment, Food & Rural Affairs (the "**Secretary of State**") under section 6 of the Water Industry Act 1991 (the "**WIA 1991**"). TWUL's core activities are regulated by the Water Services Regulation Authority ("**OfWat**"), the Drinking Water Inspectorate (the "**DWI**") and the Environment Agency ("**EA**"). TWUL's regulated water and sewerage undertaking is described as its "**Appointed Business**". It also carries out other activities (described as its "**Permitted Non-Appointed Business**") which includes third party discharges to sewerage treatment works and treatment of waste. Finally, the Consumer Council for Water represents the interests of consumers and handles complaints which have not been resolved by the water companies.

37. Section 7 of the WIA 1991 imposes a statutory duty on the Secretary of State to ensure that at all times there is a company holding an appointment as water and sewerage undertaker. Section 6 requires an appointed company to comply with the conditions of its licence and to comply with any statutory duties imposed on a water or sewerage undertaker. Those statutory duties include the general duty to maintain the water supply and system and sewerage system in its appointed area: see sections 37 and 94. The Licence gives effect to these statutory provisions and contains Conditions A to T which include requirements relating to price control, the provision of services, customer care and also limitations on TWUL's ability to pay dividends.

(1) The PR Process

38. Every five years OfWat sets allowable price increases and fixes performance indicators for the water companies. For each period it conducts a Price Review ("**PR**") and fixes an Asset Management Plan ("**AMP**") and Outcome Delivery Incentives ("**ODIs**"). On 31 March 2025 AMP7 (i.e. the seventh AMP since privatisation) comes to an end. OfWat has recently completed its final determination ("**FD**") in relation to PR24 (i.e. the price review for 2024) and on 1 April 2025 AMP8 (i.e. the eighth AMP since privatisation) will take effect.

39. Mr Eraj Weerasinghe, who is a Managing Director of Kroll LLC, has made two expert reports dated 11 December 2024 and 24 January 2025 ("**Weerasinghe 1**" and "**Weerasinghe 2**") addressing the value of the Plan Company at certain key dates. In Weerasinghe 1, he set out the components of the PR mechanism:

> "**1. Allowed Revenues**
>
> – Ofwat sets a revenue cap for each water company to cover service costs, including operating expenses, capital investments, and a reasonable return on investment. Any over and under spend against the cap is managed by cost-sharing factors set by Ofwat, reflecting the quality and ambition of the company's business plan. At the end of the AMP, a true-up 'midnight adjustment' to the company's RCV is made using these cost-sharing factors.
>
> **2. Performance Commitments**
>
> – Service Targets: Companies are required to meet specific performance commitments related to service quality, environmental protection, and customer satisfaction.
>
> – Price Control Deliverables: There are certain specified outputs that the companies must deliver by a certain date, with financial incentives for early/late delivery.
>
> – ODIs: These incentives include financial rewards for exceeding performance targets and penalties for underperformance.
>
> **3. Efficiency and Innovation**
>
> – Efficiency Targets: Ofwat sets efficiency targets to encourage companies to reduce costs and improve operational efficiency.
>
> – Innovation Fund: An innovation fund is established to support projects that drive technological advancements and innovative practices in the water sector.
>
> **4. Monitoring and Enforcement**
>
> – Annual Performance Reports: Water companies are required to publish annual performance reports detailing their progress against the set targets and commitments.
>
> – Regulatory Interventions: Ofwat monitors compliance and can intervene if companies fail to meet their commitments or if there are significant deviations from the approved business plans."

40. A key component of the PR is the Regulatory Capital Value or "**RCV**". In Weerasinghe 1, Mr Weerasinghe explained the relevance and significance of the RCV as follows:

> "• The RCV was established by the first economic regulator, Sir Ian Byatt, as a means of providing cash-negative companies a financial balance sheet, enabling them to access private capital for their investment programs.
>
> • RCV is a key parameter in determining the current and future level of allowed revenues that water companies can raise from their customers.
>
> • The value of the RCV represents the level of capital invested that Ofwat has committed to allowing the company to recover, in addition to its operating expenditure. The RCV is split across the various wholesale controls. Under Ofwat's regulatory framework, the allowed return is calculated by multiplying the (average) RCV by an estimate of the weighted average cost of capital. Consequently, a higher RCV directly contributes to a higher allowed return (in absolute terms).
>
> • Each year, capitalised spend is added to the RCV and regulatory depreciation is removed (through the RCV run-off rate). This means that the RCV will be growing in real terms if the value of capital expenditure exceeds RCV run off.
>
> • The value of the RCV is also uplifted for inflation. Indexation is currently based on a combination of RPI and CPIH inflation. However, Ofwat has signalled that from AMP8 onwards, indexation will be purely be in terms of CPIH. The RCV is also subjected to a further adjustment (the 'midnight adjustment') at the end of each five-year period to account for the reconciliation mechanisms that are in place."

41. Mr Weerasinghe also explained that OfWat has adopted a combined or integrated approach to the Capex and Opex of water companies under which a fixed proportion of total expenditure ("**Totex**") is added to the RCV of the company and recovered over the assumed lifetime of the assets. This is called "**slow money**". The balance of expenditure ("**fast money**" or pay as you go "**PAYG**") is recovered immediately or year on year from consumers. The amount which Thames Water is allowed to charge consumers involves three components: a fast money allowance, an RCV "**run-off**" rate which is comparable to depreciation in the value of the assets and finally a return on capital.

42. OfWat fixes the return on capital for a water company by reference to a weighted average of the cost of capital ("**WACC**") which assumes a notional percentage of debt in the capital structure. It was Mr Weerasinghe's evidence that OfWat sets wholesale revenue allowances including the rate of return in real terms and indexes them by reference to forecasts of general inflation but that there is a "true up" mechanism once actual inflation figures are published. It was also his evidence that OfWat is moving from the RPI to CPIH (i.e. the consumer prices index including owner occupiers' housing costs).

43. The process by which OfWat fixes the RCV and revenue allowances of a water company is as follows. OfWat publishes a draft determination ("**DD**") to which the company is able to respond in what is called a draft determination response ("**DDR**"). OfWat then publishes a final determination ("**FD**") which is binding on the water company subject to an appeal or statutory review by the CMA. Mr Fraiser's evidence was that this would take place by way of redetermination and that an appeal to the CMA had to be commenced within 8 weeks.

(2) PR24

44. On 11 July 2024 OfWat released the DD for AMP8. It allowed £16.9 billion of Totex compared with the £22.2 billion which TWUL had included in its most recent business plan published in April 2024. It also included a wholesale 3.66% WACC based on an assumed gearing of 55% debt (and after deduction of what is described as the retail margin deduction). Mr Cochran gave evidence in Cochran 1 that it would have generated potential penalties of up to £2 billion for TWUL. Mr Fraiser's evidence in Fraiser 1 was that this was "neither financeable nor investible" and that in the DD OfWat had only provided for half of TWUL's proposed waste water enhancement expenditure and set unachievable waste water targets.

45. On 29 August 2024 TWUL submitted its DDR making key changes to its business plan and on 19 December 2024 TWUL published its FD. Mr Cochran's evidence was that it was approximately 2,000 pages long and that TWUL has had over 250 people contributing to the PR24 FD process. It was also his evidence that TWUL and its advisers had produced a financial model called the

"**Crabtree Model**" based on the FD and designed to model its outcomes. He also gave the following evidence about those outcomes:

> "4.1 In the PR24 Final Determination there is a significant difference between the allowed regulatory totex spend (£20.5bn) and the totex ask for in TWUL's DD Response, where TWUL estimated it needed £24.5bn. Put another way, Ofwat expects TWUL to sufficiently deliver against TWUL's performance commitments and wider regulatory and legal requirements, with c.£4bn less totex than TWUL estimated it would need in the DD Response.
>
> 4.2 In my view, in certain areas it is going to be incredibly challenging to deliver on TWUL's performance commitments and regulatory requirements, within the regulatory totex spend amount and the gap cannot be bridged with just 'efficiencies'. By way of example only, in the PR24 Final Determination Ofwat allows a unit rate of £1,200/m to deliver mains renewal in central London. However, in TWUL's experience the unit rate has been historically as much as £5,000/m (and may be greater given the macroeconomic factors I described in paragraph 2.11).
>
> 4.3 Instead, I consider that in order to fully bridge the c.£4bn gap, TWUL would either need to remove significant items from its capex programme or materially overspend as compared to what's included in the PR24 Final Determination. As TWUL's capex programme is largely compliance driven, removing items from the capex programme may expose TWUL, and its directors, to legal liability. Furthermore, delivery on the capex programme is heavily incentivised by Ofwat such that not spending the money may be counterproductive as it will result in some combination of TWUL's revenue allowance being clawed back, penalties for non-delivery and/or penalties for missing TWUL's performance commitments. TWUL may, therefore, be left with little choice but to materially overspend in AMP8."

46. When he was cross-examined by Mr Day, Mr Cochran explained that the Crabtree Model had only been updated to incorporate the revenues allowed by OfWat in the FD. He also explained that revenue which TWUL was permitted to raise was net of any penalties:

> "The final determination for PR24, that was published on 19 December last year? A. Correct. Q. We heard earlier you have a team of 250 employees and contractors working on it. That is right, isn't it? A. Approximately, yes. Q. You have produced a detailed provisional financial model based on that

> determination, which is called the Crabtree model, the updated Crabtree model. That is right, isn't it? A. No. To be clear, the Crabtree model has not been updated for the final determination. It reflects an old version, the drafted termination [sic] response plan, not the final determination. Q. Can we just go to your witness statement, so I am clear on your evidence then. That is in the sanction bundle, tab 15, page 297. At paragraph 4.6, you say -- MR JUSTICE LEECH: 297, please. MR DAY: Sorry, my Lord? MR JUSTICE LEECH: It is not on the screen. MR DAY: Sanction bundle, tab 15, page 297. There we are. I want to focus on paragraph 4.6, where you say: "In order to provide a better comparison between Mr Weerasinghe's report and the Grunwald report, the operating company has provided Mr Weerasinghe a version of the Crabtree model that incorporates the unadjusted revenues from the PR24 final determination." As I understand it, you have a Crabtree model and you have updated it to include the revenues that you are going to be permitted under PR24, is that right? A. It is not quite that simple, if I may. As I explained earlier, it has been updated for the allowed revenues. However, the revenue we actually receive is net of any penalties that will be incurred for failing to deliver Ofwat's target performance outcomes. The actual revenue we receive, the adjusted allowed revenues, which determines the cash inflow of the business, has not been updated in that model. Q. I understand, thank you. Your evidence, as I understand it from your answers earlier this afternoon, is that there is a £4 billion gap between what Thames Water can afford and what is required of Thames Water in terms of its performance commitments and regulatory obligations, is that right? A. There is a 4 billion gap, yes. Q. Presumably you think that gap is unworkable? A. What do you mean by "unworkable"? Q. That that is not a gap that Thames Water realistically can bridge? A. At this point in time, no."

47. Mr Cochran accepted in cross-examination that the time for appealing against the PR24 FD to the CMA expired on 18 or 19 February 2025. Dr Dora Grunwald, to whom Mr Day referred above, is a partner at Osborne Partners and specialises in valuation, economic and financial analysis. She gave expert valuation evidence on behalf of the Class B AHG and I consider her evidence in greater detail below. But she also gave evidence in cross-examination that the PR24 process involved an element of negotiation between OfWat and TWUL to arrive at the final figures. However, she accepted that a redetermination by the CMA was a true statutory appeal.

(3) Penalties

48. Mr Fraiser also gave evidence that TWUL had been subject to significant fines and penalties from the regulators which were unfunded. Mr Day took him to two examples in cross-examination. In August 2024 OfWat issued a notice of its proposal to issue an enforcement order for £104.5 million against TWUL for failure to comply with its obligations under the Urban Waste Water Treatment (England & Wales) Regulations 1994. Then, in December 2024 OfWat issued a notice of its proposal to impose a financial penalty of £18.2 million on TWUL for contravention of Condition P30 of the Licence for approving the payment of interim dividends totalling £37.5 million on 27 October 2023 and interim dividends totalling £158.3 million on 27 March 2024.

49. Mr Fraiser accepted that as at 11 December 2024 TWUL understood that it would have to pay the first penalty between 1 April 2025 and 30 June 2025 and the second penalty by 31 March 2025. Mr Cochran gave evidence that TWUL was challenging the fines but that once any appeal process was exhausted it would typically have to pay these penalties within 14 days. He also confirmed that the payment of these penalties was unfunded and would have to be paid out of its liquid assets and, therefore, out of sums advanced under the Plan (assuming that it was sanctioned).

(4) Special administration

50. Sections 23 to 26 of the WIA, the Water Industry (Special Administration Regulations) 2024 (the "**2024 Regulations**") and the Water Industry (Special Administration) Rules 2024 (the "**2024 Rules**") govern the special administration of a company appointed under the WIA 1991 (which I will call a "**SAR**"). Section 23(1), (2), (2B) and (2C) set out the purposes of a SAR where it is the result of insolvency:

> "(1) A special administration order is an order of the High Court made in accordance with section 24 or 25 below in relation to a company holding an appointment under Chapter I of this Part or which is a qualifying water supply licensee or a qualifying sewerage licensee and directing that, during the period for which the order is in force, the affairs, business and property of the company shall be managed, by a person appointed by the High Court— (a) for the achievement of the purposes of such an order; and (b) in a manner which protects

> the respective interests of the members and creditors of the company.
>
> (2) The purposes of a special administration order made in relation to any company holding an appointment under Chapter 1 of this Part shall be— (a) the transfer to another company, or (as respects different parts of the area to which the company's appointment relates, or different parts of its undertaking) to two or more different companies, as a going concern, of so much of the company's undertaking as it is necessary to transfer in order to ensure that the functions which have been vested in the company by virtue of its appointment may be properly carried out; and (b) the carrying out of those functions pending the making of the transfer and the vesting of those functions in the other company or companies (whether by virtue of the transfer or of an appointment or variation which replaces the former company as a relevant undertaker).
>
> (2B) Where a company is in special administration as a result of an order made on the grounds that the company is or is likely to be unable to pay its debts— (a) a purpose of the special administration order is to rescue the company as a going concern, and (b) the transfer purpose under subsection (2)(a) or (2A)(a) applies only if the special administrator thinks that— (i) it is not likely to be possible to rescue the company as a going concern, or (ii) transfer is likely to secure more effective performance of the functions or activities mentioned in subsection (2).
>
> (2C) Where subsection (2B) applies, subsections (2)(b) and (2A)(b) have effect as if they referred to carrying out functions, or carrying on activities, pending rescue or transfer."

51. I will refer to the purpose in paragraph 23(2B)(a) as the "**rescue purpose**" and the purpose in paragraph 23(2B)(b) as the "**transfer purpose**". It is clear from the sub-section that the transfer purpose is subordinate to the rescue purpose and only governs the SAR if the administrator forms the view that it will not be possible to rescue the appointed company or a transfer is likely to be more effective.

52. A petition for a SAR may be presented by the Secretary of State or OfWat with the consent of the Secretary of State: see section 24(1). The grounds on which a petition may be presented include the normal insolvency ground, namely, that the company is or is likely to be unable to pay its debts applying the test under section 123 of the Insolvency Act 1986: see section 24(2)(c) and (6). The WIA 1991 does not prevent a creditor from petitioning to wind up an appointed

company. But if such a petition is presented, the Court is not permitted to wind up the company in the usual way although it may make an order for a SAR: see section 25. It also prohibits the voluntary winding up of an appointed company or an administration order being made under Schedule B1 of the Insolvency Act 1986.

53. Mr Smith placed great emphasis on the duty of a special administrator to manage an appointed company both for the achievement of the purposes of the SAR but also to protect the interests of creditors: see section 23(1) (above). Mr Day accepted that a special administrator had both duties but submitted that where the two were in conflict the interests of creditors are ultimately subordinated to the public interest in achieving either the rescue purpose or the transfer purpose.

54. In *Re Metronet Rail BCV Ltd* [2007] EWHC 2697 (Ch), [2008] All ER 75 Patten J pointed out that a special administrator appointed under the Railways Act 1991 had a duty to manage the appointed company's affairs in order to achieve the statutory purpose but also in a manner which protected the interests of the creditors. He also pointed out that a creditor could enforce this obligation by an unfair prejudice petition: see [27]. He then dealt with the situation in which there was a tension between the two duties in the context of a transfer scheme:

> "It seems to me that there could easily in certain circumstances be a tension between the need to secure the transfer of the existing appointee's undertaking to the new appointee in order to maintain the underground network and the interests of creditors in obtaining the best return from an otherwise insolvent company. The Court on an application under s.27 would have to balance those interests (so far as inconsistent with each other) in deciding what (if any) order to make. But it is also important to observe that the Court on a s.27 application under Schedule 14 to the 1999 Act is not empowered to dictate the terms of any proposed transfer scheme. The most that the Court can do is to discharge the PPP administration order unless measures are taken to protect the interests of creditors: see Schedule 14 paragraph 10(4). It would only, I think, be in extreme circumstances that such an order would ever come to be made."

55. The scheme of the 2024 Regulations is to modify Schedule B1 to the Insolvency Act 1986. Regulation 5 disapplies Schedule B1, paragraph 3 (which requires an

administrator to perform his functions in the interests of creditors). Subject to minor modification, Regulation 17 applies Schedule B1, paragraph 49 (which requires the special administrator to set out proposals for achieving the statutory purpose). Finally, Regulation 21 modifies Schedule B1, paragraph 68 and requires the special administrator to manage the affairs, business and property in accordance with those proposals.

56. Mr Day took me to the Explanatory Memorandum to the 2024 Regulations. Section 7 sets out the Policy Background to the regulations and under the heading "What is being done and why?" it states as follows:

> "7.1 Special administration is a process in which the objectives under a normal administration are modified to include public interest objectives. The process typically enables an insolvent company, which provides vital public services (e.g., water, energy, rail) to be put into special administration with a requirement that the public service will be provided pending rescue or transfer to new owners. This contrasts to a normal administration, where the appointed administrator is generally focused on the creditors' interests. The Government prepares for all eventualities to ensure the uninterrupted provision of vital public services. There is a high bar for implementing a SAR and it is a tool to be used when other options have been exhausted.
>
> 7.2 There is no universal special administration regime (SAR) legislative framework, rather each vital public service is governed by their own distinct SAR, e.g., the water industry special administration regime (WISAR), the Energy Supply Companies Special Administration Regime (introduced by the Energy Act 2011). This is because SAR legislative frameworks typically adapt general insolvency law to ensure it provides for the specifics of their industry."

57. Mr Day submitted that if TWUL went into special administration, then the interests of its creditors would be subordinated to the achievement of the purposes set out in section 23(2) and (2B). In support of this submission he relied upon *Re Metronet Rail* (above), *Re Railtrack plc (No 2)* [2002] EWCA Civ 955, [2002] 1 WLR 3002 at [12] (Lord Woolf CJ) and *Secretary of State for Education v Hadlow College* [2019] EWHC 2035 (Ch) at [6] (Chief ICC Judge Briggs).

58. Mr Smith submitted that there was "no general prioritisation of public/customer interests" in a special administration such that no regard should be had to the interests of creditors. But, as Mr Day pointed out in his closing submissions, this was something of a "straw man" because he had not submitted that a special administrator should always prioritise the interests of the public or customers over the interests of creditors. Nor had he submitted that a special administrator should have no regard for the interests of creditors. Moreover, Mr Smith did not really answer his central submission that where a special administrator had to choose between the achievement of the statutory purposes and the interests of creditors, the former should have priority.

59. I accept Mr Day's submission. In my judgment, where there is a tension or conflict between the interests of creditors and the achievement of the statutory purpose (whether the rescue or the transfer purpose), it is the duty of a special administrator to balance creditor interests against the public interest in achieving the statutory purpose. But provided that the special administrator has taken the interests of creditors fully into account, the Court cannot interfere with their decision to give priority to the fulfilment of the statutory purpose. Indeed, a special administrator is bound to perform the duties in Regulations 17 and 21 "to ensure the uninterrupted provision of vital public services" (as stated in the Explanatory Memorandum) even if it is not in the interests of creditors to do so.

(6) The wider context

60. Mr Fraiser and Mr Cochran both accepted that the Thames Water Group had suffered financial difficulties which they described as the consequence of "operational and regulatory factors". One noticeable feature of the evidence filed by the Plan Company was that there was no real acceptance that these regulatory and operational factors were the consequence of any financial mismanagement by shareholders and directors as opposed to changes in OfWat policy. In his first witness statement dated 27 January 2025 ("**Maynard 1**") Mr Maynard MP gave the following unchallenged evidence about the wider context of the Plan:

> "23. Significant Thames Water capital (ultimately funded by customer bills) has been extracted by investors since privatisation. By way of example, dividends from the

Appointed Company recorded in its annual statements from 1990 onwards (which are publicly available on Companies House) amount to £2.061bn for 1990-1999; £1.769bn for 2000-2009; £1.823bn for 2010-2019; and over £300m for 2020-2024.7 The vast majority of these dividends paid up to the Plan Company have been either distributed further up the corporate structure either to equity investors or used to service its debt obligations. Yet further debt obligations have been incurred directly by the Appointed Company or its subsidiaries.

24. Alongside paying out significant dividends, Thames Water has become highly leveraged since privatisation. The Appointed Company (and its wider group) was transferred debt-free to the private sector in 1989. As at 28 November 2024, Thames Water now has principal outstanding debt of approximately £19bn (plus hedging with a mark-to-market value representing a further liability of £1.68bn): see the Plan Company's explanatory statement (the Explan), pt 1, paras 3.5 and 3.17. That is to be contrasted with the Appointed Company's underlying EBITDA in its financial statements for the year ended 31 March 2024 of £1.2bn [1/8].

25. According to a note published by Macquarie in August 2023, Thames Water when sold by RWE had a 6.5x debt-to-EBITDA ratio which rose to a 10x debt-to-EBITDA ratio in 2017 [46/1562-1569]. Based on the last available financial statements, the debt-to-EBITDA ratio is now obviously much higher; if the full £3bn in further debt funding envisaged by the restructuring plan is made available (and factoring in the impact of PR24 FD) that debt-to-EBITDA ratio may well increase even further. These are obviously unsustainable ratios for any business as a going concern.

26. As a result of this financial mismanagement, Thames Water has been downgraded progressively by the credit ratings agency. In particular, on 24 July 2024, Moody's downgraded Thames Water to Ba2 with a negative outlook and Standards and Poor's downgraded Thames Water to BB with a negative outcome [32/1169]. Moody's has since downgraded Thames Water again. That means Thames Water how holds junk rather than investment grade status as an investment proposition (and several notches beneath investment grade). This itself is a significant breach of the Appointed Company's terms of its appointment: see paragraph 31.7 below.

27. Although Thames Water claims to have been borrowing to invest or meet regulatory obligations,8 that is not a view widely shared by independent observers. Professor Sir Dieter Helm has written that [43/1521-1538]: "…what makes Thames more of a basket case than the [other water companies] is that, in addition to failing on the capital

> maintenance, it was profit-maximising by gearing up its balance sheet at the outer limits of what was sustainable. This turned out to be the most profitable activity of the company. Whereas the balance sheet had been set up at privatisation to move from pay-as-you-go to pay-when-delivered, Thames (and others) used the balance sheet to mortgage the assets and pay out the proceeds in special dividends and other benefits to the shareholders. All the companies were doing this, but Thames pushed it further … Thames took this to a whole new scale, engaging in whole-company securitisation and creating an offshore set of companies to facilitate this, going under the label of various Kemble entities. It was brilliantly executed, building on a strategy that had its origins back in the mid-1990s when OFWAT … decided not to act to protect the balance sheets. It was as if the owners were shown an open goal – not only had the goalkeeper been removed, but the referee was taken off the pitch too."
>
> 28. As I explain further in section C below, a widespread view amongst customers and campaigners is that the restructuring plan should not be sanctioned because it aggravates rather than addresses the problem that the current Thames Water debt burden is unsustainable given its pre interest, tax and depreciation profit levels. The proposed terms of the restructuring plan are therefore not financially sustainable in the mid or long term for Thames Water and/or its appointed functions and activities."

61. It is not for this Court to attribute blame for the financial position in which the Plan Company now finds itself. The issue for this Court is forward-looking and whether to sanction the Plan in order to try and restore the Group to financial health. However, I would have been more confident that the Plan Company would achieve that outcome and be able to comply with its statutory obligations for the foreseeable future if there had been some evidence of introspection before the Court about the reasons why the Group has got itself into the current situation. I should add that by saying this I do not address any criticism to Mr Fraiser and Mr Cochran personally. Mr Fraiser joined Thames Water in March 2024 and although Mr Cochran became the CFO of TWUL in September 2021 he is not a director of the Plan Company itself.

C. Chronology

62. I now turn to the chronology of the events running up to the formation of the Class A AHG, the Class B AHG and the immediate background to the Plan. This

chronology is largely based on the uncontested evidence given by Mr Fraiser in Fraiser 1 and Fraiser 2, the uncontested evidence of Mr David Burlison, the uncontested evidence of Mr Ashish Thomas-Watson and the correspondence which I was shown in cross-examination. Mr Burlison is a Managing Director of Jefferies International Ltd ("**Jefferies**"), the financial adviser to the Class A AHG Group, and made two witness statements dated 10 January 2025 and 24 January 2025 ("**Burlison 1**" and "**Burlison 2**"). Mr Thomas-Watson is a Senior Analyst at Polus Capital Management ("**Polus**"), which is a member of the Class B AHG and holds £77 million of Class A Debt and £206 million of Class B Debt by face value. He made a witness statement dated 17 January 2025 ("**Thomas-Watson 1**").

(1) March 2023 to September 2024

63. In March 2023 the ultimate shareholders of the Thames Water Group provided new equity funding of £500 million and agreed to provide £750 million in March 2024 subject to certain conditions. However, in March 2024 they took the view that the Group's PR24 business plan was "unfinanceable and uninvestible" and that the funding conditions had not been satisfied. They, therefore, declined to provide the new funding of £750 million. From April 2024 onwards members of the Kemble Group announced that they would not be servicing their own debt and defaulted on all debt payments.

64. Thames Water Group appointed Rothschild & Co (the trading name of N.M. Rothschild & Sons Ltd) ("**Rothschild**") to advise it in relation to the raising of equity investment. On 9 July 2024 TWUL announced that following the publication of the DD by OfWat, it would be engaging with potential investors and creditors to raise new equity and to extend its liquidity runway. I will refer to this process as the "**equity raise**". On 11 July 2024 OfWat published the DD and on 12 July 2024 Rothschild launched the pre-marketing phase of the equity raise.

65. In parallel with the equity raise the Thames Water Group began negotiations with the Creditors. On 28 March 2024 Jefferies was appointed as the financial adviser to the Class A AHG which had begun to form and in July 2024 an informal co-ordinating committee of Class A Creditors was established. It was

Mr Burlison's evidence that in July 2024 Jefferies and Akin Gump began preparations for a potential restructuring including the development of the Interim Platform Transaction which he described as a stable platform to implement a "more holistic recapitalisation solution". His evidence about the need for this transaction in Burlison 1 was as follows:

> "17. It was clear at this time that Thames Water needed urgent funding, maturity and amortisation extensions (primarily of the Class A Debt which is, by quantum, the most significant external financing Thames Water has incurred), and covenant waivers/modifications to help it and its senior creditors bridge to a holistic recapitalisation. This package of accommodations was required because there was not enough time to agree and implement a holistic recapitalisation with the then current liquidity runway (given that the holistic recapitalisation would require a broader reset of governance and operations, in addition to a right-sizing of the balance sheet). At the time, Thames Water's position was that the liquidity runway extended to May 2025 but, even prior to their announcement on 20 September 2024 (referred to below), I thought that the size of the funding commitments the business needed to make could constrain this period. These three elements (bridge funding, maturity / amortisation extensions, and covenant relief), together with the release of trapped cash and the waivers to initiate the Plan referred to below, formed the cornerstones of the proposed Interim Platform Transaction."

66. On 20 September 2024 TWUL published an RNS in which it stated that it would run out of money and enter into a Standstill by the end of December 2024. I set out the text of that RNS in full because it provides a very useful summary of the background to the agreement reached in October 2024:

> "We previously announced that following the Price Review 2024 ("PR24") draft determination and our response to Ofwat, we would be engaging with potential investors and creditors to seek new equity and to extend our liquidity runway. We submitted our response to Ofwat's draft determination for 2025 to 2030 on 28 August 2024. We plan to launch our formal equity solicitation process in the coming weeks. Any equity process is not expected to conclude until after the Final Determination, originally due in December 2024, which Ofwat are consulting on moving to January 2025. We will have the option to request an appeal of the Final Determination to the CMA.

> We have been engaging with financial stakeholder groups and their advisors since July 2024 and are assisting with information requests to enable financial stakeholder groups to better understand Thames Water's business plan and future funding needs. As at 31 August 2024, we had £1.57 billion of liquidity consisting of £1.15 billion of cash and cash equivalents (£0.38 billion of which is currently required to be placed in reserves under our financing) and £0.42 billion of Class A and Class B undrawn committed facilities. A further £0.55 billion of undrawn reserve liquidity facilities are available to support Thames Water should we enter standstill under our financing. The combination of these resources provides a liquidity runway to May 2025. As contingency planning, we have entered into discussions with our financial stakeholders to release cash reserves under our financing. This would require majority creditor consent. If consent were not forthcoming and should it not be possible to draw the Class A and/or Class B facilities, available cash and cash equivalents would expire at the end of December 2024, whereupon we would enter standstill under our financing and the £0.55 billion undrawn reserve liquidity facilities and £0.38 billion of cash reserves would become available.
>
> We, together with our financial stakeholders, are considering options for the extension of our liquidity runway to enable time to complete a recapitalisation transaction. In parallel, we continue to undertake contingency planning as a matter of good corporate practice."

(2) The TSA

67. Mr Burlison's evidence in Burlison 1 was that following the announcement intensive discussions took place between the Thames Water Group, Jefferies and Akin Gump and certain members of a separate Class A Creditor group which resulted in what the parties described as the "**October STID Proposals**", the execution of a Transaction Support Agreement dated 25 October 2024 (the "**TSA**") and the execution of a backstop agreement also dated 25 October 2024 (the "**Class A Backstop Agreement**") to underwrite the provision of new money.

68. The effect of the October STID Proposals was to permit the Group to have access to £400 million of restricted cash which extended the liquidity runway until March 2025 and to facilitate the Interim Platform Transaction. Mr Burlison's summary of the effect of those arrangements in Burlison 1 was as follows:

> "21. As part of the package agreed by Thames Water and the Class A Creditors, the Class A Creditors granted waivers to allow (among other things) for Thames Water to: (i) access over £400 million of restricted cash which extended the liquidity runway from December 2024 to March 2025; and (ii) facilitate the initiation of the Plan to implement the other aspects of the Interim Platform Transaction (being the "STID Waivers"). My understanding is that, absent the granting of the STID Waivers by the Class A Creditors (which are part of and contingent on the broader Interim Platform Transaction), the directors of Thames Water were on the brink of seeking to have TWUL put into a SAR given the imminent end to the liquidity runway and the consequent defaults which would occur if Thames Water could not make scheduled payments."

69. The Explanatory Statement states that as of 10 December 2024, 90% of the Class A Creditors representing the principal and "Make-Whole" amounts of the Class A Debt and 91.09% of the Class A Creditors representing the balance of the Class A Debt had entered into the TSA but that only 7.4% of Class B Creditors had done so. The Explanatory Statement also stated that Plan Creditors who had entered into the TSA were required to perform the following obligations:

> "4.17.1 promptly take all actions (within their power) reasonably necessary to support, facilitate, implement, consummate or otherwise give effect to all or any part of the Interim Platform Transaction (including pursuant to the Agreed Form Transaction Documents);
>
> 4.17.2 not intentionally take, encourage, assist or support (or procure that any other person takes, encourages, assists or supports) any action which would, or would reasonably be expected to, breach or be inconsistent with the terms of the Transaction Support Agreement or any Agreed Form Transaction Document, or delay, impede, frustrate or prevent the implementation or consummation of all or any part of the Interim Platform Transaction, including opposing the making of any temporary restraining order, or other similar injunctive relief, necessary or desirable to implement or consummate the Interim Platform Transaction;
>
> 4.17.3 temporarily forbear from exercising any rights or remedies against any member of the Thames Water Group they may have as a result of any breach of a Finance Document, any Default or Event of Default (as such terms are defined in the relevant Finance Documents) or other analogous concepts under the Finance Documents and their consequences thereunder occurring solely in connection with or as a result of:

> (i) the taking of any action necessary or desirable to support, facilitate, implement or consummate or otherwise give effect to all or any part of the Interim Platform Transaction in accordance with the Transaction Support Agreement and the Term Sheet, including entering into the Transaction Documents (in Agreed Form); or
>
> (ii) the provisions of the Transaction Support Agreement giving rise to a breach, default or an event of default (howsoever described) under any contractual agreements (other than the Finance Documents) entered into by the Plan Company or any of its Subsidiaries (or the payment of which is guaranteed by the Plan Company or any of its Subsidiaries)."

(3) The Class B AHG proposals

70. It was also Mr Burlison's evidence that some members of the Class A AHG Group also held Class B Debt and that on or about 17 October 2024 both Jefferies and Akin Gump realised that they had a conflict of interest or a significant risk of a conflict and ceased to act for those creditors. Mr Thomas-Watson's evidence was that the Class A AHG's advisers did not inform Polus of this conflict of interest at any time before that date and that if they had done so, the Thames Water Group would have been in a position to agree to the proposal put forward by the Class B AHG.

71. In any event, under cover of a letter dated 22 October 2024 QE wrote to Linklaters enclosing an indicative term sheet and putting forward alternative proposals for the Interim Platform Transaction. I return to the content of those proposals below. But in the covering letter QE stated as follows:

> "As is evident from the enclosed indicative term sheet, the Ad-hoc Group is in a position to provide a significant liquidity injection for the Companies on attractive terms and in very short order. The Ad-hoc Group would welcome full engagement with the Companies and their advisors at the earliest opportunity to progress matters and agree a funding solution which meets the Companies' liquidity needs. The Ad-Hoc Group believes that it is essential that any liquidity proposal which is agreed by the Companies offers the best terms commercially available to preserve value and facilitate a successful long-term resolution of the situation of the Thames Group. Our clients understand the urgency of the Companies' need for liquidity and expect that they will be in a position to

> execute a transaction on a compressed timetable, subject to being swiftly provided with the necessary information."

72. By letter dated 24 October 2024 Linklaters replied raising a number of practical objections to the alternative proposals. Their first objection was that these proposals were made very late in the process. By letter also dated 24 October 2024 QE responded by stating that the terms offered were plainly and materially better for the Group than the terms offered by the Class A AHG Group. Under cover of a letter dated 7 November 2024 QE also sent to Linklaters a backstop agreement which had been dated that day (the "**Class B Backstop Agreement**"). In the covering letter QE stated as follows:

> "4. The Backstop Agreement provides your clients with a certain, deliverable, binding and fully underwritten offer for the entire £3bn new money facility on the terms previously shared. Each signatory's share of the commitment is reflected in the Backstop Agreement.
>
> 5. As noted, the Backstop Group includes members of the Ad Hoc Group and a number of other institutions. We are authorised by the Ad Hoc Group and all the other signatories to the Backstop Agreement to deliver this offer to the Group Companies.
>
> 6. For the avoidance of doubt, each of the signatories to the Backstop Agreement have confirmed to us in writing that their respective necessary internal investment committee approvals have been obtained to enter into the commitments which the Backstop Agreement represents, and have signed the documents attached which evidence those commitments. The proposed transaction is, in addition, supported by all members of the Ad Hoc Group, who, as mentioned above, would represent sufficient holdings as to approve on behalf of the entire class of Class B debt in any restructuring plan."

73. The Class B Backstop Agreement is expressed to be an agreement made between the Plan Company, TWUL, TWUF and the "**Original Backstop Parties**" (and also Kroll Issuer Services Ltd as the Lock-Up Agent). It had been signed by all of the Original Backstop Parties. However, clause 3(a) provided as follows:

> "This Agreement will become effective and legally binding on: (i) an Original Backstop Party upon the date on which all of the following have occurred: (A) countersignature to this Agreement by TWUHL, TWUL, TWUF and the Lock-Up Agent; (B) occurrence of the TSA Amendment Date; and (C)

> termination of the backstop agreement entered into on or around 25 October 2024 by TWUHL, TWUL, TWUF and the Lock-Up Agent pursuant to which the Group is released from any liability or obligation thereunder (including in respect of any fees set out therein); and (ii) any other person permitted to accede to this Agreement in accordance with its terms, upon delivery of a duly completed and executed Additional Backstop Party Accession Deed or Issuer Deed of Accession (as applicable) by (or on behalf of) that person."

