Part 26A restructuring plans: Like buses…

With four significant decisions in heavily contested Part 26A restructuring plans (*Adler*[1], *McDermott*[2], *Aggregate*[3] and *Consort Healthcare*[4]) being handed down so far in 2024, the restructuring plan is living up to its billing as the most significant change to UK restructuring and insolvency since the Enterprise Act 2003. These cases have given us greater clarity on the principles and process and also point to a number of areas to be resolved in future.

Adler (in January 2024) marks the first time the Court of Appeal has been asked to consider a restructuring plan. The decision of Snowden LJ sets down guidance that is currently binding on all future first instance decisions and involved the plan in question being overturned on appeal.

The judgments in *McDermott* (in late February 2024) and *Aggregate* (in early March 2024) have already emphasised the importance of *Adler* by citing, applying and building on its findings in a number of instances. Most recently, *Consort Healthcare* saw the High Court making the first ever security for costs order in the context of a scheme of arrangement or a restructuring plan.

Our key takeaways and our broader commentary on the judgments in *Adler*, *McDermott*, *Aggregate* and *Consort Healthcare* are below, together with a general overview of the basic principles of the restructuring plan and the background to each of the four cases.

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1. *Re AGPS Bondco plc* [2024] EWCA Civ 24
2. *Re CB&I UK Ltd* [2024] EWHC 398 (Ch)
3. *Re Project Lietzenburger Straße Holdco S.à r.l.* [2024] EWHC 468 (Ch)
4. *Consort Healthcare (Tameside) plc v Tameside and Glossop Integrated Care NHS Foundation Trust*

1 Basic principles of part 26A restructuring plans

The restructuring plan was introduced under the Corporate Insolvency and Governance Act 2020 and has emerged as a powerful and flexible court-supervised restructuring tool.

A restructuring plan can be used to implement a very broad variety of arrangements, including debt for equity swaps and maturity extensions. Furthermore, unlike a Part 26 scheme of arrangement, in a restructuring plan, the court has (provided the relevant statutory thresholds are met) the discretion (but not the obligation) to use the cross class cram down mechanism to sanction a restructuring plan even if one or more classes of creditors has voted against it. This makes the restructuring plan a particularly powerful tool as it means that there is considerably more scope from "cramming down" dissenting classes than there would be under a scheme of arrangement (where all classes have to vote in favour).

Statutory threshold conditions for a restructuring plan to be sanctioned

Two key initial statutory threshold conditions must be met in order for the court to sanction a restructuring plan:

Condition A

(section 901A(2), Companies Act 2006)

The company must be facing or must be likely to face "financial difficulties" which may or will affect its ability to continue as a going concern. The meaning of "financial difficulties" is not defined and is to be given a broad interpretation.

Condition B

(section 901A(3), Companies Act 2006)

The purpose of the restructuring plan must be to eliminate, reduce or prevent or mitigate the financial difficulties that the company is experiencing, or is likely to experience.

Company's consent

In *Re The Good Box Co Labs Ltd*[5], the court held that another condition inherent to section 901A is that the company itself (by its directors, shareholders or any relevant office holder) must also consent to the restructuring plan.

Voting

(section 901F(1), Companies Act 2006)

Subject to the cram down mechanism, a restructuring plan must be approved by a 75% majority in value within a class. In contrast to a scheme of arrangement, there is no need for a majority in number.

Statutory conditions for court to exercise its cram down power

Condition A of cross class cram down

Classes of creditor on whom a restructuring plan is imposed must be "no worse off" under the restructuring plan than under the "relevant alternative".

The relevant alternative is defined by section 901G of the Companies Act 2006 as whatever the court considers to be most likely to occur in relation to a company if a restructuring plan is not sanctioned.

Condition B of cross class cram down

At least one class of creditor who would receive payment or who has a "genuine economic interest" in the event of the "relevant alternative" must vote in favour of the restructuring plan.

