Neutral Citation Number: [2025] EWCA Civ 475

Case No: CA-2025-000371
CA-2025-000375
CA-2025-000376

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INSOLVENCY AND COMPANIES LIST (ChD)
Mr Justice Leech
[2025] EWHC 338 (Ch)

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15/04/2025

Before :

SIR JULIAN FLAUX CHANCELLOR OF THE HIGH COURT
LORD JUSTICE ZACAROLI
and
SIR NICHOLAS PATTEN

- -

Between :

(1) KINGTON S.À.R.L. **(2) THAMES WATER LIMITED** **(3) MR CHARLES MAYNARD MP**	**Appellants**
- and –	
(1) THAMES WATER UTILITIES HOLDINGS LIMITED **(2) THE MEMBERS OF AN AD HOC GROUP OF CLASS A CREDITORS**	**Respondents**

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- -

Mark Phillips KC, Tony Singla KC, Matthew Abraham, Jamil Mustafa and Imogen Beltrami (instructed by **Quinn Emanuel Urquhart & Sullivan LLP**) for the **First Appellant, Kington S.À.R.L.** appearing on behalf of an ad hoc group of Class B creditors
Andrew Thornton KC and Georgina Peters (instructed by **Freshfields LLP**) for the **Second Appellant, Thames Water Limited**
William Day, Dr Riz Mokal, Rabin Kok, Niamh Davis and Lucas Jones (instructed pro bono by **Marriott Harrison LLP**) for the **Third Appellant, Mr Maynard MP**

Tom Smith KC, Charlotte Cooke and Andrew Shaw (instructed by **Linklaters LLP**) for the **First Respondent**
Adam Al-Attar KC and Edoardo Lupi (instructed by **Akin Gump LLP**) for the **Second Respondent**

Hearing dates : 11, 12 and 13 March 2025

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Approved Judgment

This judgment was handed down remotely at 10.30am on 15 April 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives (see eg https://www.bailii.org/ew/cases/EWCA/Civ/2022/1169.html).

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Sir Julian Flaux Chancellor of the High Court, Lord Justice Zacaroli and Sir Nicholas Patten:

1. Introduction

1. This is an appeal against the decision of Leech J dated 18 February 2025, approving a restructuring plan (the "**Plan**") under Part 26A of the Companies Act 2006 (the "**2006 Act**") in respect of Thames Water Utilities Holdings Limited (the "**Plan Company**"). Shortly after the hearing of the appeal, on 17 March 2025 we announced our decision that, subject to the amendment of the Plan in one respect relating to the release of certain claims against directors and advisers, the appeal was dismissed. These are our reasons for the decision.

2. At the outset, we wish to pay tribute to the judge whose extremely thorough judgment, dealing comprehensively with the numerous issues of fact and law that arose, including complex questions of valuation evidence and competition law, was delivered within an exceptionally short time-frame.

3. It is unacceptable that the judge was put under enormous pressure to hear the case and hand down judgment in such a compressed fashion. The judge said (at §133) that he 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. We note that the Plan Company did not accept this criticism, and it is not necessary to determine where the blame ultimately lies. On any view, however, there has been a wholesale failure by the parties to comply with the guidance given by this Court in *Re AGPS Bondco Plc* [2024] EWCA Civ 24 ("***Adler***"), at §55 and following. The financial difficulties of the Plan Company, and the urgency of the situation by the time the matter came to trial, were very real, but they hardly came as a surprise. We repeat in particular what was said in *Adler* at §64:

> "These considerations suggest that to prevent undue delay and expense, a plan company must (subject to the giving of any necessary confidentiality undertakings) make available in a timely manner the relevant material that underlies the valuations upon which it relies. The parties and their advisers and experts must also co-operate to focus and narrow the issues for decision so that sanction hearings are confined to manageable proportions. If sensible agreement is not forthcoming, the court should exercise its power to order specific disclosure of key information and its other case management powers robustly."

The Thames Water Group

4. The Plan Company is a subsidiary of Thames Water Limited ("**TWL**"). It has no material assets of its own, but is the holding company for the Thames Water Group (the "**Group**"). The principal operating company of the Group, Thames Water Utilities Limited ("**TWUL**"), is a direct subsidiary of the Plan Company. TWUL is a water and sewerage undertaker, holding a licence for that purpose granted by the Secretary of

State for the Environment, Food & Rural Affairs (the "**SoS**") pursuant to s.11 and s.14 of the Water Industry Act 1991 ("**WIA 1991**").

5. The Group's assets include a network of over 32,000 km of water mains, 109,000 km of sewers that cover London, the Thames Valley and the home counties, approximately 354 wastewater and treatment sites and 88 water treatment works. It employs approximately 8,000 people.

The existing debt structure

6. The Group's debt is governed by approximately 60 different loan agreements, instruments and security documents. These, and their key terms, are explained in more detail by the judge at §11 to §35. They include: a Security Trust and Intercreditor Deed (the "**STID**"); a Master Definitions Agreement (the "**MDA**"); a Common Terms Agreement (the "**CTA**"); and a Security Agreement.

7. Most of the Group's debt has been borrowed or issued by TWUL and its direct subsidiary, Thames Water Utilities Finance plc ("**TW Finance**").

8. The debt is divided, roughly, into the following groups, in order of priority ranking:

   (1) Liquidity facilities, in the amount of £550 million, all of which are undrawn;

   (2) Hedging agreements;

   (3) Class A Debt, consisting of various loans totalling approximately £16 billion. Of this: £209 million, together with interest of £15 million, was due for repayment on 24 March 2025 (but this has been extended pursuant to the Plan); a further £3.552 billion matures between 19 July 2025 and 18 April 2027; and the remainder of the Class A Debt matures between 2027 and 2062;

   (4) Class B Debt, consisting of various loans totalling approximately £1 billion, all of which matures within the next two to three years; and

   (5) Subordinated Debt, owed by the Plan Company to TWL, of which principal of £1.98 billion and interest of £1.25 billion is outstanding, and due to mature in 2056. The Subordinated Debt also consists of four further loans, totalling £331 million, all of which are payable on demand, and three of which have term dates expiring between July 2027 and August 2028.

9. The Plan Company is guarantor of TWUL's and TW Finance's obligations under the Class A Debt and the Class B Debt, and has entered into a deed of contribution with TWUL and TW Finance to contribute to amounts paid by those entities towards their obligations under any debt ranking in priority to the Subordinated Debt. It is the primary obligor in respect of the Subordinated Debt.

10. All of the above-mentioned debt, except for the Subordinary Debt, has the benefit of the same security package over the assets of the Group, including first fixed charges over the shares in TWUL, TW Finance, the Group's land and real property, plant and machinery, credit balance in bank accounts, IP rights, shares, dividends, and book debts.

The parties and their representation

11. The Plan Company (and respondent to this appeal) is represented by Mr Smith KC, Ms Cooke and Mr Shaw.

12. The Plan is supported by an ad hoc group of holders of Class A Debt (the "**Class A AHG**"), represented by Mr Al-Attar KC and Mr Lupi. The Class A AHG is a respondent to the appeal.

13. The appellants are those who opposed the sanction of the Plan before the judge:

    (1) An ad hoc group of holders of Class B Debt (the "**Class B AHG**"), represented by Mr Phillips KC, Mr Singla KC, Mr Abraham, Mr Mustafa and Ms Beltrami;

    (2) TWL, represented by Mr Thornton KC and Ms Peters; and

    (3) Charles Maynard MP ("**Mr Maynard**"), who was given permission to intervene by the judge, and is represented *pro bono* by Mr Day, Dr Mokal, Mr Kok, Ms Davis and Mr Jones.

14. We are grateful to all Counsel and those instructing them for the high quality of their written and oral submissions, prepared in exceptionally quick time.

The Group's financial difficulties

15. The Group has been facing serious financial difficulties for some time. The Plan Company's evidence was that these were the consequences of "operational and regulatory factors". The judge addressed this briefly at §60 to §61 of his judgment. He noted the unchallenged evidence from Mr Maynard, which referred to the payment of significant dividends by the Group, used either to distribute to equity investors or to service debt, to the fact that the Group has become highly leveraged since its privatisation, and to the unsustainably high debt-to-EBITDA levels. Mr Maynard also referred to the progressive downgrading of the Group by the credit ratings agencies "as a result of this financial mismanagement".

16. At §61, the judge, while expressing concern at the lack of introspection before the Court about the reasons why the Group has got itself into the current situation, commented that it is not for the Court on an application to sanction the Plan to attribute blame for this, but its focus must now be "forward-looking", in order to try to restore the Group to financial health. We agree. This appeal is not about the steps, if any, which might be taken by the Plan Company, TWUL or any other Group company in respect of past failings. It is concerned only with whether the judge was correct to conclude that the requirements of Part 26A of the 2006 Act had been satisfied in this case.

17. An important part of the context for the resolution of the Group's financial difficulties is that TWUL is subject to regulatory limitations on the amount it can charge to its customers, its main source of revenue, as explained by the judge at §38 of his judgment:

> "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."

18. At §39 to §49, the judge set out further details of this process. For present purposes, we note the following.

19. A key component of the Price Review is the "Regulatory Capital Value", which represents the level of capital invested that OfWat has committed to allowing the company to recover via charges to customers, in addition to its operating expenditure. The amount which TWUL is allowed to charge customers involves three components: (1) a Regulatory Capital Value "run-off" rate, which is comparable to the depreciation in the value of its assets, and is recoverable over the assumed lifetime of the assets (referred to as "slow money"); (2) a return on capital; and (3) a "fast money" allowance, which is the balance of expenditure recovered immediately, year on year, from customers.

20. On 11 July 2024, OfWat released the draft determination for AMP8 in which it allowed £16.9 billion of total expenditure (capital expenditure and operating expenditure), compared with the figure of £22.2 billion which TWUL had included in its most recent business plan. TWUL submitted a draft determination response on 29 August 2024, seeking a total expenditure allowance of £24.5 billion. In its final determination, however, issued on 19 December 2024, OfWat allowed only £20.5 billion.

21. The Plan Company's evidence was that it would be "incredibly challenging" for TWUL to deliver on its performance commitments and regulatory requirements within the total expenditure allowed in the final determination. On top of this, TWUL is liable for significant fines and penalties, including for having approved the payment of interim dividends in 2023 and 2024. These penalties are unfunded.

22. On 24 February 2025, TWUL announced that OfWat had been requested to refer the final determination to the CMA. The CMA has six months to reach its own determination, but this can be extended by a further six months.

The Plan in outline

23. The Plan Company recognises that TWUL's business is unsustainable given the high level of its debt, and the regulatory restrictions on increasing its main source of revenue. A substantial injection of new equity will in due course be required.

24. The Plan, however, has only a limited purpose – to provide a stable platform, or 'bridge', as an interim measure to enable a further restructuring plan based on an equity raise ("**RP2**") to be implemented, hopefully within a period of six months. On the basis of the findings made by the judge, the enterprise value of the Group will by then be significantly less than the aggregate amount of its debt, such that in order to attract further equity investment RP2 will inevitably have to result in a reduction of the Group's debt burden.

25. The Plan is designed to achieve this limited purpose by extending the maturity dates on all Class A and Class B Debt and the Subordinated Debt, and by providing for a new subsidiary of TWUL to issue Super Senior Funding ("**SSF**") in the headline amount of £1.5 billion, with a maturity date of two years and six months, with an option to provide an additional £1.5 billion on the same terms. All holders of Class A and Class B Debt will have the right to participate in the SSF, pro rata to their respective share of the Class A or Class B Debt. The SSF will have priority over all existing Plan debt (other than certain hedging liabilities).

26. The appellants' objections pursued on this appeal relate principally to the cost of the SSF, and the terms on which it is to be made available. Specifically, the Class B AHG contends that certain rights conferred on the Class A Creditors, but not others, give the Class A Creditors unfair control over the design and implementation of RP2 (the "**Class A Control Terms**"). Mr Maynard and TWL have focused their arguments on the cost aspect.

2. The statutory framework

27. There are two statutory frameworks relevant to this appeal: Part 26A of the 2006 Act relating to restructuring plans, and the WIA 1991 and rules made under it which, among other things, modify insolvency law as it applies to a water and sewerage undertaker such as TWUL.

Part 26A

28. Part 26A applies where two threshold conditions are met: s.901A of the 2006 Act. Condition A is that the 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, the purpose of which is to eliminate, reduce or prevent, or mitigate the effects of, any of those financial difficulties. There is no doubt that these threshold conditions are met in this case.

29. Pursuant to s.901C the Court may order a meeting of the creditors or classes of creditors to be summoned in such manner as the Court thinks fit.