74. Under cover of a letter dated 7 November 2024 Linklaters sent QE's letter and the Class B Backstop Agreement to Akin Gump. In the body of the letter they stated that it contained "certain key commercial terms that improve the existing economics of the proposed new money financing". In their letter Linklaters asked whether the Class A AHG Group would be prepared to amend their own proposals (described as the "New Money Funding") to match the terms of the Class B AHG proposals. By letter dated 13 November 2024 Akin Gump replied stating that before answering this question, it was helpful to restate the background (which they set out in a series of bullet points):

> "● The group of Class A senior secured creditors we represent holds in excess of £12bn of the Company's debt and is made up of more than 100 institutions, many of which are the largest and most committed long-term investors in UK infrastructure.
>
> ● The institutions that sit on our group's Coordinating Committee include Abrdn, Apollo Global Management, Assured Guaranty, BlackRock, Corebridge Financial, D.E. Shaw, Dexia, Diameter Capital Partners, Elliott Investment Management, GoldenTree Asset Management, Insight Investment, Invesco, Metlife, PIMCO, PRICOA Private Capital, Silver Point Capital, Sona Asset Management and Voya Investment Management.
>
> ● The Class B creditors are junior, subordinated creditors. Even though Quinn Emanuel claim to represent over 75% by value of the Class B Creditors, amounting to around £746m in face value, that is de minimis compared to the Class A creditor group, and only amounts to around £112m in value based on the 85% discount which is currently implied by the market trading price of the Class B debt.
>
> ● The New Money Financing was heavily negotiated by a representative cross-section of the Group's senior secured creditors and has achieved a broad consensus within our group. In that regard, we understand that more than 75% by value of

> the Class A Creditors have now acceded to the Transaction Support Agreement in respect of the New Money Financing.
>
> ● The Company is of course also a party to the Transaction Support Agreement, and so obliged to support the New Money Financing.
>
> ● The financial position of the Company, and the fact that our group was negotiating a New Money Financing, has been publicly known for many weeks. Despite that, the Class B creditors only organised into a separate group very recently, and we understand only sent an executed backstop agreement on 7 November.
>
> ● We have already met (with you) with Quinn Emanuel on a without prejudice basis in order to see if there is any basis for a commercial resolution. At your instigation, Quinn Emanuel have now reached out to us directly, on an open basis, seeking a further discussion."

75. Akin Gump pointed out that the Class B Creditors did not have the support of 75% of the Class A Creditors which would be required for the implementation of their proposals (and which the Class A Creditors were not prepared to give). But they also set out reasoned objections to those proposals. They also annexed a table which suggested that the difference between the total cost of the new money which each Class B Creditors were proposing was only £10 million more than the total cost of the new money which the Class A Creditors were proposing.

(4) The Convening Hearing

76. On 10 December 2024 the Plan Company issued the Claim Form in these proceedings and on 17 December 2024 the Convening Hearing took place. Trower J gave permission for the Plan Company to convene seven Plan Meetings of seven classes of the Plan Creditors to be held on 21 January 2025 at Linklaters' offices. He also gave directions for the form and service of the Plan Documents and for the procedure to be adopted at the individual Plan Meetings. He also directed that the Class B AHG Group should file and serve grounds of objection by 3 January 2025 and for the service of both evidence of fact and expert evidence.

77. On 3 January 2025 TWL served Grounds of Objection to the Plan (the "**TWL Grounds of Objection**") as did the Class B AHG. On 10 January 2025 the Class

A AHG served Burlison 1. The Plan Company had by this time already served Weerasinghe 1 and the first and second expert reports of Mr Matt Cowlishaw dated 11 December 2024 and 24 December 2024 ("**Cowlishaw 1**" and "**Cowlishaw 2**"). Mr Cowlishaw is a Senior Managing Director at Teneo Financial Advisory Ltd ("**Teneo**") and an experienced insolvency practitioner.

78. On 17 January 2025 the Class B AHG served its factual and expert evidence including Thomas-Watson 1, the first report of Dr Grunwald dated 17 January 2025 ("**Grunwald 1**") and the first report of Mr Richard Heis also dated 17 January 2025 ("**Heis 1**"). Mr Heis is also an experienced insolvency practitioner. On 23 January 2025 the Class B AHG served Amended Grounds of Objection (the "**Class B Grounds of Objection**").

(5) The Plan Meetings

79. The Plan Company circulated copies of the Plan, the Explanatory Statement, the notice to convene the Plan Meetings and supporting documents to the Plan Creditors and on 21 January 2025 the Plan Meetings were held. Neither TWL nor the Class B AHG suggested that the Plan Company had failed to comply with the Convening Order either by failing to circulate the relevant materials or to convene the Plan Meetings correctly. Nor did they challenge the composition of the classes at each of the meetings.

80. The Plan was approved by 100% of those present and voting in the following classes: (1) the holders of the Liquidity Facilities, (2) the holders of the interest rate and index-linked Hedging Facilities and (3) the holders of the cross-currency Hedging Facilities. The Plan was also approved by (4) 98.06% of the Class A Creditors "Make-Whole" class and (5) 98.99% of the remaining Class A Creditors. Of the remaining two classes 15.5% of the Class B Creditors voted in favour of the Plan and 84.49% voted against it and the Subordinated Creditor (which formed a class on its own) also voted against the Plan.

(6) The B Plan

81. At the Convening Hearing Mr Phillips told Trower J that in addition to opposing the sanction of the Plan, the Class B AHG intended to promote an alternative

restructuring plan and I will refer to it as the "**B Plan**". By letter dated 20 December 2024 QE wrote to Linklaters stating that the convening hearing was listed for 20 January 2025. By letter dated 1 January 2025 QE wrote to Linklaters enclosing a draft Practice Statement Letter ("**PSL**").

82. By letter dated 6 January 2025 Akin Gump wrote to Linklaters stating that the Plan Company should not take any steps to promote or support the B Plan. They reminded Linklaters that the Plan Company was bound by the TSA and stated that it would be contrary to the interests of the "senior creditors and economic owners of the Company (the Class A creditors)" for the Plan Company to take any steps to support it. They then set out a number of further reasons why the Plan Company should not do so before stating as follows:

> "For at least these reasons, it is not acceptable to our clients for the Company to navigate indeterminately between the Supported Plan and the Junior Plan or to jeopardise the Supported Plan by entertaining the Junior Plan. Instead, the Company and its directors should unequivocally reject the Junior Plan and take all steps necessary to ensure that it does not interfere with the Supported Plan, including by seeking to vacate the court hearing date of 20 January 2025, which we understand was unilaterally reserved by Quinn Emanuel for the Junior Plan's convening hearing. Further, to the extent that the Class B creditors persist with the Junior Plan and their challenge to the Supported Plan, we expect to see the Company seeking to recover costs from the Class B creditors in the relevant proceedings."

83. By letter also dated 6 January 2025 Akin Gump wrote to QE directly referring to the PSL for the B Plan and taking the same position. They stated that it was the Plan Company's evidence that the Class B Creditors were "deeply out of the money" and had no standing to propose the B Plan. They also stated that it was the Plan Company's evidence that the B Plan was not viable or deliverable or capable of implementation. Nevertheless, on 7 January 2025 the PSL was published online at a dedicated website and a press announcement was issued to a number of media outlets.

84. On 24 January 2025 QE issued a Claim Form seeking permission to convene six meetings of creditors and for sanction of the B Plan. The Claim Form was issued in the name of a company called Westonbirt Fund LP ("**Westonbirt**") giving as

its address PO Box 309 Ugland House Grand Cayman. In his third witness statement dated 24 January 2025 ("**Ereira 3**") in support of the B Plan Mr David Ereira OBE, who is a partner of QE, stated that Westonbirt was the ultimate beneficial owner of £100,000 of Class B Bonds and £7 million of Class A Bonds. He also stated that the Class B AHG held 75% of the Class B Debt.

(7) The 20 January hearing

85. On 17 January 2025, and following a letter to the Court from QE dated 13 January 2025, Trower J adjourned the convening hearing for the B Plan until 13 February 2025 and he listed it before me on that date. In the event, it was necessary for me to adjourn the convening hearing for the B Plan until 19 February 2025 and until I had handed down this judgment. I did so to give the parties a very brief period to consider this judgment before that hearing.

86. On 20 January 2025 Trower J also dismissed an application by the Class B AHG Group for permission to adduce expert economic evidence in relation to the competition law objection which it had taken in relation to the Plan. The judge held that the report was either legal commentary from an expert's perspective or expressed in such tentative, incomplete and caveated terms that it was not reasonably required to resolve the proceedings: see [2025] EWHC 84 (Ch) at [64]. However, he did not rule that the Class B AHG Group was not permitted to argue the objection.

(8) The Rothschild Letter

87. On 24 January 2025 the Plan Company served its evidence in reply including Fraiser 2, Cochran 1, Weerasinghe 2 and the second supplemental report of Mr Cowlishaw ("**Cowlishaw 3**"). The Class AHG also served the second witness statement of Mr Burlison dated 24 January 2025 ("**Burlison 2**") in reply to the Class B AHG Group evidence. By letter dated 24 January 2025 Rothschild also wrote to the Plan Company providing an update in relation to the equity raise. They stated as follows:

> "19 Parties were invited in to Phase 1B on 19 December 2024. Parties are being provided with updated materials in Phase 1B, in relation to Ofwat's Final Determination and Thames

> Water's operational performance, as well as access to management via a dial-in / listen-in management session on these topics. Parties have also received a pensions due diligence report and an insurance report. Parties who have received the updated materials include those that entered the process after Ofwat published its Final Determination, i.e. those noted in para 15 above.
>
> 20 We have been pleased with the level of engagement shown by parties throughout Phase 1 and there are a number of serious and motivated parties involved in the process. They have engaged substantively with the due diligence materials and meetings, and dedicated a significant amount of internal resource. All parties currently in the process are incurring costs, all of them have engaged legal and financial advisers, and the financial bidders have retained technical advisers.
>
> 21 It has been of benefit to the process that the diligence phase commenced early with extensive information, so that following Final Determination, parties have been well placed to analyse the outcome, and formulate their updated NBOs.
>
> 22 In relation to the so-called "June Release Condition" (which we believe is the subject of some criticism by the Class B Ad Hoc Group), this provision has not been the subject of any criticism or concern expressed to us by bidders, nor has any party left the equity process as a result of publication of the terms of the restructuring plan (which included the June Release Condition). Additional parties have joined the formal process since the publication of the terms of the restructuring plan.
>
> 23 The one exception to this is a bidder in the process who is also a holder of Class B Debt, whom we understand has also backstopped a portion of the super senior funding proposed by the Class B Ad Hoc Group. This party has made some criticisms of the process, but nevertheless remains in the process.
>
> 24 We note for completeness that there was no significant movement in the price of the Thames Water public debt as a result of publication of the terms of the restructuring plan (containing the June Release Condition) on 25 October 2024, as shown below (source - Bloomberg):…"

88. Rothschild also stated that they expected to select bidders to proceed to Phase 2 before the end of February 2025, that due diligence would typically be expected to take about 8 weeks and that they were targeting "Q2 2025" (i.e. April to June 2025) for the bidders to submit binding offers. Finally, they stated as follows:

> "We have not received any adverse comments about the process, nor any indication that the process itself has reduced the interest of any bidder, with the one exception, as noted previously, of the bidder holding Class B debt, and partially backstopping the alternative funding proposed by the Class B Ad Hoc Group. There are a number of parties in the process who continue to engage and allocate significant resources, and incur costs, with all participants currently working towards providing updated Phase 1B proposals on 10 February 2025."

89. On 27 January 2025 the Class B AHG Group served the supplemental report of Mr Heis ("**Heis 2**") and Mr Maynard MP served Maynard 1. On 30 January 2025 the Class B AHG Group served a supplemental report prepared by Dr Grunwald ("**Grunwald 2**"). The Convening Order did not permit the Class B AHG to serve further evidence but I was told that Dr Grunwald had not received the updated Crabtree Model until late on Sunday 26 January 2025 and the Plan Company and the Class A AHG did not object to the service of this evidence. On 1 February 2025 Mr Maynard MP also served a second short witness statement ("**Maynard 2**").

(9) The Reinstated Plan

90. On 24 January 2025 TWUL launched an alternative STID Proposal seeking the consent of a majority of creditors to an alternative plan (the "**Reinstated Plan**") and on 24 January 2025 a creditor within the Class A AHG issued a PSL explaining its purpose and terms. It stated as follows (identifying the Reinstated Plan as the "Senior Plan"):

> "1.1 Further to the Practice Statement Letter dated 22 November 2024 issued by the Plan Company to the Plan Creditors (as defined therein) (the "November PSL"), a Class A Creditor (the "Senior Plan Petitioner") intends to apply to the Court seeking orders to convene meetings of the Plan Creditors in relation to the proposed restructuring plan under Part 26A of the Act between the Plan Company and its Plan Creditors (the "Senior Plan"). In advance of that application, this Practice Statement Letter has been issued to engage the Practice Statement in respect of the Senior Plan."
>
> "2.1 The Senior Plan is on the same terms as the Company Plan, with only certain consequential amendments.
>
> 2.2 The Senior Plan Petitioner will seek orders convening meetings of the Plan Creditors to consider the Senior Plan,

> such that, in the event that the Court does not sanction the Company Plan at the Company Plan Sanction Hearing, the Plan Creditors have a further opportunity, in light of the circumstances prevailing at the time, to consider and vote on the Transaction (in the case of the Consenting Creditors, in accordance with the terms of the Transaction Support Agreement to which they are party).
>
> 2.3 If, contrary to the Plan Company's current position based on advice, (a) the Court were to find that SAR is not the relevant alternative to the Company Plan and were to decline to sanction it on that basis and (b) the Court were subsequently to give permission to convene creditor meetings to consider an alternative restructuring such that there is sufficient time for such alternative restructuring to be fully implemented within the Plan Company's remaining liquidity runway, the Plan Company will take steps to facilitate the Senior Plan. For the avoidance of doubt, the Senior Plan Petitioner agrees with the position set out in the Company Plan that the relevant alternative to the Company Plan is the SAR Scenario (as defined below)."

91. The PSL made it absolutely clear that the Class A AHG intended the Reinstated Plan to be an alternative to the B Plan in the event that the Court did not sanction the Plan but considered that there was sufficient time to implement an alternative restructuring transaction:

> "6.1 As set out in the disclosures in the November PSL, if the Company Plan is not implemented, it is expected that Thames Water Group will run out of available liquidity on 24 March 2025. In circumstances where it is anticipated that Thames Water Group will run out of liquidity prior to being able to implement an alternative liquidity solution, it is expected that TWUL's directors will request Ofwat to petition to place TWUL into a SAR and that the Plan Company and TWUF would each enter their own insolvency processes (anticipated to be UK administration proceedings) (the "SAR Scenario"). The Senior Plan Petitioner agrees with the position set out in the Company Plan that the relevant alternative to the Company Plan is the SAR Scenario.
>
> 6.2 Insofar as the Court decides at the Company Plan Sanction Hearing not to sanction the Company Plan and that there is a sufficient available liquidity to implement an alternative restructuring transaction, the Senior Plan Petitioner will seek to have the Senior Plan run in parallel to the Junior Plan to enable Plan Creditors to consider whether to approve the Transaction in light of the circumstances prevailing at the time.

The SAR Scenario is considered to be the "Relevant Alternative" to the Senior Plan."

III. The Plans

D. The Plan: the terms

(1) Summary

92. The stated purpose of the Plan is to provide the Thames Water Group with a stable platform as an interim measure until a substantive restructuring based on the equity raise can be achieved and then implemented. I set out now a brief summary of the principal terms of the Plan which are intended to achieve this purpose before turning to the specific agreements and terms which were the subject of evidence and argument before me. I take the following summary primarily from the Plan Company's Skeleton Argument:

Maturity dates

(1) The existing maturity dates of the Class A Debt, Class B Debt and Subordinated Debt will be extended by two years together with any relevant scheduled amortisation payment debts. This will relieve the immediate pressure on TWUL to pay the US PPNs.

The Super Senior Funding

(2) A new company, the "**Super Senior Funding Issuer**" or the "**Issuer**", will become a subsidiary of TWUL and will issue a new bond and term loan facility, with the total principal amount of £1.5 billion (the "**Super Senior Funding**") which will mature two years and six months from the "Initial Funding Date". TWUL and the Plan Company will guarantee the Super Senior Funding and TWUF will also provide a cross-guarantee.

(3) The Super Senior Funding will be issued with a 3% OID (i.e. at a subscription price of 97%). It will carry interest at 9.75% payable in cash semi-annually and it will benefit from the same shared security package as the existing Secured Creditors. Make-whole amounts will be payable on

all voluntary and mandatory prepayments under the Super Senior Funding or on any acceleration following an Event of Default.

(4) Class A Creditors and Class B Creditors will have the right to participate in the Super Senior Funding pro rata to their respective share of the Class A and the Class B Debt.

The Additional Super Senior Funding

(5) The Super Senior Funding will also have an "accordion" option whereby, if certain conditions are satisfied, the Super Senior Funding Issuer will provide an additional £1.5 billion of Super Senior Funding on identical terms (the "**Additional Super Senior Funding**").

(6) The providers of the Super Senior Funding will have the right to participate in the Additional Super Senior Funding pro rata to their holdings. If any existing Super Senior Funding providers do not subscribe for the full amount, the remaining Class A and Class B Creditors will have the right to participate pro rata to their respective share of the Class A and Class B Debt.

The Class A and Class B RCFs

(7) The Class A RCF and the Class B RCF will remain in place but all conditions to roll over loans already drawn will be deemed automatically satisfied without prejudice to any existing prepayment or cancellation rights and the cancellation of undrawn commitments described below.

The Hedging Facilities

(8) Payments arising under the Hedging Facilities will continue to be made in the ordinary course in accordance with their existing terms. Certain fees and break rights will be provided in exchange for the swaps remaining open.

Undrawn facilities

(9) All undrawn amounts under the existing Liquidity Facilities, the Class A Debt and Class B Debt will be cancelled.

Other terms

(10) Certain financial covenants in the Finance Documents will be amended to enable the Thames Water Group to operate after the Plan is implemented and to prevent an Event of Default arising. The Payment Priorities, Class A Bonds and Class B Bonds will also be amended to give effect to the priority of the Super Senior Funding.

(2) The TSA

93. In October 2024 those Plan Creditors who entered into the TSA agreed to give the STID Waivers (which Mr Burlison described above). However, they did so subject to certain conditions remaining satisfied. The principal conditions were that the TSA had not been terminated (or replaced) and that the Interim Platform Transaction continued to have the support of the Creditors in the percentages set out in the Explanatory Statement.

94. It is also important to note that those Plan Creditors who have entered into the TSA and voted at the Plan Meetings have only voted in favour of the Interim Platform Transaction and granted STID Waivers to enable the Plan Company to implement the Plan. They have not granted STID Waivers for any long-term equity raise or permanent solution. Class A Creditors and Class B Creditors will, therefore, have the opportunity to support or oppose any final restructuring plan.

95. The TSA, Schedule 7 contained the term sheet for RP1. In the box at the head of the first page it stated that it was subject to negotiation, tax structuring, execution and delivery of mutually acceptable definitive documentation and satisfaction of all conditions precedent that may be specified in such definitive documentation (including the TSA itself). Cell 9 of the term sheet defined the term "**Management Retention Plan**" as follows:

> "A new management retention plan in respect of the Company to be implemented upon the Plan Effective Date (on terms acceptable to the Company and the Relevant Creditor Groups).

> Management retention plan to be provided to advisers of the Ad Hoc Hedge Counterparties and Ad Hoc Hedge Counterparties (subject to confidentiality arrangements being in place satisfactory to the Company, acting reasonably)"

(3) The Super Senior IBLA

96. One of the new agreements into which TWUL will be required to enter (and which the Plan Company will guarantee) is the Super Senior Class A Issuer Borrower Loan Agreement (the "**Super Senior IBLA**" or the "**IBLA**"). It will be made with the Super Senior Funding Issuer and Kroll Trustee Services Ltd as the Security Trustee and will govern the terms on which the Super Senior Funding of £1.5 billion will be made available. Schedule 6 sets out the "**Agreed Scheduled Funding Amounts**" payable on each "**Scheduled Funding Date**" which is defined as the last business day of each month:

(1) *February 2025*: £293 million;

(2) *March 2025*: £25 million;

(3) *April 2025*: £333 million;

(4) *May 2025*: £156 million;

(5) *June 2025*: £231 million;

(6) *July 2025*: £350 million; and

(7) *August 2025*: £112 million.

97. Schedule 6 contains no release dates for the Additional Super Senior Funding under the accordion facility. This is because that release of these additional funds is subject to the satisfaction of certain conditions precedent. I should also note at this stage that Schedule 6 records that £98 million is immediately payable by TWUL in February 2025 out of the Super Senior Funding in fees. This figure is made up of £45 million for the "**OID**" or initial funding premium and £52.5 million in backstop fees payable under the Class A Backstop Agreement.

98. Clause 1.1 of the IBLA defines the term "Initial Loan" as the first loan made available to TWUL in accordance with clause 2.2. Clause 2.1 provides that the Issuer will make the Super Senior Funding facility available to TWUL as the borrower and clause 2.2 provides that on each Scheduled Funding Date the Issuer shall advance to TWUL an amount no greater than the relevant Funding Amount. Clause 2.4 which is headed "Accordion" provides as follows:

> "2.4.1 The Borrower may request, on not more than two (2) occasions, that the Total Commitments under this Agreement be increased by delivering to the Super Senior Issuer (with a copy to the Super Senior Security Trustee) a Super Senior IBLA Accordion Request. Each Super Senior IBLA Accordion Request submitted under this Agreement shall be for an amount not exceeding £750,000,000 and, to the extent the Super Senior Issuer accepts such request in accordance with Clause 2.4.2, shall be funded by the Super Senior Issuer solely out of the proceeds of Additional Super Senior Issuer Funding incurred in accordance with, and where expressly permitted by, the Super Senior Issuer Intercreditor Agreement and the Common Agreements generally (the "Additional Commitments")."

99. Clause 4 is headed "Conditions of Utilisation" and it provides that the following conditions are "Initial Conditions Precedent" to the utilisation of both the Initial Loan and the Additional Commitments:

> "The Super Senior Issuer shall only make the Initial Loan or, in respect of any Additional Commitments, the first Additional Loan in respect of such Additional Commitments made available to the Borrower under this Agreement if the following conditions precedent are satisfied and relevant copies thereof and other evidence is provided to the Super Senior Issuer and the Super Senior Security Trustee (unless waived by the Super Senior Security Trustee in accordance with the Super Senior Issuer Intercreditor Agreement): 4.1.1 evidence that each of the relevant Funding Conditions have been satisfied;…"

100. Clause 1.1 defines the Funding Conditions. A number of them are procedural (e.g. the delivery of the correct notices) and others are standard (e.g. that the representations made by TWUL continue to be true and that there is no potential Event of Default). However, the Funding Conditions also include the following:

> "(viii) in respect of any Loans to be made on or after 30 June 2025 (including any Additional Loans), a Supported LUA has been entered into by such date, provided that this condition shall cease to be satisfied at any time if the Supported LUA has terminated or ceases to be fully effective in accordance with its terms (unless a Recapitalisation Transaction has been implemented which is the subject of the Supported LUA) (such condition being, the "June Release Condition") provided further that, where the Borrower is (at the relevant time) acting in good faith towards a Recapitalisation Transaction, any extension of the June Release Condition can be effected with the consent of the Super Senior Issuer and the Super Senior Security Trustee in accordance with clause [4.7(a)(iv)] of the Super Senior Issuer Intercreditor Agreement;…"

101. I will refer to this condition either as the "**June Release Condition**" or the "**JRC**". It was common ground that the last two tranches of the Initial Loan totalling £462 million which would otherwise become payable on 31 July 2025 and 31 August 2025 would not be payable if the JRC had not been satisfied by 30 June 2025. It was also common ground that the accordion Additional Super Senior Funding would not become payable either. Neither party argued that the tranche of £231 million which would otherwise become payable on 30 June 2025 would not become payable unless the JRC was satisfied. The term "**Supported LUA**" is also defined in clause 1.1 as follows:

> ""Supported LUA" means a lock-up agreement in respect of a Recapitalisation Transaction which has been entered into by (i) holders of at least 66 2/3% of the Super Senior Issuer Funding (the test described in this limb (i) being the "Supported LUA Super Senior Condition"); and (ii) Class A Debt Providers holding at least 66 2/3% of the aggregate Class A Debt (not including any Super Senior Debt) (the test described in this limb (ii) being the "Supported LUA Class A Condition"), to implement such solution through a restructuring plan;…."

(4) The Super Senior ICA

102. A second agreement into which both the Plan Company and TWUL will be required to enter is the "**Super Senior Issuer Funding Intercreditor Agreement**" (which I will call the "**Super Senior ICA**"). It imposes an additional condition which TWUL will have to satisfy in order to obtain the

Additional Super Senior Funding. Clause 3.5 is headed "Additional Super Senior Issuer Funding: Allocation" and it provides as follows:

> "(a) Notwithstanding anything to the contrary in any other Underlying Super Senior Finance Document, the Company shall not submit an Additional Super Senior Issuer Funding Request Notice under this Agreement or incur any Additional Super Senior Issuer Funding unless: (i) as at the relevant time: (1) a CMA Reference Decision has been made; and (2) the Supported LUA has been entered into and is effective; and (ii) the relevant Additional Super Senior Issuer Funding Closing Date does not fall prior to 30 June 2025."

103. The term "**Majority SSIS Creditors"** which is used in the definition of the Supported LUA and the term "**Enhanced Majority SSIS Creditors**" are defined in the Super Senior ICA as follows:

> ""Enhanced Majority SSIS Creditors" means, at any time, those Super Senior Issuer Secured Creditors whose Super Senior Issuer Secured Credit Participations aggregate at least 66 2/3rds of the total Super Senior Issuer Secured Credit Participations as at such time, taking into account any adjustments to the Super Senior Issuer Secured Credit Participations deemed voting and/or disenfranchisement in accordance with Clause 22 (Consents, Amendments and Override)."
>
> ""Majority SSIS Creditors" means, at any time:
>
> (a) those Closing Date Super Senior Issuer Secured Creditors whose Super Senior Issuer Secured Credit Participations aggregate more than 50 per cent. (50%) of the total Super Senior Issuer Secured Credit Participations of all Closing Date Super Senior Issuer Secured Creditors at that time, provided that, as at the relevant time, those Closing Date Super Senior Issuer Secured Creditors: (i) hold at least 40 per cent. (40%) of the aggregate Super Senior Issuer Secured Credit Participations; and (ii) represent more than ten (10) in number of the Closing Date Super Senior Issuer Secured Creditors (disregarding any Closing Date Super Senior Issuer Secured Creditors which are Affiliates of each other or Related Funds); or
>
> (b) if paragraph (a) above does not apply, those Super Senior Issuer Secured Creditors whose Super Senior Issuer Secured Credit Participations aggregate more than 50 per cent. (50%) of the total Super Senior Issuer Secured Credit Participations as at the relevant time, and in each case taking into account any adjustments to the Super Senior Issuer Secured Credit

> Participations deemed voting and/or disenfranchisement in accordance with Clause 22 (Consents, Amendments and Override)."

104. Clause 4.7 is headed "Basic Consent Requests" and addresses the consents which those Plan Creditors participating in the Super Senior Funding might be required to give:

> "(a) Where required to provide its consent under Clause 4.4 (Basic Consent Requests: General) in respect of any Basic Consent Request relating to the Super Senior IBLA, the Super Senior Security Trustee shall act on the instructions of:…(iv) subject to paragraph (b) below, the Majority SSIS Creditors, in respect of all other Basic Consent Requests, it being acknowledged that, provided the Parent is acting in good faith towards a Recapitalisation Transaction, the Majority SSIS Creditors shall, in connection with a Basic Consent Request relating to the extension of the date for entering into a Supported LUA in respect of the June Release Condition: (1) not unreasonably withhold, delay and/or make subject to conditions any such extension request; and (2) consider any such extension request in good faith.
>
> (b) The Super Senior Security Trustee may consent to any Basic Consent Request in respect of the Super Senior IBLA without the consent of the Super Senior Issuer Secured Creditors (or any group of them) which is, in its opinion: (i) to correct a manifest or proven error; or (ii) of a formal, minor or technical nature."

(5) The MDA

105. The terms "**CMA Reference Decision**", "**CMA Appeal**" and "**Recapitalisation Transaction**" are all defined in Schedule 2, Parts 1 and 2 of the MDA (to be amended and restated) as follows:

> ""CMA Reference Decision" means a decision by TWUL to dispute any determination in relation to the AMP 8 regulatory period made by Ofwat under Part III of Condition B of the Instrument of Appointment and require that Ofwat refer the disputed determination to the Competition and Markets Authority for determination, as specified by Part V of Condition B of the Instrument of Appointment and section 12(3)(a) of the WIA (a "CMA Appeal"), provided that such decision (i) has also been approved by a majority of the TWUL Directors and each of the Reference Decision Nominated

> Directors, or (ii) to the extent the conditions in (i) are not satisfied, is approved by the Super Senior Security Trustee;…"
>
> "Recapitalisation Transaction" means a transaction involving the reinstatement, recapitalisation, restructuring, compromise or arrangement with creditors (including, without limitation, an extension of maturity) in respect of any Senior Debt (including for the avoidance of doubt any Finance Documents entered into in connection therewith) whether as part of or as condition to an equity raise or a creditor led transaction, or otherwise;…"

106. The term "Reference Decision Nominated Directors" is also defined in the MDA (to be restated and amended) as follows:

> ""Reference Decision Nominated Directors" means at least two independent non-executive directors of TWUL with restructuring experience, whose appointment has in each case been made in accordance with the Governance Requirements;"

(6) The CTA

107. The CTA will be amended to prohibit the Plan Company, TWUL or any of the Group companies from incurring any additional financial indebtedness or making voluntary repayments once the Plan has taken effect. Clause 56 will provide as follows:

> "**Debt Incurrence and Prepayments**
>
> (a) Save as permitted by Paragraphs 14 and 17 of the Hedging Policy, no Obligor may incur any additional Financial Indebtedness or enter into any new agreement in respect of the provision of additional Financial Indebtedness, which would rank pari passu with or senior to Super Senior Debt, other than any Additional Super Senior IBLA Funding. For the purposes of this Sub-paragraph (a), "incurrence of any additional Financial Indebtedness" or "entry into any new agreement" includes any amendments to or replacement of any existing Financial Indebtedness (including Financial Indebtedness represented by Hedging Agreements) or any agreement in respect thereto which has the effect of increasing (or potentially increasing) in any manner whatsoever the liabilities owing under or in respect of such Financial Indebtedness.
>
> (b) During the Stable Platform Period, no Obligor shall make any voluntary repayments in respect of Class A Debt or Class B Debt, and shall not exercise any rights of early termination or close-out of any Hedging Agreements, other than

termination on the final exchange date of Cross Currency Hedging Agreements in respect of any exposure whereby the maturity date of the Class A Debt corresponding to the Cross Currency Hedging Agreement has been deferred but such Cross Currency Swap has not been extended, provided that nothing in this Sub Paragraph (b) shall prevent a Hedge Counterparty from exercising its rights to terminate or close-out a Hedging Agreement in accordance with its terms."

108. Schedule 4, Part 3 contains the general covenants which each Obligor is required to observe. Paragraph 57 imposes a covenant upon the Plan Company and other Obligors to ensure that its board of directors includes two "**NEDs**" and paragraphs 59 and 60 will impose detailed obligations upon the Plan Company in relation to a Recapitalisation Transaction:

"57. **Governance Requirements**

(a) Each Obligor will ensure that its Directors at all times include at least two independent non-executive directors ("INEDs") who possess restructuring experience (being, as at the Restructuring Effective Date, Aidan de Brunner and Neil Robson).

(b) The Obligors will not appoint any replacements for the directors described in Sub-paragraph (a) above or for TWUL's Chief Restructuring Officer (if being appointed in accordance with the terms of the Transaction Support Agreement) without the consent of the Super Senior Security Trustee."

"59. **Recapitalisation Transaction**

In respect of any Recapitalisation Transaction:

(a) in which Secured Creditors (or any of them) are offered the right to reinvest (either directly or indirectly) in the TWU Financing Group (by means of debt, equity or any similar instrument) or any entity that acquires any rights or assets of the TWU Financing Group (whether constituting a lender-led process or a co-investment with third party investor(s) or otherwise), each member of the TWU Financing Group shall:

(i) in good faith, consult with the advisers to its Secured Creditors (including, without limitation, the Relevant Creditor Advisers and the Ad Hoc Hedge Advisers) in respect thereof; and (ii) use its reasonable efforts to engage with its Secured Creditors and their advisers on an equal and open basis and use reasonable endeavours, taking into account the circumstances at the time, to ensure the Recapitalisation Transaction includes options for participation (including via different instruments) for all relevant Secured Creditors which will avoid material adverse capital or other economic treatment for some Secured

Creditors relative to other *pari passu* Secured Creditors (the "Participation Condition"); and

(b) each member of the TWU Financing Group shall consult with the advisers to its Secured Creditors (including, without limitation, the Relevant Creditor Advisers and the Ad Hoc Hedge Advisers) and commence negotiations in respect of the Supported LUA by no later than 31 March 2025.

(c) without prejudice to the other information undertakings and obligations set out in this Agreement (including in Paragraph 60 (Engagement with Creditors) below), each member of the TWU Financing Group shall engage with the Hedge Counterparties and their advisers on an equal and open basis with other creditors in relation to any potential amendment and/or restructuring of the Hedging Agreements in connection with such Recapitalisation Transaction.

60. **Engagement with Creditors**

(a) Subject to Sub-paragraph (b) below, TWUL shall share with the Relevant Creditor Advisers and the Ad Hoc Hedge Advisers (subject to confidentiality arrangements, which are satisfactory to TWUL (acting reasonably), being in place), until the completion of the equity raise or Recapitalisation Transaction, updates on key issues, including (without limitation) TWUL's response to the Ofwat final determination, the equity raise, the turnaround plan, the pension deficit, TWUL's liquidity, any meetings with the UK Government, Ofwat, the EA and/or any other regulatory body or Governmental Agency, a Recapitalisation Transaction (including (i) draft term sheets or indicative terms provided by TWUL or any other member of the TWU Financing Group to any Secured Creditors in respect of the Recapitalisation Transaction, and (ii) draft term sheets or indicative terms that TWUL or any other member of the TWU Financing Group has received from any Secured Creditors from time to time which

TWUL, acting reasonably, considers would be reasonable to disclose in accordance with this Sub-paragraph (a)). In relation to the equity raise and the Recapitalisation Transaction, this will include:

(i) regular updates to the Relevant Creditor Advisers and the Ad Hoc Hedge Advisers (such updates to be provided to each of the advisers on an equal basis to facilitate parity of information) as to the progress of the equity raise process or Recapitalisation Transaction (as applicable), together with question-and-answer sessions; and

(ii) the provision of information as may be reasonably requested from time to time by the Relevant Creditor Advisers and/or the Ad Hoc Hedge Advisers, and (in relation to the equity raise) reasonable access to TWUL's advisers in the respect of the equity raise.

(b) Nothing in Sub-paragraph (a) shall require TWUL to disclose commercially sensitive information that, in TWUL's opinion (acting reasonably), could prejudice the equity raise process and/or be in breach of its obligations under the UK Market Abuse Regulation.

(c) TWUL shall consult in good faith with the Relevant Creditor Advisers and the Ad Hoc Hedge Advisers (or the Secured Creditors which they each represent) in respect of (i) the progress in relation to a Recapitalisation Transaction and/or (ii) a potential decision to be reached as to whether a CMA Appeal is to be made, provided that: (A) this shall not require the disclosure of any inside information and/or any information of a legally-privileged or commercially sensitive nature, (B) this shall not require TWUL to share commercially sensitive information that (in TWUL's opinion, acting reasonably) could prejudice the equity raise process and/or be in breach of its obligations under the UK Market Abuse Regulation; and (C) relevant Secured Creditors (and/or their advisers) have in each case entered into appropriate confidentiality arrangements on terms satisfactory to TWUL (acting reasonably).

(d) TWUL shall engage with the Relevant Creditor Groups and the Ad Hoc Hedge Counterparties (and/or their advisers) on a good faith basis to facilitate development of a creditor led Recapitalisation Transaction (the "Creditor Led Transaction"), including (without limitation) by:

(i) providing access to any relevant investor data rooms (including any virtual data rooms or other data sites made available to investors);

(ii) providing reasonable access to TWUL's senior management team;

(iii) cooperating with the reasonable information requests of any of the Relevant Creditor Groups and/or the Ad Hoc Hedge Counterparties (or any of the Relevant Creditor Advisers and the Ad Hoc Hedge Advisers on their behalf);

(iv) cooperating in facilitating reasonable access to Ofwat, the EA and other relevant regulatory bodies or Governmental Agencies; and

(v) ensuring that any proposal in relation to a Creditor Led Transaction will be able to be submitted as an offer in any formal equity process run by TWUL (or any of its Affiliates),

it being understood that these obligations shall not fetter any of the Obligors' Directors' duties to consider and, subject to such duties, facilitate all other available options relating to the

> Recapitalisation Transaction or otherwise (if relevant) or TWUL's compliance with the Participation Condition."

