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Thames Water: English Court Approves Restructuring Plan, Despite Major Opposition — But Appeal Imminent

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At a Glance

The English Court today approved the restructuring plan of Thames Water, but granted all opposing parties permission to appeal. The appeal is expected to be heard on an expedited basis within the next few weeks.

The plan seeks to implement an interim solution to extend the group's liquidity runway and provide a stable platform in order to allow time for a substantive restructuring later this year.

This unprecedented plan faced major opposition from certain junior creditors on multiple grounds, as well as from a Member of Parliament, Mr. Maynard MP, on public interest grounds.

In a 178-page judgment, Mr. Justice Leech held as follows.

- **Relevant alternative:** The correct relevant alternative to the Plan was special administration in which junior creditors would receive nothing. The Court rejected opposing arguments that the relevant alternative was a competing restructuring plan proposed by certain junior 'Class B' creditors (the **B Plan**).[1]
- **'No worse off':** Junior creditors would be no worse off under the Plan than in the relevant alternative of special administration, even considering the potential effect of certain terms which granted senior 'Class A' creditors control in respect of an anticipated second holistic restructuring plan (the **Class A Control Terms**).[2] The Court found such terms had no effect on value.
- **'Fair share' of post-restructuring value:** The case gave rise to no issue of horizontal fairness as the Plan was an interim restructuring plan which involved no restructuring surplus; in any event, all plan creditors were treated equally because they were entitled to participate equally in the new super-senior funding. The Court attached little weight to the opposition of junior creditors given they were out of the money in the relevant alternative.
- **Public interest issues:** Although it took careful account of opposition to the Plan on public interest grounds, the Court nonetheless exercised its discretion to approve the plan.
- **No stay:** The Court did not order that its judgment be stayed pending the judgment of the Court of Appeal. Instead, it will accept undertakings from the plan company to the effect that any steps it takes to implement the Plan must be capable of reversal if so ordered by the Court of Appeal.

See Key Takeaways on next page.

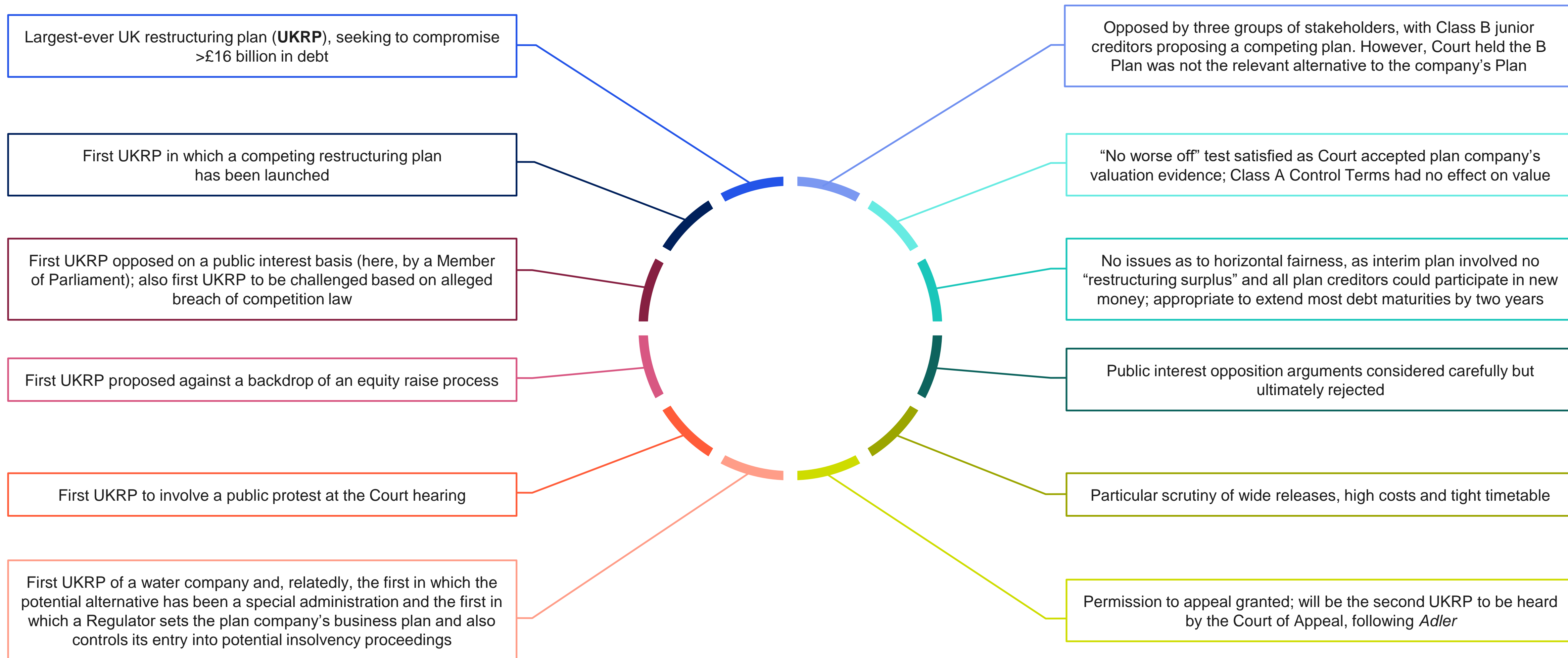
"The relevant alternative to the Plan is a [special administration] which will have to be funded by the Government.