30. Trower J, in an order dated 17 December 2024, directed that meetings be held of seven classes of creditors, including two classes comprising Class A Creditors, one class comprising Class B Creditors, and one class consisting of the subordinated creditor (see [2024] EWHC 3310 (Ch)).

31. Section 901C(4) permits the Court to exclude from participation at meetings in relation to the Plan, creditors who are colloquially referred to as "out of the money". It provides:

> "But subsection (3) does not apply in relation to a class of creditors or members of the company if, on an application under this subsection, the court is satisfied that none of the members of that class has a genuine economic interest in the company."

32. The Plan Company did not in this case seek to exclude either the Class B Creditors or TWL from attending meetings to consider and vote upon the Plan.

33. The Court's discretion to sanction a Plan derives from section 901F(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."

34. This is, however, subject to the power of the Court under s.901G to "cram-down" one or more classes of creditors in which the requisite majority was not obtained:

> "(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."

The WIA 1991 and relevant rules

35. The SoS and OfWat are required by s.2(2) of the WIA 1991, when exercising their powers in relation to TWUL, to do so in a manner which he or it considers is best calculated:

> "(a) to further the consumer objective;
>
> (b) to secure that the functions of a water undertaker and of a sewerage undertaker are properly carried out as respects every area of England and Wales;

> (c) to secure that companies holding appointments under Chapter 1 of Part 2 of this Act as relevant undertakers are able (in particular, by securing reasonable returns on their capital) to finance the proper carrying out of those functions;
>
> (d) to secure that the activities authorised by the licence [of a water supply licensee or sewerage licensee] and any statutory functions imposed on it in consequence of the licence are properly carried out; and
>
> (e) to further the resilience objective."

36. The "consumer objective" is "to protect the interests of consumers, wherever appropriate by promoting effective competition between persons engaged in, or in commercial activities connected with, the provision of water and sewerage services."

37. The "resilience objective" is:

> "(a) to secure the long-term resilience of water undertakers' supply systems and sewerage undertakers' sewerage systems as regards environmental pressures, population growth and changes in consumer behaviour, and
>
> (b) to secure that undertakers take steps for the purpose of enabling them to meet, in the long term, the need for the supply of water and the provision of sewerage services to consumers, including by promoting-
>
> (i) appropriate long-term planning and investment by relevant undertakers, and
>
> (ii) the taking by them of a range of measures to manage water resources in sustainable ways, and to increase efficiency in the use of water and reduce demand for water so as to reduce pressure on water resources."

38. By s.26 of WIA 1991, there are restrictions imposed on the ability to commence insolvency proceedings in relation to a water and sewerage undertaking. It cannot be voluntarily wound up, an administrator cannot be appointed under Schedule B1 to the Insolvency Act 1986 (the "**1986 Act**"), and no creditor can enforce security over its property without 14 days' notice being served on the SoS and OfWat.

39. Instead, by s.23 of WIA 1991, the SoS or (with the SoS's consent) OfWat may apply to the Court for the making of a special administration order. Creditors can present a petition to wind up the company, but the Court cannot make a winding-up order and instead – if it would otherwise have made a winding-up order – shall make a special administration order.

40. Such an order requires that the affairs, business and property of the company are managed by a special administrator, (a) for the achievement of the purposes of the order and (b) in a manner which protects the interests of members and creditors of the company. The purposes of the order vary depending on the reason for the appointment.

If the appointment is made on the ground that the company is or is likely to be unable to pay its debts (which would be the case in respect of TWUL) then the purpose is (a) to rescue the company as a going concern, or (b) to transfer the business as a going concern to another entity or entities so as to ensure that the functions which have been vested in the company may be properly carried out. The second of these purposes applies, however, only if the special administrator thinks that it is unlikely to be possible to rescue the company as a going concern, or a transfer is likely to secure more effective performance of its functions.

41. The Water Industry (Special Administration) Regulations 2024 modify certain aspects of Schedule B1 to the 1986 Act. In particular, Regulation 5 disapplies paragraph 3 of Schedule B1, which requires an administrator to perform his functions in the interests of creditors, and Regulations 22 and 40(a)(iii) amend the provisions of Schedule B1 relating to the disposal of charged property. Under paragraph 71 of Schedule B1, an administrator has power to sell such property as if it was not subject to the security, on the basis that he must account to the security holder for the proceeds of sale together with "any additional money required to be added to the net proceeds so as to produce the amount determined by the court as the net amount which would be realised on a sale of the property at market value." This is modified in relation to a SAR of a water and sewerage undertaking, by the replacement of "market value" with "appropriate value", which means "the best price that could be reasonably available on a sale which is consistent with the achievement of the purposes of the special administration."

42. The purpose and effect of these provisions is to ensure that the essential functions of water and sewerage companies continue notwithstanding the insolvency of the entity which holds the licence to carry them out. We will need to return to this point when considering Mr Maynard's arguments based on public policy.

3. The judge's judgment

43. The judge was required to deal with a wider array of issues than those raised on appeal (see §134-§135 and §160 of the judge's judgment). The Class B AHG objected to the sanction of the Plan on four bases. The first was that the Court had no jurisdiction to sanction the Plan because the relevant alternative was a different restructuring plan proposed by the Class B AHG, and the Class B Creditors would be better off in that event than under the Plan. The Class B Plan was abandoned shortly after the judge delivered his judgment, and it has played no part on this appeal.

44. The second objection by the Class B AHG was that the Plan did not warrant the extent of alteration of the rights of the dissenting creditors and gave rise to an unfair distribution of the restructuring surplus between the Class A and Class B Creditors. In particular, there was no good reason why the Class A Creditors should have the benefit of the Class A Control Terms. Before the judge it was contended that these effected a diversion of value to the Class A Creditors. That point is not pursued on appeal, but the Class B AHG maintains its contention that the Class A Control Terms render the Plan unfair and, on that basis, the judge ought not to have sanctioned it.

45. The third of the Class B AHG's objections was that there was a "blot" on the Plan because the Plan infringed the Chapter 1 prohibition contained in s.2(1) of the Competition Act 1998. This point is not pursued on appeal.

46. The fourth objection was that the wide releases granted to third parties under clause 16.1 of the Plan were not necessary for the implementation of the Plan and constituted a "blot" on the Plan. This is pursued, in a limited form, on appeal.

47. TWL objected to the Plan on the basis that clause 9.7 of the amended and restated STID diluted and qualified TWL's existing voting rights and/or disenfranchised TWL from participating in the voting process in relation to RP2. This is not a point pursued on appeal. TWL also objected to the disparity between the information rights of the classes of creditors under the Plan.

48. Mr Maynard objected to the Plan on the basis that it was not in the public interest. That was because the Plan would load an unwarranted further debt burden onto TWUL, due to the excessive costs as compared with the relevant alternative. The customers of Thames Water and the wider public, he contended, would be better served by TWUL going into a SAR.

The Relevant Alternative

49. The judge accepted the Plan Company's evidence that the current "liquidity runway" – that is the period of time before which TWUL's liquidity problems were such that its directors would have no choice but to request that OfWat and the SoS apply for a special administration order on the basis of TWUL's insolvency – ran out on 24 March 2025. For that reason, the Relevant Alternative is a SAR of TWUL (and, in tandem, an administration of the Plan Company and TW Finance). This is now common ground.

50. The same urgency led to the extreme expedition of the hearing of this appeal, and the need for a decision to be announced very shortly after the hearing. Although Mr Smith acknowledged that it was not possible to identify a particular date – or "cliff edge" – beyond which TWUL could not continue to trade without the protection of a SAR if the sanction of the Plan was not confirmed, he submitted that this would occur within a very short time, that the position was worsening day by day and that TWUL was "running on fumes" in the meantime.

The no worse off test: valuation

51. The parties adduced evidence as to the enterprise value of TWUL in various scenarios, in order to address the issue whether the Class B Creditors were no worse off under the Plan than in the relevant alternative. The valuations of each expert were based on three different dates: (1) the valuation date; (2) 30 September 2025, being the estimated date on which RP2 would be implemented following an equity raise; and (3) 31 July 2026, being the estimated date on which TWUL would exit a SAR, on the assumption that it entered a SAR in February 2025.

52. Each expert used the discounted cashflow method, and produced a low, mid and high valuation as at each date.

53. The Plan Company's expert, Mr Eraj Weerasinghe, identified a mid-point enterprise value of TWUL as at the valuation date of £14.729 billion (in a range from £13.674 billion to £15.844 billion). The Class B AHG's expert, Dr Dora Grunwald, identified a mid-point enterprise value as at the valuation date of, in contrast, £21.496 billion (in a range from £20.806 billion to £22.712 billion).

54. The judge preferred the evidence of Mr Weerasinghe over that of Dr Grunwald and adopted his mid-point valuation as at the valuation date (£14.729 billion) in determining that the Class B Creditors would be no worse off under the Plan than they would be in the relevant alternative.

55. It is common ground that, on the basis of this valuation, the Class B Creditors would be "out of the money" in the relevant alternative, in the sense that if a sale of TWUL's business and assets occurred within a SAR and the proceeds were distributed among creditors, the Class B Creditors would receive nothing. That is worse than the amount the Class B Creditors will receive under the Plan, viz the interest which will continue to be paid on their outstanding debt.

56. As we have noted, the issue to which the valuation evidence was primarily directed at trial – whether the Class B Creditors would be no worse off under the Plan than in the relevant alternative – is no longer in dispute.

57. The valuation evidence remains potentially relevant to the exercise of the discretion under s.901G of the 2006 Act. For reasons developed below, however, we uphold the judge's exercise of discretion whether or not the Class B Creditors would be out of the money in the relevant alternative. It is therefore unnecessary to resolve the questions raised by the Class B AHG's appeal against the judge's findings on valuation. With no disrespect to those who ably argued the valuation issues before us, we do not think it desirable to add to the length of this judgment by addressing them in it.

58. In case he was wrong on the valuation issue, and Dr Grunwald's evidence was to be preferred, the judge went on to consider whether the Class A Control Terms caused the Class B Creditors to be worse off under the Plan.

The no worse off test: Class A Control Terms

59. There are two aspects to the Class A Control Terms.

60. The first is something called the "June Release Condition" (the "**JRC**"). The second is additional rights to information which the Class A Creditors are said to have in the context of the implementation of RP2.

The JRC

61. The JRC is contained in the agreement which governs the SSF, the Super Senior Class A Issuer Borrower Loan Agreement ("**IBLA**"). This provides for the advance, on various pre-determined dates, of particular loans that make up the SSF. It contains numerous conditions which are required to be satisfied prior to the making of each loan. The JRC is one of those conditions, contained in clause 1.1 of the IBLA:

> "(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;…"

62. A "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;…"

63. It was common ground that two tranches of the first £1.5 billion part of the SSF (totalling £462 million), as well as the second £1.5 billion part of the SSF, fall due after 30 June 2025. The effect of the JRC, therefore, is that these funds will not be advanced unless a lock-up agreement in respect of RP2 has been entered into by two-thirds of the SSF lenders *and* two-thirds of the Class A Lenders (unless the effect of the JRC was suspended).

64. The judge first rejected the Class B AHG's case on the JRC as a matter of construction. He held (at §201 to §203) that, under the existing finance documents, the issue of a Claim Form to obtain the Court's sanction to RP2 would be an Event of Default, and the Plan Company would need to seek a waiver from a majority of the Class A Creditors. The JRC – which makes the drawdown of any further loan dependent on – among other things – approval from the majority of the Class A Creditors – is the quid pro quo for the Class A Creditors waiving in advance the Event of Default constituted by RP2.

65. Accordingly, seen in that context, he held that the JRC does not constitute the grant of materially different rights. The Class A Creditors always had a significant element of control over RP2.

66. The judge further rejected the argument that the JRC empowered the Class A Creditors to "divert value" away from the Class B Creditors, and that the Class A Creditors would in fact use the JRC or any other of the Class A Control Terms within RP2 to prevent the Class B Creditors from making any recovery at all, for example by depressing the equity bids. The judge reminded himself, at §233, that the substance of the Class B AHG's case was that the Class A AHG was involved in an unlawful means conspiracy, the equivalent to "bid-rigging", but found that there was no evidence to support that allegation.