109. The terms "Relevant Creditor Groups" and "Relevant Creditor Advisers" were defined (or will be defined) in the MDA as the "Ad Hoc Committee and the Bank Group" and the "Ad Hoc Committee Advisers and the Bank Group Advisers". Finally, an important amendment is to be made to the CTA, Schedule 6, Parts 1 and II, paragraph 5 (which I have set out above). In its amended and restated form, the CTA will now contain the following provision:

> "5.3 No Event of Default shall occur under Paragraph 5.1 or 5.2 under a Finance Document (excluding for these purposes any Hedging Agreement) as a consequence of proposing and implementing a restructuring plan under Part 26A of the Companies Act 2006 in order to implement a Recapitalisation Transaction which is subject to a Supported LUA."

(7) The STID

110. Finally, clause 7 of the STID, which deals with voting procedure, will be amended so that TWL will be bound by the majority decision of the Secured Creditors in relation to STID Proposals as defined in clause 9.1 (which I have set out above):

> "9.7 **Binding Decisions of Majority Creditors**
>
> 9.7.1 Subject to Clause 9.3 (Notice to Secured Creditors and Secondary Market Guarantors of STID Proposal), Clause 9.4 (Notice of Entrenched Rights or Reserved Matters Procedure) and Clause 9.10 (Disputes), decisions of the Majority Creditors in relation to STID Proposals will bind: (a) the Secured Creditors and the Secondary Market Guarantors in all circumstances; and (b) Subordinated Creditors and the Subordinated Creditors will (i) give (or be deemed to give) a corresponding consent (to the extent required) in relation to each Finance Document to which they are party; and (ii) do anything (including executing any document) that the Proposer or the Security Trustee (acting on the instructions of the Majority Creditors) may reasonably require in order to give effect to such decisions. This paragraph (b) does not apply to a Subordinated Creditor where the relevant decision of the Majority Creditors materially adversely affects the right of the relevant Subordinated Creditor under the Finance Documents (taken as a whole) and such Subordinated Creditor has notified the Security Trustee that it objects to the relevant decision of

> the Majority Creditors before the applicable STID Voting Date until such time as the relevant Subordinated Creditor (or, where the relevant decision affects all Subordinated Creditors equally, each Subordinated Creditor) confirms its consent to such decision.
>
> 9.7.2 Subject to Clause 9.6 (DIG Directions Request), decisions of: (a) the Majority Creditors in relation to any DIG Proposal; and (b) the DIG Representatives representing the requisite percentage of the Outstanding Principal Amount of the Qualifying Class A Debt or, if no Class A Debt is outstanding, Qualifying Class B Debt set out in Clause 13.4 (Termination of Standstill) and Clause 13.5 (Extension of Standstill) in respect of any vote to terminate Standstill, will bind the: (i) Secured Creditors and the Secondary Market Guarantors in all circumstances; and (ii) Subordinated Creditors and the Subordinated Creditors will (i) give (or be deemed to give) a corresponding consent (to the extent required) in relation to each Finance Document to which they are party; and (ii) do anything (including executing any document) that the relevant DIG Representative or the Security Trustee (acting on the instructions of the Majority Creditors) may reasonably require in order to give effect to such decisions. This paragraph 9.7.2(b)(ii) does not apply to a Subordinated Creditor where the relevant decision of the Majority Creditors or the DIG Representatives (as the case may be) materially adversely affects the rights of the relevant Subordinated Creditor under the Finance Documents (taken as a whole) and such Subordinated Creditor has notified the Security Trustee that it objects to the relevant decision of the Majority Creditors before the applicable DIG Voting Date until such time as the relevant Subordinated Creditor (or, where the relevant decision affects all Subordinated Creditors equally, each Subordinated Creditor) confirms its consent to such decision."

E. The Plan: the cost

111. Mr Day took Mr Cochran carefully through the cost of funding the Interim Platform Transaction for six months in cross-examination and Mr Cochran accepted the figures which Mr Day put to him. In his Closing Note Mr Day summarised the evidence and neither Mr Smith nor Mr Al-Attar challenged that analysis and I accept it. Based on Mr Day's analysis I summarise the cost of funding the Plan as follows.

(1) Drawdown

112. Mr Day pointed out that over the next six months (even assuming that the JRC is satisfied) the full amount of the Super Senior Funding will not be drawn down but only an amount of £1.388 billion. This is because the final tranche of £112 million will not be drawn down until 31 August 2025.

(2) OID

113. The Super Senior Funding will be issued at a discount of 3% to its face value totalling £45 million. This generates an immediate cost to the Plan Company and TWUL. No justification or rationale for an immediate discount was given to me by any of the witnesses or counsel and I, therefore, treat it as an additional cost of the new debt. As Mr Day pointed out, the Super Senior Funding is very low risk (as Mr Cowlishaw accepted in cross-examination).

(3) Backstop fees

114. As Akin Gump pointed out in their letter dated 13 November 2024 to Linklaters, a backstop fee of 3.5% or £52.5 million is payable to those Plan Creditors who have agreed to underwrite or "backstop" the Super Senior Funding. Again, this generates an immediate cost to the Plan Company and TWUL and, again, I was given no justification or rationale for this fee given the risks associated with this debt. Indeed, it was the evidence of the Class B AHG and Mr Maynard that the Super Senior Funding was so attractive that Bloomberg had reported that it was already trading at 105 pence in the pound on a "when-issued basis".

(4) Coupon

115. The Super Senior Funding carries interest at 9.75% which would amount to £73 million over a six month period.

(5) "Make Whole" fee

116. As I have stated above, the term of the Super Senior Funding is two and a half years. But it also carries a "Make Whole" fee of £156 million in the event that a Recapitalisation Transaction were successfully implemented in the next six months.

(6) Early bird/consent fees

117. There was no evidence of the total which the Plan Company has agreed to pay in early bird and consent fees to the Interim Platform Transaction. But Mr Cochran accepted that in December 2024 it was anticipated that £116 million would be paid in these additional fees on the basis that 85% of Plan Creditors had acceded to the TSA. Mr Cochran could not say what the total was and the Plan Company did not update the Court even though Marriott Harrison requested this information by letter dated 4 February 2025.

(7) Adviser fees

118. Mr Cochran accepted in cross-examination that the Plan Company was paying fees to advisers at a "burn rate" of approximately £15 million per month out of its current cashflow. He also accepted that the bulk of these costs was the Plan Company's own legal fees and that the Plan Company would continue to incur them at this rate until the completion of the Recapitalisation Transaction. Mr Day submitted that this was a total of £100 to £120 million for the Plan itself and a further £90 million for the Recapitalisation Transaction. None of the other parties challenged this figure.

(8) Total

119. These figures do not include the continuing interest which the Plan Company and TWUL have to pay on the existing Debt. But Mr Cochran accepted in cross-examination that including continuing interest payments £800 million of the £1.388 billion which the Company is able to draw down over the next six months is purely the cost of the continuing finance and new money:

> "MR DAY: We have discussed three categories, we have discussed interest on the existing Class A debt. Do you recall that? A. Yes. Q. We came to a figure of around 245 million? A. Correct. Q. We then came to the costs and interest on the super senior funding, which is in excess of 443 million for six months? A. Correct. Q. We don't know how much more, because you cannot tell us how much more the early bird and consent fees are? A. Correct. Q. Then we have discussed the advisory fees and you gave us two figures, your budget for the next six months is 90 million? A. Correct. Q. As we have

discussed, you have effectively borrowed ahead of time for the 100 to 120 million to get you here to date? A. That's correct. Q. I add that up, but I'm not an accountant, Mr Cochran, you tell me, to around 800 million? A. That's correct. Q. I am saying to you that, effectively, of the 1.388 billion that you plan to draw down over the next six months, 800 million is just being used for cost of finance, debt servicing and professional and advisory fees, that's right, isn't it? A. That is correct. Q. If I am right on that, that leaves under 600 million left over. Can you explain to me where that goes? A. The 600 million goes to fund the shortfall between operating cash flow and our capital investment programme. Q. So some goes into opex and some goes into capex over the next six months? A. No, so let me try again. So we receive revenues, net of the operating expenditure gives you effectively operating cash flow. Because we are required to spend more on capital investment than we generate in operating cash flow, there is a deficit, so the balance of funding is making whole that deficit between our capital investment requirement and our operating cash flows. Q. Your evidence is that the entire of the balance goes into capital investment? A. That is correct.

120. Mr Cochran also accepted that the total figure of £800 million did not include any additional or unanticipated hedging costs or any sums paid under the Management Retention Plan. Furthermore, he accepted that this figure did not include any fines or penalties which were imposed by OfWat:

> "A. So, as Mr Fraiser said, we are challenging the fines from Ofwat, so we do not know how much we will be fined, and, if we are fined, when they will be due. And then any associated undertakings, it is unclear as to the cost of those undertakings and when they will be incurred. Q. It is right, isn't it, that Ofwat has not committed to the company to refrain from finalising that enforcement action over the next six months? A. That's correct. Q. So the company may be landed with accrued regulatory obligations under those enforcement notices? A. That is correct. Q. If Ofwat takes that enforcement action in the next six months, given your evidence of the 590 million left once you have paid out creditors and professional expenses 3 and so on, your evidence was all of that needs to go into the company to meet capital expenditure. This bridge finance has insufficient headroom for Thames Water to comply with those regulatory obligations. That is right, isn't it? A. I think that is oversimplistic, because the cost of any undertakings is typically incurred over a longer period of time. Therefore would fall due outside the period you have just outlined. Q. You would have to start spending the 1.7 billion, wouldn't you? Let's say Ofwat says next week enforcement action is

> confirmed, you couldn't take no steps to start remediation action over the next five or six months, could you? A. I agree, but I am simply saying you could not spend all that money in that period. Q. You would have to spend some of? A. Yes, you would start. Q. You would have to pay the 104.5 million in the fine? A. The fine would be due within a period of weeks I believe. Q. Likewise with the unlawful dividend, the 18 -- I think, 14 days. Q. The point I am putting to you, that this bridge finance, envisaged by this plan, has insufficient headroom for you to comply with your regulatory obligations in those circumstances? A. And I am simply saying in response that the fines would be due within several weeks, but amounts required to spending to -- to -- as part of an undertaking to make good any failing, founded by the regulator, would be spent over a longer period of time than six months as I suggested in your question. Q. Okay. Let me try one last time, my Lord, then I am going to stop on this. Can we go back to the bottom of the previous page. This is in a section which refers to material unfunded costs, fines and prosecutions. I am putting to you -- let's just focus on the fines -- that if Ofwat decides in the next six months to finalise those fines, you do not have financial headroom in this bridge plan to meet those regulatory obligations. That is right, isn't it? A. If the fine was £145 million, we would be running the business with £200 million of headroom. That is what the super senior facility and that drawdown schedule provides for. So logically we would have £45 million of cash in the business. Q. But not funded. I mean that is why you flagged this to the markets, it is unfunded? A. It is unfunded, but there is liquidity to cover the cost."

F. OfWat's position

(1) Consents

121. The Licence contains what OfWat describes as "regulatory ring-fencing provisions". Condition P21.1 prohibits TWUL from giving a guarantee in support of an associated company and Condition P21.3 prohibits it from entering into a cross-default obligation without OfWat's consent. By letter dated 22 January 2025 Ms Helen Campbell, Senior Director – Sector Performance, wrote to Mr Cochran stating that OfWat had provided its consent subject to the following conditions:

> "a) On acquisition, the Financing Subsidiary will meet the Appointment definition in Condition A in that it will be a wholly-owned subsidiary, controlled by Thames Water and its

> sole purpose will be raising finance on behalf of the regulated entity, Thames Water. This will be reflected in the Articles of Association of the newly acquired Financing Subsidiary;
>
> b) Following acquisition, the Financing Subsidiary continues to be wholly-owned and controlled by Thames Water and its sole purpose remains raising finance on behalf of the regulated entity, Thames Water;
>
> c) All funds raised by the new Financing Subsidiary are passed on to Thames Water less the relevant administrative expenses of the Financing Subsidiary. The funds raised by the Financing Subsidiary are to be held on the account of the Financing Subsidiary and, to the extent not utilised by the regulated entity, Thames Water, would be applied by the Financing Subsidiary to repay the finance provided by the external creditors (in accordance with the documents between the Financing Subsidiary and the external creditors, which we understand provide for this);
>
> d) On the acquisition of the new Financing Subsidiary, Thames Water must inform Ofwat, within 10 days of the date it is acquired, of the Financing Subsidiary's trading name, company number and provide Ofwat with the articles of association (in each case to the extent not already provided or if provided previously, to the extent any changes have been made).
>
> e) The nature of the guarantee and Cross-Default Obligation arrangements for which this Consent is required are, and remain, materially as described in the Consent Request Letter."

122. By letter dated 28 January 2025 Ms Jenny Block, the General Counsel of OfWat, wrote to TWUL copying in Linklaters and QE. She also provided a copy of this letter directly to the Court. She stated that the purpose of the letter was to address in brief OfWat's statutory role and its current views on a number of matters although it did not intend to attend the sanction hearing or be represented by counsel. She also stated that OfWat had reviewed the Finance Documents and was of the view that no change of "Ultimate Controller" had occurred and that consistent with its Financial Consents Policy, OfWat had consented only to those elements of the Plan which required its consent. She then continued:

> "17. Ofwat confirms that, if the board of directors of the Company were to conclude that the Company is unable to pay its debts and to write to Ofwat requesting a petition is made for entry into special administration under s24 WIA (i.e. the SAR Request Scenario), then Ofwat would likely make a special

> administration application, on the grounds of inability to pay debts under s24(2)(c) WIA, after having sought and obtained consent from the Secretary of State for Environment, Food and Rural Affairs ("SoS") to do so.
>
> 18. Ofwat considers that the directors of a company are in the best position to make a decision about the solvency of that company and its ability to continue trading should the SAR Request Scenario arise. If the board of directors of the Company consider that there is no other viable plan, such that other funding options have been exhausted, Ofwat is likely to accept the board's conclusions and to make a special administration application under s.24 WIA. Ofwat reaches the conclusion that it is likely to make such an application having regard to its statutory duties, including its responsibilities to customers and the environment, and noting the objectives of special administration to continue the functions of the water and sewerage undertaking under the Licence.
>
> 19. Ofwat has carried out appropriate and prudent contingency planning, as any regulator would in a position of uncertainty of this kind, and expects that it could make a special administration application promptly, as required, in the days immediately following any decision by the directors described above.
>
> 20. Ofwat wishes to note that the Company and the relevant experts instructed by the Company remain responsible for the presentation of all aspects of their relevant alternative, including in any expert's report provided to the Court under CPR 35, and including their assessment of the likelihood of the SAR Request Scenario arising and of the outcomes for stakeholders.
>
> 21. Ofwat makes no comment (and by doing so should not be inferred to be taking any position) in this letter on any other aspect of the Company's proposed relevant alternative or the likely actions of the directors, including the likelihood of the SAR Request Scenario arising."

123. Ms Block also addressed the B Plan. She confirmed that OfWat had not consented to the plan although it could do so in short order. But she was not prepared to express a preference for either the Plan or the B Plan:

> "24. Ofwat considers it a matter for the Company, its creditors and the Court as to which of the Company Plan or the Alternative Plan should be voted on, approved and, in due course, sanctioned in accordance with the Companies Act 2006. As set out above, Ofwat is proceeding on the basis that a SAR Request Scenario is likely to arise only if the directors

> of the Company have concluded that they have exhausted all other viable funding options.
>
> 25. Ofwat has considered carefully whether it is required to have a position or preference on which of the Company Plan or the Alternative Plan is pursued by the Company. Ofwat is of the view that its statutory duties alone do not require it to do so in this instance. Absent a breach by the Company of either the Licence, undertakings given to Ofwat, or other legal or regulatory requirements on the Company in relation to which Ofwat has a statutory responsibility, the directors of water and sewerage undertakers are responsible for agreeing the terms of their financing arrangements and engaging with their respective creditors, including in cases involving financial distress.
>
> 26. Ofwat does not object to either the Company Plan or the Alternative Plan. Ofwat continues to monitor the progress of the proceedings, including the evidence being submitted to the Court. Ofwat also continues to monitor this information in the context of the undertakings to restore Investment Grade status discussed below."

(2) Credit ratings

124. Condition P26 of the Licence also imposed an obligation upon TWUL to ensure that it or any associated company which issues corporate debt on its behalf maintains, at all times, two "**Issuer Credit Ratings**" which are "**Investment Grade Ratings**" from two different "**Credit Rating Agencies**" (as these terms are all defined in the Licence). On 24 July 2024 Moody's downgraded the Thames Water Group's rating to Ba2 with a negative outlook and on 31 July 2024 S&P downgraded its rating to BB with negative outlook. These actions placed TWUL in breach of Condition P26.

125. In August 2024 OfWat made a final decision to accept undertakings under section 19(1) of the WIA in lieu of imposing an enforcement order upon TWUL. Those undertakings included a commitment to develop a new plan and to use reasonable endeavours to achieve the equity raise:

> "3.5 Thames Water commits to use all reasonable endeavours to raise substantial equity investment into its business (the Equity Raise), which will be underpinned by the development and implementation of the Business Plan. Thames Water has already commenced the initial stages of the Equity Raise and commits to implement the process of the Equity Raise, and

> other necessary processes, on a timetable and to milestones agreed with us, and will evolve the Equity Raise process appropriately."

126. TWUL also undertook to appoint a further two appropriately experienced independent non-executive directors and to appoint a monitor to assist TWUL to restore its Issuer Credit Ratings in order to comply with P26:

> "3.7 Thames Water agrees that we will appoint a monitor (the Monitor), who will be independent of the company, with appropriate qualifications and experience, to monitor and review the company's compliance with the conditions of the undertakings and progress towards achieving the objective of the undertakings, which is to take all reasonable steps to address the concerns raised by its Credit Rating Agencies and to restore two Investment Grade Ratings in line with Condition P26. The Monitor will report to us and make recommendations to us as to any additional steps Thames Water should take to achieve the conditions and objective of the undertakings."

127. In her letter dated 28 January 2025 Ms Block drew the Court's attention to the fact that OfWat had accepted undertakings from TWUL in relation to the breach of Condition P26 but did not consider that either the Plan or Plan B involved a breach of those undertakings:

> "27. For completeness Ofwat records here that it has accepted undertakings from the Company in relation to its breach of Condition P26 of the Licence. The undertakings require the Company to take steps to restore the investment grade rating of its debt in accordance with Condition P26.
>
> 28. Ofwat continues to monitor the Company's compliance with these undertakings, assisted by the appointment of an independent monitor.
>
> 29. As at the date of this letter, Ofwat is not currently of the view that entry into financing arrangements under the Company Plan or under the Alternative Plan would involve a breach of those undertakings. In the event that either the Company Plan or the Alternative Plan is sanctioned by the Court, Ofwat would continue to monitor the Company's compliance with the Condition P26 undertakings, including as regards the Company's proposed equity raise process."

G. The B Plan

128. Mr Ereira stated in Ereira 3 that the B Plan is the same as the Plan insofar as it provides for an extension of maturity dates, interest, payments under the Hedging Agreements, the Liquidity Facilities and the covenant regime. However, he stated that it was different from the Plan in the following respects:

> "53.1 Market participation – a significant portion of the committed funding offered pursuant to the Alternative Plan is backstopped by a number of leading international financial institutions that, in contrast to the backstop parties to the Company Plan, do not hold Thames Water Debt. These institutions are participating because they consider the terms of the Alternative Plan to be commercially attractive.
>
> 53.2 Drawdown and June Release Condition - the Alternative Plan contains similar conditions to the Company Plan in respect of the drawdown of funds but importantly, and by contrast with the Company Plan, the Alternative Plan does not contain a condition which requires Thames Water to have entered into a recapitalisation solution by way of lock-up agreement (by way of an equity raise or a creditor led solution) with a two-thirds majority of both the lenders providing the Company Plan Funding and holders of its Class A Debt ("June Lockup Agreement") by 30 June 2025 (referred to as the "June Release Condition"). If the June Release Condition is not satisfied, Thames Water will not be able to drawdown any of the Company Plan Funding after 30 June 2025. £483 million of the Company Plan Funding is scheduled to be drawn down after 30 June 2025.
>
> 53.3 The Applicant considers that the absence of the June Release Condition gives Thames Water the ability to pursue the equity raising process via a more competitive and transparent process and on a more flexible timetable.
>
> 53.4 The absence of the June Release Condition will mean that Thames Water is not required to enter the June Lockup Agreement before the existing ongoing equity raise process is currently expected to complete. Fraiser 1 explains that "final binding offers from bidders [are] currently expected by mid-2025". I understand from DC Advisory that these final binding offers would be expected to be detailed and complex and will require careful evaluation by Thames Water and its advisers before a preferred bidder is selected. The equity bids would be expected to be subject to various conditions relating to the actions of third parties (for example regulators (Ofwat, the Pensions Regulator and CMA), pension trustees, and Thames Water's creditor groups). Once a preferred bidder has been selected, progressing the satisfaction of these conditions to a sufficient extent to allow a lockup agreement to be signed in respect of the equity raise may take weeks or months.

> 53.5 Following the selection of a preferred bidder, a lockup agreement will also need to be negotiated and signed with (i) 66.6% of the Super Senior Funding; and (ii) 66 2/3% of the aggregate Class A Debt (in each case as defined in the Class A Term Sheet). Paragraph 5.6 of Fraiser 1 explains that it took the Class A AHG Co-com "months" to negotiate the TSA.
>
> 53.6 I understand from DC Advisory that it is likely to take longer to negotiate and execute the lockup agreement than the TSA given the nature of the recapitalisation and the number of stakeholders whose consent will be required, including potentially the CMA. By contrast, I understand that even after "months" of negotiations, holders of only £6.7 billion of Thames Water's secured debt had signed the TSA when the liquidity extension transaction which underpins the Company Plan was announced by RNS on 25 October 2024.
>
> 53.7 The absence of the June Release Condition will enable Thames Water to raise equity in accordance with a flexible timetable that can be adapted to future events. This will allow for the equity raise process to take into account the emergence of new equity bidders who may be waiting to see if Thames Water pursues the CMA Appeal (and the outcome of any CMA Appeal), before investing the significant time and financial resource required to conduct due diligence on Thames Water. This would also accommodate prospective bidders who are known to only have indicated their interest in Thames Water's equity process post publication of Ofwat's Final Determination. This will also allow the equity raise timetable to be adjusted in light of prevailing market conditions."
>
> "53.13 Re-financing – the Alternative Plan permits Thames Water to refinance the Alternative Plan Funding in full provided any new funding is on better terms. By contrast, the long-form documents filed prior to the Company Plan Convening Hearing and the term sheet annexed to the TSA appear to conflict such that it is not clear if the Company Plan Funding can be refinanced. To the extent the Company Plan Funding can be refinanced, Thames Water would be required to pay the make-whole (even if the replacement funding is on better terms)."

129. Mr Ereira also exhibited to Ereira 3 a table headed "Comparison of Key Terms – Class A vs Class B New Money Proposal." I reproduce that table below after removing some of the text and footnotes:

	The Plan	**The B Plan**

The Facility	£1.5bn committed facility £1.5bn uncommitted facility (2 x £750m tranches)	£3.0 bn committed facility (1 x £1.5 bn and 2 x £750m tranches)
OID	3.0%	2.0%
Interest	9.75% per annum	8.00% per annum
Maturity	2.5 years	1 year (extendable to 15 months on CMA Appeal)
Target Liquidity	£200 million	£250 million
Backstop fees	3.5% on committed amount	1.5% on committed funding 1.5% ticking fee on undrawn amount (payable over time)
Make Whole	All foregone interest payments (discounted at 1 year Gilt yields)	2% fee on drawn amounts if loan is prepaid within 6 months
Headline fees	coupon: 9.75% OID: 3.0% Early repayment: 7.9%-10.4% Backstop: 3.5% Early bird/consent: 0.5%/0.75%	coupon: 8.0% OID: 2.0% Early repayment: 1.0%-2.0% Backstop: 1.25%-2.75% consent: 0.5%
Total fees and interest	£327m	£169m
Cost of Debt	22.5%	11.5%

H. The Reinstated Plan

130. It is unnecessary for me to set out the terms of the Reinstated Plan because I accept that it is in all material respects identical to the Plan. Mr Phillips and his team suggested that the Class A AHG would present a modified plan and he put a number of questions to Mr Burlison to test whether it would consent to the removal of individual terms. But Mr Al-Attar made it very clear in his oral submissions that the Class A AHG would apply for the sanction of the Reinstated Plan on exactly the same terms. I do not, therefore, consider any modifications to it further.

IV. The Issues

131. On 31 January 2025 the parties appeared before me on the application of the Class B AHG to extend the sanction hearing by at least two days. The Plan Company resisted that application on the basis that I had to deliver judgment (or at least make a decision) by 14 February 2025 or early the following week in order to give time for an appeal and to permit the Plan to be implemented. I reluctantly accepted the Plan Company's submissions on that issue although in the event I sat for four very long days and gave the parties an additional half day for their competition law submissions.

132. There was no list of issues agreed between the parties and apart from the Grounds of Objection no statements of case. I was faced with a huge volume of documentation and nine expert reports on valuation. I was also told that the Plan Company required 17 working days to implement the Plan and that less than a week had been built into the timetable for the Court to consider its judgment because the convening hearing of the B Plan was listed for 13 February 2025. In the event, the Class B AHG reluctantly agreed to adjourn the convening hearing until the following week and I was able to circulate a judgment on Monday 17 February 2025 and then hand it down the following day.

133. This was an important case of some urgency. But I was never given a satisfactory explanation why no application was made to Court before December 2024 or so little time built into the timetable for the Court to consider its decision. I remind the parties yet again of the guidance which Snowden LJ gave in *Re AGPS Bondco plc* [2024] Civ 24, [2024] Bus LR 745 ("***Adler***") at [65]:

> "It must also be reiterated that the court's willingness to decide cases quickly to assist companies in genuine and urgent financial difficulties must not be taken for granted or abused. In particular, where a restructuring is designed to deal with the foreseeable maturity of financial instruments, and a division of the anticipated benefits of the restructuring is being negotiated between sophisticated investors, sufficient time for the proper conduct of a contested Part 26A process must be factored into the timetable. This will include complying fully with the Practice Statement [2020] 1 WLR 4493, giving interested parties sufficient time to prepare for hearings, giving the court appropriate time to hear the case and to deliver a reasoned decision, and permitting time for the determination of any application for permission to appeal. If this is not done, the

> parties can have no complaint if the court decides to adjourn hearings and to take whatever time it requires to give its decision."

134. In the Class B Grounds of Objection the Class B AHG advanced one jurisdictional objection and four discretionary objections. It withdrew its objection based on breaches of the Licence but maintained four objections to the Plan (one jurisdictional and three discretionary):

(1) The Court had no jurisdiction to sanction the Plan because the relevant alternative was the B Plan and the Class B Creditors would be better off under the B Plan than under the Plan ("**Objection 1**"). This objection depended on both valuation evidence and the Court's assessment of the "**Class A Control Terms**". The Class B AHG used that term to refer to the following provisions:

> "The Plan implements several control provisions that are unnecessary to give effect to the Interim Platform Transaction and which give control rights to the Class A Creditors, whether directly or through their participation in the provision of Super Senior Funding, in respect of the subsequent Recapitalisation Transaction to be given effect through RP 2, including, without limitation, terms implementing (and any associated terms that restrict their waiver, amendment and/or modification):
>
> i. the June Release Condition;
>
> ii. the requirements to obtain the consent, approval or similar of the Reference Decision Nominated Directors for a CMA Reference Decision (each as defined in the draft Amended and Restated Master Definitions Agreement) and for the Post-Final Determination Business Plan Update (as defined in the Super Senior Class A Issuer Borrower Loan Agreement);
>
> iii. the requirement for a management retention plan in respect of TWUL upon the Plan Effective Date on terms acceptable to the Relevant Creditor Groups (as that term is defined in the Term Sheet in Schedule 7 to the TSA);
>
> iv. the covenant prohibiting the Group from incurring further financial indebtedness ranking pari passu with or senior to the Super Senior Debt (as defined in the draft Amended and Restated Master Definitions Agreement) even if the further financial indebtedness is to refinance the Super Senior Debt in full and is on better economic terms

> than the Super Senior Debt, which cannot be modified or waived without the prior written consent of 75% of the Qualifying Class A Debt (as defined in the draft Amended and Restated Master Definitions Agreement) (and without taking into account the vote of any Super Senior Debt Provider (as defined in the draft Amended and Restated Master Definitions Agreement)); and
>
> v. the covenant only requiring the TWU Financing Group (as defined in the draft Amended and Restated Master Definitions Agreement) to engage with the Relevant Creditor Groups and the Ad Hoc Hedge Counterparties (each as defined in the draft Amended and Restated Master Definitions Agreement) and/or their advisers in respect of a creditor led Recapitalisation Transaction. (together, the Class A Control Terms)."

(2) The Plan does not warrant the extent of the alteration of the rights of the dissenting Creditors. Further, the Plan gives rise to an unfair distribution of the restructuring surplus between the Class A Creditors and the Class B Creditors. In particular, there is no good reason why the Class A Creditors should have the benefit of the Class A Control Terms ("**Objection 2**").

(3) There is a "blot" on the Plan because the June Release Condition infringes the Chapter 1 prohibition contained in section 2(1) of the Competition Act 1998 (the "**CA 1998**") ("**Objection 4**").

(4) The Plan is unfair because of the wide releases to be granted in clause 16.1 of the Plan. They are not necessary for the implementation of the Interim Platform Transaction and also constitute a "blot" on the Plan ("**Objection 5**").

135. In the TWL Grounds of Objection TWL objected to clause 9.7 of the amended and restated STID on the basis that its effect is to "dilute and qualify TWL's existing voting rights and/or disenfranchise TWL from participating in the voting process in relation to RP2". TWL also objected to the Plan on the basis that there was a disparity between the information rights of the classes of creditors and there ought to be parity.

I. Jurisdiction

(1) The threshold conditions

136. Section 901A of the CA 2006 provides that Part 26A applies where two threshold conditions are met. Condition A is that the subject company has encountered, or is likely to encounter, financial difficulties that are affecting, or will or may affect, its ability to carry on business as a going concern. Condition B is that a compromise or arrangement is proposed between (in this case) the company and its creditors and that its purpose is to eliminate, reduce or prevent, or mitigate the effect of, any of those financial difficulties.

137. Section 901C provides that the Court may order a meeting of the creditors or class of creditors to be summoned in such manner as the court directs. Section 901D provides that where a meeting is summoned under section 901C, the notice must either include a statement which explains the effect of the compromise or arrangement or state where and how creditors and members can obtain a copy of the statement.

138. At the Convening Hearing Trower J was satisfied that the two threshold conditions were met: see [2024] EWHC 3310 (Ch) at [40] to [42]. He was also satisfied that sufficient notice of the Convening Hearing had been given, that there were no roadblocks which might prevent the Plan being sanctioned and that the composition of seven classes of creditors was appropriate: see [37], [43] and [57]. It is clear from his judgment that he heard full argument on these issues.

139. None of the opposing creditors or Mr Maynard MP submitted that the Court should revisit any of these issues or that it had become clear that either the class composition was incorrect or that the Plan documents were incorrect or misleading. Mr Day submitted that the Plan Company had not been frank or transparent about the costs of the Plan but he did not invite me to re-open any of the issues which Trower J determined at the Convening Hearing.

140. In *Re Global Garden Products Italy SpA* [2017] BCC 647 Snowden J (as he then was) held that if a judge has heard full argument at the convening hearing and has decided the appropriate constitution of classes, it is not ordinarily appropriate for a different judge to take a different view of their own motion at the sanction hearing in the absence of a creditor appearing to challenge class composition:

see [43]. I respectfully agree. Two classes of the Creditors opposed the sanction of the Plan but did not seek to re-open the issue of class composition or any of the other issues which Trower J decided at the Convening Hearing. I remain satisfied, therefore, that the threshold conditions for the exercise of the jurisdiction in Part 26A are met and that it is appropriate for the Court to consider whether to sanction the Plan.

(2) Section 901F

141. The second condition for the exercise of the jurisdiction is the requirement that 75% of creditors in (at least) one of the classes ordered at the Convening Hearing have voted in favour of the Plan. Section 901F ("**S.901F**") provides as follows (so far as relevant):

> "(1) If a number representing 75% in value of the creditors or class of creditors or members or class of members (as the case may be), present and voting either in person or by proxy at the meeting summoned under section 901C, agree a compromise or arrangement, the court may, on an application under this section, sanction the compromise or arrangement.
>
> (2) Subsection (1) is subject to— (a) section 901G (sanction for compromise or arrangement where one or more classes dissent)…"
>
> "(5) A compromise or arrangement sanctioned by the court is binding— (a) on all creditors or the class of creditors or on the members or class of members (as the case may be), and (b) on the company or, in the case of a company in the course of being wound up, the liquidator and contributories of the company.
>
> (6) The court's order has no effect until a copy of it has been— (a) in the case of an overseas company that is not required to register particulars under section 1046, published in the Gazette, or (b) in any other case, delivered to the registrar."

142. The Plan was approved by the requisite majority of the Creditors in five classes at the Plan Meetings. The condition in S.901F(1) is, therefore, met. However, two classes of creditors (the Class B Creditors and the Subordinated Creditor) dissented and, accordingly, the Court must go on and consider section 901G ("**S.901G**").

(3) Section 901G

143. S.901G is often described as conferring the power on the Court to "cram down" dissenting classes of creditors or as the "cross-class cram down" power. It is headed "Sanction for compromise or arrangement where one or more classes dissent" and it provides as follows:

> "(1) This section applies if the compromise or arrangement is not agreed by a number representing at least 75% in value of a class of creditors or (as the case may be) of members of the company ("the dissenting class"), present and voting either in person or by proxy at the meeting summoned under section 901C.
>
> (2) If conditions A and B are met, the fact that the dissenting class has not agreed the compromise or arrangement does not prevent the court from sanctioning it under section 901F.
>
> (3) Condition A is that the court is satisfied that, if the compromise or arrangement were to be sanctioned under section 901F, none of the members of the dissenting class would be any worse off than they would be in the event of the relevant alternative (see subsection (4)).
>
> (4) For the purposes of this section "the relevant alternative" is whatever the court considers would be most likely to occur in relation to the company if the compromise or arrangement were not sanctioned under section 901F.
>
> (5) Condition B is that the compromise or arrangement has been agreed by a number representing 75% in value of a class of creditors or (as the case may be) of members, present and voting either in person or by proxy at the meeting summoned under section 901C, who would receive a payment, or have a genuine economic interest in the company, in the event of the relevant alternative."

144. S.901G introduces a quite separate Condition A and Condition B from the threshold conditions. Condition A is that if the plan were to be sanctioned, none of the members of the dissenting classes would be any worse off than they would be in the event of the relevant alternative. As Snowden LJ remarked in *Adler* at [12] this is colloquially known as the "**no worse off**" test and I will use that term to describe it.

145. Condition B is that the compromise or arrangement has been approved at a class meeting by a class who would receive a payment or have a genuine economic interest in the company in the event of the relevant alternative. To sanction the Plan, therefore, the Plan Company must satisfy the Court that the Class A

Creditors would be in the money in the event of the relevant alternative. Likewise, to sanction the B Plan, the Class B AHG must satisfy the Court that the Class B Creditors or the Subordinated Creditor would be in the money in the event of the relevant alternative. I will use the phrase "**in the money**" to capture the requirements of Condition B.

146. It will also be seen that both statutory conditions depend on what the Court considers would be the most likely relevant alternative to the Plan or, if either the B Plan or the Reinstated Plan reach the sanction stage, all three plans. In *Adler* Snowden LJ described the relevant alternative as the "central statutory concept in relation to the exercise of the cross-class cram down power": see [12].

(i) The relevant alternative

147. The principal issue between the parties was the relevant alternative to the Plan. The Plan Company and the Class A AHG argued that the relevant alternative was a SAR. The Class B AHG and TWL argued that the relevant alternative to the Plan was the B Plan. One of the reasons why the Plan Company and the Class A AHG submitted that the B Plan was not the relevant alternative was that there was insufficient time to implement an alternative restructuring plan if the Court declined to sanction the Plan. However, if (contrary to that submission) the Court found that there was sufficient time to do so, the Plan Company and Class A AHG argued that the relevant alternative was nonetheless a SAR because the Class A AHG would never vote for the B Plan and would instead vote for the Reinstated Plan (whose relevant alternative was a SAR). The common element for all of the proposed plans, so they submitted, was a SAR.

