KIRKLAND & ELLIS

Thames Water: Court of Appeal Delivers Judgment Rejecting Challenges to Restructuring Plan

15 APRIL 2025

At a Glance

The English Court of Appeal today handed down its judgment rejecting the multiple appeals to the restructuring plan of Thames Water, which the High Court approved in February.

Approval of the plan was appealed by:

- the ad hoc group of Class B creditors (who proposed a competing restructuring plan, which ultimately did not proceed);
- a Member of Parliament, Charlie Maynard MP, representing the public interest and the interest of customers; and
- Thames Water Ltd (**TWL**), the subordinated creditor (which is also the plan company's immediate shareholder).

The Court of Appeal held as follows.

- **Discretion:** The Court of Appeal upheld the High Court's exercise of discretion *irrespective* of whether or not the Class B creditors would be out of the money in the relevant alternative. It was therefore unnecessary to resolve questions raised by the Class B AHG's appeal against the judge's findings on valuation. There was no relevant unfairness in Class A Creditors preserving – via the June Release Condition[1] – their practical influence over a future restructuring.
- **Caution on applying "guidance" from previous cases:** Courts should confine themselves to the facts of the relevant case and must exercise caution in applying guidance in previous cases, especially where the nature and purpose of the relevant restructuring plan was fundamentally different.
- **Benefit preserved or generated by the plan:** Here, this benefit consisted of the intangible benefit of preserving the Thames Water operating company as a going concern in the short to medium term to enable it to pursue the opportunity of preserving or obtaining further value within a second, holistic restructuring (**RP2**).
- **Treatment of "out of the money" stakeholders:** It will not necessarily always be right 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 benefits the plan preserves or generates. The Court *can* take account of the treatment of out of the money creditors in considering the fair distribution of the benefits of a plan.
- **Public interest issues:** The inability of creditors to agree does not mean the Court should conduct a wider enquiry as to whether the plan or a special administration would better serve the public interest.

See Key Takeaways on next page.

- For further background, see our *Alert* on the first-instance approval of the plan and the headline terms of the plan in the *Annex*.

"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."

"…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."

Extracts from Court of Appeal judgment, 15 April 2025

1. 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.

Key Takeaways

Guidance from case law: to be approached with caution, especially where plan is of a different nature

Treatment of out of the money stakeholders: Court can take account of their views; not always right to conclude that fact that dissenting classes would be out of the money in relevant alternative is sufficient justification to exclude them from benefits of the plan

Benefits preserved or generated by the plan can be intangible, as here – preserving company as a going concern in short to medium term to permit it to pursue opportunity of preserving/obtaining further value within RP2

Public interest: not the Court's role to conduct an enquiry as to whether the plan or a special administration would better serve the public interest

Possibility of further appeal: challenging parties given until 25 April to apply for permission to appeal to Supreme Court

Valuation issues not considered at all, as Court of Appeal upheld the judge's exercise of discretion irrespective of whether dissenting stakeholders were in or out of the money

Releases: ordered carve-out for any claim that might be brought by a special administration / insolvency officeholder against directors, as not "necessary" in order to give effect to the plan

No blame: Court's focus must be "forward-looking" (rather than to attribute blame for the group's current situation), to try to restore the group to financial health

Timetable: unacceptable that the judge was put under "enormous pressure" to hear case and deliver judgment in such a compressed fashion

Grounds of Appeal

Class B AHG's Appeal

"Fairness"

The Court erred in concluding that the plan was fair, in light of the Class A Creditors obtaining beneficial non-financial rights not provided to the Class B Creditors, specifically because:

(i) the judge was wrong to conclude that there were no horizontal fairness issues because the plan is an interim one which involves no "restructuring surplus";

(ii) the judge was wrong to conclude that no horizontal fairness issues arose because all creditors could participate in the new money; and

(iii) the judge was wrong (in fact and in law) in holding that the plan was fair because the Class B Creditors were out of the money.

Releases

The judge was wrong to conclude that the releases provided in the plan were not a "blot" on the plan and/or unfair

Failure to Consider "Fairness"

The judge erred in law in concluding 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

Horizontal Fairness

The judge was wrong to conclude that the plan did not give rise to any issues of "horizontal fairness"

"Errors of Principle Ground"

TWL's Appeal

Mr. Maynard MP's Appeal

Public Interest

Where the relevant alternative was a special administration, the judge should have given priority to the public interest and/or the interests of customers over any private creditor interests

"Wrong" Decision to Sanction

The judge's decision to sanction was wrong, by reference to various factors, including e.g. in placing weight on Ofwat's position in respect of the plan; terms under the plan vs. special administration, etc.

Duty of Candour

The judge was wrong to determine that the plan company had discharged its burden of proof and/or that it had complied with its duty of utmost candour

Procedural Unfairness

There was procedural unfairness because the plan company did not appoint and fund a customer advocate nor make all available information properly available

Failure to Conclude Not "Fair"

The judge's errors of principle and approach meant he failed to conclude that the plan was not fair and would confer unjustified benefits on the Class A Creditors

Failure to Account for "Cost"

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

"Fairness Ground"

Decision: Discretion

The Court of Appeal held as follows.