Information rights

67. The enhanced information rights to which the Class B AHG and TWL objected were primarily those contained in paragraphs 59 and 60 of Part 3 of Schedule 4 to the CTA. The judge gave careful consideration to these objections and required – at the hearing to deal with consequential matters – an amendment to the Plan to improve the rights of the Class B Creditors and TWL in this respect. Specifically, he required an amendment to be made to paragraph 59, so that the rights within it were conferred equally on the Class A and Class B Creditors and to ensure that TWL received equivalent information rights to the secured creditors in relation to the restructuring process. The amended paragraph reads as follows:

> "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, the Class B Ad Hoc Committee Advisers and the Ad Hoc Hedge Advisers) in respect thereof on an equal and open basis relative to other *pari passu* Secured Creditors and taking into account the circumstances at the time; and
>
> (ii) use its reasonable efforts to engage with its Secured Creditors and their advisers (including, without limitation, the Relevant Creditor Advisers, the Class B Ad Hoc Committee Advisers and the Ad Hoc Hedge 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, the Class B Ad Hoc Committee 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; and
>
> (d) TWUL shall provide periodic updates on a monthly basis to the advisers to the Secured Creditors and the Subordinated Creditors (including, without limitation, the Relevant Creditor Advisers, the Class B Ad Hoc Committee Advisers and the Ad Hoc Hedge Advisers) (subject to confidentiality arrangements, which are satisfactory to TWUL (acting reasonably), being in place), as to the progress of such Recapitalisation Transaction, provided that nothing in this Sub-paragraph (d) 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.
>
> (e) For the purposes of this paragraph 59:
>
> "Class B Ad Hoc Committee" means the informal ad hoc committee of certain Class B Debt Providers established prior to the Restructuring Effective Date as constituted from time to time; and
>
> "Class B Ad Hoc Committee Advisers" means the professional advisers to the Class B Ad Hoc Committee from time to time, being at the Restructuring Effective Date, Quinn Emanuel Urquhart & Sullivan UK LLP and Sidley Austin as legal advisers and Daiwa Corporate Advisory Limited as financial advisers."

68. Paragraph 60 remained in its unamended form. This required the Plan Company to share with the "Relevant Creditor Advisers" (as well as the Ad Hoc Hedge Advisers) updates on key issues, including the equity raise, TWUL's liquidity and any meetings with the Government. Sub-paragraph 60(d) was the main focus of Mr Phillips' submissions on appeal on this issue. It provides as follows:

> "(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."

69. "Relevant Creditor Groups" means the Ad Hoc Committee of certain Class A Creditors (and an informal committee of Bank creditors).

70. The judge rejected the Class B AHG's objections based on paragraph 60: see §242. He accepted the Plan Company's evidence that its intention was to communicate with all of the Plan Creditors throughout the restructuring plan process, and accepted that this was consistent with its obligations under the CTA, specifically by reference to paragraph 59 (even before the amendments to it which were made after the hand-down of the judge's judgment): see §243.

71. Various other aspects of the documentation relating to the SSF were also challenged by the Class B AHG. The judge dismissed these objections and they are not resurrected on appeal.

Discretion

72. Given the importance this issue has assumed on appeal, we set out this part of the judge's judgment in some detail. He addressed the question of fairness under two sub-headings: (1) the horizontal comparison; and (2) a better or fairer plan.

73. At §245 and §246 the judge recited two reasons advanced by Counsel for the Plan Company and the Class A AHG as to why there were no issues of fairness by reference to the horizontal comparison. The first was that "[the present case] 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…" The second was that the Class B Creditors were out of the money. At §249, he concluded 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 [Counsel for the Plan Company and the Class A AHG]".

74. The Plan Company cited the decision of Snowden J (as he then was) in *Re Virgin Active Holdings Ltd* [2021] EWHC 1246 (Ch), [2022] 2 BCLC 62 ("***Virgin Active***") for the proposition that the views of creditors who are out of the money should be given little

weight, even though they had voted against a restructuring plan. At §249 of *Virgin Active*, Snowden J said:

> "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 paragraph 51 of his judgment in *DeepOcean*."

75. The judge rejected the Class B AHG's contention that this passage from *Virgin Active* was wrong, and that the Court must consider issues of horizontal fairness of its own accord, even if the challenge is brought by an out of the money creditor. In doing so, he noted that §249 had been approved by this Court in *Adler* and followed in two other first instance decisions: *Re Cine-UK Ltd* [2024] EWHC 2475 (Ch), per Miles J at §67 to §69; and *Re Project Lietzenburger Strasse Holdco SARL* [2024] EWHC 468 (Ch), per Richards J at §212.

76. The judge further held that even if the Plan could be treated as generating a restructuring surplus, all of the Plan Creditors are treated equally, because they are all entitled to participate *pari passu* in the SSF.

77. As to the Class B AHG's basic objection that the effect of inserting the SSF at the top of the debt structure was to push down the Class B Debt out of the money, the judge held (at §250) that this 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, then "it is not unfair that little weight is attached to their views", citing again *Virgin Active*.

78. At §251, the judge referred to Snowden LJ's indication in *Adler* that there might be examples where the Court would reject a restructuring plan as unfair if new money was provided on terms more expensive than those the Company could have obtained in the market (although we note that in this part of his judgment in *Adler* Snowden LJ was addressing the elevation of existing debt where the holders of that debt opt to participate in providing new money). The judge noted at §252 that the cost of the new funding was "very, very high", given that over half of it would be used to pay for the new money and to service the existing debt, and that "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".

79. At §253, however, the judge dismissed these points as a reason for refusing to sanction the Plan. He said:

> "It must be remembered that the [Transaction Support Agreement] 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."

80. At §254, the judge dealt again with the Class A Control Terms. He accepted "up to a point" the submission of the Plan Company and the Class A AHG that the Court was not required, in considering the horizontal comparison, to consider whether every provision of the Plan is fair or whether it might have been amended or omitted. He did not find it necessary, however, to consider the extent to which the Court should take out its blue pencil, because he had found that the Class B Creditors were out of the money in the relevant alternative. At §255 he concluded, "[g]iven that finding", that none of the Class A Control Terms were unfair or unreasonable.

81. The only one of these Terms that gave him cause for concern was paragraph 60 of Part 3 of Schedule 6 to the CTA and the imbalance of information rights to which that gave rise. After careful consideration, however, he was not satisfied that he should refuse to sanction the Plan for this reason or require the Plan Company to re-formulate paragraph 60.

82. The judge rejected the Class B AHG's argument that the plan was unfair because it extended the maturity date of all Class A, Class B and Subordinated Debt, whereas it was only necessary to extend the maturity dates of the debt due to mature within the six-month intended period of the Plan. He held, at §260, that given that the Class B Creditors were out of the money, the Court should not "accept a roving commission from them to decide whether the Plan is 'necessary' to give effect to an interim solution." In any event, he accepted the Plan Company's evidence that the decision was based on legal advice and was considered the best way to achieve the interim solution, and he was 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.

83. Having addressed and rejected the argument that there was a blot on the plan, based on the competition law objection, the judge also rejected (at §282 and §283) the contention that the releases of third parties constituted a blot on the Plan.

84. Finally (having accepted that Mr Maynard had standing to appear on the application), the judge dealt with the arguments advanced on behalf of Mr Maynard that he should refuse to sanction the Plan because it was contrary to the public interest, given the high costs of the restructuring.

85. Mr Maynard's objections focused on the high cost of the SSF (where it was said that £443 million of the first tranche of the SSF would be repaid to the Plan Creditors in

interest and costs), whereas the same funding was said to cost £65.93 million if made available by the Government to a special administration within a SAR. The judge rejected the Plan Company's evidence that a SAR would cost between £3.35 billion and £4.01 billion, but accepted, at §293, that the costs of a SAR were likely to be equal to or more than the costs of the Plan 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."

86. Mr Maynard also contended that the Court could not conclude that the steep price of the Plan was worth it, that the Plan Company had failed to submit clear and cogent evidence that the equity raise would be achieved, and that it could only be achieved at the price to be paid under the Plan. The judge concluded (at §297) that in considering what degree of assurance the Court required that the sanction order would be effective, the appropriate test is whether there is more than a fanciful prospect of RP2 succeeding and, if not, whether it was desirable that the Court should give the Plan Company an opportunity to assemble the remaining pieces of the puzzle.

87. While acknowledging the "eye-watering" costs of finance and adviser fees, and the fact that customers of Thames Water 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", he nevertheless concluded that the Plan should be sanctioned, for three reasons:

(1) He was not satisfied that TWUL or its customers would have to bear the finance costs of the Plan. That was not because of the regulatory limit on the amounts which TWUL could charge its customers, but because it was inevitable that as part of RP2 the Class A Creditors would have to suffer a substantial reduction in their debt. Without the Plan Company's balance sheet being adjusted in that way there would be no prospect of raising the equity on which RP2 depended. It was accordingly appropriate to treat the creditors as bearing the costs of the Plan.

(2) There is a public interest in facilitating the rescue of struggling companies, which he was required to balance against the public interest in the benefits to the public of a SAR, in which priority is given to the uninterrupted supply of services. He gave particular weight to this consideration, noting that a SAR would have to be funded by the Government, and there was a public policy in favour of rescuing the Group and giving the market the chance to agree a permanent restructuring plan before the Government is forced into funding a SAR.

(3) He also gave some weight to the fact that OfWat and the SoS did not oppose the Plan, and that the pension trustees – creditors of TWUL and other Group companies – supported it.

4. The grounds of appeal

88. The Class B AHG appeals on the following two grounds:

(1) The judge was wrong to conclude that the Plan was fair, in light of the Class A Creditors obtaining beneficial non-financial rights that were not provided to the B Class Creditors. The relevant rights of which complaint is made are the JRC and the information and facilitation rights given to the Class A Creditors. The Class B AHG advances the following three sub-grounds:

(a) The judge was wrong to conclude that the case gives rise to no horizontal fairness issues because the Plan is an interim one which involves no "restructuring surplus";

(b) The judge was wrong to conclude that no horizontal fairness issues arose because all Plan Creditors were treated equally as they could participate *pari passu* in the Super Senior Funding. This failed to take account of the valuable rights given to the Class A Creditors;

(c) The judge was wrong – both in fact and in law – in holding that the plan was *fair* because the Class B Creditors were out of the money.

(2) The judge was wrong to conclude that the releases provided in the Plan were not a "blot" on the Plan and/or unfair.

89. TWL appeals on the following grounds:

(1) The judge was wrong to conclude that, having found TWL and the Class B AHG to be out of the money in the Relevant Alternative, he did not need to consider whether the Plan was fair or appropriate to impose on dissenting creditors.

(2) The Judge was wrong to conclude that the Plan did not give rise to any issues of "horizontal fairness".

(3) Those failures meant the judge failed to conclude that the Plan was not fair and would confer unjustified benefits on the Class A Creditors.

(4) The judge failed to take account of the cost of the new debt provided under the Plan, and the likelihood that the Plan Company could have found bridge finance on better terms elsewhere.

90. Mr Maynard appeals on the following grounds:

(1) In circumstances where the Relevant Alternative was a special administration of TWUL, the judge should have given priority to the public interest and/or the interests of the customers over any private creditor interests.

(2) In deciding to sanction the Plan, the judge was wrong – and, if necessary, plainly wrong:

(a) In concluding that the costs of finance under the Plan and the deployment of such finance did not justify withholding sanction, and/or that the costs of special administration were likely to be equal to or more than the costs of the Plan;

(b) In concluding that TWUL or its customers would not bear the cost of restructuring advisory fees and the costs of finance under the Plan, because creditors would bear those costs, and/or that a special administration would result in a cost to the Government, and hence customers;

(c) In concluding that the Court had sufficient assurance that the costs of the Plan would lead to a successful restructuring via RP2;

(d) When considering whether the Plan Company should be given an opportunity to implement a successful restructuring and recapitalisation outside of special administration, not giving due weight to the costs of that opportunity and/or the public interest and/or the interests of customers. Accordingly, the judge erred in failing to consider, or consider adequately, whether special administration was a better route;

(e) In failing to consider whether the conditionality, controls and initiatives built into the terms of the finance under the Plan were in the public interest and/or the interests of customers;

(f) In failing to consider the management and governance issues arising from the Plan and RP2, and the judge erred in failing to refuse to sanction the Plan with, or remove or qualify, the releases in clause 16;

(g) In giving weight to the (absence of a) position of the Government or OfWat; and

(h) It was wrong to sanction the Plan in light of developments since the close of evidence at the sanction hearing, specifically that an appeal against the FD had been referred to the CMA.

(3) The judge was wrong to determine that the Plan Company had discharged its burden of proof on all matters relevant to the decision to sanction and/or that the Plan Company had complied with its duty of utmost good candour.

(4) There was procedural unfairness because the Plan Company did not appoint, fund and make all available information available to an independent public interest or customer advocate at the appropriate time.