The court's discretion

Even if both of the cram down criteria are satisfied, the court retains ultimate discretion over whether the restructuring plan is sanctioned. This point was emphasised in *Adler* where Snowden LJ noted that there was "no kind of presumption" that the court should exercise its discretion in favour of sanctioning a plan merely because Conditions A and B have been satisfied.

5. [2023] EWHC 274 (Ch)

2

Adler

Adler is a German property group which owns a large portfolio of rental properties. Following a failed consent solicitation process to amend the terms and conditions of its senior unsecured notes ("**SUNs**") to deal with an impending maturity date in April 2023, the Adler group launched its restructuring plan to avoid commencing insolvency proceedings whilst it facilitated an orderly wind-down of its business. At a very high level, under the Adler plan:

- there were six classes of creditors (being the holders of the six series of SUNs, due 2024, 2025, January 2026, November 2026, 2027 and 2029);
- the overall aim of the Adler plan was to facilitate a managed wind-down of the Adler group (with the sale of its assets being used to pay off the debt under the SUNs);
- the relevant alternative was a formal insolvency;
- the maturity date of the 2024 SUNs was to be extended by one year but, crucially in the context of the successful appeal, the maturities of the other SUNs were to remain the same despite the SUNs all ranking *pari passu* in the relevant alternative;
- the terms of the SUNs were to be varied in order to permit and provide for (among other things) (i) the incurrence of further indebtedness and (ii) the creation of new security to secure that indebtedness and the rest of SUNs (with the holders of the 2024 SUNs being given priority in exchange for their maturity being extended by a year); and
- the shareholders of the Adler group would retain 77.5% of the equity (with the providers of the new money under the Adler plan receiving the remainder of the equity).

At the relevant plan meetings, the Adler plan was approved by five out of six classes of creditors, with 37.72% of the 2029 noteholders class voting against. The High Court in the first instance therefore exercised a cram down against the holders of 2029 SUNs, with Leech J sanctioning the Adler plan.

An ad hoc group of the holders of the 2029 SUNs appealed on eight grounds (including that the Adler plan had failed to respect (or justify a departure from) the *pari passu* principle and the judge in the first instance had failed to apply the correct rationality test when deciding whether to exercise the court's discretion to sanction the Adler plan).

In January 2024, the Court of Appeal (led by Snowden LJ) allowed the appeal primarily on the grounds that (i) the Adler plan had departed from the *pari passu* principle that would have applied in the plan company's presented relevant alternative and (ii) the court in the first instance had failed to correctly exercise its discretion when sanctioning the Adler plan.

3

McDermott

The McDermott group, headquartered in Texas, operates internationally in the Energy, Construction, Technology, Automotive, Transport and Defence sectors. The relevant restructuring plan was proposed by an English subsidiary of the group, CB&I UK Ltd as part of a wider restructuring of the group, which included two inter-conditional Dutch WHOAs.

Under the McDermott plan:

- the relevant alternative was a liquidation of the group;
- the maturity dates of the relevant plan company's secured debt were to be extended;
- an unsecured arbitration award of $1.3bn and ongoing litigation claim of $718m were to be released (in exchange for a variable (and much smaller) contingent cash payment and, following settlement negotiations) non-voting equity in the group's parent company); and
- there were seven classes of creditors, five of which were secured, and the other two unsecured.

At the relevant plan meetings, the secured creditor classes approved the McDermott plan, but the unsecured classes opposed it.

Following a six-day sanction hearing, Green J sanctioned the McDermott plan on the basis that (at a very high level) (i) the dissenting creditors would be "no worse off" under the McDermott plan than in the relevant alternative, and (ii) the amounts offered to the unsecured creditors under the McDermott plan, though a small fraction of the debt, were enough to be deemed a "compromise or arrangement", which is a prerequisite to approval of a restructuring plan (as in a scheme of arrangement).

The case was notable for ongoing negotiations between the group and Reficar (ie the creditor with the $1.3bn unsecured arbitration award), which continued up to the last day of the sanction hearing (with the conduct of Reficar being specifically criticised by Green J in his judgment).

