SLAUGHTER AND MAY/

CLIENT BRIEFING

OCTOBER 2025

RESTRUCTURING PLANS: WHERE NEXT?

BACKGROUND

In the period since its inception in 2020, the Part 26A restructuring plan has proven to be a powerful addition to the English restructuring toolkit, allowing – through cross-class cram down – a transaction to be imposed on a dissenting class. There is a great deal of flexibility with this power; in particular, unlike with many other regimes, there is no absolute priority rule, and therefore it is possible (in justifiable circumstances) for shareholders to retain a material equity stake, while one or more creditor classes are compromised.

The question of when the Court should exercise its discretion to approve cross-class cram down has been a key area of contention and developing case law, against a backdrop where sophisticated creditors have been seeking to explore the boundaries of what is permissible, while challenging restructuring plans where they consider they have been unfairly treated.

In this respect, a key question that has arisen is what is fair with respect to the treatment of an 'out of the money' class of dissenting creditors, i.e., dissenting creditors that would receive minimal/no recovery in the 'relevant alternative', the most likely alternative to the restructuring plan (which, in most cases, has been the insolvency of the plan company). The key argument from such creditors has been that the goal of a restructuring plan is to create or preserve value for stakeholders, and the out of the money creditors are contributing to this value creation/preservation. Therefore, the question has been, to what extent ought they to share in the benefits preserved or generated by the restructuring plan?

Summer 2025 proved a significant one for the restructuring plan and, in particular, the question of how plan companies should engage with and allocate value to out of the money creditors:

- First, at the start of July, the Court of Appeal handed down its decision overturning the sanction order in Petrofac ([2025] EWCA Civ 821), building on earlier Court of Appeal decisions in Adler ([2024] EWCA Civ 24) and Thames ([2025] EWCA Civ 475). In coming to this decision, the Court held that the purpose of cross-class cram down was 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.

- And, in September, a new Practice Statement for restructuring plans and schemes of arrangement was published, which will require (among other things) that plan companies – where cross-class cram down is expected to be required – provide evidence before the convening hearing as to their efforts to engage with creditors.

COURT'S EVOLVING APPROACH TO FAIRNESS AND 'OUT OF THE MONEY' CREDITORS

The original approach, derived from Virgin Active ([2021] EWHC 1246 (Ch)) in 2021, was that it was fair to provide only a *de minimis* payment to out of the money creditors, which 'beat' their recovery in the relevant alternative, in exchange for the compromise of their claims. This was on the basis they would otherwise receive less value (and potentially nothing) in the relevant alternative. While this approach had the benefit of providing a simple framework against which the Court could consider the fairness of a restructuring plan, it was a key point of opposition from dissenting out of the money creditors. The Court's position has evolved since Virgin Active – in essence due to its agreement that this approach risks, in certain circumstances, the unfair treatment of out of the money creditors.

The parameters continue to develop as different types of cases are heard (and it is possible that the law may change if Waldorf's 'leapfrog' application to the Supreme Court is successful and the appeal is heard), but as things stand it is clear, following the appellate decisions in Adler, Thames and Petrofac, that the 'Virgin Active' approach is no longer appropriate, and that the fairness of treatment of out of the money creditors needs to be determined by reference to what those creditors, properly informed, would fairly and reasonably expect to be paid to give up their claims so as to enable the expected benefits of the restructuring plan. As Lord Justice Snowden reportedly put it in Petrofac, "*If you get nothing in the relevant alternative that doesn't mean you get nothing for your contribution to the new shiny ship shed of your debt*".

We are at the early stages of seeing how this principle is applied in practice and restructuring plans which have come to Court for sanction post-Petrofac have met with differing levels of success, with a handful of plans being sanctioned but Waldorf ([2025] EWHC 2181) being refused sanction. Nevertheless, certain requirements are becoming clear:

- **Establish fairness**: the burden of establishing that the restructuring plan is fair (i.e., there is a fair sharing of the burden and benefits of the restructuring) falls on the company. Plan companies will therefore need to be able to explain and stand behind the rationale for the allocation of value under their restructuring – this will be fact-specific and require proper engagement with all the circumstances of the case.

  There are likely to be different ways of achieving this depending on the restructuring plan in question. In some cases, it may be appropriate to look at each party and perform a qualitative comparison of what they are giving up against what they are receiving through the plan, and asking whether any party is getting too much or too little. In other cases, it may be appropriate to adopt a more scientific two-stage approach of quantifying the 'restructuring benefits', being the value which is created/preserved through the restructuring, and allocating an appropriate proportion of the benefits to each party. A broad range of factors will be relevant to this assessment – for example, it may be justifiable to allocate less value (which might be based on an assessment of the cost and value leakage which may arise if a 'Plan B' implementation route were to be pursued) to a creditor if it could have been possible to implement the transaction via an alternative means which did not require their consent (e.g., through a pre-pack administration or enforcement route). Comparisons to similar cases which have been implemented, both consensually and through a process, are also likely to be helpful.