5. Analysis and conclusions

Legal principles relating to the exercise of discretion to sanction a Plan

91. Part 26A is silent as to the approach the Court should take when exercising its discretion to sanction a Plan. The approach was left to be worked out on a case-by-case basis, building on the jurisprudence developed over the century and more of experience of schemes of arrangement, under what is now Part 26 of the 2006 Act.

92. This Court, in *Adler*, drew together the key first instance authorities, and certain writings of academics, that have sought to grapple with this question. We start by summarising the principles that we consider to be settled, following *Adler*.

93. Before doing so, however, we make four preliminary comments.

94. First, where Parliament has left it to the Courts to develop the approach to be taken upon sanctioning a plan, the Court's function in any case is to work out how best to exercise its discretion on the facts of the case before it and in light of the arguments advanced by the parties, guided as appropriate by such principles as have been identified in previous cases. It is not for the Court to assume the legislator's role and lay down principles of broader application. Development on a case-by-case basis is an

inevitably slower process, but has the advantage that the principles that emerge are moulded by real-life examples.

95. Second, when considering the guidance offered in previous cases, it is important to recognise their limitations. Many applications to sanction a scheme or plan are uncontested, and while the views of judges experienced in this area are to be afforded great respect, they have not always been tested by adversarial argument.

96. Third, it is important not to divorce guidance in an earlier decision from the circumstances of that case. Restructuring plans can be used in a variety of situations and can be structured in many ways. To take three examples: they might be used (as in *Adler*) as an alternative to a formal distribution process in liquidation or administration; or (as in *Virgin Active*) as a means of restructuring a balance sheet (for example by swapping debt for equity) in order to enable the company to continue to trade as a going concern with a reduced debt burden; or (as in this case) simply as a mechanism to avoid a formal insolvency process now, so as to buy time to enable a further, substantive, restructuring to be implemented in the future.

97. Guidance developed in the context, say, of a distributing restructuring plan may not read across directly to a plan designed only as an interim measure.

98. Fourth, it was common ground that this appeal is one from an exercise of discretion and, as such, this Court will not interfere with the judge's decision unless we are satisfied that the judge applied incorrect legal principles, took into account irrelevant factors or omitted to take into account relevant factors, or came to a conclusion on the facts that no reasonable judge could reach: see, for example, *Adler* at §104.

Principles derived from Adler

99. Paragraph references in this section are, unless otherwise indicated, to the judgment of Snowden LJ in *Adler*, with which Nugee LJ and Sir Nicholas Patten agreed.

100. Where there is no cross-class cram-down, the principles established in the context of schemes of arrangement remain applicable (§115 to §117). Those were summarised by Snowden J in *Re Noble Group (No.2) Ltd* [2019] 2 BCLC 548, at §17 as follows:

> "(i) At the first stage, the court must consider whether the provisions of the statute have been complied with. This will include questions of class composition, whether the statutory majorities were obtained, and whether an adequate explanatory statement was distributed to creditors.
>
> (ii) At the second stage, the court must consider whether the class was fairly represented by the meeting, and whether the majority were coercing the minority in order to promote interests adverse to the class whom they purported to represent.
>
> (iii) At the third stage, the court must consider whether the scheme is a fair scheme which a creditor could reasonably approve. Importantly it must be appreciated that the court is not

> concerned to decide whether the scheme is the only fair scheme or even the 'best' scheme.
>
> (iv) At the fourth stage the court must consider whether there is any 'blot' or defect in the scheme that would, for example, make it unlawful or in any other way inoperable."

101. The same principles continue to apply within an assenting class, as the basis of an exercise of discretion to impose the plan on the dissenting minority within that class: §128.

102. The first and fourth of those principles continue to apply even where the cross-class cram-down power is engaged: §119.

103. In any case where the cross-class cram-down power is engaged, however, the Court cannot simply apply the rationality test (i.e. the third of the above principles summarised in *Re Noble Group*) either (i) as regards voting within the dissenting class, or (ii) as regards the overall vote across different classes: §129. The logic that drives the rationality test in a scheme of arrangement – that a majority of those who share materially the same rights against the debtor are in the best position to consider their own commercial interests – is lacking when the question is whether to impose the plan on one or more of the classes which have *not* approved the plan by the requisite majority: §125 to §127 and §140 to §141.

104. Nor is it sufficient to establish that a dissenting class is no worse off under the plan than in the relevant alternative (the so-called "vertical comparator" test borrowed from CVAs). That is a necessary requirement for the exercise of the cross-class cram-down power, embodied in Condition A in s.901G(3) of the 2006 Act, but is clearly not in itself sufficient to justify the exercise of the power: §153.

105. It is, however, obviously appropriate to conduct some form of "horizontal comparison" in deciding whether to sanction a plan where the cross-class cram-down power is engaged: §156 to §158.

106. That requires the Court to examine whether the Plan provides for differences in treatment of the different classes of creditors *inter se*, and whether those differences can be justified: §159. In doing so, an obvious reference point is the treatment of the creditors in the relevant alternative. Departure from that treatment within the Plan is not, however, fatal to the plan, and nor is the exercise to be carried out merely by restating the "no worse off test": §159 to §160.

107. For example, where a "wind down" plan is proposed as an alternative to a formal insolvency in which the claims of creditors would rank equally for a *pari passu* distribution of the debtor's assets, as in *Adler*, the Court would normally approve a plan which replicated that *pari passu* distribution, but a departure from the principle of *pari passu* distribution could be approved, provided it was justified, in the sense that there was a good or proper reason for doing so: §165 to §166.

108. Of particular importance is the following passage from §160:

> "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."

109. One example of a justification for giving a class of creditors some priority or proportionately enhanced share of the benefits is where it has provided some additional benefit or accommodation to assist the achievement of the restructuring in the interests of creditors as a whole: §167. Put another way, in considering whether there has been a fair distribution of the benefits preserved or generated by the restructuring, it may be relevant to take account of the source of those benefits: §167, endorsing the comment made in *Re Houst* [2023] 1 BCLC 729, at §31.

110. Other examples are where the supply of goods or services from certain creditors is essential to the continuation of the business, and thus the success of the plan, which justifies the exclusion of those creditors from impairment under the plan, and the long-standing 'salvage' principle, under which liabilities to a creditor in respect of property which is retained and used for the benefit of the insolvent estate are satisfied in full: §170 to §172.

111. In considering whether the allocation of assets within a plan is fair, in contrast to the approach taken in relation to a scheme of arrangement, the Court may be required to consider whether a different allocation would have been possible: §180 to §181.

112. One matter which was *not* directly in issue in *Adler* was the extent to which a class of creditors which would be out of the money in the relevant alternative might be entitled to share in the distribution of benefits under the plan. The Court addressed a different contention: namely, that in order to comply with the *pari passu* principle, a company that would be insolvent in the relevant alternative and promotes a restructuring plan in which there is a prospect of a return to solvency *must* provide for the compulsory cancellation or reallocation of the existing shares among creditors who would be in the money in the relevant alternative: see §244.

113. In rejecting that contention, Snowden LJ gave as one of his reasons (albeit *obiter* – see §258) that there is no jurisdiction under Part 26A either to cancel or compulsorily transfer shares, or to extinguish debt, in both cases for no consideration. We return to this aspect of *Adler* when considering the question whether, in considering the fairness of a plan, no regard is to be had to the views or position of creditors who would be out of the money in the relevant alternative.

Issues of principle raised by the Class B AHG's and TWL's appeal

114. As we have noted above, the Class B AHG's and TWL's contention that the judge erred as a matter of law centres on what he said about the lack of any restructuring surplus

and the relevance, in the context of the exercise of his discretion, of the Class B Creditors and TWL being out of the money.

115. Ultimately, we do not think that the answer to this appeal turns on these points of law. That is because even assuming these points in favour of the Class B AHG and TWL, the judge did address the Class B AHG's and TWL's objections to the Class A Control Terms, and rejected them on their merits, albeit largely in the section of his judgment dealing with the no worse off test. For the reasons developed below we consider that he was right to do so, and that his conclusions also answer the Class B AHG's objections to the exercise of discretion to sanction the Plan. Nevertheless, these points were fully argued before us and, if the Plan Company's position in relation to them is to be accepted, that would be a complete answer to the appeal without needing to consider the fairness of the Class A Control Terms.

Restructuring surplus

116. The judge found that there was no restructuring surplus in this case because the Plan is only an interim plan (see §249 of his judgment).

117. In our judgment, in doing so the judge adopted too narrow an approach to the question of restructuring surplus. As a preliminary point, we prefer the term "benefits preserved or generated by the restructuring", in place of the term "restructuring surplus", because the latter tends to suggest something of quantifiable value which exists in the restructuring that would not exist in the relevant alternative. In many cases, that will accurately describe the benefit of a restructuring over the relevant alternative, but it will not necessarily do so in every case.

118. An interim plan, such as the present one, is a good example. The benefit of the Plan is to buy the Plan Company the time it needs in order to effect a longer term restructuring via RP2. The reasonable assumption is that RP2 itself will preserve or generate tangible and quantifiable benefits, if only by avoiding the value destructive consequences of a SAR. What those benefits will be, and how they are to be quantified, can only be determined in the future within the context of RP2. The benefit preserved or generated by the Plan is the more intangible one of preserving TWUL as a going concern in the short to medium term to enable it to pursue the opportunity of preserving or obtaining further value within RP2.

119. We see no reason why, in considering the fairness of the terms of the Plan, this should not be regarded as a relevant benefit of the restructuring for the purposes of considering a horizontal comparison between the rights conferred under the Plan on different groups of creditors.

The position of out of the money creditors

120. At §249, the judge found that the present case gave rise to no issues of horizontal fairness, for the two reasons given by the Plan Company and the Class A AHG. One of those reasons was (see §246) 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.

121. The Class B AHG and TWL contend this was wrong in principle.

122. It is not entirely clear that the judge's conclusion was as stark as this. Mr Smith pointed out that what the judge said at §249 was the case did not give rise to issues of horizontal fairness "of the kind explored in *Adler*", that the issue in *Adler* was that the distribution of assets did not reflect the *pari passu* principle that would have applied in the relevant alternative, and that it is common ground no issues of *that* kind arise in this case. We note, however that, at §247, the judge also rejected the Class B AHG's submission that the Court must consider issues of horizontal fairness of its own accord even where the challenge is brought by out of the money creditors.

123. At the hearing of the appeal, Mr Smith expressly disavowed the submission attributed to him at §246 of the judgment: he agreed that it was putting it too high to say that <u>no</u> issue of fairness can arise because the Class B Creditors are out of the money. The correct principle, he submitted, was that when considering issues of fairness, "little or no weight" is to be attached to the views or objections of the out of the money creditors.

124. He nevertheless maintained that a creditor who would be out of the money in the relevant alternative is not an economic owner of the business and is for that reason not entitled to any share of the benefits created by the plan. In other words, in considering issues of horizontal fairness the fact that out of the money creditors get nothing at all counts for nothing. There is in substance little difference between that submission and the submission recorded at §246 of the judgment, which Mr Smith disavowed making.

125. Mr Smith accepted, in light of the comments of this Court in *Adler* as to the need for give and take in respect of *any* creditor whose rights were compromised by a plan, that there had to be some form of consideration given to an out of the money creditor if their claim was released by the plan, but submitted that this need be no more than *de minimis*. He maintained, however, as a hard-edged rule, that in assessing the fairness of a plan, no account could be taken of the fact that an out of the money creditor received nothing more than such *de-minimis* consideration. He submitted that we are bound to reach this conclusion because of this Court's approval, in *Adler*, of Snowden J's decision in *Virgin Active*.

126. For the reasons which follow, we do not accept that there is such a hard-edged rule, or that *Adler* compels us to that conclusion.

127. The relevant circumstances in *Virgin Active* were that a group of dissenting landlords, who would have been out of the money in the relevant alternative (a formal insolvency process) objected to the restructuring plan under which shareholders, who also would have recovered nothing in an insolvency process, retained equity.

128. It was submitted on behalf of the company in that case that because the dissenting landlords would be out of the money in the relevant alternative, they had no rights to any assets of the company from which they could derive any benefit in the absence of the plans. They could accordingly not have any basis to complain about the willingness of the secured creditors, who would be in the money in the relevant alternative, to approve a plan under which, in return for providing new money, the shareholders retained some of their shares.

129. This argument was advanced in the context that the plan was designed to enable the company to return to profitability and that, if that happened, the shares in the company would increase in value.