There is a public policy in favour of rescuing the Thames Water Group and giving the market a chance to agree a permanent restructuring plan before the Government is forced to fund a special administrator."

Extract from sanction judgment, 18 February 2025

1. The terms of the B Plan are similar to the company's Plan in providing for an extension of maturity dates. In contrast to the company's Plan, the B Plan does not contain the June Release Condition and a full £3 billion is committed upfront.
2. Such terms included a condition precedent to drawdown of a second £1.5 billion tranche of the new money which required that at least 2/3 of super-senior and Class A creditors must have locked up to a wider recapitalisation deal - the **June Release Condition**).

Key Takeaways



Background, Terms of and Opposition to the Plan

- *Plan Company:* Thames Water Utilities Holdings Ltd
- *Purpose of Plan:* To provide the Thames Water Group with a stable platform as an interim measure until a substantive restructuring based on the equity raise can be achieved and then implemented. This "interim platform transaction" involves:
  - £1.5 billion new super-senior funding;[1]
  - an additional £1.5 billion super-senior funding if certain conditions are satisfied, including the June Release Condition; and
  - extending maturity dates of most debt by two years.
- *Relevant Alternative:* The plan company asserted that the relevant alternative to the plan was special administration (with liquidity shortfall forecast for 24 March 2025) within which the most likely exit route was a whole business sale delivered via a "Water Transfer Scheme" c.18 months later. However, this was disputed; see next page.
- *Opposition:* The plan was opposed by:
  - the ad hoc group of Class B creditors (who proposed a competing plan, as noted);
  - a Member of Parliament, Charlie Maynard MP, representing the public interest and the interest of customers; and
  - the subordinated creditor (which is also the plan company's immediate shareholder).
- *Reinstated Plan:* The Class A ad hoc group also proposed a plan on substantially the same terms as the company's Plan; the Reinstated Plan was intended as an alternative to the B Plan in the event the Court did not sanction the company's Plan.

	CREDITOR CLASSES	TREATMENT UNDER PLAN	EST. DIVIDEND IN RELEVANT ALTERNATIVE	APPROVALS (BY VALUE, OF THOSE VOTING)
1	Liquidity Facility Class	▸ Consent to introduction of the new super-senior financing and related amendment to payment priorities[2] ▸ Two-year extension of maturity dates for most debt instruments ▸ Cancellation of all currently-undrawn commitments ▸ Class A and Class B plan creditors have the right to participate in the new super-senior financing (pro rata to their share of existing Class A / Class B debt)	N/A as undrawn	100%
2	Class A Debt (Make-Whole) Class		72%	98%
3	Class A Debt (Non-Make-Whole) Class		76%	99%
4	Class B Debt Class		0%	16% - i.e. rejected
5	Interest Rate and Index Hedging Class		100%	100%
6	Currency Hedging Class		74%	100%
7	Subordinated Creditor Class		0%	0% - i.e. rejected

Regulator's position

Although Ofwat did not appear in court, it wrote to Thames Water expressing its position (and provided a copy of its letter to the Court), in which Ofwat:

- confirmed that, if the board of the Thames Water operating company were to ask Ofwat to petition for special administration, Ofwat would likely make such an application;
- considered that it was not required to have a position or preference as between the company's Plan and the competing B Plan; and
- did not object to either plan.

