15 April 2025

PRESS SUMMARY

Kingston S.À.R.L., Thames Water Limited and Mr Charles Maynard MP v Thames Water Utilities Holdings Limited [2025] EWCA Civ 475
On appeal from [2025] EWHC 338 (Ch)

Court of Appeal (Civil Division): Sir Julian Flaux (Chancellor of the High Court), Lord Justice Zacaroli, Sir Nicholas Patten

BACKGROUND

This appeal concerns the Court's power under Part 26A of the Companies Act 2006 (the "**CA 2006**") to order a "cross-class cram-down" of a restructuring plan (the "**Plan**") on creditors of a company who did not approve the terms of the Plan.

The case arises from the serious financial difficulties faced by the Thames Water group (the "**Group**") and the efforts of its holding company, Thames Water Utilities Holdings Limited ("**TWUHL**"), and certain of its senior creditors (the "**Class A AHG**") to avoid the Group entering into insolvency in late March 2025.

TWUHL's longer-term strategy is to raise funds via an equity sale of the Group to new investors ("**RP2**"). However, additional liquidity via, *inter alia*, new super senior funding ("**SSF**") is required in the shorter-term to keep the Group solvent whilst RP2 was negotiated and implemented. It is this interim restructuring that the Court was being asked to sanction on an urgent basis.

Ordinarily, the Court will sanction a restructuring plan if 75% or more of each class of a company's creditors approve the restructuring plan. In this case, that threshold was not met for two of the classes of junior and subordinated creditors. The Court was, therefore, required to assess whether it should approve the Plan nevertheless via what is called a "cross-class cram-down" under s.901G of the CA 2006.

The question of sanctioning the Plan came before Mr Justice Leech. The Plan was supported by TWUHL as the plan company and an ad hoc group of TWUHL's senior creditors (the "**Class A AHG**"). Another ad hoc group of TWUHL's junior creditors (the "**Class B AHG**"), TWUHL's parent company and subordinated creditor ("**TWL**"), and Mr Charles Maynard MP (intervening) opposed the Plan.

On 18 February 2025, Leech J rejected the objections and exercised his discretion to approve the Plan.

The Class B AHG, TWL and Mr Maynard MP appealed on an expedited basis.

JUDGMENT

The Court of Appeal unanimously dismissed the appeal, subject to an amendment to the releases granted under the Plan.

REASONS FOR JUDGMENT

A warning to parties

The Court of Appeal paid tribute to Leech J's thorough judgment which dealt comprehensively with numerous issues of fact and law, including complex questions of valuation evidence and competition law, and was delivered in an exceptionally short time-frame (**[2]**).

The Court of Appeal considered that it was unacceptable that Leech J had been placed under such enormous pressure to produce his judgment and reiterated the importance of the Court of Appeal's earlier guidance in *Re AGPS Bondco Plc* [2024] EWCA Civ 24 ("*Adler*") that parties considering a restructuring requiring the Court's sanction must factor in sufficient time for the Court to consider the plan and produce its judgment (**[3]**).

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

The appeal concerned the Court's discretion to sanction the Plan. Part 26A of the CA 2006 is silent as to the approach that the Court should take in exercising its discretion (**[91]**). The leading case on the exercise of the Court's discretion is the Court of Appeal's decision in *Adler* (**[92]**).

In the present appeal, the Class B AHG and TWL challenged Leech J's application of *Adler* on two grounds (**[114]**). First, they said he was wrong to find that there was no "restructuring surplus" because the Plan was only an interim one. Second, they said he was wrong to say that their views were irrelevant because they were "out of the money" in the relevant alternative (i.e., what would happen if the Plan was not approved).

Before addressing *Adler*, the Court of Appeal identified four preliminary principles that had to be borne in mind (**[93]**). First, the Court should not assume the role of the legislator by laying down principles of broad application where Parliament left discretion to be resolved on a case-by-case basis (**[94]**). Second, when considering guidance from previous cases, it is important to recognise their limitations, including that many applications to sanction are uncontested so not subject to adversarial argument (**[95]**). Third, guidance from previous cases might also be of limited application given the variety of circumstances in which a restructuring plan can arise (**[96]**). Fourth, an appellate court will only interfere with the judge's exercise of discretion if the judge applied incorrect legal principles, took into account irrelevant factors or omitted to take in account relevant factors, or came to a conclusion on the facts that no reasonable judge could reach (**[98]**).

As regards *Adler*, it was held in that case that the four principles established for schemes of arrangement remained applicable where there was no cross-class cram-down (**[100]**). Those four principles were whether (i) the provisions of the statute had been complied with, (ii) the class was fairly represented, and not coerced by the majority, at the meeting approving the plan, (iii) the scheme is a fair one which a creditor could reasonably approve, and (iv) there was any 'blot' or defect in the scheme.

In the case of cross-class cram-downs, the first and fourth principle continue to apply (**[102]**). It is also appropriate for the Court to conduct a "horizontal comparison" that involves the Court examining whether the Plan provides for differences in treatment of different classes of creditors *inter se*, and whether those differences can be justified, and the relevant alternative is

a helpful reference point for that assessment (**[105]-[106]**). It also involves an assessment of how the distribution of 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, which is sometimes referred to as the "restructuring surplus" (**[108]**).