130. Snowden J's analysis began with the authorities relating to schemes of arrangement, where – starting with *Re Tea Corp Ltd, Sorsbie v Tea Corp Ltd* [1904] 1 Ch 12 ("***Tea Corp***") – a practice had developed under which the assets of the scheme company were transferred to a new company to be owned by those who would have been entitled to share in the distribution of the proceeds of sale of the scheme company's assets in a formal insolvency (see §238). By that route, the creditors and shareholders who would have been out of the money in the formal insolvency of the scheme company would be left behind in its shell, and the benefits of future trading would be enjoyed by those who would have been in the money in the formal insolvency.

131. Snowden J then reasoned that those principles were plainly understood when Part 26A was introduced (see §243), and there was nothing in Part 26A, or the Explanatory Notes to it, that indicated that the legislature intended any different approach to be adopted by the Court to the position of creditors who were out of the money under the relevant alternative. Section 901C(3) and (4) reinforced that view, in permitting the Plan Company to exclude those without any "genuine economic interest in the company" from participating in meetings to consider and vote upon the Plan: §247.

132. That led Snowden J to his conclusion, at §249 quoted above, that the fact that out of the money creditors have voted against a plan "should not weigh heavily or at all in the decision of the court as to whether to exercise its power to sanction the plan and cram them down." Insofar as Snowden J was there saying that *the fact* of opposition to a plan by creditors with no genuine economic interest in the company had little or no weight, we agree. That is the logic of excluding such creditors from voting at all under s.901C.

133. Later in the judgment, however, it appears that Snowden J may have regarded the fact that the relevant landlords were out of the money as going further and providing a reason for discounting altogether their position when considering the allocation of benefits under the plan. At §268 and following, Snowden J explained why, on the facts in *Virgin Active* – even if their objections counted for anything – they were not sustainable. He did so, however, only if it had been necessary, i.e. if he was wrong to say (at §266) that "their objections as to what the Secured Creditors have agreed with the Plan Company in this respect carry no weight".

134. If that is taken to mean that the Court <u>cannot</u> take account of the treatment of out of the money creditors in considering the fair distribution of the benefits preserved or generated by a plan, simply because they would be out of the money in the relevant alternative, then – for the reasons developed below – we disagree with it.

135. The Plan Company contends that this was approved at §251 to §252 of *Adler*, where §249 of *Virgin Active* and the application of the principles set out in it were set out.

136. The starting point, in any consideration of *Adler*, is the Court's conclusion at §160 (quoted above at [74]) that when the Court is asked to subject a dissenting class to an enforced compromise of its rights for the perceived benefit of the assenting classes, it must enquire how the benefit preserved or generated by the plan is allocated among different creditor groups.

137. As we have already noted, the position of out of the money creditors was only addressed in *Adler* in the context of the argument that the plan in that case also wrongly departed from the *pari passu* principle because it left the shareholders with some of their equity.

138. In fact, this argument was comprehensively rejected at §241 and §242 of Snowden LJ's judgment in *Adler*, on the basis that the *pari passu* principle does not require shareholders to forfeit their shares, and there was no breach of that principle in circumstances where no distributions would be made under the plan to shareholders until all creditors had been paid in full.

139. In the paragraphs that followed, Snowden LJ addressed an "altogether more adventurous" way of putting the submissions, namely that in assessing fairness under Part 26A, only those creditors who are in the money should stand to benefit from any excess value generated over and above the amount required to repay their debts, so that the shareholders' shares should have been cancelled or transferred for no consideration.

140. In the passage relied on by the Plan Company, Snowden LJ was in fact setting out the submissions being advanced by Mr Smith (who appeared for the appellants in *Adler*), and which were founded on what had been said in *Virgin Active* (see §247 of *Adler*). At §255 onwards, Snowden LJ addressed those arguments and rejected them. It was, in agreement with the submissions of Ms Peters on this point, no part of the ratio of *Adler* to endorse this aspect of *Virgin Active* (which, as pointed out at §253, was not put in issue).

141. Further, the reasons given at §258 and following of *Adler* for rejecting Mr Smith's argument that the plan should have expropriated the shares (albeit *obiter*) undermine the hard-edged rule for which the Plan Company contends.

142. An important element in the conclusion that there was no power within Part 26A to extinguish claims or expropriate shares for no value was the critical difference between schemes under Part 26 and plans under Part 26A.

143. While it is true that it has been recognised since *Tea Corp* that a company may (through a two-stage process of a pre-packaged sale in administration and a scheme of arrangement) transfer all of its assets to a new company in which only those with a genuine economic interest in the scheme company may participate, this involves no interference with the rights against the scheme company of the creditors with no such economic interest. Those rights have at least potential value, because the sale would be carried out at a value determined by an independent officer of the Court, and the creditors or shareholders left behind would retain the necessary standing to pursue any remedies available to them in respect of the failure of the scheme company (see §268 of *Adler*).

144. Such safeguards would, however, be lost under Part 26A if the Court could, merely because creditors or members would have been out of the money in the relevant alternative, expropriate their claims or shares. The Court held that there was nothing in Part 26A or its legislative history which suggested Parliament intended to introduce a new power of confiscation. That was in contrast to the clear removal under Part 26A, achieved by s.901C(4), of the right of an out of the money class to *veto* a plan.

145. The removal of that right of veto did not abrogate the need, in order to address the rights of the out of the money creditors, for there to be a "compromise" of their rights (see §271 of *Adler*, quoting Professor Jennifer Payne in *Schemes of Arrangement*, 2nd ed, at p.319). It was noted, at §276, that the decision to exclude creditors from the ability to vote under s.901C(4) is taken on the balance of probabilities on the basis of opinion

evidence as to what is most likely to occur, which is not a firm foundation upon which to expropriate rights and property.

146. Although this part of *Adler* was *obiter*, it was not challenged before us. We consider it is correct.

147. We note for completeness, that a number of first instance cases have cited or followed the comments in *Virgin Active* to the effect that little or no weight is to be given to the views of out of the money creditors (see, for example, *Re Houst* [2022] EWHC 1941 (Ch) per Zacaroli J (as he then was) at §27, where the point was made that little regard was to be had to the vote *in favour* of a plan by creditors who were out of the money; *Re Great Annual Savings Co Ltd* [2023] EWHC 1141 (Ch), per Adam Johnson J at §109 to §110; *Fitness First Clubs Ltd* [2023] EWHC 1699 (Ch), per Michael Green J at §71, §74 and §107; *Re Cine-UK Ltd* [2024] EWHC 2475 (Ch), per Miles J at §69; and *Re Project Lietzenburger Straße Holdco S.à.r.L* [2024] EWHC 468 (Ch), at §211 to §215, where Richards J was prepared to follow the senior creditors' views on how the benefits of the restructuring should be shared, as the subordinated creditors were "so far out of the money").

148. On the other hand, in *Re Nasmyth Group Ltd* [2023] EWHC 988 (Ch) Leech J at §100 rejected the suggestion that Snowden J in *Virgin Active* had intended to lay down a rigid rule, and said that "there may be circumstances in which the out of the money creditors have a legitimate interest in opposing the Plan"; and in *Re Ambatovy Minerals Societe Anonyme* [2025] EWHC 279 (Ch), Hildyard J, having noted at §25 that the exercise of the cross-class cram-down power engages the Court much more fully in the commercial rationale of what is proposed, said, at §118 (in reliance on §160 of *Adler*) that "although what I have described as the "personal" objections of a dissenting creditor which is out of the money are to be given little weight, the general requirement to consider whether there has been a fair distribution of the restructuring surplus is to be treated as overriding and will necessarily take into account, albeit in overall terms, the treatment of the dissenting class."

149. As a matter of principle, we reject the rigid approach suggested by the Plan Company. While it may well be right in some cases to conclude that the fact that a dissenting class would be out of the money in the relevant alternative is a sufficient justification to exclude them from whatever benefit the restructuring preserves or generates, that will not necessarily always be so. As we have already noted, and in agreement with the submissions of Mr Thornton on this point, there are myriad reasons why a company might be suffering financial difficulties, and why a plan may be proposed, and a variety of structures that it might adopt. The nature of the benefits preserved or generated by a plan and the extent to which a fair distribution of those benefits will require consideration to be given to those who would be out of the money in the relevant alternative are likely to vary accordingly.

150. So far as this Plan is concerned, its intended benefit is to provide a bridge, to give the Plan Company and its stakeholders time to try to implement RP2. The reasonable assumption is that the Class A Creditors, at least, will stand to benefit from RP2. The benefit which the Plan is intended to provide would be lost if any of the creditors, including the Class B Creditors, were permitted to enforce their existing rights. That is because TWUL would be forced into a SAR if it were required to honour the obligation

to pay the amounts falling due on maturity under various loans from the Class A and Class B Creditors over the next six months.

151. It is also an important circumstance that, while the relevant alternative is a SAR, the purpose of that SAR would at least initially be to provide a similar bridge, to explore the rescue of TWUL as a going concern. A special administrator would be able to pursue an equity raise and a restructuring of the Group's debt to seek to achieve that. The problem which the Plan proponents perceive, and wish to avoid, is the reduction in value of the Group, and thus the value that could be preserved or generated in due course by RP2, in that event.

152. The agreement by the Class B Creditors to the postponement of the maturity date in respect of their loans is as critical in achieving the benefit of the restructuring, over the relevant alternative, as the postponement of the maturity date in respect of the Class A Creditors' loans. Both sets of creditors contribute equally in this sense to the benefits to be preserved or generated by the Plan.

153. Given that the initial purpose of a SAR would likely be to provide a similar bridge, it does not seem to us to be an answer to this point that, *if there were* to be a distribution within a SAR, the Class B Creditors would be out of the money.

154. Importantly, the Class A and Class B Creditors would be treated in the same way within that SAR. Neither of them would receive any capital repayments on the forthcoming maturity dates of their loans, and it was common ground that neither the Class A nor Class B creditors would be paid interest accruing on their loans after the commencement of the SAR. This serves to reinforce the conclusion that the source of the benefits which the Plan is intended to provide, which includes the continued payment of interest on existing debt in the meantime, is the fact that *both* the Class A and Class B Creditors are giving up their existing rights by extending the maturity dates on their loans.

155. In fact, the Plan *does* involve interest being paid on both the Class A and Class B debt and both classes are invited to participate in the SSF, but Mr Smith's point was that this was as a result of benevolence by the Class A Creditors: no regard should have been given to the position of the Class B Creditors, he said, if they had received neither benefit, and similarly no consideration need be given to any other supposed unfair treatment of them under the Plan. We disagree, for the reasons already given.

156. Before turning to consider the substance of the objections to the Class A Control Terms, we note that one of the arguments advanced by Mr Phillips was that under s.901C(4) a "genuine economic interest in the company" does *not* mean an interest in the company *in the relevant alternative*. We do not need to determine that issue. It does not arise in this case because there was no attempt to disenfranchise any class of creditors under s.901C. Its determination is better left to a case where it arises on the facts. The question is a binary one: a creditor either does or does not have a genuine economic interest in the company. In contrast, the exercise of discretion whether to sanction a plan involves wider considerations and the fact that a creditor would be out of the money in the relevant alternative is not in itself a reason to exclude that creditor from the consideration of whether the benefits preserved or generated by the restructuring are fairly allocated among all creditors whose rights are compromised under the plan.

The JRC

157. The Class B AHG's principal attack was on the fact that, pursuant to the JRC, no funding under the SSF could be released after 30 June 2025 (unless that date is extended) unless holders of at least two-thirds of the Class A Debt have entered into a lock-up agreement in respect of the proposed RP2. This, it is said, effectively gives the Class A Creditors a right of veto over any future restructuring of the Group.

158. As we have noted above, the judge addressed this issue in the context of the "no worse off" argument. His conclusion, however, is equally relevant to the objection pursued on appeal relating to the exercise of discretion to sanction the Plan. He rejected the Class B AHG's objection in large part because the effective right of veto which the Class A Creditors were given under the JRC was not materially different from the rights they already had. That was because under the STID the launch of RP2 would constitute an event of default, and without waiver of that event of default by a majority of the Class A Creditors, they would have been entitled to put TWUL into a "Standstill", with the inevitable consequence that the directors would be required to request OfWat and the SoS to appoint special administrators.

159. The Class B AHG does not dispute that the Class A Creditors have such a right, but contends that this is the wrong analysis, because the presence of the JRC must be compared with the rights that the Class A Creditors would have in the relevant alternative. As we understood the argument, it is that once TWUL is in a SAR, any leverage which the Class A Creditors had pursuant to the STID, by reason of their ability to withhold waiver to an event of default, would be lost. Moreover, the decision as to what funding to obtain, and on what terms, would be for the special administrators, without any group of creditors having the right to veto the drawdown of that funding.