1. New super-senior funding issued with a 3% OID with interest at 9.75% payable in cash.
2. The consent of the Subordinated Creditor was not required for this.

Decision: Jurisdictional Matter – the ‘No Worse Off’ Test

ISSUE	CHALLENGE	JUDGMENT
1 **‘No worse off’ test** *Background:* The Court only has power to bind dissenting class(es) to a restructuring plan if the relevant class would be no worse off under the plan than in the most likely relevant alternative to it (and at least one ‘in the money’ class has approved the plan).	▸ The Class B AHG asserted that the Court had no jurisdiction to sanction the Plan because the relevant alternative was the B Plan and the Class B creditors would be better off under the B Plan than under the company’s Plan. ▸ This objection depended on both valuation evidence and the Court’s assessment of the “Class A Control Terms” i.e. provisions giving control rights to the Class A creditors in respect of the anticipated subsequent recapitalisation transaction, including the June Release Condition.	▸ The Court rejected the Class B AHG’s submissions and accepted the company’s evidence, finding that: – if the Court were to refuse to sanction the Plan, the most likely outcome was that the directors would write to Ofwat and the Secretary of State requesting that they apply for a special administration order and that such an order would be made, such that the Thames Water opco would enter into special administration on or before 24 March 2025; and – it was not satisfied that the Class A Creditors would support the B Plan if the Court refused to sanction the Plan (particularly given the Class A AHG had taken steps to promote the Reinstated Plan). ▸ The Court held it was reasonable for the directors to take the view that: – there was insufficient time to present the B Plan and the Class A Creditors were unlikely to consent to it (the Court found on the facts that the company would need 17 business days to implement either the company’s Plan or the B Plan, once approved by the Court); – there was a reasonable prospect that the Thames Water opco would become insolvent if the Plan were not sanctioned, that the interests of creditors were now paramount and it would be their duty as directors to take steps to put the Thames Water opco into special administration; – there was a risk that suppliers would accelerate payment terms, demand payment of arrears and even withdraw their services; and – the Court was unlikely to sanction the B Plan or, at the very least, to decide that whether it would do so was risky and uncertain. – In particular: ▸ the Court was not satisfied that the Class B AHG would be able to persuade the Court that the Class A Creditors would be no worse off under the B Plan than in the relevant alternative or that it was likely that the Court would sanction the B Plan; ▸ it was even less likely that the no worse off test would be satisfied for Class A Creditors if the relevant alternative to the B Plan were the Reinstated Plan; and ▸ the Class B AHG had not persuaded the Court that it was likely that they would be able to prove that they would receive a payment, or have a genuine economic interest in the company, under a special administration (as is required in order to engage the Court’s discretion to bind dissenting classes). ▸ Accordingly, the B Plan was not the most likely scenario if the company’s Plan were not sanctioned. The Court was “far from satisfied that the B Plan was any more than an exercise by junior creditors to negotiate a larger participation in the Super Senior Funding for themselves”. ▸ The Court accepted the plan company’s evidence as to the enterprise value of the Thames Water opco and rejected opposing evidence. It held that the Class B Creditors and the Subordinated Creditor would be no worse off under the Plan than in the relevant alternative of special administration – even considering the potential effect of the Class A Control Terms, which the Court found had “no effect on value” and did not empower Class A Creditors to “divert value” away from the Class B Creditors; the Court rejected the submission that the June Release Condition would limit the equity raise process.