4

Aggregate

The German real estate group Aggregate sought approval from the court to implement a restructuring plan in order to restore the group to solvency (which would provide it with sufficient time to complete and then dispose of a large development project in Berlin).

Under the Aggregate plan:

- the plan company was a Luxembourg entity that moved its centre of main interests/COMI to England in order to ensure there was a sufficient connection with England (thereby giving the court jurisdiction to sanction the relevant plan);
- the relevant alternative was liquidation;
- the terms of the secured senior debt were to be extended, allowing for the injection of €190m into the group;
- it was initially proposed to release €245m of subordinated debt for zero consideration. In the wake of *Adler*, the relevant plan company amended the terms of the Aggregate plan to offer €200,000 to these creditors, so that the relevant restructuring plan could be considered as a "compromise"; and
- there were three classes of plan creditors (ie one class of senior creditors and two classes of subordinated creditors).

The court at first refused to sanction the Aggregate plan on the basis that it could neither approve the unamended version of the plan, nor the amended version (which had not been voted on by creditors). However, the court provided permission for the relevant plan company to convene a new plan meeting for the senior creditors to vote on the updated plan and disenfranchised the subordinated creditors (on the basis they were "out of the money").

After the relevant senior creditors approved the amended Aggregate plan at the new plan meeting (which was held three days after the original sanction hearing), Richards J sanctioned the Aggregate plan at a second sanction hearing. Although it had still been opposed by one class of subordinated creditors, and the other subordinated creditors were not fairly represented at the meeting so were treated as dissenting, the judge held that (among other things):

- the relevant plan company had effectively shifted its COMI to England such that the UK Court had jurisdiction;
- the amendment to the Aggregate plan was sufficient for it to be regarded as a "compromise".

5

Consort Healthcare

Consort Healthcare (Tameside) plc ("**ProjectCo**") is a project company concession which was incorporated as part of the UK Government's Private Finance Initiative to construct, finance, and maintain certain facilities at Tameside General Hospital. After years of attempting to consensually resolve various issues arising under the relevant project agreement (which had placed the company in a position of severe financial distress), in April 2024, ProjectCo proposed a restructuring plan in order to place the project on a sustainable financial footing and avoid entering into administration. This was notable as it was the first (and, to date, remains the only) time that a PFI company has proposed a restructuring plan.

Under the relevant plan (among other things):

- plan creditors were given the opportunity to vote on two different plan options (to reflect that an open settlement offer had been made by ProjectCo to the relevant NHS trust and, following *Adler*, there was a risk that such an offer could be regarded as being a "fairer" or "better" offer than that contained in the primary restructuring plan terms);
- certain liabilities owed to the relevant NHS trust under the project agreement would be settled (including a £9 million debt owed following a previous adjudication process) in return for a sculpted reduction in the amounts payable by the Trust to ProjectCo under the relevant project agreement;
- certain amendments would be made to the relevant project agreement to try to ensure that the project became financially sustainable;
- the NHS trust was given a right to terminate the relevant project agreement within 30 days of the plan being sanctioned;
- Ambac (ie the guarantor of £93.3 million bonds issued by ProjectCo) would (among other things) amend the financial covenants under the relevant bond documents, waive any outstanding events of default and grant additional access to certain of Consort Healthcare's restricted reserve accounts; and
- the holder of ProjectCo's subordinated loan notes would release a significant amount of the debt owing to it under the relevant loan notes and waive all outstanding events of default); and
- there were three classes of plan creditor with one creditor (ie the NHS trust, Ambac and the subordinated creditor) in each class.

The court granted permission to convene meetings of the plan creditors, at which (as anticipated) Ambac and the subordinated creditor voted in favour of the plan and the NHS Trust voted against the plan.

After being joined as a defendant to the restructuring plan, the NHS trust made the first ever security for costs application in the context of a restructuring plan or scheme of arrangement. ProjectCo contested this application on a number of grounds, including that an order for security for costs would stifle the restructuring plan given the plan company would not have sufficient liquidity to pay the sum. However, the judge ordered that ProjectCo pay £463,280 as security for costs (which was half the amount requested by the NHS trust). As anticipated its submissions at the relevant hearing, ProjectCo was unable to comply with the costs order and the restructuring plan was stayed on 10 July 2024.