160. The first point to note is the unlikelihood that this particular right of the Class A Creditors will have any practical implications, because the JRC also requires the same lock-up to have been agreed by two-thirds of the SSF lenders. No objection is made in that respect, and rightly so, it being a reasonable condition for the lenders of the SSF to impose in respect of the drawdown of further funds in the future.

161. We were told by Mr Smith (and this was not challenged by the Class B AHG) that 93.29% of the Class A Creditors are participating in the SSF. Accordingly, the fact that under the JRC the drawdown of further funds is dependent on the consent of two-thirds of the Class A Creditors *in addition to two-thirds of the SSF lenders*, will have no practical relevance unless the proportion of 93% of the Class A Creditors who agree to enter into a lock-up in their capacity as SSF lenders is insufficient to constitute two-thirds of *all* of the Class A Creditors. It is only in those circumstances that the additional requirement to obtain the consent of the requisite majority of Class A Lenders is not academic.

162. The unlikelihood of that happening is an unpromising starting place for the argument that the JRC operates so unfairly to the Class B Creditors that the Court should refuse to sanction the Plan.

163. We are in any event unpersuaded that there is any relevant unfairness in the Class A Creditors preserving – via the JRC – the practical influence they have pursuant to the existing security arrangements over a future restructuring proposal. In the context of a

Plan that provides a bridge to buy time for a substantive restructuring to be implemented, it is not unfair if whatever effective veto in respect of a restructuring plan the Class A Creditors have prior to the implementation of an interim Plan is preserved within that Plan. Given the respective size of the debt, as between the Class A and Class B Creditors, irrespective of the JRC, the reality is that the Class A Creditors will have at the very least a highly influential voice in any substantive restructuring. The JRC is certainly not sufficiently unfair so as to lead to the refusal to sanction the Plan.

Information rights

164. We have set out the relevant parts of paragraphs 59 and 60 of Part 3 of Schedule 4 to the CTA at §67 and §68 above. The judge again addressed the information rights in the context of the "no worse off" argument, but his conclusions apply equally to the objection pursued on appeal relating to the judge's exercise of discretion to sanction the Plan.

165. So far as paragraph 59 was concerned, Mr Phillips suggested that the rights of a particular group of secured creditors were engaged, by that paragraph, only if an offer was made *to that particular group of creditors* under sub-paragraph (1). We disagree. In our view the "Secured Creditors" in the remaining sub-paragraphs of paragraph 59 are not limited to the group of Secured Creditors to whom an offer is made under sub-paragraph (a). Mr Phillips did not press an alternative reading, but instead focussed on the unfairness which he submitted stemmed from paragraph 60(d).

166. As to paragraph 60(d), we recognise, as did the judge, that it provides an additional contractual right to certain Class A Creditors. Mr Smith suggested that there was no unfairness because it related to the possibility that creditors made a "credit bid" in the context of RP2, and there was no possibility of the Class B Creditors making a credit bid. Paragraph 60(d) refers, however, to a "Creditor Led Transaction", which could include any kind of bid (not merely a credit bid) in which Class B Creditors participated with third parties.

167. We nevertheless do not accept that it confers an unfair advantage on the Class A Creditors.

168. The judge accepted the Plan Company's evidence that its intention was to communicate with all Plan Creditors throughout the restructuring plan process. That was a finding the judge was entitled to make and which we are not prepared to overturn on appeal.

169. More importantly, however, if the Plan Company wishes to obtain the Court's sanction to RP2, it will need to demonstrate that it has engaged with any reasonable proposals made to it, and that it has indeed communicated fairly with all of the Plan Creditors throughout the restructuring process. The implementation of RP2 will be conducted in the full glare of publicity, and the Plan Company has fair warning that it must engage fairly with, and provide sufficient information to, all stakeholders throughout the process. We reiterate the point made in §3 above, moreover, that it must do so at an early enough stage that any issues that arise can be identified, and narrowed, so that the judge before whom RP2 comes is not placed under the same intolerable pressure as Leech J was in this case.

The appeals of TWL and Mr Maynard: Objections based on the cost of the Plan

170. Before the judge, the Class B AHG had objected that the SSF cost more than could otherwise be obtained, citing its own Plan B in that regard. That objection is not pursued by it on appeal. Instead, it fell primarily to Mr Maynard (supported by TWL) to advance objections based on the costs of the Plan. Those objections focus on the following amounts.

171. First, it is said that the cost of the SSF is approximately £443 million, comprising the following elements (as summarised by the judge at §111 to §117 of the judgment):

(1) The new debt will be issued at a discount of 3% to its face value, which equates to an initial cost to the Plan Company and TWUL of £45 million.

(2) A backstop fee of 3.5% (totalling £52.5 million) is payable to all those Plan Creditors who agreed to underwrite the new funding. The judge said that he was given no justification or rationale for this fee, or for the discount referred to in (1) above.

(3) The new debt carries interest at 9.75%, which amounts to £73 million for six months.

(4) In the event that a recapitalisation transaction is successfully implemented in the next six months, then a make-whole fee totalling £156 million is payable.

(5) "Early bird" consent fees were also payable in an unknown amount, although these were estimated to total £116 million in December 2024 when it was anticipated that 85% of Plan Creditors had acceded to the Transaction Support Agreement dated 25 October 2024.

172. Second, objection is made to the interest payable in respect of the existing debt and professional fees. The former amounts to approximately £245 million. The latter was estimated to be £210 million (consisting of £120 million already spent, and £90 million for the period of the Plan, on the basis of a "burn rate" of £15 million per month).

173. The grounds of appeal asserted on behalf of Mr Maynard are set out above at §90. They boil down mostly to an argument that the judge failed to take proper account of the public interest. That public interest has two aspects. First, the aggregated private interests of the customers of TWUL, including the uninterrupted provision of water and sewerage services. Second, the wider public interest which includes, for example, maintaining a clean water supply and preventing the discharge of untreated sewage into rivers. The public interest in both senses extends to the debt burden of the Group (and thus the burden imposed by the excessive costs of the new debt), because a higher debt burden may impact on the long term delivery by TWUL of public services.

174. Mr Day submitted that because the relevant alternative is a SAR, the question on this appeal is whether the public interest is better served by the Plan or by a SAR of TWUL. The latter, he said, is the best way of providing a bridge to a substantive restructuring to put TWUL and/or its public services on a sustainable financial footing. He put forward two bases for giving preference to the public interest in this case: first because *Adler* required it and, second, because there would otherwise be a "blot" on the Plan.

Adler

175. As to *Adler*, Mr Day submitted that it confirmed that the relevant alternative is key not just to the no worse off test but also to the question of fairness in the exercise of discretion under s.901F, referring to Snowden LJ's description of it in *Adler* as "the central statutory concept". Mr Day submitted that because in a SAR the interests of creditors are subordinated to public interest objectives, it was necessary for the Plan Company to justify that "those priorities" were being respected under the Plan and, if not, why not.

176. It is true that the relevant alternative, and the outcomes for creditors in it, is an important reference point in considering the fairness of the Plan at the sanction stage. It is a non-sequitur, however, to say that it follows that the Court is required to decide whether the public interest would be better served by a SAR than by the Plan.

177. The inquiry as to the fairness of the Plan, including the horizontal and vertical comparisons, is required because sanctioning a plan has the effect of imposing a compromise on dissenting creditors. The Court's involvement is – save for the case where there is a "blot" on the plan (as to which see below) – limited to considerations of fairness as between creditors: Was each class fairly represented at meetings? Was the majority in any class promoting interests adverse to the interests of the class? Could a member of each class reasonably approve the plan? Were dissenting creditors no worse off under the plan than in the relevant alternative? Was a dissenting class treated unfairly, for example because there was an unfair distribution of the benefits preserved or generated by the plan?

178. None of these considerations apply, and the Court would have no role at all, if all creditors had agreed to the transaction to be implemented via the Plan. The inability of the creditors to agree does not vest in the Court a responsibility to conduct a wider enquiry as to whether the Plan or a SAR would better serve the public interest.

179. Accordingly, we part company with Mr Day at the outset of his submissions: the question on this appeal is <u>not</u> whether a SAR would be better than the Plan for TWUL, its customers and the wider public interest. As the provisions of the WIA 1991 set out above §35 to §39 make clear, the SoS and OfWat are the guardians of the public interest so far as water and sewerage undertakings are concerned.

180. The decision to make an application to appoint special administrators rests with OfWat and the SoS. They have chosen not to make such an application. OfWat provided two letters to the Court (dated 28 January 2025 and 28 February 2025). It described its extensive engagement concerning TWUL's operational performance and financial resilience. It said that it considered that TWUL's directors were in the best position to make a decision about its solvency, and that it did not consider it was required to, or that it was appropriate to, take action to prevent a private sector restructuring in the circumstances. It also agreed with the judge that, as a result of the cap on the amounts TWUL could charge to its customers, the costs of the Plan would ultimately be borne by the creditors.

181. Mr Day objected that the Court ought not to defer to OfWat on the question of what is in the public interest. For the reasons already given, however, the question whether the public interest is best served by an application being made for the appointment of special administrators is one for OfWat and the SoS to consider. The mere fact that a

SAR would be the inevitable consequence of the Court refusing to sanction the Plan does not provide a reason for the Court to usurp *their* functions.

"Blot" on the Plan?

182. The concept of a "blot" on a scheme of arrangement was first used by Lindley LJ in *Re English Scottish and Australian Chartered Bank* [1893] 3 Ch 385 at p.409. Having referred to the fact that creditors, acting on sufficient information, are better judges of what is to their commercial advantage, he said:

> "I do not say it is conclusive, because there might be some blot in a scheme which had passed that had been unobserved and which was pointed out later."

183. This has long been part of the settled principles applied on sanction of a scheme, as recorded in Buckley on the Companies Acts: see for example, the extract from the 15th edition (1957) of that work cited by Plowman J in *Re National Bank Ltd* [1966] 1 WLR 819 at p.829D-E. Usually, the Court in sanctioning a scheme or plan is able to conclude there is no blot without needing to elaborate on the meaning of that term.

184. The first reported attempt to do so appears to be that of Lloyd J in *Re Equitable Life Assurance Society* [2002] BCC 319, at p.350, where he said:

> "It seems to me plain that, when Lindley LJ used that language, he was talking of some defect in a scheme which at first escaped notice, and only came to light after the meeting or meetings, and maybe not until the sanction hearing. That is clear from his words 'that had been unobserved and which was pointed out later'."

185. This suggestion – that it only applies to something not noticed at the time – has not, however, found favour in subsequent decisions. More recently, the term has been held to refer to "some technical or legal defect in the scheme, for example, that it does not work according to its own terms, or that it would infringe some mandatory provision of law": see *Re Co-Operative Bank Plc* [2017] EWHC 2269 (Ch), per Snowden J at §22. The same judge repeated that view in *Re Noble Group Ltd* [2018] EWHC 3092 (Ch) at §17, giving as an example of a blot something that would make the scheme "unlawful or in any other way inoperable".

186. Mr Al-Attar pointed out that 45 of the cases cited to us contained references to a "blot", but in only two of them had a blot been found to exist. The first case, *Re MB Group plc* (1989) 5 BCC 684, involved a scheme of arrangement in respect of the members of the company. The holder of a warrant (with an entitlement to subscribe for shares on certain complex terms) objected on the basis that the sanction of the scheme would breach their rights. The objection was in fact withdrawn, but Harman J said (at p.687H) that he had reached the tentative conclusion that the Court should refuse to sanction the scheme because to do so would be lending the Court's aid to the company acting in serious breach of its obligations to warrant holders.

187. In the second case, *Re Nasmyth Group Ltd* [2023] EWHC 988 (Ch), Leech J found that there was a "roadblock" because the company had failed to agree new "time to pay

arrangements" with HMRC, without which the plan could not take effect in the way the company and its creditors intended.

188. Mr Day submitted that "blot" has been given a much broader meaning in other cases. He first relied on *Re Childcare Corp Ltd* [2017] EWHC 2201 (Ch), where Asplin J, in reciting the test to be applied on sanctioning a scheme, referred to the requirement that there be no blot as "shorthand for the residual discretion of the court". Not only was this a passing comment in a short extempore judgment in relation to an unopposed members' scheme, but Asplin J went on to say that the question of blot "generally goes to whether there is some technical flaw in the scheme as a whole."

189. Of more help to Mr Day is *Re BAT Industries plc* ("***BAT Industries***"), an unreported decision of Neuberger J (as he then was) dated 3 September 1998. That case concerned a members' takeover scheme. It was part of a wider restructuring which involved the company, in a step to be taken subsequent to the approval of the scheme, declaring a dividend in specie of its investments in two subsidiaries. The scheme was opposed by a number of objectors who had commenced litigation against the company in the US, claiming damages.