- **Building the right evidence**: as it has become increasingly common for restructuring plans to be subject to challenge on questions of fairness, there has generally been a move in the direction of the Court requiring more evidence. In Petrofac the Court placed importance on providing evidence of market testing or expert evidence to demonstrate whether any element of the new money should be treated as a benefit of the restructuring, the fair allocation of which needs to be considered. Thought should be given more generally as to what (if any) evidence can be provided to support the allocation of value under the restructuring plan, whether through expert reports or factual evidence outlining the good faith negotiations which led to the allocation. Caution should be exercised to ensure that any evidence is clearly presented and ties together with the key points made in skeleton arguments.

- **Demonstrate proper engagement with all stakeholders**: appropriate negotiations with stakeholders are important to show that there has been a genuine attempt to formulate and negotiate a reasonable compromise between all stakeholders – and therefore that it is appropriate to sanction cross-class cram down against the opposition of those unreasonably holding out for a better deal.

  However, it is clear that there is no pre-condition of negotiation, and there may in certain circumstances be justifiable limitations on what is possible (for instance, in Poundland ([2025] EWHC 1822 (Ch)), the company was, for a number of reasons (including in part due to the number of landlords), unable to negotiate with all of its landlords in advance of launching the restructuring plan). Nevertheless, any such limitations will need to be reasonable in the circumstances, explained and justified – as is made clear in the updated Practice Statement in relation to schemes of arrangement and restructuring plans.

- **Explain why any counter-proposals are not workable**: while challenges on the basis of an 'alternative' relevant alternative have not generally met with success, the plan company will need to show why any alternative restructurings put forward by dissenting creditors are not capable of implementation (and therefore cannot be a measure of fairer treatment). This has often been satisfied by the lenders or new money participants providing evidence that they would not be willing to participate in any alternative restructuring; it will be interesting to see, however, whether the Court starts to place less weight on this sort of evidence after companies such as Petrofac and Waldorf did not enter into insolvency proceedings after their restructuring plans failed. It may be that the explanation and evidence which are required to show a restructuring plan is fair can also help to dismiss any alternative restructuring argument – if the plan company can show its plan is the result of good faith efforts to develop and negotiate a fair allocation of value, why would the Court be willing to contemplate an alternative?

- **Developing timelines**: pre-launch timelines may require some adjustment to build in time for the plan company to show that it has engaged in good faith negotiations with relevant stakeholders. There may be ways of accelerating this process in certain cases, such as appointing creditor committees to negotiate on behalf of a broader creditor group or exploring ADR techniques. Another significant change is the requirement under the new Practice Statement that court dates cannot be booked until a claim form has been filed. The hope is that this will enhance court availability and make it easier for plan companies to secure an appropriate slot; however, given the filing of a claim form may often trigger a default under finance documents, plan companies may either need to seek waivers from lenders at an earlier stage in restructuring discussions (i.e., before they have a locked-up deal) or risk having a longer gap between lock-up and the first court date.

WHERE NEXT?

We expect the Court to be very focused on the process and evidence put forward by the plan company when considering whether to exercise its discretion to sanction a restructuring plan involving cross-class cram down – and this is reflected in the evidence requirements set out in the updated Practice Statement. While cases will be fact specific, we expect the market to innovate and adapt to the need for the company to demonstrate fairness (e.g., benefits reports have been used in certain contexts) and for parameters to continue to develop and become settled, which will help guide the use of restructuring plans. In this respect, there are some similarities with the practice which has developed in relation to schemes of arrangement compromising redress liabilities, where there are now clear parameters which, if followed, help demonstrate that the scheme is fair.

We are aware there is a view in the market that recent developments in restructuring plans are unhelpful for the competitiveness of the process as compared with options in other jurisdictions. We are much more optimistic – while there may be some bedding down required as parameters develop, we have no doubt the London restructuring market will adapt and rise to the challenge, and new plans have been launched post-Petrofac. After a period where it felt like almost every restructuring plan was being challenged and (in many cases) appealed, with the 'Virgin Active' approach being stretched to its limits, it is helpful to have had a clear steer from the Court of Appeal. It is also no bad thing if companies and their creditors are forced into the negotiating room, with a restructuring plan being used as a stick or fallback option rather than Plan A – even if restructuring plans are used less, that does not mean they are any less effective. We therefore expect lawyers and financial advisers to be involved in the structuring and negotiation of the terms of any proposed restructuring at an early stage and for a restructuring plan to continue to be a powerful tool which is benchmarked against other implementation options, both in the UK and in other jurisdictions where relevant.

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