Decision: Discretionary Matters

ISSUE	CHALLENGE	JUDGMENT
2 **Distribution of restructuring surplus**	► The Plan did not warrant the extent of the alteration of the rights of the dissenting creditors. ► The Plan gave rise to an unfair distribution of the restructuring surplus between the Class A Creditors and the 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.	► The Court rejected the Class B AHG's argument that the Court must consider issues of horizontal fairness even if the challenge is being brought by an out of the money creditor. ► The present case gave rise to no issue of horizontal fairness of the kind explored in *Adler* (see our *Alert*). The Plan was an interim restructuring plan which involved no restructuring surplus and, even if it could be treated as if it did, all plan creditors were treated equally because they were entitled to participate equally (*pari passu*) in the super-senior funding. ► If junior creditors are out of the money in the relevant alternative (as here), the restructuring plan is not unfair and little weight is attached to their views. ► *Better or fairer plan:* The headline price of the new money was "very, very high"; both the terms of the B Plan and an interim trading price of the super-senior funding suggested that the company might have found better terms in the market. However, this was not a reason for refusing sanction. Nor was it necessary for the Court to consider the extent to which it should re-write the commercial terms, given it had found that the Class B Creditors were out of the money in the relevant alternative. It was not satisfied that any of the Class A Control Terms were unfair or unreasonable. ► A combination of the debt structure and the maturity dates of the various instruments would have made it very difficult to put in place an interim plan without extending the maturity dates of all the various instruments. It would have been unrealistic to seek to extend maturity dates of only the near-term debt.
3 **"Blot" on Plan – competition law**	► There was a technical "blot" on the Plan because the June Release Condition infringed s.2(1) Competition Act 1998 (as an agreement with the object or effect of preventing, restricting or distorting competition).	► The competition law objection failed on the facts as: – the Court had dismissed the allegation that the plan company and the Class A AHG intended to collude together to interfere in the equity raise process or that the Class A AHG would use its right of approval in respect of any final offer to prevent the Class B creditors from making a recovery; – the June Release Condition did not have a "chilling effect" on the equity raise and bidding process, as the Class B AHG had asserted; – although the Class A AHG wanted "controls" over the process, it did not appear that they intended to take over control of the process themselves; and – the June Release Condition was a fundamental element of the deal which provided downside protection for the Class A AHG. ► The competition law objection also failed as a matter of law, for various reasons.

Decision: Discretionary Matters (cont.)

	ISSUE	CHALLENGE	JUDGMENT
4	**Releases**	▸ The Plan was unfair because of the wide releases to be granted under it, which were not necessary for the implementation of the interim platform transaction and also constituted a "blot" on the Plan.	▸ It was unnecessary to demonstrate that there was a clear risk of "ricochet" claims before the Court can approve the release of directors. It is well-established that the Court may approve releases where necessary to give effect to the arrangement. Accordingly, the release clause was not a "blot" on the Plan, nor should the Court refuse sanction as a matter of discretion because of the width of the releases or because it was an interim plan. ▸ The Court considered whether to refuse to authorise releases without a proper investigation into parties' conduct (in particular, as it was alleged that the plan company had not made full and frank disclosure to the Court about the cost of finance and all of the fees). It also considered the possibility that the releases should involve some carve-out if Thames Water were later to enter special administration. ▸ The Court heard further argument at the consequentials hearing regarding the releases. It ultimately decided to retain the releases in the form proposed by the company, albeit "with some hesitation".
5	**Information rights**	▸ The Subordinated Creditor asserted that there was a disparity between the information rights of different classes of creditors under the Plan, where there ought to be parity.	▸ The Court would not refuse sanction for this reason. However, it indicated that the plan company ought to share information not only with secured creditors who were offered the right to re-invest in the Thames Water Group, but more widely with all secured creditors and the subordinated creditor, even if they were not involved in a bid during the second restructuring plan. The parties are to agree adjusted wording in this regard by the end of this week.

Timetable: The Court noted that the sanction hearing lasted for four and a half days; it was faced with a huge volume of documentation and nine expert reports on valuation. Although this was an important case of some urgency, the judge noted that he had never been given a satisfactory explanation as to 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. He reminded the parties again of the guidance given in *Adler*, that the Court's willingness to decide cases quickly to assist companies in genuine and urgent financial difficulties must not be taken for granted or abused; sufficient time for the proper conduct of a restructuring plan process must be factored into the timetable (including the possibility of an appeal).