190. Counsel for the company (Mr David Richards QC as he then was) contended that the objectors had no standing to appear, and that their interests could not be taken into account. He did so on the basis that the scheme was a domestic matter between the company and its members, the purpose of which was to make the scheme binding on all members, and that – in the event that all members had agreed – the terms of the scheme could have been achieved by agreement in which event the objectors could raise no objection. The objectors were in fact objecting to the dividend in specie, which was not part of the scheme itself, but was something the company would do consequent upon the scheme being sanctioned. In reality, Mr Richards submitted, the objectors were attempting to get a Mareva injunction without having to give an undertaking in damages.

191. Neuberger J saw the force of these arguments, but held that there was nothing in the statute (then s.425(2) of the Companies Act 1985) which indicated that the power of the Court on an application to sanction a scheme is to be fettered as to whom it can hear and what it must take into account. The reference in Buckley on the Companies Acts to a blot on the scheme was not clear, but suggested to him that "while it may require exceptional circumstances, it is open to the court to take into account the legitimate concerns of third parties in relation to a proposed scheme, even if they are not members of the company." That was supported by the *MB Group* decision of Harman J. Nor was the court required to take a blinkered and uncommercial approach by ignoring the fact that the scheme was part of a larger process including the dividend in specie. If the next stage involved a step that was ultra vires or illegal, that would be a good reason to refuse to sanction the scheme.

192. Having said that, Neuberger J sanctioned the scheme, recognising the force of Mr Richards' points that a scheme was essentially a domestic matter between the company and its members. That was the Court's primary concern. The target of the objectors' complaint – the dividend – could be done without the scheme. There was nothing to suggest that the dividend was intended to deprive the objectors, or any other potential claimant, of monies they might otherwise recover following judgment. Moreover, the

directors had formed the view that the dividend could be paid, and that view was not challenged as being dishonest or unreasonable.

193. Mr Day also relied on *Re Halcrow Holdings Ltd* [2011] EWHC 3662 (Ch) ("***Halcrow Holdings***"). That case involved a members' takeover scheme. Objection was made by a member of a pension scheme (the trustee of the pension scheme being a creditor of the company), on the basis that the takeover facilitated by the scheme would leave the trustee of the pension scheme with less likelihood of recovering its deficit.

194. The company's counsel submitted that the Court should exercise its discretion by reference only to the interests of the shareholders, rather than creditors or employees of the company. He accepted, however, that if there were concrete evidence that the scheme would lead to the company's obligations to the pension trustee not being respected, or that the buyer's intention was to use the takeover to damage the interests of pensioners, then the Court could properly take that into account in exercising its discretion.

195. Vos J (as he then was) rejected the submission that the Court should have regard only to the interests of the shareholders. Having referred to *BAT Industries*, he held, at §47:

> "The word 'blot' has the benefit of a lengthy history, but has no inherent meaning in this context. The reality is, as the authorities I have set out above made clear, that the court can, within the context of the exercise the court is undertaking, take into account matters such as the effect on a company pension scheme in deciding whether or not it is appropriate to sanction a scheme."

196. In concluding at §48 that there was no blot on the scheme, "in the sense that there is nothing unlawful or inappropriate about it", Vos J relied on the facts that: the scheme did not in itself affect the obligations owed to the pension trustee; there was no evidence of any malign intentions on the part of the buyer towards the group or the pension scheme; and no evidence of any underlying intention to cut the company adrift or damage the pension scheme.

197. Drawing the strands together from these authorities, we consider that each of Neuberger J and Vos J was correct to conclude that in some limited instances the interests of third parties may be taken into account in deciding whether there was any blot on the scheme or plan.

198. In considering the limits on so doing, it must, as Neuberger J recognised in *BAT Industries*, be kept in mind that a scheme or plan is essentially a domestic matter between the company and its members and/or creditors (as the case may be).

199. Without purporting to define its limits for all circumstances, the concept of "blot" is undoubtedly capable of covering a case where the scheme or plan contains a technical defect so that it is unworkable or incapable of achieving what was intended. It is equally capable of covering a case where the scheme or plan requires the company to take, or contemplates it taking, a step which is illegal, ultra vires, or in breach of some other obligation owed by the company, even where the obligation is owed to persons who are not members or creditors of the company. No case has found a blot to exist other than

in such circumstances, and in both *BAT Industries* and *Halcrow Holdings*, in the absence of such circumstances the Court was not prepared to find that there was a blot.

200. In the present case, Mr Smith accepted that if the Plan had the effect of loading such an enormous debt burden on TWUL that it would be put in breach of its regulatory obligations as a result, that could constitute a blot.

201. Whatever the limits of the concept of a "blot", in the circumstances of this case it does not require the Court to undertake an enquiry as to whether a SAR would better serve the interests of the public than the Plan, or whether a SAR would achieve the resolution of the financial problems that have beset the Group at a lower cost than the Plan. We reiterate that the SoS and OfWat are charged with protecting the interests of customers and the wider public interest, and it is for them to consider whether to apply for the appointment of special administrators.

202. In any event, we consider the judge was correct to conclude that the costs which the Plan Company has borne, and will bear under the Plan, do not constitute a blot so as to refuse to sanction the Plan. On a proper analysis, significant elements of the headline figures which are set out at §171 and §172 above are not costs of the SSF, or costs of the Plan that would be avoided in a SAR. Moreover, the judge was entitled to conclude that the overall costs of the intended restructuring via the Plan are at least equalled by the negative financial consequences of a SAR.

203. TWL and Mr Maynard contend that the judge's findings as to the costs of the Plan cannot be interfered with on appeal. That is correct, so far as the amounts and the immediate purposes for which they are payable are concerned. The characterisation of these amounts, and whether they are to be regarded as a cost of the Plan, or of the SSF, or whether they are cumulatively greater than the likely negative financial impact of a SAR is another matter. As to the latter point, it is Mr Maynard who seeks to challenge the judge's finding. As to the former, it is an oversimplification to say that these are all costs of the Plan, or of the SSF, or otherwise something that would not have to be incurred in the relevant alternative.

204. First, as to the figure of £245 million for interest on existing debt, while the parties were agreed that in the event of a SAR such interest would not continue to be paid out of cashflow, it is nevertheless a liability which the Plan Company will incur in any event, which would be capitalised in a SAR. The liability is not caused by the Plan.

205. Second, of the headline figure for fees, more than half (i.e. £120 million) had already been incurred and paid. That, again, is not a cost which would be avoided in a relevant alternative. It would also be wrong to characterise this amount and the ongoing fees of £15 million per month only as costs of the Plan. They cover all the work being undertaken in trying to address the Group's financial difficulties, including work in relation to the equity raise and the preparation for and implementation of RP2, liquidity management in the meantime, and the cost of the appeal in respect of the referral of the FD to the CMA.

206. Third, the interest rate payable on funding from the government in a SAR, on the assumption that alternative lending could not be obtained in the market, would – according to the experts – be somewhere between 8.87% and 9.5%. The rate payable under the SSF, while greater, is not excessively so. The relatively high interest rate

reflects the fact that, while the lending is relatively low risk in terms of ultimate repayment, there remain commercial risks in lending to a company which may shortly end up in a SAR, where any additional SAR funding would take priority, particularly over the timing of recovery.

207. Fourth, as to the various other components of the pricing of the SSF (the backstop fee, the initial discount, and the make whole sum), Mr Smith pointed out that these are not only a cost of the SSF. Together, they represent the cost to the Plan Company of obtaining a number of benefits:

(1) The "early bird" and consent fees are payable in return for obtaining early commitment from creditors (including those who chose not to, or who could not, participate in the SSF) to the restructuring process as a whole. Without obtaining an early commitment from a substantial body of creditors, it would have been difficult for the Plan Company to embark on the restructuring process at all.

(2) The Plan Company required (and was permitted by a majority of Class A Creditors) access to £400 million in blocked accounts, in order to provide liquidity while it negotiated the restructuring with creditors. Mr Phillips objected that obtaining access to *its own funds* could hardly be described as a benefit being conferred by creditors on the Plan Company. That misses the point, however, that the money in blocked accounts forms a valuable element in the security package available to creditors, and that secured creditors can be expected to require something in return for giving up that element of their security.

(3) Under the Plan, the maturity of £2.9 billion of debt, otherwise falling due within the next six months, is deferred for two years, with no increase in interest rate or separate fee, to which lenders asked to defer maturity would normally be entitled.

(4) Insofar as the costs relate to the SSF, they relate to the whole £3 billion, albeit that the Plan Company has only a conditional right to drawdown the second half of this amount.

(5) Contrary to what the judge said at §114, he was provided with a justification for the backstop fee. The evidence of the Plan Company was that this was compensation for those creditors who were prepared to underwrite the provision of the funding. We accept that someone who agrees to underwrite the provision of funding would ordinarily expect to be compensated for doing so. Mr Thomas-Watson, who gave evidence on behalf of the Class B AHG, accepted in cross-examination that commercial parties providing such a service would not be expected to waive their fee for doing so.

208. The judge commented, at §252, that "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." The B Plan is not pursued, and it was not suggested that the relevant alternative was bridge financing from another source in the market outside a SAR. As the judge noted at §253, super senior funding from another source could not have been obtained without the consent of all the secured creditors. There was in any event, as Mr Thornton fairly accepted, no evidence as to what terms are available in the market, without which the assertion that

the costs associated with the SSF are excessive compared to what could have been obtained remains speculation.

209. Critically, the judge accepted that the costs associated with the SSF, the Plan and the proposed RP2 are not likely to be higher than those in the relevant alternative. The judge concluded (at §293), having heard evidence from experts for both sides as to the costs of a SAR, and its likely impact on the value of the Group's business and assets, that the costs of a SAR were 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".

210. Mr Day submitted that this finding was wrong, because it contained an obvious mathematical error: accepting the Plan Company's evidence as to the additional costs of a SAR at its highest, he said that the total cost of a six month special administration would be approximately £830 million, which was 60% of the equivalent cost of £1.388 billion under the Plan.

211. This, however, is not a realistic comparison: it seeks to compare the total amount of borrowing available during the first six months of the Plan on the one hand with the estimated increase in costs of running a SAR over and above the costs of implementing RP2, together with a much lower amount of borrowing within a SAR, on the other.

212. Moreover, it is based on the mistaken premise that the Plan Company benefits from liquidity of only £500 million under the Plan, having deducted the amount of £898 million (being the total amount said to constitute the cost of the SSF, professional fees and servicing of existing borrowing). The premise is wrong because none of the make-whole amount (£156 million), the early bird and consent fees (estimated to be £116 million), and the professional fees so far incurred (£120 million) affect the liquidity available under the SSF. So far as the make-whole fee is concerned, the assumption is that it will become due (as the price of early termination of a fixed term loan) upon the successful implementation of RP2, in which case it would be restructured within that plan. The early bird and consent fees are payable in debt, and the professional fees have already been paid out of cashflow.

213. Mr Day's calculation also wrongly attributes all of the costs associated with the Plan to the funding to be obtained within the first six months, whereas those costs relate to the restructuring as a whole, including all of the £3 billion of funding under the SSF. Mr Day's calculation is premised on the Plan Company receiving a loan in a SAR of only £500 million.

Further points arising from Mr Maynard's grounds of appeal

214. We address here points arising from Mr Maynard's grounds of appeal (enumerated at §90 above) insofar as they are not already dealt with above, and are not duplicative of points made by others.

215. Ground 2(b) is that the judge was wrong to conclude that TWUL or its customers would not bear the costs of the finance and advisory fees under the Plan. This does not strictly arise in view of our conclusion that TWUL is not burdened under the Plan with excessive costs over and above the cost and negative financial impact of a SAR. The judge concluded that the costs would ultimately be borne by the Class A Creditors. That

was because he accepted that in RP2 the Class A Creditors would have to take "a very substantial haircut", in order to effect the equity raise: the amount which the Class A Creditors would be required to write-off their debt, in order to restructure the Plan Company's balance sheet sufficiently to attract new equity investment in RP2, would be more than the cost of the new borrowing.

216. Mr Maynard objected that this was unsupported by evidence. Mr Smith submitted, however, and we agree, that it is plain common sense that no-one would be prepared to acquire equity in the Plan Company while it had a negative balance sheet. That is not a complete answer, because if the Plan Company is burdened with unnecessary cost, that may well restrict its ability to invest in infrastructure and other projects, so as to put it in breach of its regulatory obligations to the detriment of its customers and the wider public.