148. The Court must, therefore, decide which is "most likely to occur": see S.901G(4) (above). However, this does not mean that the Court is required to decide on a balance of probabilities that one alternative will occur and that any other alternatives will not. The Court is required to decide which is more likely to occur. In *Re CB&I UK Ltd* [2024] EWHC 398 (Ch), [2024] BCC 551 ("***CB&I***"), Michael Green J explained the approach which the Court should adopt at [89] to [92]:

"89. The determination of the Relevant Alternative is made at the time at which sanction is being considered. If there are a number of alternatives, the Court must select the alternative which is more likely to occur than the other alternatives: see *Virgin Active* at [106]-[108]. At [107], Snowden J said: "…the Court is not required to satisfy itself that a particular alternative would definitely occur. Nor is the Court required to conclude that it is more likely than not that a particular alternative outcome would occur. The critical words in the section are what is "most likely" to occur. Thus, if there were three possible alternatives, the court is required only to select the one that is more likely to occur than the other two."

90. This was adopted by Zacaroli J in *Hurricane Energy Plc, Re* [2021] EWHC 1759 (Ch), where he said at [37] that: "the court is not required to be satisfied that a particular alternative would definitely occur, merely (where there are possible alternatives) which one is most likely to occur".

91. It has been recognised in the cases that because of the nature of the Relevant Alternative, it is a matter on which the directors are uniquely well-placed to give evidence. As Trower J said in E D & F Man Holdings Ltd, Re [2022] EWHC 687 (Ch) at [39]: "In my view, the court should recognise that the directors are normally in the best position to identify what will happen if a scheme or restructuring plan fails. Where the evidence appears on its face to reflect a rational and considered view of the company's board, the court will require sufficient reason for doubting that evidence." The same was said in *AGPS Bondco Plc, Re* [2023] EWHC 916 (Ch) per Leech J; and by me in *Fitness First Clubs Ltd, Re* [2023] EWHC 1699 (Ch): at [63].

92. However, the Court should not just accept what the Plan Company's witnesses say about this and should carefully scrutinise the evidence put forward by the Plan Company and its supporting creditors. It is often in the interests of a plan company (and senior supporting creditors) to present a "doomsday" scenario as if it were the relevant alternative (or comparator) to a scheme or plan, in order to justify the treatment of a dissenting creditor. A disastrous liquidation may in some cases be the most likely alternative to a plan (or scheme). However, it needs to be borne in mind that the plan company and its stakeholders would naturally wish to avoid that outcome if at all possible and would act in a commercially rational way in their best interests should the plan company find itself in that position. Its evidence must therefore show that there is real substance to its assertion that such a liquidation is the most likely to occur."

<u>(ii)</u> <u>The no worse off test</u>

149. The Plan Company argued that the Class B Creditors were no worse off whatever the relevant alternative and whether the Court accepted the valuation evidence of Mr Weerasinghe or of Dr Grunwald. Mr Cowlishaw gave evidence based on Mr Weerasinghe's valuations that the Class B Creditors would recover 3.5p/£ under the Plan but would be completely out of the money in a SAR. Mr Heis gave evidence based on Dr Grunwald's valuations that subject to the effect on valuation of the June Release Condition, the Class B Creditors would recover 100p/£ under both the Plan, the B Plan and in a SAR. He confirmed this in cross-examination:

> "Q. I want to ask you first about your assessment of the different returns in the different scenarios, just to set the scene. Can we go to paragraph 7.1.4 of your first report and the table, which is figure 6, is S/36/3042. If we look in that table at the Class B debt, you show a return of 3.5 pence in the pound under the A plan and final RP, can you see that? A. Yes. Q. Then 100p in the pound under the B plan and final RP? A. Yes. Q. Also 100p in the pound in SAR; do you see that? A. Yes. Q. Those are all based on Dr Grunwald's valuation, aren't they? A. Yes, they are. Q. If we look at the returns for the A plan and the final RP, that is headed "With control provisions", isn't it? A. Yes. Q. As I understand it, that reflects the fact that these estimated returns have been adjusted by you to reflect what you say would be the effect of the June release condition, is that right? A. Yes, that's right, and associated conditions, yes. Q. On your assessment, if you were to ignore the effect of those conditions, then the Class B creditors would receive the same returns under each of the existing plan, the Class B plan and SAR? A. I think that is right. It is reflected I think in 8.2.6, Mr Smith. Q. Exactly, that is where I was going to go to. If we go 15 to S/36/3044. Just to check I understand this as well, so you have the first set of columns, they show the return for the existing plan based on Dr Grunwald's valuation, with the effect of those conditions, correct? A. Yes. Q. Then the second set of columns show the return for the existing plan without the effect of those conditions? A. Yes. Q. I think it follows from that you agree that your opinion on the satisfaction of the no-worse-off test in relation to the Class B debt all turns on your opinion as to the effect of the June release condition and the associated conditions, correct? A. Not strictly, Mr Smith. If you are looking at the comparison with the B plan, the B plan even without the control provisions is better, because of the better economics. Q. Yes, but the no-worse-off test means you have to be no worse off than in the relevant alternative, doesn't it? A. As regards the Class B debt, yes. Q. What I was putting to you is the question of satisfaction of the no-worse-off test

> all turns on your view of the effect of the control provisions in the existing plan, doesn't it? A. Yes, it does, but, sorry, the point I was making was that if you look at the subordinated creditor line, it is better in the B plan than the A plan, even without control. Q. I understand that. I was talking about the Class B creditors, I completely understand in relation to the subordinated creditor."

150. As Mr Heis stated (and Mr Smith acknowledged) the position is different for the Subordinated Creditor. Mr Cowlishaw's evidence based on Mr Weerasinghe's valuations was that the Subordinated Creditor was out of the money under either the Plan or a SAR (and by extension the B Plan). However, Mr Heis's evidence based on Dr Grunwald's valuations was that the Subordinated Creditor would recover between 60.7p/£ and 100.0p/£ under the Plan but between 67.0p/£ and 100.0p/£ on a waterfall basis. It is probably necessary, therefore, for the Court to resolve the valuation issues to decide the jurisdictional objection. For other reasons which will become clear, it was important to decide the valuation issues in any event.

(iii) Approval

151. Condition B requires the approval of an in the money class. There was no issue between the parties that all five classes of Class A Creditors would be in the money whether the relevant alternative was the B Plan, a SAR or the Reinstated Plan and that Condition B was, therefore, satisfied so far as relevant to the Plan. However, there was a dispute between the parties whether the Class B Creditors would be in the money if the relevant alternative to the B Plan was a SAR. The evidence of Mr Weerasinghe and Mr Cowlishaw was that the Class B Creditors would be out of the money in the event of a SAR and for this reason also it was necessary for the Court to decide the valuation issues between the parties.

J. Discretion

(1) The horizontal comparison

152. In *Adler* the principal issue for the Court was whether the proposed restructuring plan was unfair to the dissenting classes of creditors because it did not provide for a *pari passu* distribution and the Court of Appeal held that it was unfair for

this reason. A critical feature of the decision is the importance of carrying out the "horizontal comparison" where the Court must compare the position of creditors or classes of creditors if the restructuring plan is approved:

> "148 Although, for the reasons that I have given, I do not consider that the rationality test derived from scheme cases has any part to play outside a consideration of the appropriateness of a plan within an assenting class, there are other concepts that have been developed in scheme cases and cases involving challenges on the grounds of unfair prejudice to CVAs that can be modified and applied to the question of whether to impose a plan on a dissenting class under Part 26A. These involve what have come to be known as the "vertical comparison" and the "horizontal comparison".
>
> 149 These expressions were first used judicially by Etherton J in the context of an unfair prejudice challenge to a CVA in *Prudential Assurance Co Ltd v PRG Powerhouse Ltd* [2007] Bus LR 1771 but have since been adopted in the context of Part 26 and Part 26A. The vertical comparison involves a comparison of the position of the particular class of creditors in question under the restructuring proposal with the position of that same class in the relevant alternative. The horizontal comparison compares the position of the class in question with the position of other creditors or classes of creditors (or members) if the restructuring goes ahead."

153. Snowden LJ stated that it is appropriate to carry out a horizontal comparison when S.901G is engaged. He accepted that differential treatment might be justified but only if that treatment can be justified. He stated this at [159] to [161]:

> "159 I agree with both Trower and Zacaroli JJ that a key issue for the court in exercising its discretion to impose a plan upon a dissenting class is to identify whether the plan provides for differences in treatment of the different classes of creditors inter se and, if so, whether those differences can be justified. I also agree with Zacaroli J that an obvious reference point for this exercise must be the position of the creditors in the relevant alternative.
>
> 160 This exercise cannot, however, properly be carried out merely by asking whether any dissenting creditor will be any worse off as a result of the restructuring plan than in the relevant alternative. That would simply be to restate Condition A in section 901G. As a matter of principle, when the court exercises its discretion to impose a plan upon a dissenting class, it subjects that class to an enforced compromise or

> arrangement of their rights in order to achieve a result which the assenting classes of creditors consider to be to their commercial advantage. In my judgment, that exercise of a judicial discretion to alter the rights of a dissenting class for the perceived benefit of the assenting classes necessarily requires the court to inquire how the value sought to be preserved or generated by the restructuring plan, over and above the relevant alternative, is to be allocated between those different creditor groups.
>
> 161 It is this concept that has been encapsulated in the expression "the fair distribution of the benefits of the restructuring" or "fair distribution of the restructuring surplus": see *DeepOcean* and *Houst*. To similar effect, in the paper referred to in *Houst* at para 30, Professor Sarah Paterson adopted a dictum of Mann J in the scheme case of *In re Bluebrook Ltd* [2010] 1 BCLC 338 ("Bluebrook") at para 49 and suggested that the essential question for the court is whether any class of creditor is getting "too good a deal (too much unfair value)"."

154. Snowden LJ accepted that a departure from the *pari passu* principle of distribution of the benefits of the restructuring plan is permissible where there is a good reason or proper basis for doing so: see [166]. He also accepted that it is considered justifiable for creditors who provide new money to facilitate a restructuring to be entitled to full repayment because the new money avoids an immediate cashflow insolvency and provides breathing space: see [168]. However, he stated this at [169]:

> "169 In other cases, of which *E D & F Man* [2022] EWHC 687 (Ch) is an example, some enhanced priority ("elevation") has also been extended to the existing claims of the providers of the new money. It should be acknowledged, however, that to date such cases have not been the subject of adverse argument and are likely to be highly fact sensitive. There might, for example, be no such justification for the elevation of existing debt if the opportunity to provide the new money was not in reality available on an equal and non-coercive basis to all creditors; if the new money was provided on more expensive terms than the company could have obtained in the market from third parties; or if the extent to which the existing debt was elevated was disproportionate to the extra benefits provided by the new money."

(2) A better or fairer plan

155. In *Adler* Snowden LJ also considered that it was appropriate to consider whether a better or fairer plan might have been available to the creditors. He stated this at [180] and [181]:

> "180 *New Look* [2021] Bus LR 915 involved a challenge to a CVA. At paras 191–196, in considering the horizontal comparison, Zacaroli J said:
>
> > "191. Whether unfair prejudice exists depends on all the circumstances, including those that would be taken into account in exercising the discretion to sanction a scheme … and in exercising the discretion to cram-down a class in a Part 26A plan.
> >
> > 192. Without attempting to define what all the circumstances in any case might be, I make the following four points which are of particular relevance on the facts of this case.
> >
> > 193. First, an important consideration is whether there is a fair allocation of the assets available within the CVA between the compromised creditors and other sub-groups of creditors. That will include considering the source of the assets from which the treatment of the different sub-groups derives, and whether they would or could have been made available to all creditors in the relevant alternative. …
> >
> > 195. … if assets that would, in the relevant alternative, have been available for all unsecured creditors are allocated in a greater proportion to other creditors (e g where critical creditors are paid in full), then the fact that the requisite majority was reached by reason of the votes of those creditors may point towards the CVA being unfairly prejudicial, even if there was an objective justification for their payment in full.
> >
> > 196. … in considering whether the allocation of assets is fair, the court is necessarily required to consider whether a different allocation would have been possible, so the principle adopted in scheme cases, against considering whether an alternative arrangement would have been fairer, needs to be modified."
>
> In my judgment, Zacaroli J was entirely correct in this approach to the horizontal comparison in a CVA, and the point which he made in para 196 applies equally to the same exercise in relation to a plan under Part 26A.
>
> 181 That was also the view taken by Adam Johnson J in *GAS* [2023] Bus LR 1163, para 106:
>
> > "106. … if the question to be addressed is one about the overall balance and fairness of the proposed plan in light of

> the relative treatment of the different creditor classes, I fail to see why that should not involve comparing the plan with other possible alternative structures. Points of comparison might well be helpful. Indeed, in many cases the basic challenge is likely to be: this is not fair— *things could and should have been done differently*. As I read it, Zacaroli J said something similar in In *re Houst Ltd* [2023] 1 BCLC 729, because in addressing the question of fairness at para 37, he posited an alternative plan structure in which the cram-down power was sought to be used against the company's bank (rather than HMRC) and not the other way around (as was the case under the plan in that case)."
>
> I agree with that analysis.
>
> 182 Accordingly, in my view the Judge was wrong to reject the appellants' contentions in this regard. Ground 1 of the appeal is well founded."

(3) A blot or blots on the Plan

156. In *Re Telewest Communications plc (No 2)* [2004] EWHC 1466 (Ch), [2005] 1 BCLC 772 at [20] David Richards J (as he then was) stated the principles to be considered by the Court when deciding whether to sanction a scheme of arrangement in the following terms:

> "The classic formulation of the principles which guide the court in considering whether to sanction a scheme was set out by Plowman J in *Re National Bank Ltd* [1966] 1 All ER 1006 at 1012, [1966] 1 WLR 819 at 829 by reference to a passage in Buckley on the Companies Acts (13th edn, 1957) p 409, which has been approved and applied by the courts on many subsequent occasions: "In exercising its power of sanction the court will see, first, that the provisions of the statute have been complied with; secondly, that the class was fairly represented by those who attended the meeting and that the statutory majority are acting bona fide and are not coercing the minority in order to promote interests adverse to those of the class whom they purport to represent, and thirdly, that the arrangement is such as an intelligent and honest man, a member of the class concerned and acting in respect of his interest, might reasonably approve. The court does not sit merely to see that the majority are acting bona fide and thereupon to register the decision of the meeting; but at the same time the court will be slow to differ from the meeting, unless either the class has not been properly consulted, or the meeting has not considered the matter with a view to the interests of the class which it is empowered to bind, or some blot is found in the scheme."

157. A blot on a restructuring plan may consist of a defect which prevents it from taking effect according to its terms or which prevents the subject company from carrying its terms into effect, e.g., because it infringes against foreign law or because the directors will be in breach of their duties to perform its terms. In the present case, the Class B AHG originally objected to the Plan on the basis that the Plan Company was acting in breach of Conditions P2, P6 and P10 of the Licence. However, they withdrew this objection in their written Opening Submissions and it is unnecessary for me to decide it.

158. In *Re Matalan Finance plc* [2020] EWHC 2345 (Ch) ("***Matalan***") Miles J dealt with the relationship between a blot on a plan and the releases which the company might be asked to give to its officers (an issue which arises in the present case). He stated as follows at [30]:

> "The logic underlying the acceptance of releases is that scheme creditors are the persons whose rights are reflected by the scheme and as scheme creditors each will have the opportunity to object to the scheme in whatever way they see fit, whether by voting against it or, more importantly, at the sanction hearing. This would include the right to argue that there had been a blot upon the scheme in the form of a breach of duty in relation to its formulation and implementation. If no such breach is alleged and proper and adequate disclosure has been given, it is appropriate that third parties identified in the releases, including directors, should have the certainty of such releases which relate to the promotion and formulation of the scheme, not to the management and affairs of the Company generally. As I have already noted, the releases in this case cover also the formulation, negotiation, promotion or provision of the Additional Liquidity Arrangements. It seems to me this is appropriate since the matters covered by the Scheme are part and parcel of an overall package of measures to improve the liquidity and cash flow of the Company. Releases are not being given in relation to the management and affairs of the Company generally."

159. The principal objection which the Class B AHG raised at the trial was that the June Release Condition infringes the Chapter I prohibition contained in section 2(1) of the CA 1998. They also objected to the form of the releases in clause 16.1 of the Plan. They set out those objections in the following paragraphs of the Class B Grounds of Objection:

"9. There is a 'blot' on the Plan because the June Release Condition infringes the Chapter I prohibition contained in section 2(1) of the Competition Act 1998.

10. In particular:

10.1.1 The June Release Condition is or results from an agreement between "undertakings", namely the Class A Creditors who have agreed to impose and/or include it in the Plan; further or alternatively, the June Release Condition is or results from an agreement between the Plan Company and the Class A Creditors.

10.1.2 The June Release Condition has the object and/or effect of restricting or distorting competition between rival sources of funding for the purposes of the Recapitalisation Transaction. In particular, by imposing and/or including the June Release Condition in the Plan, the Class A creditors have agreed to reserve to themselves in substance a right to control, or at least a significant degree of control, over the Recapitalisation Transaction, which right or control they otherwise would not have in the absence of the Condition. This is illegitimate, being detrimental to the competitive process for the provision of funding through the Recapitalisation Transaction and, thereby, to the outcome of the Group's future restructuring.

10.1.3 The June Release Condition affects or may affect trade within the UK.

11. The Plan is unfair because the wide releases provided for in Clause 16.1 of the Plan (and to subsequently be given effect in an agreed form deed of release) are not necessary for the implementation of the Interim Platform Transaction through the Plan and/or constitute a blot. The Plan is an interim measure to bridge the Group so that it can implement a holistic restructuring transaction. There is no certainty as to either the nature or implementation of RP 2 and whether the Plan Company RA can be avoided even if the Plan were to be sanctioned. Accordingly, it would be an inappropriate exercise of discretion to sanction the Plan including the wide releases proposed at this interim stage, which may, for example, release:

11.1 claims for breach of directors' duties which officeholders appointed in respect of the Plan Company, TWUHL and/or TWUF may look to bring, and which would be valuable to the estates; and/or

11.2 any claims for breach of contract and/or professional negligence which the Plan Company and/or its creditors may have against any advisers involved in the negotiation and preparation of the Plan (not otherwise excluded by Clause 16.2 of the Plan).

> The appropriateness of the proposed releases should be considered on their merits within the context of RP2 in the event that such a plan is proposed."

(4) Public interest

160. Mr Maynard MP opposed the Plan on the basis that it was not in the public interest or the interests of customers of the Thames Water Group to sanction it. Mr Smith accepted that in principle the Court could take into account the interests of customers as part of its general discretion. In my judgment, this concession was rightly made and I consider the standing of Mr Maynard MP and a number of arguments advanced by Mr Al-Attar in addressing the public interest (below).

V. The Relevant Alternative

161. Mr Fraiser gave evidence in Fraiser 1 that if the Plan was not sanctioned and the Thames Water Group ran out of liquidity and then entered into a Standstill Period, the Group would be unable to pay its debts and the directors would write to OfWat and the Secretary of State requesting that they apply for a SAR:

> "6.7 For the reasons I explain below, a Standstill Period places significant restrictions on TWUL's capex spending, which would give rise to a number of significant additional legal and regulatory risks for TWUL and its directors. As a result of these additional risks, and given that the Thames Water Group would be unable to pay its debts, it is expected that prior to a Standstill Period commencing (or as soon as possible thereafter), TWUL's directors would write to Ofwat and the Secretary of State requesting that they apply for a special administration order on insolvency grounds in respect of TWUL; or otherwise that OfWat and/or the Secretary of State would decide to do so unilaterally.
>
> 6.8 Consequently, as the Plan Company's and TWUF's solvency prospects are entirely dependent on TWUL as the only operating entity in the Thames Water Group, it is expected that the Plan Company and TWUF would each enter their own insolvency processes (anticipated to be UK administration proceedings)."

162. Mr Fraiser also gave evidence in Fraiser 2 that the boards of the Plan Company and the other Group companies would require a high degree of certainty that the B Plan could be implemented in time to avoid a SAR:

> "7.9 If the Plan is not sanctioned by the Court, the boards of the Thames Water Group companies would in any event need to consider carefully if those companies would have a reasonable prospect of avoiding entry into insolvency processes. As matters stand, the boards concluded at the 21 January 2025 meeting that the only sensible basis to conclude that there is such a reasonable prospect would appear to be if a liquidity extension transaction could be implemented before an intervening SAR. In the immediate aftermath of the Plan failing and in light of the proximity by that stage at the end of the liquidity runway, before pursuing a further transaction, the boards of the Thames Water Group companies would likely need a very high degree of certainty that such a transaction could be implemented in time to avoid SAR. The mere possibility, or even a good chance, that such a transaction could be implemented is unlikely to be sufficient comfort for the boards of the Thames Water Group companies. That is particularly so given the risk for individual directors of wrongful trading in those circumstances.
>
> 7.10 Broadly, the boards considered at the 21 January 2025 meeting that Mr Heis' report fails properly to consider the reality and scale of Thames Water's day-to-day operations and the uniquely challenging regulatory and legal environment within which its directors operate. As noted, it is the board's assessment that this would lead towards seeking the protection of insolvency proceedings (i.e. SAR) in the event the Plan fails. Mr Heis' report suggests that TWUL's directors should instead favour trading through a period of significant legal and regulatory risk, exhausting the company's remaining liquidity in pursuit of an alternative transaction that on any view carries a significant degree of execution risk."

163. Mr Fraiser was referring to Heis 1 in this passage. In his first report Mr Heis accepted that four conditions had to be satisfied before the B Plan could be implemented. However, he expressed the view that these conditions could all be satisfied within time to enable the B Plan to be implemented:

> "4.1.14 Four key conditions that would determine whether the Plan could be implemented include:
>
> 1. The ability to be completed and funds drawn down within the liquidity runway available (see section 4.2 below);

> 2. The consent of TWUHL (in light of the lock up and TSA) and that of the directors;
>
> 3. The B Plan must pass the "No worse off" test, i.e. Plan Creditors must be no worse off in the relevant alternative to the B Plan, should a cross-class cram down/up be required; and
>
> 4. The Class B Creditors have a genuine economic interest in the B Plan Relevant Alternative should a cross-class cram down/up be required.
>
> Tests 3 and 4 are demonstrated in the SAR outcomes at section 7.
>
> 4.1.15 In my opinion, these conditions can be satisfied. Condition 1 can be amended by the behaviours of certain creditors to extend the liquidity runway if necessary (see section 4.3 below).
>
> 4.1.16 In respect of condition 2, at the point when the A Plan is not sanctioned, I am of the view that it is likely that the Class A Creditors (and other acceding creditors) would be willing to consider an alternative solution which avoids insolvencies in the Group. I therefore consider that the TSA terms could be amended or terminated if required to implement the B Plan."

164. I must therefore decide whose evidence to accept. In order to do so, I test Mr Fraiser's evidence by reference to the four conditions which Mr Heis identified (above). They cover not only the timing question, namely, whether there would be sufficient time for the Class B AHG Group to obtain the Court's approval to the B Plan but also whether it is likely that the Court would sanction the B Plan. For this purpose, I make a number of assumptions in favour of the Class B AHG (which I set out below).

(1) Timing

165. The Class B AHG submitted that 24 March 2025, which is the end of the liquidity runway, was a red herring because it was only necessary to extend the Maturity Dates of the US PPNs. Mr Fraiser accepted in cross-examination that all that was required was a deferral of the notes and not an injection of cash. He also accepted that there was a grace period of five business days for the payment of interest which extended the payment date until 31 March 2025. Mr Cochran also accepted that if the B Plan was sanctioned and the maturity date of the US PPNs was extended, TWUL could defer the principal of £200.4 million and could pay

the interest of £15.1 million out of available cash without requiring the Super Senior Funding to do so.

166. The Class B AHG also submitted that there was no evidence that it would take 17 business days for the Super Senior Funding to become available to the Group or that suppliers would attempt to renegotiate or terminate contracts and that the decision to put TWUL into a SAR was for OfWat and the Secretary of State. Finally, they submitted that even if the Group entered into a Standstill Period it could continue to survive for a further 12 months.

167. I reject the Class B AHG's submissions on timing. I accept Mr Fraiser's evidence and I find that if I refuse to sanction the Plan, the most likely outcome is that the directors will write to Ofwat and the Secretary of State requesting that they apply for a special administration order on insolvency. I also find that if such a request is made, the most likely alternative is that OfWat will make such an application with the consent of the Secretary of State and that TWUL will enter into a SAR on or before 24 March 2025. I have reached this conclusion for the following reasons:

(1) In my judgment, it is reasonable for the directors of the Plan Company and TWUL to believe that the risk of an Event of Default is a significant one if the Plan is not sanctioned. Mr Cochran's evidence was based on the current cashflow forecast and he accepted that there was a margin of £10 million available to TWUL if the B Plan was sanctioned and the payment of the US PPNs was deferred. However, it was also his evidence that it was only a forecast and that the swings in working capital were typically much higher. He also gave evidence that the Thames Water Group was run on the basis of headroom of £200 million per month and that the board of directors did not like to drop beneath it at any point in time. Mr Cowlishaw supported this evidence in re-examination:

> "In the same document, could we go to page 322. Mr Phillips asked you questions about whether your analysis took into account the sanction of a modified plan in March, which would have the effect of deferring the maturity dates on the notes due on 24 March. Do you remember that? A. Yes. Q. It was put to you that your analysis had not taken

> that into account; do you recall that? A. Yes. Q. Could you just look, please, at the third bullet point on the right-hand side, and just read that to yourself. A. Yes. Q. Does that help you with whether or not your analysis has taken into account the possibility of a deferral of those notes? A. It has been taken into account in that liquidity headroom would be well below the 200. Q. When you say far below the liquidity headroom required to run a business of this scale, can you just explain what you mean by that? A. Yes, and it probably builds on Mr Cochran's comments around the working capital swings. I note in the cash flow that has been prepared that actually it falls below the 200 million headroom, to safely run this business, actually I think towards the end of February I think, and then runs at a very low amount from there on, under the 200 million."

(2) In my judgment, it is also reasonable for the directors of both companies to take the view that there is a reasonable prospect that TWUL will become insolvent if the Plan is not sanctioned, that the interests of creditors (including suppliers) are now paramount and that it is their duty under section 172 of the CA 2006 not to take that risk but to take steps to put TWUL into a SAR. Mr Fraiser put this in a lay person's terms when he described TWUL as "effectively running on vapour for quite a number of weeks" and that it was "a very dangerous place to take the company to".

(3) In my judgment, it is also reasonable for those directors to take the view that there is a risk that suppliers will accelerate payment terms, demand the payment of arrears immediately and even in extreme cases withdraw their services. This was the evidence in chief of both Mr Cochran and Mr Cowlishaw and Mr Cowlishaw confirmed his evidence in re-examination. Mr Fraiser also gave evidence that suppliers had reacted badly to the departure of a previous CEO. I accept the evidence of all three witnesses. Administration is a value destructive event for a company which has a statutory monopoly and it is reasonable for directors and insolvency professionals to assume that suppliers will take action to reduce their exposure to a company threatened with administration by any or all of these means or to seek to exploit an administration to renegotiate terms.

(4) The real issue in the present case was whether suppliers would take similar action between the handing down of this judgment and the end of the

liquidity runway whilst the Class B AHG attempt to obtain sanction for the B Plan and in their written Closing Submissions the Class B AHG relied heavily on the fact that both Mr Cochran and Mr Cowlishaw accepted in cross-examination that their evidence was based on the assumption that the Plan had failed which did not necessarily apply if an alternative plan was in the process of being sanctioned before the liquidity runway expired.[1]

(5) I do not accept that submission and I attribute little weight to the evidence on this point. My difficulty with this submission that it assumes that the directors can be reasonably certain that if the Plan is not sanctioned, then the B Plan will be sanctioned. For reasons which I explore below, I am not satisfied that the directors can reasonably form this view. Moreover, even assuming that the sanction hearing of the B Plan takes place on 4 March 2025 and that I am able to deliver judgment either that day or within a couple of days (and I do so in the Class B AHG's favour), this leaves less than three weeks to implement the B Plan. If TWUL is unable to do so in time, the Group will go into a Standstill.

(6) In their written Closing Submissions the Class B AHG also challenged Mr Fraiser's evidence that it would take 17 business days to implement the Plan because he accepted that this was based on the advice of Linklaters or the Plan Company's other advisers. To meet this point, the Plan Company produced a timetable or timeline which they appended to their written Closing Submissions which showed the different documents which had to be served and the different consents which had to be obtained before the Super Senior Funding can be released. I note, in particular, that over 770 entities have to issue over 750 individual bonds through the clearing system. Now that I have much greater familiarity with the Plan documents and I have examined the timeline carefully, I am satisfied that it is

[1] Mr Day also cross-examined Mr Cowlishaw about the effect of a SAR on suppliers. I do not consider that evidence is relevant to this particular point and I return to it below.

reasonable for the directors to take the view that they will need 17 business days to implement either the Plan or the B Plan.

(7) Further, Mr Heis accepted in cross-examination that his evidence was based on a timetable which assumed that the B Plan would not be sanctioned until 4 April 2025 and, therefore, after the liquidity runway had expired. He also accepted that his own timetable did not include any time for an appeal:

> "If we just go to your subsequent report at S/42/3339. If we look at 1.4.7, towards the bottom of the page, you have quite helpfully set out three scenarios here on your timeline. Do you see that? A. Yes. Q. The 17-business-day scenario results in implementation on 4 April 2025, doesn't it? A. Yes. Q. That is after the group's liquidity would have expired? A. Shortly after, yes, including the grace period, but yes, after. Q. You have also not allowed any time for contingencies or for the possibility of an appeal, have you? A. No, I haven't in this report. Could I say that regarding the appeal, Mr Smith, I do apologise for that, because my instructions asked me to consider an appeal if relevant and as you are highlighting, I think it probably is relevant. So I concede, if I had looked at it more carefully, I would have put the reference to appeal. Q. Yes, indeed. An appeal is a real prospect, isn't it? A. Yes. But I think the point I make about if a plan is sanctioned, that would obviously give a -- it makes it a lot easier to deal with your creditors, because you would say, look, we are on our way out of this. If there were an appeal, again, I cannot see whose interest it would be in for the company to lurch into special administration simply while people are waiting for an appeal. One assumes that would seem like a very bad outcome. Q. You are just making assumptions though, as you say, aren't you? A. Inevitably in this kind of report, I have to consider what might happen in future. Q. If there was an appeal, that is clearly going to blow completely your timeline, isn't it? A. The time for an appeal, if it is assumed to be 30 days, that would make things a lot more difficult and you would have to consider some of the other issues like standstill. I am assuming for these purposes, and please forgive me if this is wrong, that the effect of the sanction that had been granted would no longer be effective during the period prior to the appeal? Q. I think it is suggested that a sanction order ought to be stayed pending appeal."

(8) Finally, I am satisfied that OfWat will make the necessary application to Court for a SAR if the directors resolve to request the regulator to do so. In her letter Ms Block stated that if the board of directors of the Plan Company consider that there is no other viable plan, OfWat is likely to accept the board's conclusions and to make a special administration application under s.24 WIA: see paragraph 18.

(2) Consent

168. It was common ground that in the absence of a cram-down, the Class B AHG would require the consent of the Class A Creditors who are parties to the TSA. In their written Closing Submissions the Class B AHG submitted that if I refused to sanction the Plan, the Class A Creditors would quickly change their minds and support the B Plan in order to avoid a SAR. They relied on the fact that all of the witnesses were concerned to avoid a SAR if at all possible, that the terms of the B Plan were better for the Plan Company and that the only reason why the Plan Company has been forced to promote the Plan rather than the B Plan is that its hands are tied by the TSA. Finally the Class B AHG relied on the fact that both the Company and the Class A AHG accepted that they would be flexible about the terms of any restructuring plan if the Court expressed objections to any particular terms. Mr Thornton also put this point very persuasively in his short oral submissions.

169. Despite the Class B AHG’s argument and Mr Thornton’s persuasive submissions, I am not satisfied that the Class A Creditors would support the B Plan or release the Plan Company from the TSA if the Court refused to sanction the Plan. Again, I have reached this conclusion for the following reasons:

(1) Mr Burlison gave evidence on behalf of the Class A AHG. I found him to be a straightforward and credible witness. I deal with his evidence later in this judgment in some detail. But in relation to this point, his evidence was clear. The Class A AHG Group would support the Reinstated Plan rather than the B Plan:

“Q. Would you mind terribly just casting your eye and just

> 13 reminding yourself of what you said in 52.4. (Pause) A. 52.4? Q. Yes, please. A. Yes. (Pause) Yes. Q. Thank you. You will see that what you say is: "... if the Plan were not sanctioned, I expect the Class A AHG would consider whether other steps may also be available to ensure that a position does not arise whereby the only proposed restructuring plan that is put to creditors is the B plan." That is your starting position? A. Yes. Q. Thank you. What you say is that this may include, yes -- we can all see you say: "This may include: "The issuance or reissuance of a further plan." Then you say: "On the same terms as the plan, adjusted if necessary." Do you see that? A. Yes. Q. Then if we can move to your second witness statement, please, go to paragraph 25, it is on 2978 of the same bundle. Tell me when you have that. A. Yes. Q. You pick up something that Mr Heis had said. You say that Mr Heis says he cannot form a view on the Class A AHG plan because he doesn't know its terms. You then say: "However, the terms of the Class A AHG Plan will be materially the same terms as the Plan." See that? A. Yes. Q. Then you say: "If the court does identify any defects with the Plan [you make a forensic point there] then the Class A AHG plan would be modified accordingly to address those defects (only)." See that? A. Yes."

(2) I accept that evidence. The difficulty with the argument advanced by the Class B AHG is that it assumes that the Class A Creditors would be faced with a binary choice between the B Plan and a SAR and commercial reality would force the Class A Creditors to release the Plan Company from the TSA and get in behind the B Plan. But this ignores the reality of the situation. As Mr Burlison made clear in his evidence the Class A AHG would take steps to avoid this situation and, indeed, it has already done so by promoting the Reinstated Plan.

(3) Moreover, as Mr Al-Attar and Mr Lupi pointed out in their written Closing Submissions, Mr Phillips did not challenge that evidence. He explored with Mr Burlison what changes the Class A AHG might be prepared to make in order to give effect to the Plan or the Reinstated Plan, but he did not put it to Mr Burlison that faced with a choice between the B Plan and the Reinstated Plan or even a choice between the B Plan and a SAR, the Class A AHG would support the B Plan.

(4) Moreover, I am very far from satisfied that the Class B AHG have made a binding commitment to provide Super Senior Funding of £3 billion to the Plan Company or that either the Class A AHG or, more importantly, the directors of the Plan Company should be forced to rely on the assurances of Mr Thomas-Watson that they have done so. In their letter dated 7 November 2024 QE stated that the Class B Backstop Agreement gave rise to a "binding and fully underwritten offer" and in Thomas-Watson 1, Mr Thomas-Watson stated in terms that the Class B AHG had obtained binding commitments of £3 billion to underwrite the B Plan. However, in cross-examination he had to accept that it was not binding because none of the conditions in clause 3(a) had been fulfilled:

> "Q. Let's go back to the clause -- A. -- but to the point you asked me previously, can I tell from clause -- can I tell you whether 3(a) means that the agreement is binding or not, I am afraid I am not lawyer and I can't answer it. Q. You don't need to be a lawyer, you need to speak English. You went to Oxford University, can we just read clause 3(a) together, please? A. Sure. Q. Can you read it aloud? A. "This agreement will become effective and legally binding on I, an original backstop party, upon the date on which all of the following have occurred (A) countersignature to this agreement ..." Q. Stop there, have any of the parties countersigned this agreement? A. I don't believe so, no. Q. Just doing some simple linguistic deduction, is this agreement legally binding? A. On the premise that it has not been countersigned by the entities there, then I would say no, but my understanding of the backstop agreement was indeed that it was meant to be, for a layman like me, a binding agreement in the sense that all of the institutions who went away to the investment committee to get the commitments underwritten and approved did so on the basis that they were locked into providing funding on the terms contemplated. Q. Can you go to condition (C) please and can you read that? A. C: "Termination of the backstop agreement entered into on or around 25 October 2024 by TWUHL, TWUL, TWUF and the lock-up agent pursuant to which the group is released from any liability or obligation thereunder, (including in respect of any fees set out therein); and ..." Q. That requires two things, doesn't it, it requires termination of the backstop for the company plan and it also requires a waiver of fees under that backstop agreement, doesn't it? A. It requires termination of the backstop agreement and release of any liability. Q. Including in respect of any fees set out? A. Yes. Q. Has the backstop to

> the agreement to the company plan been terminated? A. No. It has not. Q. Has the fee been waived? A. No, it hasn't. Q. That fee is 52.5 million, isn't it? A. Yes, I believe so. Q. There was no reason to think parties providing a commercial backstop service would waive that fee; is there? 4 A. I don't expect they would, no. Q. Can I ask you one quick question: can I have my pen back, please?"

