Press Summary

1 July 2025

SAIPEM S.P.A., SAIPEM SINGAPORE PTE LTD, SAMSUNG E&A CO., LTD and SAMSUNG E&A (THAILAND) CO., LTD - v - PETROFAC LIMITED and PETROFAC INTERNATIONAL (UAE) LLC [2025] EWCA Civ 821

Court of Appeal (Civil Division): Lord Justice Snowden, Lord Justice Zacaroli and Sir Christopher Floyd

<u>Background</u>

This appeal is against the approval ("sanction") by the High Court of two related restructuring plans (the "**Plans**") under Part 26A ("**Part 26A**") of the Companies Act 2006 in relation to two companies: Petrofac Limited ("**PL**") and Petrofac International (UAE) LLC ("**PIUL**"). PL and PIUL are together the "**Plan Companies"** and with their subsidiaries comprise the "**Petrofac Group**". The Petrofac Group is a leading international service provider to the energy industry which sought to restructure its debts to avoid an insolvent liquidation.

The Petrofac Group has liabilities to secured creditors of about US$909 million. The secured creditors include the members of a so-called "ad hoc group" of creditors (the "**AHG**") which negotiated the Plans with the Plan Companies. The Group also has unsecured creditors of an uncertain amount which could be about US$3 billion. These include liabilities to the appellants, Saipem and Samsung, which entered into an unsuccessful joint venture with the Plan Companies to provide services in relation to an oil facility in Thailand. The joint venturers were left with joint and several liabilities that are disputed but could amount to about US$1.67 billion.

If the Plan Companies were to go into insolvent liquidation, it was estimated that the secured creditors would recover (on a low case) about 24% of their claims, and the unsecured creditors would receive nothing and hence be "out of the money".

The Plans sought to restore the Group's balance sheet and preserve it in business by writing off all of the liabilities of the Plan Companies to its existing creditors. A firm of independent valuers estimated that the "day one" equity value of the Plan Companies post-restructuring and without its pre-existing liabilities would be between US$1.5 billion and US$1.85 billion. Of this equity value, the Plans proposed to allocate about US$329 million to the existing creditors in return for the writing off of their debts. About US$270 million would be allocated to the secured creditors – a return of about 29%. The unsecured creditors would receive a return of about 1.4% of their debts.

Of the remaining post-restructuring equity value, about US$1 billion would be allocated to the providers of US$350 million of "**New Money**" to the Plan Companies. These providers included some members of the AHG, a new investor, and some of the existing directors and shareholders of the Group.

Ordinarily, the Court will sanction a restructuring plan if 75% or more by value of each class of a company's creditors vote to approve the plan. In this case, the class of creditors which included Saipem and Samsung voted against the Plans. The High Court was therefore required to determine whether to exercise its discretion to use its "cross-class cram down" power under Part 26A to impose the plan on the dissenting class. On 20 May 2025, Marcus Smith J exercised his discretion to sanction the Plans.

<u>The appeals</u>

Saipem and Samsung appealed with the permission of the judge on two grounds: (1) that the judge should have taken into account, when assessing whether they would be "any worse off" under the Plans than in the "relevant alternative" of a liquidation, that they would derive substantial commercial advantages if the Plan Companies, who were their business competitors, were out of business; and (2) that the Plans allocated a disproportionate share of the benefits preserved and generated by the restructuring to the providers of New Money.

In a judgment of the Court, the Court of Appeal rejected the appeal on Ground 1, but allowed the appeal on Ground 2 and set aside the sanction of the Plans.

<u>The "no worse off test"</u>

Under Ground 1, the Court of Appeal held that the "no worse off" test requires a Court to determine the financial value which the creditor's existing *rights* which are to be compromised by the plan would likely have in the "relevant alternative", and to compare it with the financial value of the new or modified *rights* which the plan offers in return for the compromise of those rights. Applying that test on the facts, Saipem and Samsung would be likely to be better off under the Plans than in a liquidation. The commercial advantages that Saipem and Samsung would obtain if the Plan Companies went into liquidation could not be taken into account when applying the "no worse off" test because they did not result from any compromise of the rights of Samsung and Saipem.

<u>Fair allocation of the benefits of the restructuring</u>

The Court of Appeal followed two other recent Court of Appeal decisions (*AGPS Bondco (Adler)* and *Thames Water*) in holding that the cross-class cram down power will only be exercised if a plan provides for a fair allocation of the benefits preserved or generated by the restructuring.

The Court indicated that the proper purpose of the exercise of the cross-class cram down power is to enable a plan to be sanctioned against the opposition of those unreasonably holding out for a better deal where there has been a genuine attempt to formulate and negotiate a reasonable compromise between all stakeholders. It is not designed as a tool to enable assenting classes to appropriate to themselves an inequitable share of the benefits of the restructuring.

In that regard, the Court reiterated the view stated in *Thames Water* that it did not follow from the fact that a dissenting class of creditors would be "out of the money" in the relevant alternative that it would be fair to exclude them from all but a *de minimis* share of the benefits of the restructuring.

The Court of Appeal also considered that if new money is agreed to be provided to a restructured company, but on terms that are more expensive than could be obtained in the open market, that excess cost is best analysed as a benefit of the restructuring. The allocation of that benefit under the plan needs to be shown to be fair by the plan company in order to justify the exercise of the cross-class cram down power.

On the facts of the case, the New Money would only be invested into the Group post-restructuring when it would have a clean balance sheet, shorn of its liabilities and would be highly solvent with a substantial equity value. On the basis of the Plan Companies' evidence as to the value of the restructured Group, secured creditors who participated in providing New Money would be likely to reap a return of more than 266% on their investment in immediately tradeable securities on day one after the restructuring. The Court of Appeal held that the apparently disproportionate cost of the New Money required to be justified. The Plan Companies had not adduced any expert evidence as to the market price for the provision of new money in such circumstances, nor was the evidence adduced by the Plan Companies sufficient to show that there had been any testing of the market for the provision of new money to the restructured Group.

In these circumstances, the Court of Appeal held that the conclusion of the judge, that the return on the investment of New Money was "competitive" and not disproportionate, could not stand. The judge's reasoning, that the investors were injecting money into a business that would fail without the Plans, and that the returns, though considerable, were reflective of those risks, wrongly focused on the risks of investing in the Group in its present distressed state and did not address the relevance of the independent equity valuation report to an assessment of the risks of investing the New Money.

Standing back, the evidence gave the clear impression that the number of equity shares to be allocated to the providers of New Money (and in relation to the very substantial "work fees" agreed to be paid to the AHG) had been fixed before the independent valuation report had been obtained and by reference to a notional equity valuation that was several times lower than the actual equity value in the subsequent valuation report. But for reasons that were not explained, the terms of the Plans had not been reassessed after that uplift in allocated value became known.

<u>The conclusion</u>

The result was that the exercise of discretion by the judge to sanction the Plans was flawed and had to be set aside.

The Court of Appeal declined to re-exercise the discretion itself on the basis that it did not have the evidence to do so. The negotiation of the Plans appeared to have taken place on a false premise as to the value of the equity to be allocated, and no adequate evidence had been adduced to address the appropriate price at which new money could be provided to the Plan Companies post-restructuring.

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 document. Judgments are public documents and are available at: https://caselaw.nationalarchives.gov.uk