Restructuring surplus

The Court of Appeal held that Leech J adopted too narrow an approach to the question of restructuring surplus (**[117]**). The Court of Appeal disapproved of the term "restructuring surplus" and preferred the term "benefits preserved or generated by the restructuring". This is because the benefits of a restructuring can be non-quantifiable in money terms and can include non-monetary benefits such as, in the present case, preserving the company as a going concern in the short to medium term to enable it to pursue RP2 (**[118]**).

Out of the money creditors

The Court of Appeal also held that it was not correct that a finding that a class of creditors were "out of the money" in the relevant alternative should result in their objections being disregarded and/or given *de minimis* consideration (**[126]**). In essence, it was suggested that if the dissenting creditors would receive no payment in the relevant alternative (i.e., statutory insolvency) then their objections to the restructuring plan should be disregarded.

The Court of Appeal rejected this argument, and rejected the contention that it was required to find in favour of TWUHL on this issue by the decision in *Adler* (**[127]-[146]**). The Court of Appeal also considered that it was wrong as a matter of principle (**[149]**). It held that 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 might be adopted. 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 the position of those who would be out of the money in the relevant alternative are likely to vary accordingly.

In the present case, the Class B creditors were being required to give up their existing rights by extending the maturity dates to their loans in exchange for the ability to participate *pari passu* in the SSF being used to bridge the gap until RP2 (**[150]-[155]**). It was, therefore, appropriate to give consideration to their position when considering issues of horizontal fairness.

The June Release Condition

The Class B AHG's principal criticism of the Plan was that it provided that no funding under the SSF could be released after 30 June 2025 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 (**[157]**). This provision was known as the June Release Condition ("**JRC**"), and the Class B AHG said that it acted as an unfair veto when compared to the rights that the Class A creditors would have in the relevant alternative.

The Court of Appeal held that it was unlikely that the JRC would have any practical implications, because the JRC also requires the agreement by two-thirds of the SSF lenders, which was 93.29% comprised of Class A creditors (**[160]-[161]**). Further, and in any event, the Class A creditors already had the ability to block RP2 under their existing contractual rights, and the preservation of that veto under the Plan was not unfair (**[163]**).

Information rights

The Class B AHG also criticised the additional information rights granted under the Plan to Class A creditors (**[165]**). The Court of Appeal disagreed (**[167]**). First, the judge accepted TWUHL's evidence that it intended to communicate with all creditors through the process and the Court of Appeal was unwilling to overturn that finding (**[168]**). Second, and more importantly, RP2 will need to be sanctioned by the Court and the Court will, therefore, be able to assess whether TWUHL communicated fairly with all creditors when considering whether to sanction RP2 or not (**[169]**).

The public interest: the costs of the Plan

Mr Maynard MP (supported by TWL) opposed the Plan on the basis of the public interest (**[173]**). He argued that the cost of the Plan had the effect of placing an unjustifiably higher debt burden on the Group as compared to the relevant alternative, which may impact the long-term delivery of water and sewerage services.

The Court of Appeal rejected both of Mr Maynard MP's bases for arguing that the judge erred in failing to give sufficient account to the public interest.

First, the judge was not required by *Adler* to prioritise the public interest because the relevant alternative was an insolvency managed under the special administration regime ("**SAR**") in which a special administrator could prioritise the public interest (**[175]**-**[176]**). The inquiry as to the fairness of a plan is required because it has the effect of imposing a compromise on dissenting creditors (**[177]**), but no such inquiry would be required if all creditors approved the plan. The inability of the creditors to agree does not vest in the Court a responsibility to conduct a wider enquiry into the public interest (**[178]**).

Furthermore, the statutory guardians of the public interest for water and sewerage companies are the Secretary of State and OfWat (**[179]**). It is in their power to apply for the appointment of a special administrator which serves as the relevant safeguard of the public interest (**[180]**).

Second, the cost of the Plan was not a "blot" on the Plan. Without purporting to define the limits for all circumstances of what might constitute a blot, the Court of Appeal held that it was capable of including cases where the scheme or plan (i) contains a technical defect so as to make it unworkable or incapable of achieving its purpose and/or (ii) requires the company to take, or contemplate 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 (**[199]**).

TWUHL accepted that it might be a blot on the Plan were its effect to load such an enormous debt burden on the Group that it would be in breach of its regulatory obligations (**[200]**). However, this was not the circumstances of the current case, and the Court was not required to inquire whether a SAR might better serve the public interest, or whether it might resolve the Group's financial problems at a lower cost (**[201]**). Rather, it was for the Secretary of State and OfWat to protect the public interest, including by applying to appoint special administrators. Further and in any event, the Court of Appeal agreed with the judge that the cost of the SSF was lower than as presented by Mr Maynard MP and that the judge was entitled

to find that the overall cost of the Plan was at least equalled by the negative financial consequences of a SAR (**[202]**).

Releases

Finally, the Court of Appeal held that the releases granted to the Group's officers and advisers under the Plan were inappropriate (**[241]**), and required the Plan to be amended so as to exclude possible claims by a future special administrator or office-holder against directors and advisors.

References in square brackets are to paragraphs in the judgment.

NOTE

This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative documents. Judgments are public documents and are available at: https://caselaw.nationalarchives.gov.uk/