(5) I was less than impressed with Mr Thomas-Watson as a witness. He appeared to have no real appreciation of the gravity of the situation and he was prepared to give evidence that the Class B AHG had given binding commitments to underwrite Super Senior Funding of £3 billion when this was plainly not the case. I might have taken a less critical view of his evidence if the three conditions about which he was cross-examined had been concerned with mechanics rather than substance. But the B Class Backstop Agreement only becomes binding if and when the Class A Creditors release the Plan Company from the TSA, terminate the Class A Backstop Agreement and waive a fee of £52.5 million (which Mr Thomas-Watson accepted that they were unlikely to do).

(6) In substance, therefore, the Class B Backstop Agreement (in its current form) only becomes binding in the unlikely event that the Class A AHG abandon the Plan and the Reinstated Plan, release the Plan Company from the TSA, terminate the Class A Backstop Agreement and waive their backstop fees. Moreover, throughout the hearing the Class B AHG were highly sensitive about maintaining their anonymity. In those circumstances, I was far from satisfied that the B Plan was any more than an exercise by junior creditors to negotiate a larger participation in the Super Senior Funding for themselves. After all, this was Mr Thomas-Watson's real complaint about the Plan (as I set out below).

(7) By letter dated 7 February 2025 QE wrote to the Court after closing submissions had been completed on all issues apart from the competition law point. They stated that the Class B AHG had agreed to amend the Class B Backstop Agreement to remove Condition (C) in clause 3(a) and to provide a list of the parties to the agreement on a confidential basis. By

letters dated 10 February 2025 both Linklaters and Akin Gump wrote to the Court objecting strongly to that letter.

(8) I attach no weight to QE's letter dated 7 February 2025. It did not provide me with very much comfort for the reasons which Linklaters gave in their letter and, at the very least, it should have been available much earlier to enable Mr Al-Attar to test its contents in cross-examination. Moreover, it is illegitimate for a party to send further written submissions or evidence to the Court without invitation: see *Re Stanford International Ltd* [2010] EWCA Civ 137, [2011] Ch 33 at [197] (Hughes LJ). Put simply, I would not refuse to sanction the Plan and deprive the Plan Company of £1.5 billion of new funding on the basis of Mr Thomas-Watson's evidence and QE's letter.

(3) The no worse off test

170. I assume in favour of the Class B AHG that they will overcome the Class A AHG's objections on class composition and obtain the consent of the Plan Company by the time of the convening hearing on 19 February 2025. I also assume in its favour that S.901F(1) will be satisfied and that 75% of Class B Creditors will vote in favour of the Plan. Finally, I assume that OfWat would give the necessary consents in order to enable the Class B AHG to present the B Plan to the Plan Creditors and the Court: see paragraph 14 of Ms Block's letter dated 28 January 2025.

171. However, even making all of these assumptions in favour of the Class B AHG, I am not satisfied that it will be able to persuade the Court that the Class A Creditors will be no worse off under the B Plan than they would be in the relevant alternative or that it is likely that the Court will sanction the B Plan. Again, I have reached this conclusion for the following reasons:

(1) Mr Smith submitted that the B Plan involves a "cram up" rather than a "cram down" and that this has never been done. By this, I understood him to mean that the Court would be required to sanction a plan authorising a single class of junior creditors to advance new money which is "primed" to take priority over all of the senior classes of debt.

(2) I accept that this would be a highly unusual situation given that the Class B Creditors hold £1 billion of junior debt and the Class A Creditors hold £16 billion of senior debt. I also accept that it is unlikely that the Court will sanction the B Plan if all five classes of Class A Creditors vote against it. The B Plan is only likely to succeed, therefore, if they can be persuaded to give their support. Finally, I accept that it is unlikely that they will support it if the Reinstated Plan is a viable alternative.

(3) It is unclear at this stage whether the relevant alternative will be a SAR or the Reinstated Plan. The Class B AHG adduced no evidence to establish which of these alternatives is more likely by the sanction hearing for the B Plan or to demonstrate that the no worse off test would be satisfied in either case. Mr Abraham submitted in his oral closing submissions that issues relating to the B Plan were for the convening hearing or the sanction hearing in those proceedings and that I should not investigate them at this hearing.

(4) I do not accept this submission. If the Class B AHG were to persuade the Court that the B Plan was the most likely alternative, they had to demonstrate that the Court was more likely to sanction it than entry into a SAR. Indeed, Mr Heis accepted that the Court had to be satisfied about the no worse off test before it could find that the B Plan was the relevant alternative.

(5) Moreover, the calculations which Mr Heis himself had carried out for this purpose show that the no worse off test would not be satisfied for the Class A Creditors in a SAR. Mr Al-Attar was able to demonstrate in his oral closing submissions that no “make whole” payments would be made to the Class A Creditors under the B Plan but £740 million “make whole” payments would be made to them in a SAR: see Heis 1, Figures 19 and 20. Moreover, a comparison between those two tables also shows that £490 million additional interest, fees and commission would be payable to the Class A Creditors in a SAR. This was evidence which the Class B AHG relied on themselves.

(6) Finally, I turn to the Reinstated Plan. The Class B AHG attempted to persuade me that the Reinstated Plan was something of a moving target and would be substantially modified before it was presented to the Court. Mr Al-Attar submitted that this was incorrect and that the terms of the Reinstated Plan are the same as the terms of the Plan and its function is to provide an alternative to the B Plan if I do not sanction the Plan itself and there is genuinely time to present a new restructuring plan. Mr Burlison gave evidence to that effect and I accept his evidence.

(7) I find, therefore, that it is even less likely that the no worse off test will be satisfied for the Class A Creditors if the relevant alternative to the B Plan is the Reinstated Plan. The terms of the Plan and, therefore, the Reinstated Plan are significantly better for the Class A Creditors and even if they take up their participations in the Super Senior Funding under the B Plan they will be worse off than if they do so under the Plan: see the table at [129] (above).

(4) Will the Class B Creditors be in the money?

172. Finally, the Class B AHG have not persuaded me that it is likely that they will be able to satisfy Condition B in S.901G(5) in relation to the B Plan and prove that they would receive a payment, or have a genuine economic interest in the company under a SAR. These conclusions turn on my findings in relation to the valuation evidence which I set out in the next section of this judgment.

(5) Conclusions

173. For these reasons I find that the relevant and most likely alternative to the Plan is a SAR. I find that if the Plan is not sanctioned, the most likely outcome is that the directors of TWUL will write to OfWat and the Secretary of State requesting that they apply for a special administration order on insolvency and that such an application will be made and granted. In my judgment, it is reasonable for the directors of the Plan Company to take the view that there is insufficient time to present the B Plan, that the Class A Creditors are unlikely to consent to it and that there are significant doubts about the commitments under the Class B Backstop Agreement. In my judgment, it is also reasonable for them to take the

view that the Court is unlikely to sanction the B Plan or, at the very least, to decide that the question whether it will do so is risky and uncertain.

174. Finally, I add by way of footnote that there is nothing to prevent the Class B AHG from addressing these conclusions in evidence for the sanction hearing of the B Plan if they wish to do so. As Mr Al-Attar and Mr Lupi submitted in their Closing Submissions, I had to decide what the most likely outcome was based on the admissible evidence at the conclusion of this hearing. It is possible that the position may change even by the convening hearing of the B Plan.

VI. The No Worse Off Test

K. The Valuation Issues

175. Both Mr Weerasinghe and Dr Grunwald have estimated the Enterprise Value ("**EV**") of TWUL using the discounted cashflow method ("**DCF**") at (i) the date of valuation, (ii) 30 September 2025 and (iii) 31 July 2026. The second date is the estimated date on which RP2 would be implemented following the equity raise and the third date is the estimated date on which TWUL would exit a SAR on the assumption that it enters a SAR in February 2025. Both experts have also produced a low, mid and high valuation. Their valuations were as follows:

Mr Weerasinghe			
Date	**Valuation**	**30 Sept 2025**	**31 July 2026**
Low			
Discount rate	7.44%	7.44%	7.44%
EV(£bn)	13.674	15.633	17.665
% of RCV	66.9%	70.3%	73.6%
Mid			
Discount rate	7.10%	7.10%	7.10%
EV (£bn)	14.729	16.707	18.756
% of RCV	72.1%	75.1%	78.1%

High			
Discount rate	6.76%	6.76%	6.76%
EV (£bn)	15.844	17.838	19.902
% of RCV	77.5%	80.2%	82.9%
Dr Grunwald			
Low			
Discount rate	6.52%	6.52%	6.52%
EV	20.806	22.796	25.460
% of RCV	102%	107%	111%
Mid			
Discount rate	6.52%	6.52%	6.52%
EV	21.496	23.256	25.519
% of RCV	106%	109%	111%
High			
Discount rate	6.52%	6.52%	6.52%
EV (£bn)	22.712	24.324	26.294
% of RCV	112%	114%	114%

176. Mr Weerasinghe updated his valuations in Weerasinghe 2 to incorporate the current version of the Crabtree Model and to meet certain criticisms made by Dr Grunwald in Grunwald 1. In the course of cross-examination Mr Weerasinghe suggested that Dr Grunwald's analysis involved a mistake or defect in the model which she had received very late on 26 January 2025. I reject that criticism and Dr Grunwald fully explained what she had done in cross-examination.

177. There were three principal differences between the experts (although the Class B AHG made a number of other criticisms of Mr Weerasinghe's evidence which I will have to address). First, Mr Weerasinghe used a Totex allowance of £24.9 billion derived from the DDR for all of his valuations. Dr Grunwald used that

figure for each of her low cases but for her mid cases she used the figure put forward by the Group in its business plan for April 2024. Finally, for her high cases she used the Totex allowance permitted by OfWat in the FD. Secondly, in calculating the weighted average cost of capital ("**WACC**") Mr Weerasinghe based his valuations on a variable discount rate which he derived by reference to market yields. By contrast, Dr Grunwald adopted the same rate as OfWat had used in producing its RCV. Thirdly, Mr Weerasinghe used a multiple of 1 to calculate the EV/RCV exit multiple in 2040 whereas Dr Grunwald used a multiple of 1.2. I deal with each issue in turn.

(1) Totex

178. Mr Smith criticised Dr Grunwald for adopting the Group's Totex figures from the April business plan for her low cases because they were historical and now out of date. Mr Phillips defended Dr Grunwald's choice of Totex figures on the basis that she had adopted three different figures for her low, mid and high cases. He submitted that she cannot be criticised for using a number of different variables to reach a spread of valuations.

179. I accept that Dr Grunwald set out to produce a spread of valuations based on three different figures for Totex. But on reflection, it seemed to me that she had chosen the wrong variable. She adopted the same discount rate (6.52%) and RCV multiple (1.2) for each one of her valuations but a different Totex figure for each one. But in my judgment, the discount rate and multiple are the figures which are much more likely to vary based on market sentiment whereas the Totex figure ought to be more predictable following the conclusion of PR24 and the detailed evidence given by Mr Cochran.

180. Mr Weerasinghe adopted the Totex figure from the DDR on the basis that Mr Cochran had given evidence that it would be "incredibly challenging" to meet OfWat's allowance of £20.5 billion and could not bridge the gap between that figure and the DDR figure of £24.5 billion with efficiency changes only. Mr Cochran accepted that TWUL was still conducting a detailed analysis of the FD and had not decided whether to launch a CMA Appeal. But he was not cross-

examined in detail about the DD or the DDR and his evidence was that TWUL had six months to respond to the DD and that this was sufficient time.

181. In my judgment, the DDR provided the most reliable figure for Totex. The Class B AHG did not submit that TWUL had any prospect of meeting the FD Totex figure nor, indeed, did they challenge the DDR figure directly. Dr Grunwald gave evidence that TWUL was likely to have inflated it in order to bid OfWat up in reaching its final figure and I accept that there is some sense in this. But in the absence of a very detailed breakdown of the FD and DDR figures, I accept Mr Cochran's evidence and I find that the DDR figure provides the most reliable guide to the Group's actual Totex.

182. More to the point, in my judgment, this is the approach which an equity investor would take. Such an investor would have appreciated that there was a very significant risk that the Group would be unable to meet the FD figure and would be likely both to overspend and incur penalties and would have built in to their bid a significant increase in Totex. I find, therefore, that an investor would have adopted the DDR as an estimate of Totex for each of the valuation dates.

(2) WACC

183. Mr Weerasinghe also adopted the position of a market investor in adopting variable discount rates. Dr Grunwald accepted in Grunwald 1 that Mr Weerasinghe's evidence was standard for a normal business and consistent with market expectations but rejected his approach for the following reasons (and I exclude footnotes from the following quotation):

> "3.55 The other significant difference is that Mr Weerasinghe uses a nominal risk-free rate to calculate the cost of equity (in Figure 3.11 above), based on the current (as of October 2024) yields on 20-year nominal UK gilts. Ofwat, in comparison, uses the yield on similarly long-dated gilts, but uses index-linked gilts so that the yield is a real yield (it does not include inflation). The original rationale for using real gilts in the regulatory framework was that it was consistent with the other elements of the system. The value of the gilt increases with inflation but the interest (yield) applied to it is real.95 This is the same concept as the RCV in the regulatory framework: it is increased every year with inflation and the return applied to it is set out in real terms.

> 3.56 The CMA has endorsed this approach as superior for the assessment of the cost of capital for a business whose revenues are also index-linked – as described above.
>
> 3.57 Mr Weerasinghe's approach is standard for a normal business, but unsuited to a regulated entity such as Thames Water. The differences between yields on nominal and index-linked gilts will primarily reflect market expectations of inflation, which for CPIH is currently around 3.3%. This is higher than the CPIH assumptions built into Mr Weerasinghe's valuation model (the Crabtree Model), and used to inflate both revenues and the RCV, which is close to 2%.
>
> 3.58 If market expectations for CPIH inflation are greater than 2% (as they are), but the CPIH inflation rate used in the nominal cash flow model is only 2%, then the use of a nominal discount rate applied to the essentially illustrative nominal cash flows, including the terminal value, will necessarily understate value. This is because those cash flows will be increased with actual inflation figures. Therefore, Mr Weerasinghe's adoption of a nominal yield which incorporates higher inflation expectations than his modelled revenues and RCV leads to inconsistent assumptions.
>
> 3.59 In this case, the effect is that Mr Weerasinghe's cost of equity is larger than it should be by more than 1% point (more than 100 bps) because of the mismatch between current market expectations and those built into the nominally-denominated model that Mr Weerasinghe uses. The effect is to reduce his valuation by an amount of the order of £1.7 billion."

184. Again, I prefer the evidence of Mr Weerasinghe on this issue. I accept Dr Grunwald's evidence that market expectations are different from, and even inconsistent with, the assumptions used by OfWat to calculate the RCV. But this does not mean that it is wrong to adopt market expectations. All it means is that the market would place a different EV on TWUL than OfWat's RCV. But it is clear from Mr Weerasinghe's evidence that the market has often done so. He produced a table of comparable transactions and gave evidence about the trading of TWUL's debt both of which demonstrate that the market places a very different value on both water and sewerage companies more generally and on TWUL in particular.

185. It is also important to bear in mind the purpose for which Mr Weerasinghe and Dr Grunwald gave valuation evidence. It is to establish whether the Class B Creditors would be worse off under the Plan than they would be in a SAR. This

involves the Court having to assess whether they would obtain more or less for the Class B Debt if they went into the market and sold it either on the assumption that the Plan is sanctioned or on the assumption that TWUL has gone into a SAR. In my judgment, Mr Weerasinghe's evidence was directed at that purpose. It was far less obvious to me that Dr Grunwald had that purpose in mind. Mr Smith suggested to her that she had approached it as an academic exercise and there was some force in that criticism.

(3) The EV/RCV multiple

186. Both experts adopted the same methodology. They used the DCF method to calculate TWUL's cashflows for a period of 15 years and then discounted them to calculate their net present value. They then added the terminal value of TWUL in 2040 calculated by reference to a multiple of its RCV. Mr Weerasinghe used a multiple of 1 and Dr Grunwald used a multiple of 1.2. Both arrived at their multiples by analysis of comparable transactions.

187. This was an important element of the valuation and there was only very limited time for the experts to explain the comparable evidence or how they adjusted that evidence for weight. There was also a clear difference of view about the weight to be attached to some of the evidence, e.g. the trading performance of Severn Trent and United Utilities. Further, the Class B AHG made a series of criticisms of Mr Weerasinghe's evidence on this issue which were barely addressed in evidence and would have required further detailed investigation. To add complexity, I received letters from Mr Phillips dated 10 February 2025 and from Mr Smith dated 12 February 2025 in which Mr Phillips challenged Mr Smith's oral submissions in reply on this issue and Mr Smith defended them. Both made further submissions on this issue.

188. It was wholly unrealistic to expect the Court to sift the evidence and rule on these issues given the limited cross-examination of the witnesses and the week which the parties gave me to write a judgment. I therefore propose to cut through it. There was no issue that OfWat based its assessment of the RCV of water companies on the assumption that they performed in accordance with the ODIs

and other performance indicators set for them. Dr Grunwald explained how this exercise works in Grunwald 1 (again excluding footnotes):

> "**NPV neutral regulation**
>
> 2.18 Under Ofwat's regulatory framework, a company's future cash flows are NPV neutral if the present value of future cash flows and the increases in RCV equal the RCV. In other words, a water company that is NPV neutral will have an EV that is equal to its RCV. In Ofwat's view, NPV neutrality is key to ensuring that investors are fairly compensated for the time value of money.
>
> 2.19 When a company performs exactly as Ofwat expects, it earns a rate of return equal to the allowed rate of return set by Ofwat. This is because Ofwat's regulatory framework is designed so that all of the water companies' costs are recovered, and investors are fairly compensated for investing their capital. NPV neutrality fails, however, when a company deviates from Ofwat's expectations. This could happen, for example, if a company over or underperforms relative to its totex allowances, if a company has a different gearing ratio than the notional gearing set by Ofwat (55% in PR24), or if it otherwise over or underperforms in relation to the cost of the debt that it secures. Figure 2.4 shows a simple schematic of returns for a company that meets Ofwat's expectations. Over the asset management period, it earns cash flows based on its allowed revenues less the costs it is required to incur, composed of both the fast money and slow money portions of totex. These cash flows, along with the increase in the RCV by the end of the AMP, allow it to recover cash flows that, when discounted back at the cost of capital, are exactly equal to the RCV at the beginning of the AMP, making it NPV-neutral."
>
> "**Incentives and penalties**
>
> 2.21 In the stylised examples above, the RCV is always equal to the EV of the company. As noted in paragraphs 2.18-2.20, this is by design, provided that the company's actual expenditure and cost of debt matches the allowances set by Ofwat, and provided that Ofwat's assessment of shareholders' required rate of return matches the expectations of investors.
>
> 2.22 By implication, if the company's actual expenditure is expected to be lower, or higher, than the allowance set by Ofwat, the residual differences will cause a difference between the RCV and the EV. The same is true if Ofwat has underestimated, or over-estimated, the relevant costs of debt and equity for the company."
>
> **Factors contributing to differences between RCV and EV**

> Analysts value water companies by reference to a premium or discount to their RCV. The regulatory framework ensures that a regulated company which meets Ofwat's expectations (in terms of costs incurred and financing) should theoretically have an enterprise value equal to its RCV. This is referred to as NPV neutral regulation."

189. It was common ground that TWUL is not meeting OfWat's expectations both in terms of costs incurred and its financing. It was also common ground that TWUL no longer has Investment Grade Ratings in breach of the Licence. Mr Weerasinghe's multiple of 1 assumes, therefore, that by 2040 TWUL will have returned to Investment Grade Ratings, and will be meeting OfWat's expectations in terms of both costs allowance and financing. This seems to me to be a reasonable assumption to make given the equity raise and the recent pressure placed on the company by OfWat.

190. On the other hand, Dr Grunwald's multiple of 1.2 assumes that TWUL will not only have returned to NPV neutrality but will have significantly outperformed OfWat's expectations. I would not be prepared to accept that assumption without clear evidence that TWUL's current forecasts and projections are likely to achieve that outcome and that this is the market's perception. Moreover, Dr Grunwald's evidence was not based on any evidence of this nature but on historical transactions when water companies were routinely trading above their RCV and OfWat had a very different approach to their regulation. I accept Mr Weerasinghe's evidence that they are not a reliable guide to the value of TWUL either now or in 2040. I, therefore, prefer Mr Weerasinghe's evidence on this issue.

(4) Standing back

191. Given the technical nature of the exercise which both experts performed, it is also important to stand back and compare the expert valuations with any available market evidence. Mr Weerasinghe undertook this exercise and compared his valuations with the prices at which TWUL's debt was trading. His evidence in Weerasinghe 1 was that the value of TWUL's publicly traded debt was £14.1 billion to £14.5 billion. He updated that evidence in Weerasinghe 2:

"4.6.1 Dr Grunwald states that from My First Report, she notes that the only publicly traded Class B instrument is a £250 million bond, and the remaining £744 million are not publicly traded and that the conclusions that she can draw from their trading prices are, therefore, necessarily limited. I would like to point out that Dr Grunwald does not address the fact that the Class A debt, which is senior to Class B debt and has a greater number of observable data points, is also trading at a discount to its face value. Dr Grunwald also doesn't address why the Class A debt trading price may not be a relevant indicator for the overall assessment of TWUL's valuation. In my view, the observed trading prices for TWUL's Class A and Class B debt instruments reflects the discount that investors attribute to its creditworthiness.

4.6.2 Dr Grunwald appears to disregard key market data on two grounds. First, she notes that there is only one publicly traded Class B bond in issue and drawing conclusions from a single bond is therefore limited. While I acknowledge that TWUL's debt stack also includes non-traded Class B debt, however in the absence of private transactions or alternative observable data, the market pricing of the publicly traded bond remains the closest proxy for Class B's perceived market value. Moreover, the argument that having "only one" publicly traded instrument somehow renders the data irrelevant, strikes me as inconsistent with standard market valuation techniques, which rely on any reliable reference point when appraising unlisted or thinly traded securities.

4.6.3 Second, Dr Grunwald states that the steep discount at which Class B bonds trade "is not troubling" because of the uncertainty surrounding TWUL's restructuring and the relative subordination of the Class B debt. This reasoning overlooks the fact that Class A bonds and loans, of which there are over fifty instruments, are also trading at material discounts to their face value.

4.6.4 I emphasize that as of the Current Date, Class A bonds, with an outstanding amount of approximately £10.5 billion, are trading at a discount of around 21%. In contrast, Class A loans, with an outstanding amount of approximately £0.7 billion, are trading at a discount of around 26%. I understand that the total Class A debt instruments outstanding as of the Current Date are c. £15 billion and constitute approximately 85% of TWUL's debt portfolio (which includes swaps, Class A and Class B debt instruments), whereas total Class B debt instruments outstanding are approximately £1 billion and constitute about 5% of TWUL's debt portfolio.

4.6.5 As discussed in My First Report, market participants' willingness to purchase or sell a security at a discount (or premium) to face value captures both the company-specific

> underperformance concerns and market interest rate economics. I observed that the publicly traded debt instruments of the majority of the other WASCs in the UK were trading at or above par value as of the Current Date. This suggests that the market has already accounted for the risks related to the current financing environment and the FD outcome, yet the publicly traded debt instruments of WASCs (except TWUL) continue to hold or exceed their par value Therefore, in my view, the observed discount of TWUL's traded Class A and Class B bonds reflects the ongoing difficulties the Company is facing in operating the business according to the regulatory requirements set by Ofwat."

192. When Mr Smith put this evidence to Dr Grunwald she had no real answer. She first tried to suggest that this figure took into account the amounts required to cover the swaps (an answer which I did not understand). She then accepted that his figures were correct. But she would not accept that this was a valuable cross-check because the market operated on a completely different basis:

> "Q. Good, I am glad we are on the same page. That I then suggest does compare to Mr Weerasinghe's enterprise value of 14.729 billion, so he has priced the debt stack, it comes out at around 14 billion, that is close as a cross-check to his enterprise value of around 14 billion. Do you agree? A. The numbers agree, but, you know, the basis of which we are looking at the valuation is on the cash flow generation potential of the company. When we look at the enterprise value of this company, we are looking at the cash flow generation potential. What the market is looking at, let's look at for example the B bondholders, right, they are not pricing the debt according to the cash flow generation potential of the company, there are risks arising from this particular process, there are risks arising from potentially going into a SAR, there are risks arising from having 3 billion of super senior debt put above their head. So it is not the same basis on which we are assessing the value. The enterprise value is purely looking at what we were asked to assess, is purely looking at the cash flow generation potential and what an investor would pay for this company, looking at the debt -- Q. But this is -- A. -- the market value is on a completely different basis. This is uncomparable. Q. I am not suggesting it is not on a different basis, but what he has done is a cross-check, isn't it, so what he has produced is his DCF valuation. That comes out of an enterprise value and then as a cross-check he has looked at the figure you would get derived from the market price at which the debt is trading. Q. It is a cross-check, isn't it? A. It is on a completely different basis. Q. That's the value of a cross-

> check, isn't it, in many ways, it is done on a different basis? A. I think if you are looking at where the B bonds are priced now, that includes a lot more risks than what we are baking into the enterprise valuation. So it is not a comparable basis and therefore it is not a valid cross-check."

193. I reject this evidence. As Mr Smith submitted, it completely misses the point. The fact that market analysts and traders have arrived at a similar EV of TWUL for the purpose of pricing the debt on a completely different basis is a valuable cross-check and tends to suggest that Mr Weerasinghe's evidence of value is more likely to be accurate than the much higher valuations of Dr Grunwald. I place significant weight, therefore, on this evidence.

(5) Conclusions

194. I accept Mr Weerasinghe's evidence in relation to the EV of the TWUL and I reject Dr Grunwald's evidence. Given the cross-check with the current trading prices of TWUL's debt, I adopt his mid-range valuations and I find on a balance of probabilities that the current EV of the Thames Water Group is £14.729 billion and that its EV on 30 September 2025 and 31 July 2026 are more likely than not to be £16.707 billion and £18.756 billion respectively.

195. Mr Cowlishaw updated his conclusions to address the FD and gave evidence in Cowlishaw 3 that the Class B Creditors would recover £0.4 billion under the Plan but would be out of the money in a SAR. He explained his conclusions as follows:

> "**Creditor class impact**
>
> • There is no distribution to the Liquidity Facilities as these are either cancelled or undrawn.
>
> • The Super-Senior funding and HMG funding are forecast to achieve a full recovery in Scenario 1 and Scenario 2, respectively.
>
> • The Interest Rate and Index Hedges are forecast to achieve a full recovery in both scenarios.
>
> • Given the Currency Hedges' elevation in the waterfall under the Plan, they are forecast a full recovery in Scenario 1.
>
> • However, in Scenario 2, they are projected to only achieve a partial recovery as they would rank alongside Class A.

> • The value break falls in the Class A principal claims, meaning a partial recovery for the Class A Debt Make-Whole and Class A Debt Non-Make-Whole in both scenarios.
>
> • The only recovery to Class B occurs in Scenario 1 and is solely attributable to the cash interest received as part of the Plan which would not be paid in a SAR.
>
> • No value from any source is forecast for the TWL subordinated debt."

196. There was no challenge to this evidence if I found that Mr Weerasinghe's valuations were correct and I accept it. I find, therefore that Condition A in S.901G(3) is satisfied and that both the Class B Creditors and the Subordinated Creditor would be no worse off than they would be in the event of the relevant alternative, namely, a SAR. However, if I am wrong and Dr Grunwald's valuation evidence is to be preferred, I go on to consider the effect of the June Release Condition and the other terms to which the Class B AHG and TWL objected.

L. The Class A Control Terms

(1) The Class B AHG's case

197. The Class B AHG advanced a case that the Class A Control Terms enabled the Class A Creditors to "divert value" away from the Class B Creditors which they would otherwise have received in any of the relevant alternatives. In their written Opening Submissions the Class B AHG submitted that the JRC effectively gives the Class A Creditors a right to veto any future restructuring of the Group. Again, it is important for me to set out the way in which it advanced its case (original emphasis):

> "…this effectively gives holders of the Class A Debt early veto rights in respect of any future restructuring of the Group that **will** be undertaken (*i.e.,* RP2). Pursuant to the June Release Condition, no Super Senior Funding can be released after 30 June 2025 unless holders of at least (i) 66 + 2/3% of the Plan Super Senior Funding; and (ii) 66 + 2/3% of the aggregate Class A Debt, have entered into a lock-up agreement to recapitalise the Group by way of either an equity raise or a creditor-led solution (each to be implemented via a restructuring plan, *i.e.,* RP 2)."

198. When Mr Al-Attar cross-examined him, Mr Thomas-Watson accepted that the case advanced by counsel was that the June Release Condition amounted to "bid-rigging" and that by exercising their rights the Class A Creditors would be acting unreasonably and in bad faith. Mr Phillips and his team put their case in similar terms in their written Closing Submissions:

> "18. A key issue in relation to Objection 1 is whether the Class A Control Terms, and, in particular, the June Release Condition divert value away from the Class B Creditors such that they would be worse-off under the Plan than in the relevant alternative (whatever it is).
>
> 19. The evidence at trial was clear. The Class A Control Terms and, in particular, the June Release Condition, give the Class A Creditors control which they would not otherwise have in the relevant alternative (whatever it is), over the nature and outcome of the future Recapitalisation Transaction yet to be defined but implemented through RP2. That control is likely to be exercised to divert value away from the Class B Creditors. Notably, none of the witnesses giving evidence for the Company or the Class A AHG appeared to be aware that the Class B Creditors were not included in any of the contractual rights of information provision which give the Class A Creditors further advantages over any other bidders. This is concerning given the Company's history of negotiating with the Class A Creditors thus far in the recapitalisation process."
>
> "21. In other words, the June Release Condition will – particularly when married with the lack of information rights afforded to Class B Creditors—be the mechanism to replicate the predicament that the Group found itself in October 2024 (described above) that meant it could not agree to the Class B Proposal that it accepts is economically better for the Group, because the Class A Creditors will have control over the Group's access to the crucial liquidity that it needs to restructure. This is an entirely avoidable predicament.
>
> 22. This is how the June Release Condition gives the Class A Creditors control which they would not otherwise have in the relevant alternative. It is also why, despite its professed interim nature, this first Plan matters and things cannot be left to be addressed in RP2. By that time, it will be too late. The Court and the Company's other creditors would be presented with a fait accompli just as they have been with the Plan, the likely effect of which will be to divert value from the Class B Creditors."

199. It was unclear to me whether the Class B AHG advanced this case as a matter of the construction or interpretation of the Plan documents and, in particular, the June Release Condition or whether they relied on the June Release Condition and the other Class A Control Terms as evidence that this was what the Class A Creditors had (and have) in mind and intend to use these terms as a pretext for "diverting value" away from the Class B Creditors to themselves. I, therefore, address both arguments although my assessment of the evidence is inevitably influenced by my interpretation of the relevant contractual terms.

(1) The factual matrix

(i) The Class A Creditors' existing rights

200. It is important to construe the June Release Condition against the existing rights and obligations of the parties under the Finance Documents. The Class B AHG did not dispute Mr Al-Attar's submission that in the absence of the June Release Condition, the issue of a Claim Form to obtain the Court's sanction for RP2 would be an Event of Default. I have set out the relevant provisions of the CTA, Schedule 6 (above) and, if it is necessary for me to do so, I hold that this is the correct construction of Schedule 6.

201. Mr Burlison gave evidence in Burlison 1 that it was his understanding that only the Class A Creditors were able to approve the release of restricted cash under the STID and that a holistic recapitalisation could only be delivered by the Class A Creditors. Mr Thomas-Watson also accepted in cross-examination that any waiver under the STID would have to be sought from a majority of Class A Creditors:

> "Q. Let's assume you get your way and either the B plan was sanctioned or the A plan is there without the June release condition, let's assume that. Also assume that the STID is in place, and that the launch of RP2 would trigger an event of default. A. Yes. Q. In that world, you would accept the company would have to seek a default waiver under the STID to launch RP2, wouldn't it? A. Yes, I believe so. Q. That STID waiver would have to be sought from a majority of the Class A creditors, wouldn't it? A. Yes, I believe that is correct. Q. You would accept that the company would also try and

negotiate a lock-up agreement in respect of RP2 with the Class
A creditors, wouldn't you? A. Yes."

202. Mr Phillips and Mr Abraham did not submit that Mr Burlison's or Mr Thomas-Watson's understanding of the STID was incorrect and after considering the terms of the STID in its current form (i.e. as amended and restated on 31 August 2018) I am satisfied that this is correct subject to the "Entrenched Rights" of the individual classes of creditors. I have set out the very complex terms of clause 19 of the STID above and, if it is necessary for me to do so, I hold that this is the correct construction of the STID.

203. It follows, therefore, that if the Plan Company had issued a Claim Form seeking the Court's sanction to RP2 without the modifications set out in the Plan, then this would have given rise to an Event of Default and the Class A Creditors would have been entitled to put TWUL into Standstill unless the Majority Creditors had put forward and voted for a STID Proposal to waive that Event of Default.

(ii) CTA

204. One of the key modifications which the Plan will make to the existing rights and obligations of the parties under the Finance Documents is to insert a new paragraph 5.3 into the CTA, Schedule 6, Parts 1 and 2. This has the effect of carving out RP2 from the Events of Default specified in that Schedule. If the Plan is sanctioned, therefore, the Plan Creditors will lose their existing rights under the STID to enforce an Event of Default and the Majority Creditors will lose their right to waive it.

205. However, the new paragraph 5.3 only applies to a Recapitalisation Transaction which is subject to a Supported LUA, i.e., a lock up agreement supported by two thirds of the Plan Creditors participating in the Super Senior Funding and two thirds of the Class A Creditors. If the Plan Company or TWUL is unable to obtain the support of two thirds of each class and persuade them to enter into a lock-up agreement, the Creditors will retain their existing rights to enforce an Event of Default. Even if the equity raise is entirely successful but the Plan Company has not been able to obtain the requisite support for a Supported LUA, the Plan

Company would still require a waiver by a simple majority before it can apply to Court.

206. Moreover, Mr Thomas-Watson accepted that the Plan Company would try to negotiate a lock-up agreement even if the Court sanctioned the Plan without the JRC or, indeed, if it sanctioned the B Plan. Indeed, a Supported LUA is just as much a feature of the B Plan: see Ereira 3, paragraph 53.5 (above). Mr Singla also made it clear in his submissions on the last day that the Class B AHG did not challenge the Supported LUA:

> "MR JUSTICE LEECH: If you have a lock-up agreement. I mean if the aim of the Plan creditors, particularly the Class As, so the primary class of secured creditors. If you come with an interim plan it is almost inevitable they will want to lock up the equity investors before they come back to court to with the final plan. MR SINGLA: My Lord, we are not challenging the lock-up agreement. This is why I say there is so much confusion. The challenge in relation to competition law is brought specifically in relation to the JRC. We are not challenging a lock-up agreement. The JRC, there is absolutely no evidence. Your Lordship is right that it is asserted in the company skeleton that it is a standard provision. The JRC is not a standard provision. There is no factual evidence to support that. There is no expert evidence to support that."

(iii) Sanction

207. Finally, to obtain the sanction of the Court for RP2, the Plan Company will have to satisfy S.901F and obtain a vote of at least 75% of the five different classes of creditors. The Court could in theory sanction RP2 with the support of the Class B Creditors alone. But if (as I discuss below) RP2 requires the Class A Creditors to take a haircut (and the Class B Creditors are out of the money), the Court is very unlikely to sanction that plan without their support.

208. The June Release Condition must, therefore, be construed in this context. The Class A Creditors always had and, if I do not sanction the Plan, will continue to have a significant element of control over RP2 because the Majority Creditors have the power to enforce an Event of Default and put TWUL into Standstill as soon as the Plan Company applies to the Court to sanction it. Further, the quid pro quo for the JRC is the agreement by all Creditors in advance to waive that

Event of Default for a Recapitalisation Transaction backed by a Supported LUA. Finally, there is no objection in principle to the Supported LUA and it is accepted that the Plan Company would attempt to lock up as many creditors as possible under any of the three plans and whether or not the IBLA contained the June Release Condition.

(2) The June Release Condition

(i) Construction

209. It is common ground that unless the June Release Condition is satisfied, the Plan Company or TWUL cannot draw down the July and August tranches of the Super Senior Funding and that there will be no obligation to advance the Additional Super Senior Funding. I also accept that the Class A Creditors and those Plan Creditors who subscribe for the Super Senior Funding have the power to "veto" a Recapitalisation Transaction by refusing to accede to the Supported LUA. Finally, I accept that in deciding whether to accede to the Supported LUA those creditors have no obligation to consider the interests of the Plan Company, TWUL or the Thames Water Group.

210. However, in my judgment the June Release Condition does not, as a matter of construction, empower the Class A Creditors to "divert value" away from the Class B Creditors and provides no support for the Class B AHG's case. I have reached that conclusion for the following reasons:

(1) The June Release Condition contains no express or implied right which would entitle the Class A Creditors or Class A AHG to control the equity raise or the outcome of the bidding process. As Mr Al-Attar submitted, the term "Recapitalisation Transaction" is broadly defined and is not prescriptive.