217. Whether that would be so in this case, however, is no more than speculation. As we have noted, those specifically charged with protecting the public interest – OfWat and the SoS – do not believe it to be the case.

218. Under ground 2(c) it is said that the judge was wrong to conclude that the Court had "sufficient assurance" that the costs of the Plan would lead to a successful restructuring via RP2 (see §86 and §87 above). Mr Day submitted that the judge was wrong to reject the submission made to him that in view of the costs of the Plan, it should not be sanctioned absent "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".

219. The judge was right to reject that submission. Before us, it was based on cases dealing with the degree of assurance the Court will require when sanctioning a scheme or plan that it is not acting in vain, for example because the scheme or plan would not be recognised in a jurisdiction where the company holds substantial assets or carries on business (for example *Re DTEK Energy BV* [2021] EWHC 1551 (Ch) at §27), or where the Court is asked to sanction a scheme or plan where a condition to it taking effect remains outstanding (for example *Re Smile Telecoms Holdings Ltd* [2021] EWHC 685 (Ch) at §53 and §56), or where the commercial effectiveness of the scheme is subject to fulfilment of some condition (see, for example, *Re Morses Club Scheme Ltd* [2023] EWHC 1365 (Ch), where the question was whether there was sufficient certainty that commercial conditions would be satisfied as to the funding of a compensation fund, from which scheme claims would be paid).

220. The issue in those cases was very different to the question here. The success of the Plan is not conditional on some outstanding event beyond the control of the Plan Company. Mr Day's submission in reality confuses the success of the Plan (the purpose of which is to provide a bridge to RP2) and the success of RP2 (the purpose of which is a substantive restructuring via an equity raise). While the prospect of RP2 succeeding is a relevant factor in the exercise of discretion to sanction the Plan (for example, if there were some obvious impediment to any form of substantive restructuring in the future, that might be a reason to refuse to sanction the Plan), the Court does not need to be satisfied, to any particular standard, that RP2 will succeed. There was accordingly no error in the approach taken by the judge on this issue.

221. We also reject the third of Mr Maynard's grounds of appeal. Complaint is made that the judge said, during the course of the hearing, that he took certain matters "on trust"

from the Plan Company, and that he thereby reversed the burden of proof. It is correct that the Plan Company bears the burden of satisfying the Court that a plan should be sanctioned and, where necessary, the cross-class cram-down power should be exercised. We have no doubt that the judge was aware of this, and the isolated references to taking certain points on trust do not demonstrate that he failed to recognise that in his judgment. Mr Maynard also complains at the Plan Company's failure to comply with its duty of utmost candour. It is fair to say that important details on the costs incurred by the Plan Company were revealed only as a result of questioning during the hearing, and that these are matters that ought to have been provided up front. It is a long way from that, however, to the conclusion that the judge should have rejected the Plan altogether as a result of the Plan Company's failings in that regard.

222. Finally, under ground 4, Mr Maynard contends that the judge should have appointed an independent public interest or customer advocate. That is a course which is likely to be appropriate, or even necessary, where the creditors whose rights are affected by a plan or scheme are unable to represent themselves before the Court – for example because there are many of them, with little financial sophistication and without the ability to co-ordinate their responses. That is not the case here. The fact that it fell to an intervener – Mr Maynard – to advance arguments based on the public interest does not indicate any procedural unfairness in this case.

Conclusion

223. In all the circumstances, we consider that the judge was entitled to conclude that there is no blot on the Plan that should lead the Court to refuse its sanction.

6. Releases

224. The relevant provision is to be found in clause 16.1.2 of the Plan.

225. This provides that each Plan Party (which includes all Plan Creditors, the Plan Company and TWUL):

> "…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)."

226. Clause 16.1.3 contains a covenant not to sue in relation to the matters released by clause 16.1.2.

227. The releases are given by numerous parties, including Plan Creditors, the Plan Company and TWUL.

228. The judge quoted the following summary of the released parties provided in the Plan Company's skeleton:

> "(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 Judge's conclusions

229. At §281 of his judgment, the judge did not accept that it is necessary to establish a risk of "ricochet" claims before the Court can approve the release of directors and officers of the company. He said that 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, citing *Re Noble Group Ltd* [2018] EWHC 3092 (Ch) at §25, where Snowden J said:

> "*In Far East Capital SA* [2017] EWHC 2878 (Ch) at [14], I expressed the view that a release of claims against persons involved in the preparation, negotiation or implementation of a scheme and their legal advisers would also be within the scope of Pt 26. Such clauses can be justified by a need not to allow scheme creditors to undermine the terms of the scheme itself, and have become a regular feature of schemes. I see no difficulty arising from the inclusion of such a clause in the terms of cl.2.1(b)(ii) and (iii) in the instant case."

230. At §282, he concluded that the releases were not a blot on the Plan, because:

(1) The Class B AHG had no objection to the ratification of the Released Parties in relation to the B Plan.

(2) The Class B AHG's objections were principally to the release – not of creditors – but of the officers and advisers of the Plan Company and other Group companies.

(3) It was appropriate to release directors and officers for the reasons given by Miles J in *Re Matalan*: the Class B AHG had not advanced any case that there had been any breaches of duty, and that was not put to any of the officers in cross-examination.

(4) He rejected the contention that there had not been full and frank disclosure, particularly about the cost of finance and all of the fees.

(5) If the Court did not authorise the releases, there was a serious risk that the directors and officers of the Company and TWUL would face "ricochet claims", and a director might think twice about implementing the Plan unless they were given such a release.

(6) The fact that this was an interim Plan was a reason to sanction the Plan, not the reverse. The directors were not seeking a release in advance for their conduct in relation to RP2.

(7) He was concerned, however, at the width of the drafting of the release clause. He gave the parties permission to seek to improve on the wording at the hearing on consequential matters.

231. At §283, the judge noted the force of the argument that the release of claims by the Plan Company or TWUL was a different matter, since it involved those companies giving up potentially valuable assets, in the hands of a special administrator if RP2 failed. He concluded, on reflection, however, that this was not a reason to refuse to sanction the Plan altogether, but he again gave the parties permission to argue at the hearing on consequential matters whether there should be some carve-out if TWUL subsequently entered into a SAR.

232. In his judgment following the hearing on consequential matters, the judge decided against requiring any carve-out to be inserted into the release clause. He did so because he recognised the difficulties for the directors in continuing to carry through RP2 if they are subject to a potential claim being made by a special administrator down the line, and that the same was true for their advisers and creditors more widely. He said that it would be inconsistent with the rationale for granting releases in the first place, to include a form of wording which allows a special administrator to reopen the question of the directors' conduct later.

The grounds of appeal

233. The principal point taken on appeal relates to the release by TWUL or the Plan Company of any claims they may have against its officers and advisers.

234. The Class B AHG's ground of appeal on this point is in the following terms:

> "The learned Judge erred in law and fact in that he should have found, and did not find, that the releases granted under the Plan were unnecessary for the purposes of the Plan in circumstances

> where it is an interim restructuring plan and therefore a blot and/or unfair."

235. In its skeleton argument, the Class B AHG submitted that the judge failed to appreciate that the plan was an interim plan. That was important, because if there is no RP2 and the Plan Company goes into administration and TWUL goes into a SAR, then the release would deprive the administrator of the Plan Company or the special administrator of TWUL from bringing claims against the directors and advisers.

236. Mr Maynard also appealed on this point. His ground of appeal (at paragraph 2(6)) is that "the Judge also erred in failing to refuse to sanction the Plan with, or remove or qualify, the releases in clause 16 thereto". The thrust of the argument in Mr Maynard's skeleton was that this deprived TWUL of a potentially valuable asset in the event that it went into a SAR.

237. Mr Smith KC contended that it was not open to the appellants to run the argument that the releases should not extend to claims by the Plan Company and TWUL, because this fell outside their grounds of appeal. We disagree. The grounds of both the Class B AHG and Mr Maynard are broad enough to encompass this point. So far as the Class B AHG ground of appeal is concerned, although this focuses on the judge's failure to appreciate that this is an interim plan, they explain the significance of this in their skeleton, namely that if there is no RP2, and TWUL goes into a SAR, the potential for a special administrator to investigate what has led to that position, and to pursue any claims that may exist against the directors or TWUL's advisers, is lost.

Discussion and conclusions

238. As noted above, the judge relied on *Matalan* and *Noble Group*. In each case, the judge (Miles J in *Matalan*, and Snowden J in *Noble Group*) relied in turn on what Snowden J had said in *Far East Capital* at [14]:

> "The possibility of a scheme including a mechanism for the release of claims against third parties that might otherwise give rise to "ricochet" claims back against the scheme company is now well-established: see e.g. *re Lehman Brothers International Europe (No.2)* [2010] Bus LR 489 at paras 45-55 and 65. On the basis that such provisions simply grant a release in relation to (i) the guarantee and security obligations that support the Company's obligations under the notes, and (ii) any claims against the persons involved in the preparation, negotiation or implementation of the Scheme itself and their legal advisers, it seems to me that the inclusion of such provisions is well within the scope of Part 26 of the Companies Act. The intention to include provisions for such releases was also properly disclosed in the explanatory statement which was sent to Scheme creditors."

239. All of these cases involved releases given by *creditors* of the company, not by the company itself. The special feature of such releases is that they prevent the release of the claims by creditors against the company, which form a central part of the scheme or plan, being undermined by ricochet claims against the company in the event that the

creditors pursued claims against directors or other third parties. There is no risk of such ricochet claims in the event that the company pursued claims against its own directors or advisers.

240. We accept that the risk of ricochet claims is not the only justification for the release of third parties. The overriding consideration is that releases against third parties are permitted where "necessary in order to give effect to the arrangement proposed for the disposition of debts and liabilities of the company to its own creditors": see *Re Lehman Bros (No2)* [2009] EWCA Civ 1161, [2009] Bus LR 489, per Patten LJ at §65.

241. The release of claims by the Plan Company or TWUL against their own officers and advisers does not in our view, however, satisfy that test. We recognise that the directors of, and advisers to, TWUL and the Plan Company are operating in highly difficult circumstances. That is true of directors and advisers in the case of many financially distressed companies. We stress that we have not been provided with any reason to conclude that there has been any breach of duty by the directors, and we recognise that the release in issue relates only to their conduct in relation to the preparation and implementation of the Plan. Nevertheless, we are not satisfied that a release of potential assets in any future insolvency proceedings of the Plan Company and TWUL, consisting of their own possible claims against directors and advisers, is justified as being necessary to enable the Plan to be implemented.

242. So far as the reasons given by the judge, summarised above, are concerned:

(1) the risk of ricochet claims does not arise, for the reasons already given;

(2) the fact that the B Plan contained similar releases might diminish the strength of the objection from the Class B AHG, but TWUL has other stakeholders who might be affected by such releases, particularly in the event of it going into a SAR;

(3) the fact that no potential breaches of duty have been identified, and nothing was put to the directors in cross-examination is no answer: none of those opposing the Plan have access to the information which would be available to a future special administrator of TWUL, and neither the Court nor the parties to a restructuring procedure can be expected to divert time and resources to investigating the possibility of such claims in the course of seeking the sanction of a proposed plan; and

(4) a carve-out for claims by a special administrator of TWUL or insolvency office-holder of the Plan Company is not inconsistent with the rationale for the releases in the first place – as noted, that rationale does not extend to such releases.

243. Mr Smith KC objected that the Plan Company and TWUL could grant such releases anyway. Whether this is so was not developed in argument. In many cases, where a scheme or plan returns the company to solvency, that may well be true, in which case there would be no need for a release to be effected by a term in the scheme. It is in this context, however, that the interim nature of the Plan is of particular relevance, because the Plan Company and TWUL will remain insolvent following its implementation, and it is far from clear that either company could grant effective releases in these circumstances.

244. Mr Smith stressed the Plan Company's concerns at the disruption to the vital work the directors and advisers will be engaged in over the coming months, in order to implement RP2, if they are bombarded by letters from creditors asking what the Company is doing to investigate claims against the directors and advisers. He also expressed concern at the possibility of derivative claims being pursued.

245. We considered, in directing an amendment to the Plan as part of our Order dismissing the appeal, that these concerns were adequately answered in the circumstances of this case, and that the objections of the appellants were adequately addressed, if the Plan was modified so as to provide for an express carve-out from the releases in clause 16.1.2 and the covenant not to sue in clause 16.1.3 for any claims that might subsequently be brought by a special administrator of TWUL or an insolvency office-holder of the Plan Company. If RP2 is successful then the possibility that there may have been claims against directors or advisers in relation to the preparation and implementation of the Plan becomes for practical purposes irrelevant. The carve-out caters for the possibility that RP2 fails.