- **Role of the Court:** as Parliament has left it to the Courts to develop the approach to be taken upon sanctioning a plan, the Court's function is to work out how best to exercise its discretion on the facts of the case before it and in light of the parties' arguments, guided by principles identified in previous cases. The Court of Appeal cautioned that "it is not for the Court to assume the legislator's role and lay down principles of broader application".
- **Guidance to be understood in context:** when considering the guidance offered in previous cases, it is important to recognise their limitations – in particular where the case was not contested. Guidance should be undertstood by reference to the circumstances of relevant case – for example, Adler's restructuring plan was used as an alternative to a formal distribution process in insolvency and Virgin Active's plan was a means of restructuring a balance sheet to enable the company to continue to trade with a reduced debt burden, whilst Thames Water's plan was a mechanism to avoid a formal insolvency process to buy time to enable a further substantive restructuring to be implemented in the future. Guidance may not read across directly between different types of restructuring plan.
- **Benefits preserved or generated by the restructuring:**
  - the judge had adopted too narrow an approach to the question of "benefits preserved or generated by the restructuring" (sometimes termed the "restructuring surplus"; the Court of Appeal preferred and adopted the former term); and
  - the benefit preserved or generated by the plan was the intangible benefit of preserving the Thames Water operating company 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; there was no reason that should not be regarded as a relevant benefit of the restructuring when considering the fairness of the terms of the plan.
- **Weight to be given to views of out-of-the-money creditors:**
  - there is no hard-edged rule that, in assessing fairness, no account can be taken of the fact that out of the money creditors receive only de minimis consideration;
  - the *fact* of opposition to a plan by creditors with no genuine economic interest in the company has little to no weight; however, this does not mean that the Court cannot 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); and
  - it will not necessarily always be right 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 benefits the plan preserves or generates.
- **June Release Condition:** there was no relevant unfairness in Class A Creditors preserving – via the June Release Condition – their practical influence over a future restructuring (given the respective size of the debt as between Class A and Class B Creditors – the reality is that the Class A Creditors will have "at the very least a highly influential voice in any substantive restructuring").

Decision: Discretion (cont.)

- **Information rights:** such rights did not confer an unfair advantage on the Class A Creditors. Additionally, if the plan company wishes to obtain the Court's sanction of RP2, it will need to demonstrate that it has engaged with any reasonable proposals made to it and communicated fairly with all plan creditors throughout the restructuring process.
- **Public interest:** the inability of creditors to agree does not vest in the Court a responsibility to conduct a wider enquiry as to whether the plan or a special administration would better serve the public interest. The Secretary of State and Ofwat are the guardians of the public interest so far as water undertakings are concerned. The mere fact that a special administration would be the inevitable consequence of the Court refusing to sanction the plan does not provide a reason for the Court to usurp their function.
- **"Blot" on the plan:** in some limited circumstances, the interests of third parties may be taken into account in deciding whether there is any "blot" on the plan. However, a plan is essentially a matter between the company and its creditors and/or members. The concept of "blot" is capable of covering a case where the plan contains a technical defect so that it is unworkable or incapable of achieving what was intended, or involves the company taking a step which is illegal, *ultra vires* or in breach of an obligation owed by it. This issue does not, however, require the Court to enquire whether a special administration would better serve the interests of the public than the plan, or achieve the resolution of the group's financial problems at a lower cost than the plan. The judge was correct to conclude that the costs of the plan did not constitute a blot. The judge was also entitled to conclude that the overall costs of the intended restructuring via the plan were at least equalled by the negative financial consequences of a special administration.
- **Prospect of success of RP2:** the judge was correct to reject the submission (on behalf of Mr. Maynard MP) that the plan 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". This submission was misplaced (in reliance on authorities relating to expert evidence as to the likelihood of recognition of a plan or scheme in other jurisdictions). The Court does not need to be satisfied, to any particular standard, that RP2 will succeed; the judge did not err on this point.
- **Burden of proof:** the judge was undoubtedly aware that the plan company bears the burden of proof in persuading the Court to sanction a plan, and owes a duty of utmost candour. Important details on the costs incurred by the plan company ought to have been provided up front. However, this did not mean that the judge should have rejected the plan altogether.
- **Independent public interest / customer advocate:** the appointment of an independent public interest or customer advocate is likely to be appropriate, or even necessary, where affected creditors 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. However, that was not the case here. The fact that it fell to an intervener – Mr. Maynard MP – to advance arguments based on the public interest did not indicate any procedural unfairness in the case.

Decision: Ancillary Points

The Court of Appeal also held that:

- **Timetable:** it was unacceptable that the judge was put under enormous pressure to hear the case and hand down judgment in such a compressed fashion. There had been a "wholesale failure" by the parties to comply with the guidance of the Court of Appeal in *Adler* (essentially, that a plan company must make available in a timely manner the relevant material that underlies the valuations upon which it relies, and that parties and their advisers and experts must co-operate to focus and narrow the issues for decision so that sanction hearings are confined to manageable proportions). The Court of Appeal firmly reiterated this guidance.
- **Releases:** 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". The Court of Appeal was not satisfied that a release of potential assets in any future insolvency proceedings of the plan company and the Thames Water operating company (consisting of their own possible claims against directors and advisers) was justified as being necessary to enable the plan to be implemented. Accordingly, it directed an amendment to the plan to provide for an express carve-out from the releases for any claims that might subsequently be brought by a special administration of the Thames Water operating company or an insolvency officeholder of the plan company.
- **Compromise or arrangement:** the *obiter* comment in *Adler* was correct: the removal of the right of veto of out of the money classes (under s.901C(4) of the Companies Act 2006) does not remove the need for there to be a "compromise" of their rights.
- **Test for disenfranchisement:** it was unnecessary to determine whether the correct test for disenfranchisement in s.901C(4) was whether stakeholders had a "genuine economic interest in the company" *in the relevant alternative*; the Court of Appeal preferred to leave this point for determination in a case where the point arises on the facts.

Annex: 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);
  - a Member of Parliament, Charlie Maynard MP, representing the public interest and the interest of customers; and
  - Thames Water Ltd, 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.