(2) Even if the Plan Company has been unable to obtain the agreement of two thirds of both the Class A Creditors and Plan Creditors subscribing for the Super Senior Funding by 30 June 2025, the satisfaction of the condition is subject to extension in accordance with clause 4.7 of the Super Senior ICA. Further, an extension may be granted by the Majority SSIS Creditors (i.e.

50% of those Plan Creditors participating in the Super Senior Funding). Finally, the Class B AHG did not suggest that the Plan Company would not be entitled to draw down the July and August tranches totalling £462 million during any extended period for compliance and, in my judgment, they were right not do so.

(3) Clause 4.7 of the Super Senior ICA contains a qualified obligation to consent to an extension of the condition. It is sufficient for the Plan Company to demonstrate that it is negotiating a Recapitalisation Transaction in good faith and, if it is able to do so, the Majority SSIS Creditors may not unreasonably withhold or delay consent to an extension or make it subject to unreasonable conditions.

(4) I was initially concerned that this qualified obligation might be difficult to enforce. But Mr Al-Attar submitted that the Court could enforce it effectively. On reflection, I agree. The Plan Company has to demonstrate that it is acting in good faith which is a relatively low threshold. Once this is established, there is a subjective question whether the Majority SSIS Creditors are themselves considering the request in good faith and an objective question whether they are acting unreasonably. In my judgment, they would be acting unreasonably if they tried to withhold consent on the basis that they did not like the terms of RP2 and wished to improve on them for their own benefit.

(5) For example, the question whether to grant an extension might arise where the Plan Company wishes to negotiate or accept a bid which the Class A Creditors consider to be too low and to involve a deeper haircut than they are prepared to accept. In my judgment, the Majority SSIS Creditors could not refuse an extension if the Plan Company was still in the process of negotiating terms and even if the Class A Creditors were unhappy with the price or other terms which are the subject of the negotiation.

(6) Moreover, the Plan Company will still have to satisfy the jurisdictional and discretionary requirements of Part 26A before it can be implemented. There is no obligation upon any of the Class A Creditors to support RP2

or to enter into the Supported LUA and if they choose not to do so, the Plan Company will have to overcome their opposition either by persuading 75% of each class to vote in favour of RP2 or persuading the Court to cram them down.

(7) If there is an overt (or even covert) attempt by the Class A Creditors to manipulate the bidding process, e.g., by putting pressure on the Plan Company to accept a low credit bid in order to keep the Class B Creditors out of the money, then the Court will not exercise its discretion to sanction the Plan. This seems to me to be an unlikely scenario for reasons which I will explain. But if it did, then this would clearly be an attempt to divert the restructuring surplus away from the Class B Creditors.

(ii) The counterfactual

211. It does not follow, however, from this conclusion that the Class A Creditors would not abuse the June Release Condition or the Class A Control Terms more generally in order to divert value from the Class B Creditors. The Class B AHG advanced a detailed counterfactual in their opening Written Submissions which I must set out in full:

> "63. It has been said that the June Release Condition or other control terms do not give the Class A Creditors a right beyond what they already have. That is not the case. The vice of the June Release Condition and the other control terms is best seen by comparing the counterfactual where it does not exist with the scenario where it does:
>
> 63.1 Without these terms, the Company will have more time during which it can entertain equity bids for the Group from a wide range of potential investors in addition to bids from the various groups of Creditors themselves. The Company will also have the ability to consider implementation of a transaction using a restructuring plan supported by a sub-set of its creditor classes (which in some instances, may not require the consent or support of the Class A Creditors).
>
> 63.2 It may be the case that the Class A Creditors will, by virtue of their sizable debt holdings, seek to influence the Company such that is accepts a bid that favours the Class A Creditors out of the various options before the Company. That equity bid (whether promoted / influenced by the Class A Creditors or not) will, on the Plan Company's case, then form

part of RP 2 (which will likely or may include provisions to re-size the balance sheet by (for example) equitizing and / or writing off some of the Group's existing debt) and come before the Court for sanction on the premise that if that plan is not sanctioned the Group would enter SAR.

63.3 On that hypothesis, at the Sanction Hearing for RP 2, it would be open to the Class B Creditors to argue that the equity bid proposed for sanction by the Company should not be sanctioned as (inter alia) the dissenting creditors would be worse off under that plan than a plan which incorporated a more favourable equity bid that has been made and that (e.g.) produces a better outcome for all creditors rather than diverting value to the Class A Creditors. This submission would have real force given the existence of other actual offers which are likely to materialise in view of the additional time available to the Company to entertain equity bids (and to investors to prepare such bids). It will also enable the Court to see precisely what offers have been made and which offers best address the Group's financial difficulties at that stage.

63.4 However, if the June Release Condition is in place (along with the other control terms) the equity process will have to be significantly truncated, with limitations on the nature of the bids coming forward (any bid must be acceptable to 2/3 of the Class A Creditors) and on the ability of investors to prepare those bids in the time available (third parties doubtless needing considerably more time to prepare their offers than the existing creditors of the Company).

63.5 At that point, the Company is likely to be forced by the Class A Creditors to take forward to the Court for sanction at RP 2 a bid that favours the Class A Creditors. However, given the limited equity bid process, there may be no (or at any rate far fewer) other actual bids that can be used as a proper comparison. As such, when the Company puts forward RP 2 and states that the Class A favoured equity bid should be sanctioned otherwise the Group will enter SAR, the Court will have a gun put to its head as there will be a limited pool of alternative actual equity bids it could fall back on. Further, the Class B Creditors would be forced to argue that hypothetical equity bids would be out there that are better for all stakeholders (including the Group's customers) if the Court does not sanction the plan before it, but without the benefit of actual bids to refer to.

63.6 The Court's ability therefore to properly assess whether subordinated creditors such as the Class B Creditors are worse off under the proposed plan than the most likely alternative would be seriously fettered. The Court would effectively be left with a fait accompli as there will be no time to run another equity process. By these means, and as Mr Heis notes in his

> report, the Class A Creditors will likely be able to divert the value in the Group to themselves at the expense of the subordinated creditors and other stakeholders."

(iii) The evidence

212. *Mr Heis.* The Class B AHG relied on the evidence of Mr Heis in support of this counterfactual and that the Class A Creditors or the Class A AHG intended to divert value from the B Creditors. His evidence was as follows:

> "2.1.8 The A Plan contains a number of specific conditions relating to control of the process by the Class A Creditors and providers of the future super senior funding of £1.5 billion in the interim transaction proposed by the Class A AHG "A Super Senior Funding". This is due to the June Release Condition, which provides that no funding is to be released after 30 June 2025 unless holders of at least (i) 66.6% of the creditors signed up to the A Super Senior Funding; and (ii) 66.6% of the aggregate Class A Creditors, have entered into a lock-up agreement to recapitalise Thames Water by way of an equity raise or creditor led solution ("June Release Condition"). The June Release Condition and associated provisions effectively provide the Class A Creditors with control over the nature and timing of the final holistic restructuring.
>
> 2.1.9 In Mr Burlison's witness statement (clause 37.3), he describes his view of the purpose of the June Release Condition: namely, that it is "downside protection" and will ensure that "management will be focussed on delivering the required holistic recapitalisation". In my opinion, that is not its only effect. It will also allow the Class A Creditors to devise a final restructuring that would be most advantageous to themselves, without sharing value to other creditors. I also believe that there would be no reason for management or any of the other stakeholders to lack focus or delay or prolong the timeline to a final restructuring. I discuss these points in further detail in Part 3, section 8.4.
>
> 2.1.10 In respect of creditor outcomes, according to the Grunwald valuation there is substantially more value in the Group than is recognised by the A Plan. In respect of the creditor claims waterfall, this would result in substantial value for the Class B Creditors which would be likely sufficient to pay them in full. It therefore appears that the effect of the A Plan, including the June Release Condition is expected to divert the value that would flow down the waterfall to the Class B Creditors into the hands of the Class A Creditors. This would deprive the Class B Creditors of their share in the restructuring

> surplus. In my view, this may occur by the Class A Creditors proposing a holistic restructuring on the basis of the Kroll (or similar) valuation. Given Mr Burlison's statement that the Class A Creditors are the "economic owners of the business", it appears likely that the holistic restructuring would involve a plan that would seek to cram down the Class B Creditors, with removal of their value possibly with new instruments, in order that any restructuring surplus is captured by the Class A Creditors.
>
> 2.1.11 Additionally the existence of the June Release Condition would be likely to, in my view: (a) chill the equity-raising process as participants would see themselves in competition with a powerful creditor-led process controlled by the Class A Creditors; (b) create a precipice-style deadline that compromises the ability to maximise value; and (c) create an effective veto over solutions that would not be commercially favourable to the Class A Creditors. Therefore, the small mitigation of 3.5p in the £ relating to short term cash interest in the A Plan which is set out in the Cowlishaw report produces an inferior return to that suggested by their place in the waterfall (or as illustrated by the B Plan outcomes). This is reflected in my analysis of creditor outcomes at figure 1 below and is discussed in further detail at section 5.1."

213. Mr Smith asked Mr Heis in cross-examination to explain the basis for this opinion and Mr Heis gave evidence that he had come across situations in which lenders have been in competition with buyers or where the company had to disclose information relating to bids to a secured lender and this has had a "chilling effect" on bidders:

> "Let's just get into that -- we will come back to that in a moment. One of the things you are doing in this report is you are expressing opinions about the effect of the June release condition, the refinancing block and the information provisions, aren't you? A. Yes. Q. You are an insolvency practitioner. What expertise do you have to express that opinion? A. I have come across these situations before. And I have been involved in M&A situations where there is a credit bidder and, sorry, we have not come on to that, but if you have a powerful secured lender who is potentially going to compete with buyers, I do believe that that would act as an inhibitor to value. I mean there are other aspects with which I am also familiar, and when you are in that situation, it can be quite difficult, because you are dealing with parties who are bidders, who are spending a lot of money on due diligence and so on, and don't want to find that they have wasted it, but on the other hand they know that effectively, you know, fundamentally

> their prices, as well as other things, are going to have to be revealed to the secured bidder. In my case, I would generally do it by bidder A, bidder B, bidder C, but there is still a lot of useful information and people would be nervous and that is where I refer to chilling."

214. Mr Heis accepted that he had not referred in Heis 1 to clause 4.7 of the Super Senior ICA and the right to extend the June Release Condition. He also agreed that this was an oversight. However, he did not accept that this made his opinion unsustainable because the Class A Creditors would be responsible for the way that RP2 would be drawn up and that it would be perceived as a "creditor plan" rather than a "company plan":

> "Q. This extension renders your opinions about the June release condition entirely unsustainable, doesn't it, because the relevant super senior lenders can be required to give an extension? A. No, I don't think that is the case at all. I think it is one of the factors that is, you know, down the list as to what is important here. The most important thing is control. It is -- sorry, I am going off topic and please stop me if this is inappropriate, but you cannot say that that June timing issue is the most fundamental part of my opinion. The most fundamental part is the control exercised by the A creditor group, which means effectively it is and will be perceived, including by bidders, as an A creditor plan rather than a company plan. Therefore, bidders will be speaking to the A creditors, the A creditors will be responsible for the way that the plan is drawn up. For the offer which is made to creditors, or lack of it, and also the relevant alternative and other aspects of the plan. That is by far, I think, the most important aspect."

215. Mr Heis accepted that the Court would have to sanction RP2 and Mr Smith took him through the likely process which would be involved when the Court was considering a plan based on the equity raise:

> "Q. We are concerned with a situation where RP2 comes before the court in September 2025. You have expressed the opinion in your report that the effect of the June release condition is to allow the Class A creditors to divert value from the Class B creditors. Do you remember saying that? A. Yes. Q. What you mean by that is the June release condition will allow the Class A creditor to put forward a restructuring which takes value away from the Class B creditors to which they are entitled, right? A. Yes. Q. My suggestion to you is that is completely fanciful, because at the time of RP2, the Plan

Company will need to come to the court with a correct valuation. If that valuation, as found by the court, shows that value should go to the B creditors and that is not provided for under the plan, then the no-worse-off test is not going to be met, is it? A. The no-worse-off test is a comparison with the relevant alternative. In my instructions I am not asked to think about that, neither is Mr Cowlishaw, and nobody has looked at the alternative say of a SAR as a relevant alternative in June or September. Q. This is not my point, Mr Heis. My point is when RP2 comes to the court -- A. Yes. Q. -- it will be put forward by the Plan Company with valuation evidence. A. With what relevant alternative? Q. Valuation evidence, like the valuation evidence his Lordship has before him in this case from Mr Weerasinghe and Dr Grunwald. You follow? A. Yes. Q. If that valuation, as found by the court, shows that value goes to the Bs, but that is not reflected in the terms of the restructuring plan, then the court is not going to sanction the restructuring plan, is it? A. But you are saying it is a comparison between two valuations. It is a comparison between the deal that is put forward to the creditors and the relevant alternative. The no-worse-off test is applied between the relevant alternative. If, let's say, that is a SAR, as a reasonable assumption, then the SAR will be substantially reduced, as we have seen in this hearing, by all of those SAR costs and overlays that Mr Cowlishaw has talked about. Q. Let's assume for present purposes that the relevant alternative to RP2 is a SAR, because you have just mentioned. A. Okay. Q. What the court will have before it, in the context of RP2, is valuation evidence showing the returns to creditors in that SAR, agreed? A. Yes. Q. If that valuation evidence shows that the B creditors will get a return in SAR, the court is not going to sanction a restructuring plan that gives them nothing, is it? A. No, and I didn't say they would. Q. Well, with respect, you did, because your report, as we just saw, is premised, and this is your opinion, on the idea that somehow the June release condition can be used by the Class A creditors to divert value away from the Bs, ie take value away from them, do you follow? A. Yes, I do. Q. That is not the reality, is it, because under RP2, the As and the Bs will get the value they are entitled to on the valuation evidence at that time, won't they? A. Well, not necessarily, as I have said, Mr Smith. Because the comparison will not be a Grunwald-style valuation or a Weerasinghe-style valuation, it will be the returns that you might get out of a hypothetical SAR, versus the returns that you are getting from, you know, the plan itself. Q. Yes, and I have just explained to you, I think, when we get to RP 2, let's assume the relevant alternative is a SAR, there will be valuation evidence as to the returns in that SAR. If there is a dispute, there will be competing valuations but if the court finds that actually there would be a return to B creditors in that SAR, then the court will not sanction a plan that takes that

> value away from the Bs, will it? A. I completely agree with that, Mr Smith, but what I am saying is that the relevant alternative at that time will not be based on the same factors that we are looking at here today, they will be based on various kind of metrics and valuation data points, including the sale process, the M&A process, which has the effect of being chilled, which will have a number of valuations based on price, which may reduce the value. If you didn't have the June release conditions, then you would not be in that position. Q. Sorry, I just don't understand that at all. I am afraid, Mr Heis, let me -- A. I am happy to repeat it. Q. No, please don't."

216. Finally, Mr Smith addressed with Mr Heis his evidence that the June Release Condition would have a "chilling effect" on the equity raise process itself. He put the Rothschild Letter to Mr Heis and suggested to him that there was no evidence that it had had any effect on the equity raise:

> "Q. The outcome of that process will, I suggest to you, provide a pretty reliable guide as to the value of Thames, won't it? A. Subject to the point I mentioned about people being reluctant to put their best foot forward if they feel they are being used as a price marker or there is a credit bid that may cause them to have wasted their time. Q. Have you read the letter that Rothschild have put in in these proceedings? A. Yes. Q. They say there is no evidence of that at all, don't they? A. I think they point to some evidence, because I think one of the bidders has objected. Q. That is Covalis, isn't it? A. Reading between the lines, I suspect so. Q. Yes. Covalis who are aligned with the Bs. A. Well, they are still a credible bidder, as I understand it from the press they are aligned with Suez, who are a very credible organisation. Q. If we put Covalis to one side, because they might be in a special position, there is no evidence at all, is there, that any bidder has in any way been affected by the June release condition? A. Well, it is still at stage 1, or stage 1(b) as I think Rothschild call it, so it may be slightly early days. Q. Let's just go back to the sanction hearing of RP2. By that stage, the equity bid process will have come to conclusion and the court will have good valuation evidence in the form of those bids that will either show the Bs are in the money in the relevant alternative or that they are not, do you agree? A. Yes, there will be data points and you can do a simple calculation based on them, but would they be the same as the intrinsic value of the company on a Dr Grunwald-style basis? They would be compromised by the points that I have mentioned. Q. I have put it to you, Mr Heis, that ultimately, if the valuation shows that the Bs are in the money in the relevant alternative, there is no prospect of the court sanctioning a plan, whether or not it is supported by the As, that takes that value away from

> the Bs, do you accept that? A. Yes, I do. That was not my concern. Q. Can I just ask you another thing, whilst we are on this. Do you accept that if the Class B creditors are out of the money on the valuation evidence, then any restructuring in RP2 would in any event be dependent on the support of 75 per cent of the A creditors? A. Yes. Q. In practice, your point about control only arises if the Class B creditors are in the money, doesn't it? A. Yes. Everything is irrelevant otherwise, yes. Q. Yes, because if the Class B creditors are out of the money, the company is entirely dependent on the support of the Class A creditors in any event, isn't it? A. Yes. In that case, Mr Burlison's comment that they are the economic owners is true, so yes. Q. Yes. In that case, the June release condition adds absolutely nothing, doesn't it? A. Yes. Q. Yes. Why don't you mention anywhere in your report that your argument is dependent on the Class B creditors being in the money? A. Well, I didn't think it was necessary because I am required to use the Grunwald valuations, so that is the basis of everything."

217. *Covalis*. On 6 February 2025, and therefore after the evidence had been completed, Covalis Capital LLP ("**Covalis**") wrote to the Court stating that as was publicly known, they were a participant in the equity raise. They did not make any direct criticism of the process although they stated that reports which they had seen "also appear to raise questions about who may be in a position to control or in a position to materially influence the policy or affairs of Thames Water". Mr Thomas-Watson confirmed in his evidence that Covalis was aligned with the Class B AHG.

218. *Mr Fraiser.* I accept that the Class A Creditors will be able to exert some control over RP2 and that the June Release Condition provides one element of that control. But neither Mr Fraiser nor Mr Burlison suggested otherwise. Indeed, both gave frank and straightforward evidence about the JRC. Mr Fraiser accepted in cross-examination that the June and July tranches of £462 million are required to take TWUL through to September, that the Class A AHG put forward the condition and that they have the right to receive information which is not available to the Class B AHG or to Class B Creditors. But he gave evidence that the Plan Company intended to keep all of the Plan Creditors up to date with RP2:

"Q. The company has to enter into a lock-up agreement to implement a transaction through a restructuring plan, yes? A. Yes, that's correct. Q. That has to be entered into before 30 June? A. That is correct. Q. Not a scheme? A. Correct. Q. It assumes there will be a need to cramdown? A. Yes, I think that is correct. Q. If the company does not meet the requirements of the JRC, then the funding under the super senior facility will be withheld? A. Yes, that is correct. Q. That would include the 462 million we were just looking at; do you follow? A. I follow, yes, that would include that. Q. Thank you. That funding is required to take the company through to September? A. Yes, that's correct. Q. So the terms of the holistic restructuring must be acceptable to two-thirds of the Class A debt holders and the super senior funders in June in order to get the money you are going to need for July and August; do you follow? A. Yes, that's correct. Q. In the negotiations, who first suggested the JRC? A. The Class A Ad Hoc Group. Q. Mr Burlison? A. I don't know if it was Mr Burlison himself, but it would have been one of Jefferies and/or Akin. Q. Thank you. We know you had intensive negotiations over a four-month period, yes? A. Yes, that's correct. Q. You have seen that what is now suggested is that you need the JRC going forward before the holistic restructuring, to ensure that you don't let the Negotiations drift? A. I think the – as you will appreciate, in a context of negotiating the TSA and the term sheets for the restructuring plan, we had to negotiate a whole bunch of terms in the round. Q. Of course. A. One of those terms that was put on the table was the JRC, and I think what you are alluding to is that we got comfortable with the JRC on the basis that we felt very confident that we would have concluded all of the milestones that we would need to have concluded in advance of June, one of which would have been to have actually signed up the lock-up agreement, so we would be well on our way to the conclusion of RP2 in advance of June. That is how we got comfortable with the JRC. Q. Okay. Returning to the question I was asking, I will put it a different way. Will you and Mr Gething, the CRO, be focused on delivering RP2? A. Yes, we will. Q. Will you be focused on delivering RP2 regardless of whether you are subject to the JRC? A. Yes, we will. Q. Thank you. Thames is not curtailed from speaking to other investors, including the B class creditors on the holistic restructuring, that is right, isn't it? A. That is correct, but we would want to have any discussions with any other class of creditors in a manner that ensures that we don't breach any agreements that we have in place with other creditors. Q. Agreement? The one agreement you have is there is an obligation to speak to the A class creditors, follow? A. Yes. Q. The A class creditors will be entitled to information? A. Correct. Q. There is no obligation to give the B class creditors any information in good time, or at all? A. I don't know the answer to that. Q. Well,

> perhaps you will take it from me. The B class creditors are what might be described as outside the tent in terms of engaging with investors when compared to the A class creditors, that is right, isn't it? A. Could you repeat that question, please? Q. The B class creditors are outside of the tent, as compared to the A class creditors, during these negotiations for the holistic restructuring, do you follow? A. Yes, I follow. MR JUSTICE LEECH: Would you like to answer the question? You have understood it, what is the answer to it, are the B creditors outside the tent? A. I think our intention is to communicate with – well, I know our intention is to communicate with all of our creditors as we proceed through the next restructuring plan process."

219. *Mr Burlison.* He accepted in cross-examination that the Class A Creditors were the economic owners of the Thames Water Group, that RP2 would involve a restructuring of the balance sheet and that the Class A AHG would want to be heavily involved in the restructuring process:

> "Q. Okay. You have said that what you had in mind was for the senior creditors to be heavily involved in any equity process? A. That is correct. The existing equity had just walked away, the company needed substantial capital. The A class creditors represented 16 billion of the debt stack. They were essentially at that point in time the economic owners of the business, so, yes, they wanted to be heavily involved in the discussions. Q. They were the economic owners of the business? A. Yes. Q. Thank you. You wanted them to be heavily involved in any equity process, you tell us that? A. Yes, correct. Q. That process is going to involve an equity injection and it is going to involve a restructuring of the balance sheet? A. Correct. Q. Your aim in this process has been to ensure that the Class A creditors will be heavily involved in the negotiations and discussions towards an outcome, correct? A. That is absolutely correct. Q. Your aim is to ensure that the Class A creditors get to dictate the holistic restructuring; that's right, isn't it? A. My aim is to make sure the interests of my clients are looked after, and that the loss they take on this is minimised. Q. Thank you. Your shorthand for what you are trying to do is that they should be kingmakers? A. What they should be doing is playing a very proactive role in the restructuring. They are the senior creditors in the structure, there is 16 billion, there is 100 plus institutions there. They are the economic owners of this business as it currently stands, given the shareholders walked away, and the business needs a substantial recapitalisation and the losses that will result from that are going to fall in my, you know, in the

creditors that I represent. So, yes, they want to be very proactive in any solution."

220. Mr Burlison also accepted that once the Plan Company had signed the TSA, it was unable to engage with any other interim finance plan and that he was protecting the interests of the Class A Creditors in procuring that it entered into the TSA. Mr Phillips took Mr Burlison through the June Release Condition and he gave the following evidence:

> "Q. You have seen all of that. You can see that there is a condition that, in respect of any loans to be made after 30 June, then they have to have entered into the supported LUA, and as you say, unless it has been extended? A. Unless it has been extended, correct. Q. We have seen, if we go forward to the schedule, that two of the clauses provide that the 462 million will be -- the 262 million would be payable after 30 June, so it depends upon it being extended for those to be -- A. Yes. Q. Right. Good, we got there in the end. You are aware that the amended and restated CTA also includes a covenant which prohibits the incurring of financial indebtedness which ranks senior or pari passu with the super senior funding? A. Correct. Q. What that effectively means is that the super senior funding cannot be refinanced. That is right, isn't it? A. The super senior funding can be repaid and refinanced with the approval of the A class creditors, which is in line with the current rights they have under the WBS structure. So there is no enhanced rights being granted. Q. So the answer to the question was yes, but it could be done with their agreement? A. Yes, I was just qualifying it to say that gives us no additional rights above and beyond where we are today. Q. So if they don't agree, any new money has to rank below the super senior funding? A. Yes, which would be the position today."

221. Mr Burlison accepted that the assumption behind the Plan was that the consent of the Class A Creditors would be required for RP2 and that an extension of the JRC would not be automatic. Mr Phillips then put to him that if the Supported LUA was not signed by the end of June, the funding would stop:

> "Q. If the LUA is not signed by the end of – by 30 June, and there is no extension, the funding stops on 30 June? A. The providers of the super senior funding are largely the same lenders that are in the A class; there is a big overlap. The size of the super senior funding is a fraction of their exposure under the A class and therefore their economic interests are to find a solution for this company. So the reason for that clause was,

> as long as the company is working towards a recapitalisation solution, then it is in their economic interests to give the extension. The reason for that June release clause was because this business is under significant operational and financial pressure. It needs a solution. It needs a solution quickly. You talk -- we have talked to Ofwat, we have talked to the regulators, we have talked to equity. Everybody needs a quick solution. The longer this business goes into the AMP period without a solution, the bigger the losses that will be incurred and it will be my clients that suffer those losses. So, yes, we want a quick solution to this, which was the rationale for the June release condition. Q. Let's get back to the question I was asking. If the A class choose not to sign up to the LUA, the company has no money to carry out the holistic restructuring. That is correct, is it not? A. Well, it is theoretically correct, but it would be completely against the interests of my clients to do that if the company is working towards a recapitalisation that protects our interests. Q. Were you in court yesterday? A. Yes. Q. Did you hear the evidence that was given by Mr Fraiser and by Mr Cochran? A. Yes. Q. Did you hear Mr Fraiser say that of course he is going to get on with it? A. Yes, I heard that. Q. Thank you. Now -- A. But with 16 billion at stake, we do want some controls in that process. Q. 37.1, you describe these as key conditions. You describe the controls as key conditions, yes? A. Yes. Q. And you said "We do want controls"? A. Yes, we do want controls. Q. You want control. A. No, I don't want control. We want controls. Q. You want controls. Thank you."

222. However, Mr Burlison also gave evidence that if the Class B Creditors were willing to put an offer on the table which saw the Class A Creditors repaid in full, he and his clients would be delighted:

> "Q. Right. If a lock-up agreement is entered into, then following that lock-up agreement, the Class A creditors would tell the company that if they were engaging with the Class B creditors, that they were acting in breach of the lock-up agreement, wouldn't they? A. Is this a hypothetical scenario in the future? Q. It is a scenario in the future, very much based on what we have just experienced. A. So from my clients' perspective, they want the best solution here. If there are parties such as the B creditors that are willing to put an offer on the table that sees their debt repaid in full, my clients would be absolutely delighted. If the Bs put a proposal on the table that requires my clients to be impaired, then yes, they want a say as to whether that is appropriate or not. Q. And they will tell the company whether or not the company should pursue an arrangement outside your lock-up agreement. So the hypothetical is you have entered a lock-up agreement. It says

> this is the restructuring plan that the company and we have agreed the company will enter into, will seek sanction of, let's put it that way, yes? A. But you missed a step, because to enter into a lock-up agreement, we would have had to have seen the proposals that are on the table and decided which proposal is the best for our clients. If one of those proposals is they are going to get repaid in full, then, absolutely, that would be, you know, no doubt the one we would take. If those proposals require our clients to take impairments or to do things with the debt that requires their consent, yes, we have a say in which proposal to go for, because without our consent, you wouldn't be able to implement those proposals."

223. Mr Burlison then gave evidence that none of the Class A Creditors had produced a bid but that the Class A AHG were preparing a creditor bid for a situation in which there was no alternative solution and it was necessary to fix the balance sheet and put in place a new governance structure and business plan. Finally, he gave evidence that the June Release Condition provided "downside protection" and that 30 June 2025 was a key milestone for the Company to deliver RP2:

> "Q. You give a reason, if we can look at 37.3 of B1, that is on page 2962, sanction hearing bundle. Has that come up? Okay. 17 Do you see where you say: "The June release condition is an important element of down side protection for the A class creditors, as it ensures that Thames Water management will be focused on delivering the required holistic recapitalisation." A. Yes. Q. You heard the evidence in relation to that, yes, yesterday? A. Yes. Q. You wouldn't be suggesting that Mr Fraiser or Mr Gething, the new CRO, will not be focused on RP2, correct? A. Yes. Q. If Thames had the benefit of interim finance without the June release condition, it would still need to deliver RP2 as quickly as possible, given the wider need to resolve their issues, would it not? A. It would still need to move towards RP2, yes. Q. In fact, without the JRC, it is possible that the company would have more time to work on the best bid and holistic restructuring? A. I completely disagree with that. I think the JRC was a fundamental point of the package that was put forward. We were hearing from both Ofwat and from equity investors at the time and all the way through this process that the restructuring needs to happen quickly, that value will continue to dissipate in this business the longer it goes on whilst it is not fully restructured with a new governance model, a new plan, et cetera. So an absolute -- an absolute requirement of our refinancing was the JRC, to make sure there was a key milestone in the process."

224. In re-examination Mr Burlison confirmed that the Class A AHG would grant an extension to enable the equity raise to be completed and that the members of the group were supportive of the process:

> "Q. If we go back to clause 4.7(a)(iv), which is on the left-hand side of the screen, what is your understanding of the rights of Thames Water under that clause? A. My understanding is they would put forward an extension request and that my clients would assess that request, but it would be granted on the basis that it couldn't be unreasonably withheld and that it would be -- and on the basis that the company was making that request in good faith. So my view, from a commercial perspective is that, as long as the company was working towards the transaction, then that extension would be granted. Q. You mentioned, moving on, at 12.14 today, you mentioned that the A creditors are preparing a bid in the equity process. Don't mention anything more about the details of that bid, bearing in mind my Lord's caution about the integrity of the process. My question is: if there are third party bids alongside a creditor-led bid, what would be the dynamic between those bids? A. So our group is hugely supportive of the equity process that has been run. We see there is strong merit in bringing on board an equity party who has, you know, a strong experience of running these types of businesses and who can bring the necessary capability and experience. So, yes, we are -- our clients are hugely supportive of it, but we just can't -- we just can't -- you know, we just can't dictate whether a bid is going to be there or not at the end of the day and until there is a bid, which we will then assess, it is not within our powers or gift to, you know, magic one up. So, you know, we will work very closely with those equity parties as and when their bids materialise, to see if a deal can be done. Clearly it will depend upon what the terms of their bids are, if they don't require anything from our group, because, you know, either we pay the debt or they don't require any amendments, then it should be a much easier discussion. If they require a big haircut on our debt, then that will be a more difficult discussion, but, you know, throughout this process, we have been hugely supportive of the company's process around the equity."

<u>(iv)</u> <u>Findings</u>

225. The Class B AHG's principal submission was that without the JRC the Company would have more time to entertain equity bids and that the JRC will severely truncate and limit the process: see paragraphs 63.1 and 63.4 above. I reject this submission. It was based on Mr Heis's evidence and he failed to mention clause

4.7 of the Super Senior ICA or to consider the Plan Company's extension rights. In my judgment, this was a serious flaw in his evidence. I also accept Mr Burlison's evidence that the Class A AHG (and other Majority SSIS Creditors) would grant an extension as long as the company was genuinely working towards an equity transaction. Moreover, it was clear from his evidence that he properly understood the contractual effect of clause 4.7.

226. The Class B AHG also submitted that the Class A AHG would influence the Plan Company to accept a credit bid which is likely to involve writing off or resizing the balance sheet and present that to the Court as a fait accompli: see paragraphs 63.2 to 63.5. I also reject this submission. I accept that the Class A AHG is preparing a "creditor bid" but I also accept Mr Burlison's evidence that the purpose of the bid is to provide a fallback if no alternative bids are made. I accept that evidence primarily because the Class B AHG did not persuade me that it would be in the interests of the Class A Creditors to inject further funds and swap senior debt for equity (even at a depressed price).

227. In my judgment, it is obviously in the interests of the Class A AHG to promote as many competitive bids as possible to ensure that the Plan Company achieves the highest price either for the sale of TWUL or for a significant equity stake. It seems to me that this is the best (if not the only) way that the Class A Creditors will maximise the prospects that they will achieve a full recovery. Moreover, as Mr Burlison pointed out, this is likely to trigger the change of control provisions in the Licence and that OfWat's consent will also be required. If the balance sheet of TWUL has to be restructured to attract an investor who will bring it back to an Investment Grade Rating, then there is a significant risk that some of the Class A and Class B Debt will be written off. Mr Burlison gave the figures £6 billion to £10 billion.

228. I accept that it is quite possible that the Class A AHG will be satisfied with equity bids which protect their interests but not the interests of the Class B Creditors. For example, they may well be satisfied if the value of RP2 breaks in the Class B Debt or even in the Class A Debt provided that the haircut which they have to take is kept to a minimum. Mr Burlison recognised that this might involve a difficult negotiation with the Plan Company. But it is quite another thing to

suggest that the Class A AHG would interfere in the equity raise or refuse to consent to a final offer to prevent the Class B Creditors from making any recovery at all.

229. There was no direct evidence to support such a finding and I am not prepared to draw the inference from Mr Heis's evidence that the Class A AHG and the Plan Company would collude to achieve such an outcome. The evidence of Mr Fraiser and Mr Burlison did not support such an inference and I accept their evidence in preference to his. Both gave clear and straightforward evidence in which they did not play down the controls which the Class A Creditors had under the TSA or the effect of the June Release Condition. Mr Burlison freely accepted that the June Release Condition was an important term which gave protection to the Class A Creditors but he resisted any suggestion that they would interfere in the equity raise and gave clear and credible evidence that they had no reason to do so.

230. By contrast, I found Mr Heis's evidence unconvincing. It was based not only on the premise that Dr Grunwald's valuation evidence was correct but also that the Plan Company would deploy Mr Weerasinghe's valuation evidence (or, perhaps, new valuation evidence supported by low equity bids) at the sanction hearing of RP2 where a SAR was the only relevant alternative in order to keep the Class B Creditors out of the money. His evidence was that the Class A AHG could achieve this by using the "chilling effect" of the Class A Control Terms or interfering directly in the bidding process to depress the equity bids. The Court would then be told, so he reasoned, that the Class B Creditors were out of the money (or almost out of the money). This reasoning provided the basis for his valuation of the Class B Debt at 3.5p/£ if the JRC and the other Class A Control Terms were included in the Plan.

231. I do not accept this reasoning. It is highly artificial and, in my judgment, it does not stand up to scrutiny. As it happens, I have accepted Mr Weerasinghe's mid-case EV valuation and rejected Dr Grunwald's valuations. But if I had not done so and had, for example, accepted her base case valuations, then the Plan Company and the Class A AHG would have findings of fact against them on RP1 which they would have to address at the sanction hearing of RP2. I accept

that they might not have been bound by an issue estoppel and that they could attempt to re-argue the valuation issues with additional evidence based on the equity raise which would by then be public. But the Court would want to scrutinise that evidence very closely indeed. Finally, I ask myself *cui bono* and why they would do so? Mr Phillips never put a plausible reason for this either to Mr Burlison or to Mr Fraiser.

232. Further, there was no evidence either that the Class A Creditors were directly interfering in the equity raise or that the June Release Condition has had any effect on the process. I accept that the Plan Company had to keep the process confidential and there was a limit to the evidence which it could put before the Court. But within those constraints, I accept that the Rothschild Letter is accurate and that they have not received any adverse comments about the process or any indication that the process itself has reduced the interest of any bidder apart from Covalis, which is aligned with the Class B Creditors. Moreover, the Covalis letter contained no direct criticism of the process.

233. Finally, I remind myself that in substance the Class B AHG's case is that the Class A AHG are engaged in an unlawful means conspiracy which is the equivalent of "bid rigging". They allege that by imposing the Class A Control Terms and, in particular, the June Release Condition upon the Plan Company they are conspiring to cause damage to the Class B Creditors by unlawful means, namely, breach of competition law. Mr Thomas-Watson accepted that his counsel team had put forward a case that the Class A AHG's conduct was the equivalent of bid rigging and that if this was the case then they were acting unreasonably and in bad faith.

234. In my judgment, there was no evidence to support this allegation. When construed against the existing rights of the Class A Creditors, the June Release Condition did not support such an inference and Mr Phillips did not obtain any answers from Mr Burlison and Mr Fraiser in cross-examination from which I could draw that inference either. I, therefore, dismiss this allegation.

(3) The other Class A Control Terms

235. The other Class A Control Terms were something of a moving target. In their Grounds of Objection the Class B AHG relied upon the CMA Reference Condition, clause 56(a) of the CTA, the Management Retention Plan and the CTA, Schedule 3, Part 3, paragraph 60. A further objection was added in relation to the "Post-Final Determination Business Plan Update" in its written Opening Submissions. Mr Phillips did not address this with any of the witnesses and neither he nor Mr Abraham addressed it in their written or oral Closing Submissions. I, therefore, dismiss this objection. The Class B AHG were required to serve Grounds of Objection, they amended them late and they should be held to them. Given the raft of issues which they raised at the hearing, it was not fair to require the Plan Company to deal with them or to expect the Court to address them. I turn, therefore, to the other Class A Control Terms pleaded above.