Decision: Discretionary Matters (cont.) – Public Interest

ISSUE	CHALLENGE	JUDGMENT
6 Public interest	▸ Mr. Maynard MP opposed the Plan on the basis that it was not in the public interest or the interests of Thames Water customers to sanction it. *Although the plan company and the Class A AHG did not object to this appearance, they did not accept that Mr. Maynard MP had standing or that the Court should take his views into account.*	▸ *In essence:* the Court held that Mr. Maynard MP had standing to oppose the Plan but, after taking into account the public interest in ensuring the uninterrupted provision of vital public services, nevertheless exercised its discretion to sanction the Plan. ▸ *Standing:* The Court rejected the plan company's arguments that customers and members of the public would not be affected by the Plan and that Mr Maynard MP had no standing to appear. – The customers of Thames Water were plainly affected by a decision to sanction the Plan. Special administration was the relevant alternative to the Plan and a special administrator is entitled to give priority to the public interest in ensuring "the uninterrupted provision of vital public services". Accordingly, if a special administration was a better solution for customers than the Plan, then they were plainly affected by the decision whether or not to sanction it. – Mr. Maynard MP was not merely a single customer of Thames Water; he had the support of 25 Members of Parliament, 34 campaign groups and a number of individual customers, among other groups. – The Court expressed its gratitude to Mr. Maynard MP and his counsel, who appeared on a pro bono basis. ▸ *Substantive arguments:* – *Cost of bridge finance*: The Court accepted that the costs of a special administration were likely to be equal to or more than the costs of the Plan (and the envisaged second restructuring plan, RP2), on the basis that the high costs of finance under the Plan would be balanced out by the negative effects of an insolvency process. The Court described the cost of finance and adviser fees in the case as "very high" and noted it might have been tempted to refuse sanction on the basis that the costs were simply too high, if it had been clear that Thames Water would have had to bear all the costs. However, it was prepared to sanction the Plan on the basis that: 1. (most importantly) it was not satisfied that Thames Water or its customers would have to bear the finance costs of the Plan, as it seemed very likely that the Class A Creditors would have to take a substantial haircut in order to achieve RP2; 2. the restructuring plan procedure is a statutory one and there is a public interest in facilitating the rescue of struggling companies, which the Court had to balance against the public interest in the benefits to the public of a special administration; there was a public policy in favour of rescuing Thames Water and giving the market a chance to agree a restructuring plan before the Government is forced to fund a special administrator; and 3. Ofwat and the Secretary of State had not opposed the Plan, and the pension trustees supported it. – *Certainty re RP2*: The Court questioned what degree of assurance it should require from the plan company that RP2 would be achieved. It held: ▸ the appropriate test was whether there was "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"; and ▸ RP2 was "more than a fanciful prospect", on the facts – the plan company and Class A AHG were committed to the equity raise and it would provide the "only realistic way" to comply with Thames Water's regulatory licence conditions and restore its credit ratings to investment grade. – *Lack of frankness*: The Court accepted that the full costs of finance and adviser fees were brought to the Court's attention thanks to Mr. Maynard MP's intervention, but this did not mean that the plan company had failed to make full and frank disclosure to the Court.

Indicative Grounds for Appeal[1]

Class B AHG's Appeal

"No Worse Off" Test

The Court erred in law and fact in not finding Class B would be worse off under the B Plan or in special administration. The Court erred in finding that (a) Class B were out of the money in relevant alternative and (b) Class A Control Terms had no negative impact on the Class B Creditors in respect of the next stage of the restructuring

Horizontal Fairness

The Court erred in law and fact in not finding that the Plan was unfair insofar as it provided Class A Creditors with beneficial rights that were not also provided to the Class B Creditors

Releases

The Court erred in law and fact in not finding that the releases under the Plan were unnecessary in the circumstances of the interim restructuring plan