(i) The CMA Reference Decision

236. The Class B AHG objected to the Governance Requirements which require the CMA Reference Decision to be made by the NEDs, Mr Aidan De Brunner and Mr Neil Robson. In their written Opening Submissions Mr Phillips and his team invited me to draw the inference that they were appointed with the approval or concurrence of the Class A AHG. Mr Phillips put this to Mr Fraiser at the beginning of his cross-examination and Mr Fraiser's evidence was that the Class A Creditors had no involvement in their appointment. Neither he nor I were taken to any documents which might have cast doubt on his evidence and Mr Phillips did not challenge it directly. I dismiss this objection.

(ii) The Management Retention Plan

237. The Class B AHG relied on the term sheet annexed to the TSA. This document stated on its face that it was not binding. The Class B AHG did not refer me to any binding contractual provisions in the thousands of pages of documents which were put in evidence to demonstrate that it had to be approved by the Class A AHG. Moreover, Mr Phillips did not put this to any of the witnesses. Mr Day asked Mr Cochran about it and he said that, to the best of his knowledge, it had

not been agreed and that it was a matter for the board and the retention committee. Again, I accept this evidence and dismiss this objection.

(iii) Clause 56(a)

238. The Class B AHG's objection to the CTA, clause 56(a) was that it prohibited the Plan Company from incurring indebtedness which ranked in priority to the Super Senior Funding. Mr Phillips put this clause to Mr Burlison and his evidence was as follows:

> "Q. You are aware that the amended and restated CTA also includes a covenant which prohibits the incurring of financial indebtedness which ranks senior or pari passu with the super senior funding? A. Correct. Q. What that effectively means is that the super senior funding cannot be refinanced. That is right, isn't it? A. The super senior funding can be repaid and refinanced with the approval of the A class creditors, which is in line with the current rights they have under the WBS structure. So there is no enhanced rights being granted. Q. So the answer to the question was yes, but it could be done with their agreement? A. Yes, I was just qualifying it to say that gives us no additional rights above and beyond where we are today. Q. So if they don't agree, any new money has to rank below the super senior funding? A. Yes, which would be the position today. Q. And the second tranche would be required, the second tranche, by which I mean the second 1.5 billion going forward, that would be required to fund an appeal to the CMA, amongst other things, wouldn't it? A. That's correct."

239. Mr Phillips and his team stated in their written Closing Submissions that Mr Burlison had denied that the Super Senior Funding could be refinanced. In my judgment, this does not accurately reflect his evidence in the passage (above). His evidence was that the Plan Company could only be refinanced with the consent of the Class A Creditors and that without their consent it would rank below the Super Senior Funding. More to the point, however, they did not challenge his evidence that this position reflected their existing rights and that the Super Senior IBLA would not confer any enhanced rights upon the Class A Creditors.

240. I accept this evidence. It would be very surprising indeed if the Plan Company were free to refinance either the existing Class A Debt or the Super Senior

Funding or to vary the existing priorities without the consent of the Class A Creditors now or the Super Senior Issuer (if the Plan is sanctioned). But in any event, it would be justifiable for the Super Senior creditors to insist that they are repaid in full in priority to all other creditors for the provision of the new money: see *Adler* at [168]. I therefore dismiss this objection.

(iv) Paragraph 60

241. Finally, the Class B AHG objected that the CTA, Schedule 4, Part 3, paragraph 60 only required the Plan Company to engage with the Class A AHG and their advisers and not the B Creditors. In their written Opening Submissions they placed particular reliance on paragraph 60(d) (above) which provided that TWUL would engage with the Relevant Creditor Groups by giving them access to investor data rooms, access to senior management and co-operating in a number of respects. They also relied on the evidence of Mr Thomas-Watson in Thomas-Watson 1 in which he stated as follows:

> "27.5.1 The Class B creditors are wholly excluded from information and engagement from Thames Water, which is notable as I would expect the company would wish for them to also submit a "creditor led solution" to the business for consideration. This omission cannot be justified by the flawed and premature assumption that the Class B creditors will be out of the money in a second restructuring plan, which is not accepted. Affording the Class B creditors these rights (in a manner which is practically enforceable by them) would simply treat all classes fairly and equally with respect to their ability to participate and/or protect their interests in a subsequent restructuring plan, increase competitiveness around potential outcomes and therefore does not prejudice anyone.
>
> 27.5.2 There ought to be a level playing field between creditor groups on access to information and involvement in the equity process especially as the Company Plan is meant to be an interim and bridging transaction."

242. Mr Phillips did not put paragraph 60 to Mr Fraiser or Mr Burlison although he suggested to both of them that the Class B Creditors were "outside the tent". In the passage which I have set out (above) Mr Fraiser was not prepared to accept this. His evidence was that it was the Plan Company's intention to communicate with all of the Plan Creditors throughout the restructuring plan process. I accept

Mr Fraiser's evidence. Moreover, I accept that it is consistent with the obligations which the Plan Company will assume under the CTA. I say this for the following reasons:

(1) Paragraph 59 imposes specific obligations upon the Plan Company (i) to consult with the advisers to Secured Creditors who are invited to re-invest in good faith and (ii) to use reasonable efforts to engage with the Secured Creditors and their advisers "on an equal and open basis" and to ensure that the Recapitalisation Transaction includes options for participation which would avoid adverse economic treatment for some Secured Creditors relative to other *pari passu* Secured Creditors.

(2) In my judgment, this obligation reflects Snowden LJ's guidance in *Adler* that any restructuring plan must be fair by reference to the horizontal comparison. It follows that the Plan Company assumed a contractual obligation to engage with all Secured Creditors, who are invited to subscribe for equity or new money in the restructuring process openly even though they have agreed to grant specific information rights to the Class A AHG.

(3) Mr Thomas-Watson did not refer to this obligation in his witness statement and neither Mr Fraiser nor Mr Burlison was taken to it in cross-examination. As I have stated, I did not find Mr Thomas-Watson a satisfactory witness and when he was cross-examined about the June Release Condition, it was clear that he had little familiarity with the Financing Documents. I therefore attach little weight to his evidence.

(4) Further, Mr Thomas-Watson complained in Thomas-Watson 1 that Polus had not been informed by Akin Gump that Jefferies and they had a conflict of interest and were not "ejected" from the Class A AHG until 17 October 2024. But he was careful to give very limited evidence about the formation of the Class B AHG and the formation of the B Plan. The only evidence which he gave was as follows:

> "The proposal was partly underwritten by a number of third-party institutions that did not, as far as I was aware,

> have any exposure to Thames Water. The identity of those institutions is confidential, however I can confirm that they are well-known investors, many of whom share notable similarities to members of the Class A AHG Co-Com. It is notable that binding commitments amounting to £3 billion (including substantial binding commitments from third-party investors) on a facility which has cheaper terms than the Company Plan facility were obtained in a matter of days, which serves to illustrate how low-risk the investment is and how incommensurate the terms of the Class A Proposal are with the risk profile of the investment."

(5) When he was cross-examined Mr Thomas-Watson could not say how many of the Class B AHG had been in the initial creditor group or represented by Akin Gump. He also accepted that the Class B Creditors could have proposed an alternative transaction at any time and that a number of the parties who were backstopping the B Plan were not Plan Creditors at all:

> "MR AL-ATTAR: Covalis is one of the backstop parties, isn't it? MR JUSTICE LEECH: Do you object to that question? MR PHILLIPS: No. MR JUSTICE LEECH: Right. A. Yes, Covalis is one of the backstop parties. MR AL-ATTAR: Covalis was not a member of the initial creditor group, was it? A. I don't know, because as I have mentioned, I do not know who was in the initial creditor group. Q. Take it from me, it has never been a client of Akin, so Covalis could have acted to coordinate an alternative proposal earlier, couldn't it? A. Yes, I suppose it could have. Q. The company publicly announced its intended equity and liquidity process on 9 July 2024; didn't it? A. I am not aware of the precise dates, but that sounds in keeping with the timeline I understand. Q. Covalis put in its indicative equity bid in time on 5 December 2024; didn't it? A. I am not a party to the equity process. I have not seen correspondence in relation to the equity process. So I can't comment on that. Q. As a B debt holder, who is behind the B plan, that is what your counsel said, Covalis could have led a B proposal at any time, couldn't it? A. As I mentioned, I agree with your assessment that if someone wanted to put an alternative financing proposal together they could have, but I think one of the reasons the Class B AHG was relevant to being able to put the plan or put the financing together is the quantum of the financing here, which is £3 billion, which is not an inconsiderable sum, and outside the organisation of a group it would be very difficult to arrange such a financing. Q. Can I just challenge on that answer.

> Covalis is a backstop party and you, if I may, trumpet in your evidence that your backstop is backstopped by third party institutions. So it is not the case that that backstop depended on the group coming together, is it? A. The third party institutions do not form 100 per cent of the backstop commitments. Q. The one institution that is not -- we can go through all the signature pages if we have to -- is Covalis, isn't it? A. Sorry, could you repeat the question? Q. The third party institutions, in paragraph 21 of your evidence you say it is partly backstopped by third party institutions. You say partly because Covalis is a B creditor. A. I say it is partly backed by third party institutions, because I am using "third party" to refer to institutions who at the time the backstop agreement was signed I believe held no exposure at all to Thames Water, but were able to take a view on whether or not providing such a backstop was economically attractive or -- Q. Let's move on."

(6) Finally, I note that there is no allegation by the Class B AHG that the Plan Company or TWUL has committed any breach of the covenants in the CTA, Schedule 4, Part 3 and, in particular, paragraph 6(vii) (above). If the Class B Creditors had been effectively frozen out and unable to obtain any information from the Plan Company about the restructuring, I would have expected to see the requests which they had made for information to the Plan Company and its response.

243. I, therefore, dismiss the Class B AHG's objection to the Plan based on the CTA, Schedule 4, Part 3, paragraph 60. I accept that paragraph (d) confers valuable information rights on the Class A AHG. But this objection takes it out of context and ignores the rights of all Secured Creditors who will be invited to participate in RP2 in paragraph 59. Moreover, there was no evidence to persuade me that the Class A AHG will use those information rights to divert value from the Class B Creditors. I also reject the veiled suggestion in Mr Thomas-Watson's evidence that the Class A AHG effectively froze out the Class B Creditors shortly before the execution of the TSA. The current version of the CTA does not contain these information rights and there was nothing to prevent the Class B Creditors or the third-party institutions from putting a rival plan forward at any time after July 2024 when the Thames Water Group's negotiations with its Creditors were well-known.

(4) Conclusions

244. I, therefore, dismiss the Class B AHG's jurisdictional Objection 1. I have found that the relevant alternative is a SAR and that the Class B Creditors will be no worse off under the Plan than they would have been if TWUL had entered a SAR. I have also rejected Mr Heis's evidence in relation to the Class A Control Conditions and the Class B AHG's detailed objections to the individual provisions. I am satisfied that they have no effect on value and that even if I had accepted Dr Grunwald's evidence, I would have found that the Plan Company had satisfied the no worse off test. I, therefore, turn to the exercise of the Court's discretion.

VII. Discretion

M. Fairness

(1) The horizontal comparison

245. Mr Smith and Mr Al-Attar both submitted that the horizontal comparison gave rise to no issue of fairness in the present case because it involved an interim restructuring plan which did not generate a restructuring surplus by itself but gave breathing space to enable the Plan Company to complete the equity raise and present a permanent restructuring plan to the Court. They also submitted that it did not seek to depart from the priority of distribution which would apply in an insolvency process.

246. Mr Smith and Mr Al-Attar also submitted that the Court had no obligation to assess the fairness of the Plan by reference to the horizontal comparison if the Class B Creditors were out of the money. In *Re Virgin Active Holdings Ltd* [2021] EWHC 1246 (Ch), [2022] 2 BCLC 62 ("***Virgin Active***") Snowden J held that the views of creditors who were out of the money should be given little weight even though they had voted against a restructuring plan. He stated this at [249]:

> "The express equation of creditors with 'no genuine economic interest in the company' with an 'out of the money class' is striking. The logic of this point is that if creditors who would

> be out of the money in the relevant alternative could be bound to a plan which effects a compromise or arrangement of their claims without even being given the opportunity to vote at a class meeting, the fact that they have participated in a meeting which votes against the plan should not weigh heavily or at all in the decision of the court as to whether to exercise the power to sanction the plan and cram them down. Nor is it easy to see on what basis they could complain that the plan was 'unfair' or 'not just and equitable' to them and should not be sanctioned. That point was made expressly by Trower J at the end of para [51] of his judgment in *DeepOcean*."

247. In their Skeleton Argument the Class B AHG advanced five propositions of law to justify the conclusion that the Court should investigate the horizontal comparison and the fairness of the plan even if the Class B Creditors were out of the money. Their first proposition was that the Court must consider issues of horizontal fairness of its own accord even if the challenge is being brought by an out of the money creditor. They argued that this proposition could be derived from Snowden LJ's judgment in *Adler*. They also argued that his earlier decision in *Virgin Active* was wrong. The remaining four propositions developed their first proposition that it was not unfair to reject the Plan even if they were out of the money.

248. I reject the Class B AHG's first proposition. Mr Phillips and Mr Abraham did not repeat it in their written Closing Submissions or address it orally. Moreover, they did not address the fact that Snowden LJ cited [249] (above) with approval in *Adler* at [251] and or that Miles J cited and followed [249] in *Re Cine-UK Ltd* ("***Cine-UK***") [2024] EWHC 2475 (Ch): see [67] to [69]. Richards J also cited and followed it in *Re Project Lietzenburger Strasse Holdco SARL* [2024] EWHC 468 (Ch) ("***Aggregate***") at [212]. Mr Phillips and Mr Abraham did not persuade me, therefore, that I should depart from *Virgin Active* or give greater weight to their opposition once I had found that they were out of the money.

249. I am satisfied that the present case gives rise to no issue of horizontal fairness of the kind explored in *Adler* and for the two reasons given by Mr Smith and Mr Al-Attar. The Plan is an interim restructuring plan which involves no restructuring surplus and even if it can be treated as if it did, all of the Plan Creditors are treated equally because the Plan Creditors are entitled to participate

pari passu in the Super Senior Funding. Mr Al-Attar also put to Mr Thomas-Watson (and he accepted) that it would have been fair for the Plan Company to adopt a "tiered approach" and apportion Super Senior Funding to the Class B Creditors as "tier 2" super senior funders:

> "Q. If I can move on to my final two topic, they are quite short I hope. Mr Thomas-Watson, can you go to paragraph 22 of your witness statement. A. Yes. Q. You say: "Given that the ability to participate in the super senior funding is pro rata, it is the holders of the Class A debt who disproportionately benefit from those returns." A. Yes. Q. What do you understand "pro rata" to mean? A. The point I am making here is that -- Q. Just tell me what you understand pro rata to mean first, that is the question? A. I understand the pro rata to mean in proportion with one's holdings of something. Q. Next question. You agree that the super senior funding under the plan is to be allocated pro rata between the Class A and Class B debt; don't you? A. Yes, I do. Q. When you say disproportionately and not equal given the pro rata basis, is it the Class B AHG's position that they should receive better than pro rata participation rights? A. When I say "disproportionately", I mean that 16/17ths of the super senior will be held by Class A creditors should they take up their rights to do the super senior and approximately 1/17 will be held by Class B creditors. Q. That is proportionate, isn't it? You work in a fund. A. Yes, it is proportionate, it is proportionate in the sense that that is what the proportions of the Class A and Class B are, but I mean by -- Q. My question is, when you say that would be disproportionate. I am asking you, is your position that the Class Bs should receive better than pro rata participation rights? A. My position is that the vast majority of the economic benefits of the super senior accrue to Class A creditors and those benefits are effectively being paid for via a value transfer from the Class B -- Q. I have not asked you about -- MR JUSTICE LEECH: That is a fair -- MR AL-ATTAR: It is not actually. I am asking him, is it his position that they should receive better than pro rata? Do you want better than pro rata treatment? Do you want special treatment? A. We are not asking for special treatment. In the Class B plan, which we have set forward, the proposal is for the financing to be offered pro rata to the Class A and Class B creditors. Q. Have you considered that the Class B creditors are already receiving special treatment? The Class B debt ranks below the Class A debt, doesn't it? A. Yes, it does. Q. To reflect that ranking, the Bs could have been allocated their new money as tier 2 super senior and the As tier 1, that could have been the deal structure, couldn't it? A. That is possible I understand, yes. Q. That means the equal participation rights under the plan, regardless

> of ranking, are better from that perspective, doesn't it? A. Compared to your counterfactual, yes."

250. From this exchange, it became clear that Mr Thomas-Watson's basic objection to the Plan was that the effect of inserting the Super Senior Funding at the top of the debt structure was to push down the Class B Debt out of the money, and for this reason they ought to be entitled to a bigger participation in the Super Senior Funding. But that is almost always going to be the outcome of an injection of new money where the Part 26A jurisdiction is engaged. If the junior creditors are out of the money in the relevant alternative (as here), the restructuring plan is not unfair and little weight is attached to their views: see *Virgin Active*. I, therefore, dismiss the Class B AHG's Objection 2.

(2) A better or fairer plan

(i) Price

251. In *Adler* Snowden LJ indicated that there might be examples where the Court rejected a restructuring plan as unfair if the new money was provided on more expensive terms than the company could have obtained in the market from third parties. Mr Burlison's evidence in Burlison 1 was that it took four months to negotiate the TSA and that it appropriately reflected what was felt to be fair economics for those providing the new finance:

> "28. As a result, the term sheet that was ultimately agreed with Thames Water had already been heavily negotiated as among the "restricted" (i.e. permitted to receive the non-public information which was required in order to enable the terms of the financing to be agreed) members of the Class A AHG (and the separate Bank Group) to appropriately reflect both what was felt were fair economics for those bearing the risk of providing the new finance, and the need not unduly to prejudice those who were unwilling or unable to participate. The terms that were agreed to in the final term sheet were those that it was expected would be necessary to get a minimum of 75% of the Class A Creditors to consent."

252. The headline price of the new money in this case, the Super Senior Funding, is very, very high. Mr Cochran accepted that over half of it would be used to pay for the new money and to service the existing debt. I have declined to accept that

the B Plan provides an alternative which is either binding on the backstopping creditors or capable of implementation in time to prevent the Thames Water Group from entering a SAR. But both the terms of the B Plan and the immediate trading price of the Super Senior Funding suggest that TWUL might have found better terms in the market from new funders who are not exposed to the Plan Debt. I should add that I was not fully convinced that Mr Ereira's figures in the table (above) were accurate given Akin Gump's analysis in their letter dated 13 November 2024 (and I may have to return to this issue at the convening hearing for the B Plan). But for present purposes, I assume that it was.

253. In my judgment, this is not a reason for refusing to sanction the Plan. It must be remembered that the TSA was the product of agreement in October 2024 to enable TWUL to continue trading until March 2025 and to access the "trapped cash" of £400 million. Further, TWUL could never have raised new super senior funding without the consent of all of the Secured Creditors and, in particular, the Class A Creditors. Indeed, that is why the Class B AHG have to apply to Court to sanction the B Plan. Finally, and most importantly, I have described the cost of the new money as a "headline price". As I explore below in the context of the public interest, I am satisfied that it is likely that the outcome of RP2 is that the Class A Creditors will have to take a significant "haircut" and that the price of the new debt will have to be borne by the Plan Creditors themselves.

<u>(ii)</u> <u>Terms</u>

254. In their Skeleton Arguments the Plan Company and the Class A AHG argued that the question of a "better or fairer plan" was directed at the horizontal comparison and the allocation of the restructuring surplus and it did not mean that the Court should consider whether every provision of the Plan is fair or whether it might have been amended or omitted and that this would be an impossible task. I accept this submission up to a point. However, it is unnecessary in this case for me to consider the extent to which the Court should take out its blue pencil or, indeed, re-write the commercial terms because I have found that the Class B Creditors are out of the money in the relevant alternative.

255. *The Class A Control Terms.* Given that finding, I am not satisfied that any of the Class A Control Terms are unfair or unreasonable. Mr Burlison's evidence was that the Class A Creditors are the economic owners of the Thames Water Group and that, in those circumstances, they should have controls over the equity raise and, to use his phrase, "a seat at the table".

256. The only provisions which gave me concern was the CTA, Schedule 6, Part 3, paragraph 60. Mr Thornton mounted a characteristically persuasive argument on behalf of TWL that the imbalance between the information to which the Class A Creditors are entitled and the information to which other Creditors are entitled is unfair, even if they are out of the money:

> "The reluctance of the Plan Company to provide parity of information to all creditors prematurely pre-judges the merits of a future plan and mistakenly mixes the merits (and potential merits) of the A Plan and a future plan together. The Plan Company has not put forward any prejudice that it might suffer as a result of providing parity of information to all creditors. This in particularly puzzling given Linklaters' assertion in paragraph 1.7 of their letter dated 30 December 2024 that "It is likely to be important that RP2 can be implemented on as short a timetable as possible." On the face of it, it is in the Plan Company's best interests to provide all creditors with all relevant information in the lead up to a future plan."

257. After careful consideration, I am not satisfied that I should refuse to sanction the Plan for this reason or to require the Plan Company to reformulate paragraph 60. However, Mr Al-Attar accepted in his oral submissions that the Class A AHG may be prepared to modify the information rights of Secured Creditors in the Reinstated Plan if the Court thought that this was necessary. Secured Creditors who are invited to bid in the equity raise will have the benefit of the covenant in Part 3, paragraphs 59(a) and (b). But that obligation is currently limited to Secured Creditors who are offered the right to re-invest in the Thames Water Group. It would apply, therefore, to a rival equity bid by the Class B Creditors or to the injection of new debt. If necessary, the Plan Company ought to apply it widely to negotiations with all Secured Creditors and the Subordinated Creditor even if they are not involved in a bid during RP2. If necessary, I will hear further argument on this issue at the hearing to consider consequential matters.

258. *Maturity Dates*. In their Skeleton Arguments Mr Thornton and Mr Phillips and their respective teams submitted that the Court should not sanction a general extension of maturity dates when this was not necessary to provide for an interim plan. This was not a point taken in the Class B Grounds of Objection. I asked Mr Burlison about this during his cross-examination:

> "MR JUSTICE LEECH: That also gets a two-year extension, and I just want to understand the rationale. A. When we put the plan together and recognising it was just an interim plan, we felt the fairest way was to have the extension for all parties, so, you know, we were not treating different groups of creditors differently, and that was felt, you know, our judgment was that was the best way to achieve it. And given it got 98 per cent support, we believe we achieved that objective, my Lord. MR PHILLIPS: It is because you thought that that would be supported by the A class creditors with long-term maturing debt? A. Correct. Yes. Q. And that has been proved to be true? A. Correct. Q. If RP2 is not passed, all of that long-term debt has achieved a two-year extension to its maturity? A. Correct. Q. But the only debt you needed to extend was the debt that matured in the period during which you might be negotiating RP2; do you follow me? A. I follow what you are saying. Q. Your answer is that you didn't do that because that would not have achieved the support of the longer-term maturing creditors, as I understood your answer? A. No, I did not say that. I didn't say it wouldn't have achieved the support. In fact, we wouldn't know that, because that is not what we launched. The view was, in our view, and the view of Akin, it was the best way to launch this, as an interim measure."

259. Mr Al-Attar submitted that there was no basis for refusing to sanction the Plan on this basis if the horizontal comparator was met and there was no blot on the Plan. In support of his submission he cited the decision of Richards J in *Aggregate* (above) at [58] and [59]:

> "58. I acknowledge that the court has some inherent power to effect amendments to a Part 26A plan after the second stage, at which it has been voted upon, but before the third stage at which it is sanctioned. There is no need for me in this judgment to seek to delineate the precise parameters of that power. However, the power to effect amendments cannot be divorced from the statutory context of Part 26A. In *Re Kempe Ambassador Insurance Co* [1998] 1 BCLC 234, Lord Hoffmann, sitting in the Privy Council made the following statement in connection with a scheme of arrangement under

> legislation in Bermuda that is similar to what is now Part 26 of CA 2006:
>
> > "It is true that the sanction of the court is necessary for the Scheme to become binding and that it takes effect when the order expressing that sanction is delivered to the Registrar. But this is not enough to enable one to say that the court (rather than the liquidators who proposed the scheme or the creditors who agreed to it) has bias order made the scheme. It is rather like saying that because Royal Assent is required for an Act of Parliament, a statute is an expression of the Royal will. Under section 99 [the relevant legislation in Bermuda] it is for the liquidators to propose the scheme, for the creditors by the necessary majority to agree to it and for the court to sanction it. It is the statute which gives binding force of the Scheme when there has been a combination of these three acts just as the rules of the constitution give validity to act duly passed by the Queen in Parliament."
>
> 59. All of the authorities I was shown touching on my power to amend the Plan were in a context where the court had power to sanction the Part 26 scheme or Part 26A plan in its unamended form. Here, as I have concluded, I have no such power. I consider that if I exercise, or purported to exercise, an inherent jurisdiction to amend the Plan I would be turning it from something that the court has no power to sanction into something that the court can sanction. I consider that to be a material amendment that either falls outside the scope of my power or would be an improper exercise of it."

260. I accept Mr Al-Attar's submission. Given that the Class B Creditors and TWL are out of the money in the relevant alternative, the Court should not accept a roving commission from them to decide whether the Plan is "necessary" to give effect to an interim solution. But in any event, I accept Mr Burlison's evidence that this decision was taken on legal advice and that it was considered the best way to achieve an interim solution. Indeed, I am far from satisfied that the Class A AHG would have been able to promote an interim plan without extending the maturity dates of all of the various instruments for the following reasons.

261. In my judgment, a combination of the debt structure and the maturity dates of the various instruments would have made it very difficult for the Plan Company to put in place an interim plan without extending the maturity dates of all the various instruments. The only maturity dates which had to be extended to implement RP1 and continue the equity raise are the maturity dates of the US PPNs. But it was unrealistic just to extend those notes for a very short period of

time. The noteholders would have demanded a variation to their rights which might have required the consent of all Class A and Class B Creditors because of their entrenched rights.

262. Further, if the Plan Company wished to give itself longer breathing space (as it may well do to mount an appeal to the CMA), then it faced the difficulty that the shorter-dated instruments fell within both the Class A and the Class B Debt. It was reasonable to assume that the holders of those instruments would have demanded a premium for an extension (e.g. a greater participation in the Super Senior Funding) and that this would also have triggered the entrenched rights of the remaining Class A Creditors.

263. *Clause 9.7.* TWL argued that the effect of the STID, clause 9.7 was to "dilute and qualify" its existing voting rights and to "disenfranchise" TWL from participating in the voting process of a future restructuring plan. Clause 9.7 is a very complex provision and I did not hear any argument about its meaning and effect. It does not expressly exclude the Subordinated Creditor's right to vote at a plan meeting and, as the Plan Company argued, both the Class A and Class B Creditors are bound themselves by the decision of the Majority Creditors to a STID Proposal.

264. Moreover, having studied the provision myself, I am not persuaded that it would prevent TWL from voting on RP2 because it excludes from its operation any STID Proposal which would materially affect its rights under the Finance Documents. The Subordinated Creditor formed a separate class for the Plan Meetings. If the Subordinated Creditor is entitled to vote at a meeting convened to consider RP2 (whether in its own class or in another class), then in my judgment this clause would not prevent it from doing so. Furthermore, because it is out of the money, clause 9.7 should not prevent the Court from sanctioning the Plan. I, therefore, dismiss this objection.

N. Blot

(1) The competition law objection

(i) The Law

265. Section 2 of the CA 1998 is headed "Agreements etc. preventing, restricting or distorting competition" and section 2(8) provides that the prohibition imposed by section 2(1) is referred to as the "**Chapter 1 prohibition**". It provides as follows:

> "(1) Subject to section 3, agreements between undertakings, decisions by associations of undertakings or concerted practices which have as their object or effect the prevention, restriction or distortion of competition within the United Kingdom and which—
>
> (a) in the case of agreements, decisions or practices implemented, or intended to be implemented in the United Kingdom, may affect trade in the United Kingdom, or
>
> (b) in any other case, are likely to have an immediate, substantial and foreseeable effect on trade within the United Kingdom,
>
> are prohibited unless they are exempt in accordance with the provisions of this Part.
>
> (2) Subsection (1) applies, in particular, to agreements, decisions or practices which—
>
> (a) directly or indirectly fix purchase or selling prices or any other trading conditions;
>
> (b) limit or control production, markets, technical development or investment;
>
> (c) share markets or sources of supply;
>
> (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive
>
> disadvantage;
>
> (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by
>
> their nature or according to commercial usage, have no connection with the subject of such contracts.
>
> (4) Any agreement or decision which is prohibited by subsection (1) is void."

266. The Class B AHG argued that it was not necessary to call expert evidence to define the market because the JRC had the object or effect of distorting the competitive process for participating in the Recapitalisation Transaction irrespective of how the market was defined. Furthermore, the Class B AHG did not argue before Trower J (or, indeed, before me) that the relevant market was

any wider than the Recapitalisation Transaction itself: see [2025] EWHC 84 (Ch).

267. Mr Singla and his team did not cite any authority for the proposition that a single term in a single, highly complex loan transaction which has been the subject of detailed legal advice and negotiation (as here) could be held to infringe the Chapter 1 prohibition without expert evidence. Mr Singla took me to the "Guidance on the application of the Chapter 1 prohibition in the Competition Act 1998 to horizontal agreements" published by the CMA in August 2023 (the "**CMA Guidance**"), §1.4, §3.4 and §3.34 to §3.45. But he was not able to point to any paragraph in it which provided direct support for his case.

268. Mr Singla and his team relied almost exclusively on the decision of Roth J in *Jones v Ricoh* [2010] EWHC 1743 (Ch) as authority for the proposition that it was unnecessary to call expert evidence in the present case. There, Ricoh supplied devices to Mr Jones's company, CMP, under a trading agreement terminable on 90 days' notice. Ricoh also entered into a short confidentiality agreement which contained the following clause:

> "7. That no approach or contact direct or indirect in connection with or during our discussions or whilst any Confidential Information remains in the possession or under the control of any Relevant Person shall be initiated, accepted or made by or on behalf of any Relevant Person to or with any employee, client or supplier of yours or any government body or regulatory or other authority or to or with any other person who to our knowledge has any actual prospective connection with you without your prior written consent."

269. The judge held that on the true construction of this clause, it had a very wide effect and, in particular, placed Ricoh in breach of contract if any one of over 150 companies in the Ricoh group made contact with a wide group of people including any government body anywhere in the world: see [31] to [38]. Given the width of this provision, the judge found that it was in breach of the Chapter 1 prohibition and granted summary judgment for the following reasons:

> "41. The prohibition in Article 101(1) is disjunctive in its application to agreements that have the specified object or effect. Mr Hollander submits that this is an "object" case: it is

clear that clause 7 is deliberately designed to limit competition for customers as between Ricoh and CMP. In my view, the position is not quite so simple: for example, the typical vendor covenant on the sale of a business not to supply goods of the same type for a period is literally a restriction on competition with the purchaser, but it may be necessary for the transfer of the business to be achieved; and where it is so limited in scope and duration it is not regarded as a restriction of competition at all and so falls outside Article 101(1): Case 42/84 *Remia v Commission* [1985] ECR 2545. But equally, it is well-established that the question of what is the "object" of an agreement is to be ascertained on an objective assessment of the aims of the agreement in question and does not depend on the parties' subjective intentions.

42. Here, the object might at first sight appear to be to protect CMP's confidential information that was being disclosed to Ricoh as part of their cooperative relationship. But it is manifest from the analysis above that even the restriction I have referred to as (i) in clause 7, on any objective interpretation, goes very far beyond any possible view of what could be needed for that purpose. In its range and scope, it is a naked restriction on any of the more than 150 Ricoh companies dealing with or seeking to deal with a client of CMP, whenever that client was acquired for so long as Ricoh has any of the wide category of "Confidential Information". Although the context of the Confidentiality Agreement is not one which is normally held to give rise to an agreement regarded as anti-competitive by object, in my judgment this agreement exceptionally comes within that category.

43. If I am wrong about that, then although that did not form part of Mr Hollander's argument, I consider alternatively that it is clearly an agreement that is anti-competitive in effect. The Ricoh group is one of the world's major manufacturers and suppliers of MFDs. As regards the 2003 ITT, Ms Cartledge explains that the only serious rival to Ricoh and CMP in the initial bidding process was Canon; and in the end the contract was awarded to Toshiba in conjunction with CMP. As regards the 2007 ITT, this was for a major contract for the supply to Bombardier entities world-wide and, according to Ms Smith, Ricoh's principal rivals were Canon and HP. The facts of this case alone therefore demonstrate that if clause 7 were enforceable, an international group like Bombardier in its centralised procurement would be precluded from receiving a competitive bid from one of the world's leading suppliers of MFDs whereas other major suppliers such as Canon could take part. Accordingly, whatever the precise definition of the relevant market, it seems to me that this provision has the potential effect of appreciably restricting competition. This conclusion is, in my judgment, so clear on the undisputed facts

> that I see no basis on which further evidence at trial could lead to a different conclusion."

270. The only other materials upon which Mr Singla and his team relied in support of their argument that the JRC infringed the Chapter 1 prohibition was a report entitled "EU loan syndication and its impact on competition in credit markets" published by Euclid law on the instructions of the European Commission in which the authors discussed the process of re-financing. Mr Moser criticised Mr Singla and his team for attributing this report to the Commission. He pointed out that it contained a disclaimer by the Commission itself distancing it from the individual views expressed by the authors.

271. Furthermore, the authors reported that the FCA had not identified any competition law concerns in investment and corporate banking. This report also highlighted how high a bar the Class B AHG had set themselves in running the competition law argument by arguing that the conduct of the Class A AHG was the equivalent of "bid-rigging":

> "In the UK the FCA considered syndicated loan markets as part of a wider market study into investment and corporate banking. The FCA did not identify any specific competition law concerns with these markets but did note generally in respect of syndication that it has benefits for borrowers where it enables greater access to investors. The FCA examined whether the size or composition of syndicates (for example because the syndicate is too large) might lead to material detriment through inefficiencies but concluded there was evidence of such."
>
> "**Cases related to bid-rigging**
>
> In so far as the review of cases related to bid rigging is concerned we note that in several Member States there have been cases where, unsurprisingly, a feature of the bid-rigging arrangement is a mechanism to "compensate" any agreed loser of a bid/tender process, either by way of assistance in winning future bids or through appointment as a sub-contractor on the then bid in question. In some cases the compensation payment has been more direct e.g. by way of a direct payment between competitors or by way of another mechanism such as payment of a higher rent.
>
> Syndicated loans markets may display similar characteristics to those present in these cases in so far as the way in which banks are appointed to the various roles within a syndicate may

> facilitate a compensation mechanism. The frequency with which similar groups of banks participate in tenders in respect of loan origination or are otherwise involved in participating in syndicated loans together could facilitate compensation arrangements between them, either through arrangements related to future tenders or to the allocation of roles on a syndication (or a combination of the two). This might be further facilitated by the arrangements agreed with the borrower for the allocation of fees as between the various banks depending on their roles in the syndication process. The extent to which collusion might be facilitated or frustrated is likely to depend on various factors, notably the regularity and predictability of tenders, the number and stability of the group of banks participating in tenders in any particular market, the degree of engagement of the borrower or sponsor and the tender design and the terms of appointment of the MLA(s)."

272. The Class B AHG argued that the June Release Condition constituted an agreement as between each of the Class A AHG and, if necessary, the Plan Company. It may not matter but this is not strictly accurate. The only parties to the Super Senior IBLA are the Super Senior Issuer, the Super Senior Security Trustee and TWUL. Moreover, the Supported LUA is not defined as an agreement between the Class A AHG and the Plan Company but two thirds of the Super Senior Funders and two thirds of the Class A Creditors as a whole.

273. In their written Opening Submissions the Class B AHG put their case in relation to the JRC very high indeed. They argued that it was an "unlawful collusive agreement" and that it prevented, restricted or distorted competition because it fixed "purchase or selling prices" or "other trading conditions". They submitted that the JRC was "an agreement of precisely the type that the Commission was concerned about" in the passage about bid-rigging (above). They also submitted that the effect of the JRC was that the Plan Company no longer had any control over the bidding process (original emphasis):

> "224. The result is a restriction or distortion of competition in relation to the bidding process for participation in the recapitalisation transaction, because it is no longer the Company but <u>other competitors in that bidding process</u> (i.e. the Class A Creditors) who get to dictate the Company's approach. The Company's own evidence confirms that a competitive process is occurring in respect of third parties bidding to take part in the recapitalisation transaction; the Company relies on a letter from Rothschild's which says at para. 20 that "*there*

> *are a number of serious and motivated parties involved in the process*" . The fact therefore is that there is a competitive process occurring, and it would be contrary to competition law to stifle or in any way distort that process. The bid-rigging analogy is therefore wholly apt. The purpose and result of the June Release Condition are to distort the outcome of the recapitalisation bidding process. The Class A AHG have managed to achieve that distortion of competition by taking control of the competitive process itself. That is no different from, and if anything worse than, the stratagem often seen in bid-rigging cases whereby competitors to manipulate the competitive process by deciding between themselves who should put in the winning bid."

274. Finally, the Class B AHG submitted in their written Closing Submissions that their case was made out on the evidence. They accepted quite rightly that the RP2 bidding process was a competitive one and they relied on the fact that the Class A AHG had itself proposed the JRC. But they also submitted that it was the subjective intention of the Class A AHG to obtain for itself control over the process, the effect of the distortion of the RP2 competitive process would be appreciable and that the JRC was not a necessary or indispensable part of the Plan.

275. In my judgment, the Class B AHG have failed to prove any of these allegations on a balance of probabilities and the competition law objection fails on the facts. I say this for the following reasons:

    (1) In reaching my findings in relation to the Class A Control Terms I have dismissed the allegation that the Plan Company and the Class A AHG intend to collude together to interfere in the equity raise or that the Class A AHG will use its right of approval of any final offer to prevent the Class B Creditors from making any recovery at all.

    (2) I have also rejected Mr Heis's evidence in relation to the effect of the JRC on the bidding process on the basis that it is highly artificial and does not withstand scrutiny. I have accepted that the Rothschild Letter accurately represents the current state of the bidding process. In my judgment, the JRC does not have "a chilling effect" on the equity raise and the bidding process.

(3) Mr Moser reminded me that the burden was on the Class B AHG to prove a breach of the Chapter 1 prohibition and submitted that none of the critical issues were put to Mr Burlison. I am satisfied that Mr Phillips properly put his overall case to Mr Burlison and Mr Fraiser but it is fair to say that he did not put it in terms to Mr Burlison that the Class A AHG intended to take over control of the equity raise to the exclusion of the Plan Company. It follows that I do not have Mr Burlison's direct answer to that question and I have to piece his answer together from the questions which he was asked and the answers which he gave.

(4) But in any event, I am satisfied that Mr Burlison gave evidence that this was not the intention of the Class A AHG. I have set out a number of the key passages from his evidence (above). He said a number of times that the Class A AHG wanted "controls" over the process and to be proactive and involved. He also accepted that the approval of the Class A Creditors would be required and that for this reason they have "a seat at the table". But he did not give evidence that they intended to take over control of the process themselves and to pull the strings of the Plan Company.

(5) Finally, Mr Burlison's evidence was quite clear that the JRC was a fundamental element of the entire package which provided downside protection for the Class A AHG. Again, it is a distortion of his evidence to suggest the contrary and that it was not a necessary or indispensable part of the Plan.

(iii) Application

276. But even if I am wrong to dismiss the competition law objection on the facts, I dismiss the competition law objection on the application of the law to the facts as I have found them to be. I do so for the following reasons:

Restriction by object

(1) It was common ground that the Chapter 1 prohibition on restrictions of competition by object, extends only to agreements which are by their very nature harmful to the proper functioning of competition. It is also common

ground that the concept must be interpreted strictly and that the Court must be satisfied that the agreement reveals a sufficient degree of harm to competition such that it is not necessary to assess its actual effect. Finally, it is common ground that the parties' subjective intentions are not decisive although they may be taken into account: see the CMA Guidance, §3.34, §3.36 and §3.41.

(2) Neither the Super Senior IBLA nor the JRC itself falls into an established category of horizontal agreements such as price fixing or bid rigging. Indeed, the Super Senior IBLA is not a "horizontal agreement" at all between actual or potential competitors: see the CMA Guidance, §3.7(a). The Class A Creditors are not competing with each other to acquire an equity stake in the Thames Water Group.

(3) The express purpose of the IBLA is to advance the Scheduled Loans and (if the Funding Conditions are satisfied) the Additional Commitments to TWUL for the purpose of applying those funds to the expenses which it is currently incurring under its business plan. The JRC is a condition precedent to the draw down of the last two Scheduled Loans and the Additional Commitments. The Class B AHG did not suggest that it was a breach of the Chapter 1 prohibition for a lender to make the draw down of funds to an individual borrower subject to a condition precedent.

(4) The event upon which the drawdown of the July and August tranches is conditional is that a Supported LUA has been entered into by that date. Mr Singla accepted that there was no competition law objection to creditors and a borrower entering into a lock-up agreement as such or to the level of support required. Indeed, the B Plan itself contemplates that two thirds of both the Super Senior Funding Creditors and the Class A Creditors will be required to enter into a lock-up agreement: see Ereira 3, paragraph 53.5 (above).

(5) I have also found as a matter of construction that the JRC does not give the Class A AHG (or the Class A Creditors more generally) an express right to control the Recapitalisation Transaction and that the definition of a

Recapitalisation Transaction is not prescriptive but in wide terms. I have also found that this is not the subjective intention of the Class A AHG.

(6) It follows, therefore, that the only substantive objection to the JRC both as a matter of fairness under Part 26A and as a matter of competition law is that it makes the draw down of the July and August tranches of the Scheduled Loans conditional upon the entry into the Supported LUA by a certain date, namely, 30 June 2025. The objection is, to use Mr Heis's word, that it contains a "precipice" which will prevent or distort competition in the equity raise.

(7) However, I have held that as a matter of construction the JRC imposes a qualified obligation to consent to an extension of time to comply which would not permit the Class A AHG to exert control over the process. Mr Heis also accepted that any Recapitalisation Transaction would have to be approved by 75% of the Class A Creditors and the Court.

(8) In my judgment, *Jones v Ricoh* is distinguishable. This is not a case where a contractual term can be seen on its face to be a "naked restriction" on a large number of participants in a particular market on the undisputed evidence before the Court. Furthermore, in the absence of clear authority to the contrary or a compelling analogy either in the case law or guidance from the Commission or the CMA, I am not prepared to accept that a condition precedent in a loan document against the background of a restructuring plan which must be sanctioned by the Court is capable of engaging the by object restriction without any expert evidence of a wider effect on the market at all.

Restriction by effect

(9) Again, it was common ground that where a horizontal agreement does not of itself reveal that it has restrictive effects on competition, then it must be shown that it has an appreciable adverse impact on at least one of the parameters of competition in the market such as price, output, product quality, product variety or innovation: see the CMA Guidance, §3.42. The

guidance also states that a number of factors are relevant to this issue at §3.44:

> "The following factors are relevant to assessing whether an agreement has restrictive effects:
>
> — the nature and content of the agreement;
>
> — the actual context in which the cooperation occurs, in particular the economic and legal context in which the undertakings concerned operate, the nature of the products affected, and the real conditions of the functioning and the structure of the market or markets in question;
>
> — the extent to which the parties individually or jointly have or obtain some degree of market power and the extent to which the agreement contributes to the creation, maintenance or strengthening of that market power or allows the parties to exploit such market power; and
>
> — both actual and potential restrictive effects on competition, which must be sufficiently appreciable."

(10) Beyond the evidence relating to the Plan itself, there was no evidence before me in relation to any of these matters. Moreover, I have rejected Mr Heis's evidence in relation to the "chilling effect" of the JRC on the bidding process. I am satisfied, therefore, on the basis of the evidence before me that the JRC had no adverse impact on the parameters of competition in the market even if that market is limited to the equity raise.

<u>(iv) Conclusion</u>

277. Given the conclusion which I have reached in relation to section 2(1) and the Chapter 1 prohibition, it is unnecessary for me to go on and consider Mr Moser's alternative argument that the JRC is ancillary to the Interim Platform Transaction or objectively justified and, therefore, an exempt agreement. However, where I do agree with Mr Day and Mr Moser is that the competition law argument was no more than an attempt to run the same arguments in a different guise (especially after Trower J had refused permission to the Class B AHG to adduce expert evidence). I, therefore, dismiss Objection 4.

(2) Releases

278. The Class B AHG's final objection related to the releases which are incorporated into the Plan. Clause 16.1 of the Plan provides that if the Plan takes effect, each "**Plan Party**" will ratify the actions of each "**Released Party**" under the Plan and release each Released Party in relation to their actions in connection with the Interim Platform Transaction. The Plan Company identified the Plan Parties and the Released Parties in its Skeleton Argument:

> "In summary, the clause in issue provides that: (i) the Plan Company, (ii) TWUL, (iii) TWUF, (iv) the Super Senior Issuer; (v) Holdco; (vi) the Plan Creditors, (vii) the Backstop Funding Parties, (viii) the Plan Creditor Funding Parties, (ix) the CF Creditor Parties and (viii) the administrative parties involved with the Plan (a list of which is scheduled to the Plan) (the "**Administrative Parties**", and together with the other parties listed above, the "**Releasing Parties**")"
>
> "(i) the same parties granting the releases; (ii) the Affiliates of: (a) the Plan Creditors, (b) the Backstop Funding Parties, (c) the Plan Creditor Funding Parties, (d) the CF Creditor Parties and (e) the Administrative Parties; (iii) the respective officers, directors, employees, executives and agents (or equivalents) of the parties referred to in sub-paragraphs (i) and (ii) above; and (iv) each Advisor (as defined in the Plan), each Affiliate of each Advisor and each of the current and former respective officers, directors, employees, executives and agents (or equivalents) of such parties, (the parties listed in sub-paragraphs (i) to (iv) above being the "**Released Parties**")"

279. Clause 16.1.1 contains the provision ratifying the actions of the Released Parties. Clause 16.1.2 contains the releases themselves and clause 16.1.3 contains a covenant not to sue. The releases are in the widest possible form, but they are also tied to the conduct of the Released Parties in relation to the Plan (my emphasis):

> "16.1.2 pursuant to this Plan, waives, releases and forever discharges any and all actions, proceedings, claims, damages, counterclaims, complaints, liabilities, liens, rights, demands and set-offs, whether present or future, prospective or contingent, whether in this jurisdiction or any other or under any law, of whatsoever nature and howsoever arising, whether in law or in equity, in contract (including, but not limited to, breaches or non-performances of contract), in statute or in tort (including, but not limited to, negligence and misrepresentation) or in any other manner whatsoever, breaches of statutory duty, for contribution, or for interest

> and/or costs and/or disbursements, whether or not for a fixed or unliquidated amount, whether filed or unfiled, whether asserted or unasserted, whether or not presently known to the parties or to the law, in each case that it ever had, may have or hereafter can, shall or may have arising out of actions, omissions or circumstances on or prior to the Transaction Effective Date against each and any Released Party whatsoever or howsoever arising (and notwithstanding any subsequent facts or information becoming known following the Transaction Effective Date), **in relation to or arising directly or indirectly out of or in connection with, the negotiation, preparation, sanction or implementation of the Plan and/or the Interim Platform Transaction (including, without limitation, the negotiation, preparation, sanction or implementation of any Transaction Documents)**; and
>
> 16.1.3 pursuant to this Plan, undertakes to the Released Parties that it will not commence or continue, or instruct, direct or authorise any other person to commence or continue, any Proceedings against any Released Party in respect of the actions ratified or the waivers, releases, and discharges granted under Clauses 16.1.1 and 16.1.2 respectively."

280. The Class B AHG submitted that it was not necessary to sanction the wide releases in clauses 16.1. They submitted that there was "scant" authority under English law and referred the Court to a number of authorities from Singapore and Hong Kong in an effort to demonstrate that the position under English law was unclear. Finally, they submitted that because this was an interim plan the correct approach would be to defer the question of releases for directors and advisers until the sanction hearing for RP2.

281. I do not accept that there is scant authority under English law or that it is necessary to demonstrate that there is a clear risk of "ricochet" claims before the Court can approve the release of directors and officers. It is well-established that the Court may sanction the entry into a deed of release where it is necessary to give effect to the arrangement between the Plan Company and the Plan Creditors: see the consequential judgment in *Re Noble Group Ltd* [2019] BCC 384 at [24]. The Plan Company drew my attention to a number of recent cases in which the plan or scheme included similar releases and in *Matalan* Miles J stated that if no breach of duty is alleged and there has been adequate disclosure, the directors should have the certainty of releases.

282. In my judgment, clause 16 is not a blot on the Plan nor should I refuse to sanction it in the exercise of the Court's discretion because of the width of the releases or because it is an interim plan. I have reached that conclusion for the following reasons:

(1) It is clear that the Class B AHG have no objection to the ratification of the actions of the Released Parties in relation to the B Plan, to waive certain breaches and to enter into covenants not to sue under the B Plan: see the Explanatory Statement, paragraphs 9.2.1 and 9.2.3. The objection is limited, therefore, to the grant of releases.

(2) It is also clear that the Class B AHG principally object to the Plan Parties releasing officers and advisers of the Plan Company and other Thames Water Group companies rather than the release of any Creditors or other parties to the Finance Documents.

(3) In my judgment, it is appropriate to release directors and officers for the reasons given by Miles J in *Matalan*. The Class B AHG advanced no argument that they have committed any breaches of duty in promoting the Plan. I found Mr Fraiser and Mr Cochran to be honest and straightforward witnesses and although Mr Phillips put it to Mr Fraiser that the Plan Company's hands were tied by the TSA and Mr Day put it to him and Mr Cochran that the directors were putting the interests of creditors as paramount, it was not put to either of them that they had committed any breaches of their own duties.

(4) Mr Day submitted that the Plan Company had not made full and frank disclosure to the Court particularly about the cost of finance and all of the fees. I have considered whether I should refuse to permit the Plan Parties to grant releases to the Released Parties without a proper investigation into their conduct. In my judgment, it is not appropriate to do so. The relevant material was all in the Plan documents or in the evidence before the Court even if the Plan Company did not draw it to my attention. Further, Mr Smith told me on instructions (and I accept) that there had been an ongoing dialogue with OfWat.

(5) In my judgment, if the Court does not authorise the releases, there is a serious risk that the directors and other officers of the Plan Company and TWUL may face ricochet claims brought against them and that those claims will undermine the Plan. Given the sums at stake and the very different views taken by the Class B Creditors, customers and members of the public about the utility of the Plan, a director might well think twice about implementing the Plan at all unless they were given such a release.

(6) Moreover, contrary to the Class B AHG's submission, the fact that the Plan is an interim plan is a reason to sanction the Plan with the releases rather than the reverse. The releases will extend only to the Interim Platform Transaction and not to RP2 itself. Moreover, the Court will have the opportunity to scrutinise RP2 very carefully before it is sanctioned and the directors and advisers will not be granted a release in advance for their conduct in relation to the equity raise and in relation to the subsequent application under Part 26A.

(7) Finally, I have considered the drafting of clause 16.1.2 and although the wording of the release is extremely wide, the critical words are those which I have highlighted in the text above. In my judgment, those words limit the wide terms of the release to conduct which relates only to the Interim Platform Transaction and does not extend to RP2 or any subsequent plan. I accept that it may be difficult to draw the line between the two but that would be a factual issue whatever the wording of the release. If any of the parties can improve on the wording of clause 16.1.2, however, I will give them permission to raise the issue at the hearing on consequential matters.

283. Mr Day submitted that I should refuse to sanction the releases because any breaches of duty committed by officers or advisers of the Plan Company or TWUL might be a valuable asset in the hands of a special administrator if RP2 later failed and the Thames Water Group entered a SAR. Initially, I found this a persuasive argument. On reflection, however, I do not consider that it would justify refusing to sanction the Plan altogether. However, I will also give the parties permission to argue at the hearing on consequential matters that clause 16.1.2 should involve some carve-out if TWUL later enters a SAR and to put a

form of words before the Court. Subject to any representations in relation to the form of clause 16.1.2, I dismiss Objection 5.

VIII. Public interest

O. Standing

284. Although the Plan Company and the Class A AHG did not object to Mr Maynard MP appearing by counsel and solicitors at the sanction hearing, they did not accept that he had standing or that the Court should take his views into account. In particular, the Plan Company argued that neither he nor the individuals and groups whom he represented are affected by the Plan: see *Re BAT Industries plc* (Neuberger J, unreported, 3 September 1998) and *Re Steinhoff International Holdings NV* [2021] EWHC 184 (Ch) ("***Steinhoff***") (Adam Johnson J). Mr Al-Attar also argued that the sanction of the Plan was a domestic matter for the Plan Company and the Plan Creditors and not a matter for members of the public or customers of the Thames Water Group.

285. I reject both submissions. I have held that a special administrator is entitled to give priority to the public interest in ensuring "the uninterrupted provision of vital public services". I have also found that a SAR is the relevant alternative. In my judgment, the customers of Thames Water and the members of the public who are the recipients of those vital public services are plainly affected by a decision to sanction the Plan. If a SAR is a better solution for them than the Plan (whether or not it is a better solution for the Creditors), then they are plainly affected by the decision whether or not to sanction it.

286. Moreover, Mr Maynard MP is not a single customer of Thames Water. He gave evidence in Maynard 1 that he had the support of 25 Members of Parliament as well as 34 campaign and recreational groups and a number of individual customers. He also gave evidence in Maynard 2 that he had received additional messages of support from Members of Parliament and from members of the House of Lords and from 43 parish councils or councillors, landowners and businesses, further campaign and recreational groups and also a number of customer groups.

287. I am grateful to Mr Maynard MP for co-ordinating the responses of so many different groups. I am also grateful to him and to Mr Day and his team for the very clear and cogent evidence and arguments which they put forward in opposition to the Plan and all on a pro bono basis. I formed the view at the outset of the sanction hearing that the Court would be assisted by Mr Maynard MP and his team and I granted a prospective costs order on the basis that he would not be ordered to pay the costs of any of the other parties whatever the outcome.

288. Mr Smith also argued that customers and members of the public would not be affected by the Plan and that Mr Maynard MP had no standing to appear because customer prices are fixed by OfWat and the Plan would not result in an increase in prices. He also argued that there was no evidence that the quality of the provision of services would be worse under the Plan. I reject both of those submissions. In my judgment, the addition of a potential £3 billion of debt at high interest rates and high cost is bound to have a long-term effect on the quality of public services especially if the equity raise is unsuccessful and no further restructuring is possible.

289. I am satisfied, therefore, that the customers of the Thames Water Group and the wider public who use its services as a sewerage undertaker or come into contact with the Group as a service provider are affected by the Plan and the Interim Platform Transaction, that Mr Maynard MP had standing to appear at the sanction hearing to oppose the Plan and that the Court was entitled to take his views into account.

P. Sanction

(1) The cost of bridge finance

290. Mr Day advanced a number of persuasive arguments for refusing to sanction the Scheme in both his Skeleton Argument and his Closing Note. His first argument was that the cost of bridge finance is significantly higher than in a SAR. Mr Cochran accepted that more than £443 million of the first tranche of Super Senior Funding would be repaid to Plan Creditors in interest and costs. By comparison, if the same funding were made available by the Government to a special administrator at a commercial rate of interest the cost would be £65.93 million

only. Mr Day put this figure to Mr Cowlishaw and he found it surprising because it was so low.

291. Mr Cowlishaw's evidence was that the cost of a SAR would be between £3.35 billion and £4.01 billion and, therefore, more expensive than the Plan. However, this evidence was based on a number of assumptions which Mr Day challenged in cross-examination:

(1) Mr Cowlishaw assumed that it would take 18 months for a special administrator to comply with the statutory objective and as opposed to 6 months for the equity raise. He also assumed that the special administrator would sell the Group in July 2026.

(2) Mr Cowlishaw forecast that there would be additional costs or "overlays" involved in a SAR totalling between £1.226 billion and £1.270 billion. These consisted of "people costs", "bad debt provisions", "materials", "insurance", "other operating costs", "professional fees", "capex", "credit terms" and "interest" totalling at least £51.8 million per month.

(3) It also assumed that the Government would fund these costs at a rate of interest of 9.5% which would be paid on a monthly basis rather than on exit (as has happened in other special administrations).

292. In my judgment, Mr Cowlishaw's assumptions or forecasts were very pessimistic and, as he acknowledged in cross-examination, they were based on the assumptions which an insolvency practitioner would make when a normal trading company went into administration. They also seemed to me to involve an element of double-counting as Mr Heis had pointed out in his evidence. Moreover, there seemed to be no real basis for the assumption that a special administrator would take a year longer to sell the Group than the equity raise.

293. I see no reason why a special administrator could not take over the equity raise and complete it in much the same time as the Plan Company or why employees or customers would either desert the Thames Water Group or insist on different and better terms. I accept that commercial suppliers might exploit a SAR to demand better terms or take the action which I have already described (as Mr

Cowlishaw anticipated). I also accept that bidders might use a SAR as a reason to reduce their bids. For these reasons I am prepared to accept that the costs of a SAR are likely to be equal to or more than the costs of RP1 and RP2 on the basis that the high costs of finance under the Plan will be balanced out by the negative effects of an insolvency process. But I am not persuaded that the costs of a SAR would be upwards of £3.35 billion.

(2) The deployment of bridge finance

294. Mr Cochran accepted that in addition to the £445 million cost of finance which would be paid out of the advance of £1.388 billion, as much as £245 million could be used to fund the existing interest and approximately £210 million in professional fees. He also accepted that this did not include hedging costs, the costs of fines and penalties and also of any remedial action. Mr Day submitted that in a SAR none of the funding provided by the Government would be used to fund existing interest payments and that the professional fees would fall to £5 million per month even on Mr Cowlishaw's own pessimistic assumptions. The Plan Company did not challenge these submissions.

(3) Destination of the finance

295. Finally, Mr Day argued that the Court could not conclude that the steep price of RP2 was worth it. He submitted that it was incumbent on the Plan Company to provide clear and cogent evidence that the equity raise would be achieved and that it could only be achieved at the price paid by the Plan Company. He also submitted that the conditionality attached to the Super Senior Funding was not in the interests of customers and the public either and that the Plan did not address the management and governance issues which caused the financial difficulties in the first place. He referred me to the views expressed by Professor Dieter Helm, who is an acknowledged expert in this field, and he put one of Professor Helm's articles to Mr Cowlishaw.

296. I return to the steep price which the Plan Company is paying below. But Mr Day's submission gives rise to an important question which arises in the present case, namely, what degree of assurance should the Court require from the Plan Company that RP2 will be achieved. Mr Al-Attar submitted that this question is

answered by requiring a realistic degree of assurance that the sanction order will not be ineffective and he relied on the decision of Adam Johnson J in *Steinhoff* at [86] to [90]:

> "86. At the same time, however, and while acknowledging that the overall equation for the Scheme Creditors was between an overall settlement on the one hand, or no settlement and liquidation on the other, it seems to me important to acknowledge that achieving the hoped-for overall settlement is not a foregone conclusion, and is certainly not achieved by means of the present Scheme alone.
>
> 87. On the contrary, other, and significant steps, will be required in order for the Steinhoff Group Settlement to be successfully implemented. Mr du Preez's descriptions of the Scheme as a "stepping stone" and a "key gating item" were carefully phrased. The present Scheme is not the culmination of the intended settlement process, but only the beginning of it. It is the key that unlocks the door to allow the remainder of the process to unfold, including the further anticipated court approval processes in South Africa and the Netherlands. Those processes will involve seeking input and approvals from much wider constituencies of interested parties than the present process, including not only other financial creditors aside from the Scheme Creditors, but also the various parties whose disputes are intended to be compromised. The relevant Courts will need to determine whether to approve or not approve the Steinhoff Global Settlement having regard to those wider interests. One cannot be certain how all these further elements in the process will develop.
>
> 88. It follows, as it seems to me, that the question to be addressed by the Scheme Creditors was not so much about giving final approval for the Steinhoff Global Settlement, but about whether it was in their interests to allow the remainder of the process a chance to run its course, or whether it was better to stop it in its tracks.
>
> 89. This question of future uncertainty, even in the event of approval of the present Scheme by the Scheme Creditors, was addressed in the Judgment of Sir Alastair Norris at [25]. Sir Alastair was concerned with the question whether the future uncertainty, arising in particular from the need for further Court approval processes to be conducted in South Africa and the Netherlands, was such that there was no utility in convening the requested meetings of creditors. Sir Alastair considered that, despite the admitted uncertainty, the meetings should nonetheless continue. He said:
>
>> "The question has arisen in the context of whether the court should grant sanction where the scheme is a part of an

> overall restructuring which involves a CVA where the CVA is under challenge. The point was before Zacaroli J in *Re New Look Financing plc*, [2020] EWHC 2793 (Ch) and before me in *Re PizzaExpress Financing 2 plc* [2020] EWHC 2873 (Ch), both sanction hearings. Zacaroli J and I shared the view that the desirable position was to put the pieces of the jigsaw on the table and then to see whether in the events it was possible to slot them together. The test to apply is to assess whether acceptance of the CVA in that case or acceptance of the group settlement agreement in this case is a fanciful prospect. At this stage it is certainly not fanciful, and uncertainty is not an obstruction in the way of convening meetings."
>
> 90. The analogy of putting the pieces of the jigsaw on the table is an interesting and apposite one. It suggests that the better approach, in a case where a threshold or "gating" issue arises, will usually be to allow the step to be taken which at least allows an opportunity for the remaining pieces of the puzzle to be assembled, rather than shutting the gate and foreclosing the opportunity entirely."

297. In this case, I adopt the same approach as Adam Johnson J. In my judgment, the appropriate test is whether there is more than a fanciful prospect of RP2 succeeding and, if not, whether it is desirable that the Court should give the Plan Company an opportunity to assemble the remaining pieces of the puzzle. The Court has adopted an analogous test in relation to third-party and commercial conditions which have to be satisfied under a scheme of arrangement. In those cases, the Court must be satisfied that the scheme will become effective: see, e.g., *Re Morses Club Scheme Ltd* [2023] EWHC 1365 (Ch) at [49] to [50] (Trower J) and *Re All Scheme Ltd* [2022] EWHC 1318 (Ch) at [72] to [77] (also Trower J).

298. I return to the question whether the Court should give the Plan Company an opportunity to assemble the remaining pieces of the puzzle below. But the Plan Company has satisfied me that RP2 is more than a fanciful prospect. Both the Plan Company and the Class A AHG persuaded me that they were committed to the equity raise and that it provides the only realistic way for TWUL to comply with the Licence conditions and restore its Issuer Credit Ratings to Investment Grade.

(4) Lack of frankness

299. As I have indicated above, Mr Day also submitted that there had been a lack of frankness on the part of the Plan Company and, in particular, that it was not open and straightforward with the Court about the cost of finance, adviser fees and the role of Teneo as an adviser in discussions with the Government. I accept that under Mr Day's forensic gaze the full costs of the finance and adviser fees were properly brought to the Court's attention and his cross-examination permitted me to assess Mr Cowlishaw's independence. But I am not satisfied that the Plan Company failed to make full and frank disclosure to the Court. I dismiss this objection.

(5) Conclusions

300. The costs of finance and adviser fees in the present case are very high. Indeed, they might be described as eye-watering and, as Mr Day submitted, well over 50% of the Scheduled Loans go round in a circle and back into the pockets of the Plan Creditors who advanced the £1.388 billion in the first place. I also echo the views expressed by Michael Green J in *Re CB&I* in relation to adviser fees at [19]:

> "I have one more thing to say at the outset, which has troubled me throughout. I was horrified to discover that the Plan Company has spent around US$150 million on professional fees in negotiating with its secured creditors from December 2022 and then putting forward the Plan and taking it to this hearing. That is an enormous sum of money, even taking account of the fact that it includes the costs of the supporting creditors as well. The Group actually raised US$250 million of new money while the Plan was being negotiated, but that was principally to fund the professional fees for getting the Plan through. The witness from a member of the AHG, Mr Richard Carona, said that he was deeply uncomfortable with this and I agree with his comment that there seems to be something wrong with the restructuring industry, particularly in the US, where the costs appear to be out of control. Obviously the fact that the Plan has been opposed has added to the costs, but it should have been apparent from an early stage that Reficar was not going to just accept an extinguishment of its debt. I think all I can say is that I hope there can be a better way to do these financial restructurings because costs of that magnitude could be a barrier to the sort of restructurings that Part 26A was meant to encourage."

301. If anything, the position is worse in the present case for two reasons. First, Michael Green J made these comments and fired this shot across the bows of the restructuring industry almost a year ago but no notice appears to have been taken of it. Secondly, TWUL is a public utility funded by the water bills of the residents and commuters of London and the South East who cannot do without the water supply. Customers and residents who are struggling with their bills will be horrified at these costs and mystified how the Thames Water Group has been able to fund them or why it has agreed to do so. Moreover, the Plan Company and its advisers do not appear to have had any real concerns about the optics of relying on the Part 26A jurisdiction for companies in financial difficulties whilst paying the OID, backstop, consent and make whole fees to the Class A AHG and in the region of £210 million to its legal and other advisers.

302. If it had been clear that TWUL would have had to bear all of these costs totalling £800 million as the price of extending the liquidity runway until the equity raise could be completed, I might have been tempted to refuse to sanction the Plan on the basis that the costs were simply too high and that the Plan Company should present a new plan on much better terms. However, there are three reasons why I have ultimately decided to exercise the Court's discretion in favour of sanctioning the Plan. Those reasons are as follows.

303. First, and most importantly, I am not satisfied that TWUL or its customers will have to bear the finance costs of the Plan whether in the short term or the long term. I say this not because TWUL's prices are fixed by OfWat (as Mr Smith submitted) but because it seems to me very likely that the Class A Creditors will have to take a substantial haircut in order to achieve RP2. Mr Burlison gave evidence to this effect and that the Class A Creditors would end up absorbing the costs of RP1 in four passages in his cross-examination:

> "MR PHILLIPS: Absolutely, my Lord. I was not intending, but I understand. A. So where we sit here today is that, you know, the business is going to need a recapitalisation of somewhere in the region of, you know, 6 to 10 billion let's say, to right size the balance sheet, to bring in the required equity. We know the existing shareholders have walked away and they have said they are not prepared to put any more money into this. We know that there is an equity process continuing with

some very credible parties in there, which we are very comfortable with, but at the end of the day, we don't know whether those equity parties are going to come up with a bid at all or are going to come up with a bid on terms that are appropriate. So just like in any restructuring situation, we have been working with our clients to say if there is no alternative solution, what could we do as a creditor group in terms of fixing the balance sheet, coming up with the equity and putting in place a new governance structure and plan. So, yes, that is being worked on in parallel. And we have been in discussions with Ofwat on that. Q. When you say "appropriate", make sure everyone understands it: appropriate means acceptable to the A class creditors? Amongst other things? A. Actually, predominantly, as a first step, acceptable to the regulator, who is the one that ultimately needs to approve this plan. And we have been told by the regulator that they would expect to see substantial -- an element of pain being taken by the capital structure and the A creditors as part of any proposal that is being put forward. So, yes, it has to be acceptable to the A creditors but first of all it needs to be acceptable to the regulator, who are the ones that can approve it."

"Q. Your evidence is A support is the key? A. Yes, correct. Q. To everything? A. The rights within the existing WBS structure give our lenders those rights. Q. Even if it is worse for the company as a whole? A. I don't see it as being worse for the company in an interim solution. What is going to happen here, there is a stepping stone to get to a final solution, with money going in on an interim basis. That broader recapitalisation, when it happens, has to right size the debt structure, has to get back to an investment grade rating, has to bring in the required level of equity. It is our clients that are going to absorb all that cost ultimately because, you know, this -- the stepping stone to get there means that the new money has to be taken into account in the final restructuring."

"MR PHILLIPS: Ultimately, this is going to have to be paid by Thames? A. I would actually argue, ultimately, it gets paid by the creditors. Q. Because? A. Because on a recapitalisation, new money will go in, the balance sheet will be right sized and therefore all this will get factored into the final restructuring and therefore it is the creditors that end up paying this. Q. Of course that depends where the value breaks? A. That depends where the value breaks. Q. Can I just ask in relation to two other things before we reach the short adjournment, my Lord."

"Q. Given that there might not be an RP2, and that this could just result in increased borrowing by the company? A. Yes, but I come back to the point, even if you put -- extrapolate this and say this then goes into a SAR, in a SAR, if you cannot get to a rescue in a SAR, the business can be -- the assets of the business can be sold. All this comes back to our clients again.

> So we end up absorbing that cost, because it reduces the amount that can go back through the waterfall and it falls wholly on my clients again."

304. I accept Mr Burlison's evidence that the Class A AHG anticipate that RP2 will involve a restructuring of the Class A Debt and that the high costs of RP1 will be borne by them and not by TWUL, especially in light of my findings on valuation. Despite Mr Day's excellent cross-examination and his powerful submissions, I think that it is appropriate at this stage to treat the Creditors as bearing the costs of the Plan and that the pricing features of the Super Senior Funding are primarily designed to give priority to those Plan Creditors who participate in the Super Senior Funding by refinancing a share of their existing Debt.

305. Secondly, I bear in mind that the Part 26A jurisdiction is a statutory one and that there is a public interest in facilitating the rescue of struggling companies which I have to balance against the public interest in the benefits to the public of a SAR, in which priority is given to the uninterrupted provision of vital public services. Miles J explained this public policy in *Cine-UK* at [116]:

> "The restructuring plan procedure is a statutory one. The legislature has decided that there is a public interest in facilitating the rescue of struggling companies through reconstructions, assuming of course that the statutory pre-conditions are met and the court, in the exercise of its discretion, thinks fit. Counsel for the Objectors argued that there is no presumption in favour of sanction of a particular scheme and relied on Consort Healthcare at [11]. Richards J was saying there no more than that each case turns on its facts. In the same paragraph he accepted that Part 26A was enacted to enable companies in financial distress to propose restructuring plans. In my view the purpose of the legislation is to facilitate restructurings because this is often a better outcome for the creditors as a whole than the alternative. It appears to me that if a plan would otherwise be sanctioned, a simple and unqualified appeal to the equitable jurisdiction to enforce a promise to exclude a particular creditor would have to give appropriate weight to the public policy in favour of rescuing struggling companies (as well as the public policy embodied in the pari passu principle referred to above)."

306. In my judgment, this consideration has particular force here and I ought to give the Plan Company an opportunity to finish the jigsaw and put RP2 in place. The relevant alternative to the Plan is a SAR which will have to be funded by the Government. There is a public policy in favour of rescuing the Thames Water Group and giving the market a chance to agree a permanent restructuring plan before the Government is forced to fund a special administrator. It should also be borne in mind that if the Group enters into a SAR, this will not result in the nationalisation of Thames Water or the Government taking control of the water supply in London. The statutory purpose of a SAR will be the same as the purpose of RP2, namely, to rescue TWUL or transfer it to a third party so it continues to trade as a private company.

307. Moreover, this policy is reflected in OfWat's letter dated 28 January 2025. In that letter Ms Block stated that the board of directors of the Plan Company were in the best position to make a decision about the solvency of the Company and if they took the view that all other funding options were exhausted, OfWat would in all likelihood apply for a SAR. She clearly anticipated that all other funding options would include both RP1 and RP2. However, I recognise that giving the market a chance may come at a price. I make it clear, therefore, that the Court will wish to scrutinise carefully the extent to which the finance costs and adviser fees of the Super Senior Funding have been borne by the Creditors or TWUL at any sanction hearing for RP2.

308. Thirdly, and finally, I give some weight to the fact that OfWat and the Secretary of State have not opposed the Plan and also that the pension trustees support it. As I have stated above, I do not accept that the sanction of the Plan is a domestic matter between the Plan Company and its creditors. Nor do I accept that OfWat must have taken the same view. However, I do consider it of some significance that in her letter dated 28 January 2025, Ms Block stated that OfWat did not consider that the Plan would constitute a breach of the Plan Company's undertaking to take steps to restore the Investment Grade Rating of the Debt. OfWat has, therefore, made an assessment of RP1 and the equity raise and concluded that the Company is still able to comply with its undertakings even after taking on a further £1.5 billion of debt and, possibly, a further £3 billion.

In my judgment, the Court should give the Plan Company and the Plan Creditors an opportunity to achieve that outcome before imposing the costs of a SAR on the Government.

IX. Disposal

309. I find, therefore, that the relevant alternative to the Plan is a SAR and not the B Plan. I also find that the no worse off test is satisfied. Finally, I find that, applying the horizontal comparison, the Plan is not unfair to the Class B Creditors and that there is no blot on the Plan either because it infringes against the Chapter 1 prohibition, or because of the form of the releases which the Plan Company proposes to give to the directors and advisers of the Thames Water Group companies. Finally, I hold that Mr Maynard MP has standing to oppose the Plan but after taking into account the public interest in ensuring the uninterrupted provision of vital public services, I nevertheless exercise my discretion to sanction the Plan.

310. I have directed that a hearing to consider consequential matters will take place immediately after the hand down of this judgment. At that hearing, I will hear the parties on all remaining matters including any further amendments to the information rights in the CTA, Schedule 4, paragraphs 59 and 60 or the releases in clause 16 of the Plan. I will also deal with all other consequential matters (including costs).