Subordinated Creditor's Appeal

Horizontal Fairness — Law

The Court erred in law in concluding it was not required to consider fairness of the Plan by reference to the horizontal comparator test because of its finding that the Subordinated Creditor and the Class B Creditors were out of the money in the relevant alternative

Horizontal Fairness — Fact

The Court erred in fact in finding that the Plan gave rise to no issue of horizontal fairness. The Court should have held that it was still required to consider whether the Plan was fair (irrespective of the fact that it implemented an interim financing and all plan creditors could participate in the super-senior new money)

Plan Not "Fair"

The Court should have held that better terms for the new financing were available and would have been less detrimental to other plan creditors; accordingly, the Plan was not fair and/or did not fairly allocate value between the Class A Creditors and other plan creditors

Mr. Maynard MP's Appeal

Discretionary Standard

Challenge as to the correct test for sanction in law once the statutory conditions have been satisfied

Public Interest

Issues of principle including (a) whether the relevant test for the likelihood of a second restructuring plan is whether it is a "fanciful prospect" and (b) the Court's analysis as to the balance of "public interest in facilitating the rescue of struggling companies" against "the public interest in the benefits to the public of a special administration"

Duty of Candour

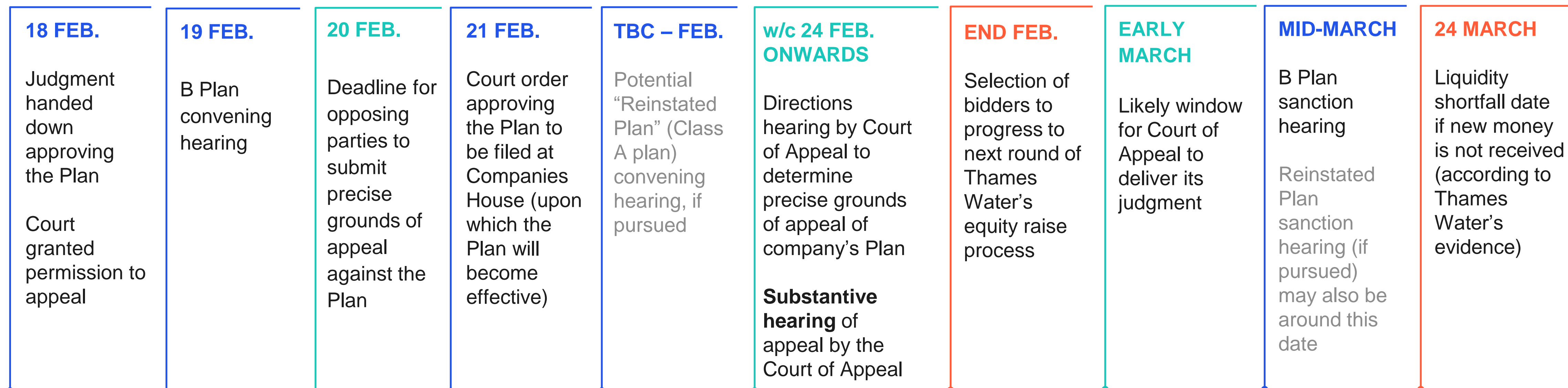
Regarding the Court's decision that the plan company had complied with its duty of candour, in including material in the hearing bundle without drawing it to the Court's attention

Broader Procedural Fairness

Regarding the Court's conclusion that it could take into account the interests of customers as part of its general discretion, but without seeking to ensure the proper representation and protection of customer interests in the proceedings from the outset

1. The Court refused the Class B AHG permission to appeal on two additional grounds: (a) the competition law ground (i.e. that the Court erred in law and fact in not finding that the Plan infringed competition law, such that there was a "blot" on the Plan) and (b) grounds of procedural fairness (i.e. that the procedure was unfair to the objecting creditors, with insufficient time caused by the company's unexplained delay in commencing proceedings). The Court of Appeal may yet give permission to appeal on these or other additional grounds. The above grounds are indicative only and will be developed further by the appellants.

What Happens Next? Indicative Timetable



KEY

- High Court matters
- Court of Appeal matters
- Commercial matters