6 The judge's discretion at sanction

Adler is Court of Appeal authority, therefore binding at first instance, as to the correct test to be applied as a matter of a law when a judge is assessing whether or not to exercise discretion to sanction a plan. Importantly, Snowden LJ confirmed that this will vary depending on whether the judge is being invited to apply cross class cram down.

No cram down

The principles from schemes of arrangement apply to plans, namely the court must consider whether:

- first, there has been compliance with the statutory provisions;
- second, the class was fairly represented by the meeting, and whether the majority were coercing the minority in order to promote interests adverse to the class whom they purported to represent;
- third, the plan is a fair plan which a creditor could reasonably approve. Note the plan does not need to be the only fair plan or even the "best" plan; and
- fourth, there is a blot or defect in the plan that would, for example, make it unlawful or in any other way inoperable.

Cram down

The principles above will generally continue to apply, subject to the following modifications:

- the court must assess the second principle above for each assenting class. This is of particular importance where any assenting class's vote is relied upon for cram down;
- the third principle is modified as followed:
  - the court cannot apply the form of rationality test traditionally used in schemes (eg by considering whether a reasonably intelligent and honest member of a plan of class creditors may reasonably approve the plan) and defer to a simple majority approval in a dissenting class, the level of voting in assenting class(es) or the overall percentage of claims voting in favour across all classes. This is because, as Snowden LJ noted in *Adler*, in a cross-class cram down situation, given the dissimilarity of interests between different classes of creditors, "the mere fact that one or more classes of creditors may have acted in their own separate interests in voting in favour of the plan says nothing about the commercial merits of the plan for a dissenting class or the fairness of imposing the plan upon them";
  - the court should not consider whether there are similarities between assenting classes and dissenting classes when assessing whether or not to cram down. Creditors are either in the same class or they are not; and
  - the court must assess the "vertical" and "horizontal" comparators – borrowing from guidance developed principally in the voluntary arrangement context. The "vertical" comparator involves a comparison of the position of the particular class of creditors in question under the restructuring proposal with the position of that same class in the relevant alternative. By contrast, the application of the "horizontal" comparator involves an assessment of whether there has been a fair distribution of the restructuring surplus between the relevant classes. Snowden LJ states:

> In my judgment, that exercise of a judicial discretion to alter the rights of a dissenting class for the perceived benefit of the assenting classes necessarily requires the court to inquire how 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."

When applying the "horizontal" comparator, the Court is required to consider whether a different allocation would have been possible – expressly disapplying the scheme principle and inviting an assessment as to whether a "fairer" plan can be found.

Snowden LJ rejected (as he did in *Virgin Active*[6]) the notion that judges are somehow required to apply general concepts of "*fairness*" and to consider whether plans are "*just and equitable*", stating that "*such general expressions are incapable of consistent judicial application without a frame of reference or rational principles to guide judges*". As Snowden J (as he then was) put it in *Virgin Active*, "*there is no more justification under Part 26A than in relation to Part 26 for the court simply to impose its own views of what is (or is not) "fair" or "just and equitable"*".

The plan principles above have been formulated by the courts in something of a statutory vacuum. They are also non-exhaustive and it is possible the market will be told in future cases that there are other principles to be considered. Particularly where Snowden LJ recognised that the assessment as to whether they may be a "*fairer*" plan in *Adler* was more straightforward on a wind down plan, principles may need to be refined to deal with more complex capital structures (ie the starting point in *Adler* was that all notes were unsecured) and relevant alternatives.

7 Fairness

With clarity on the test, a number of points of practical guidance emerge from the sanction judgments in *Adler, McDermott* and *Aggregate*:

- ***Pari passu principle***: as a general rule, any distributions in a restructuring plan where the relevant alternative is an insolvency to which the *pari passu* principle would apply should respect the *pari passu principle* unless there is a good reason or proper basis to depart from it (eg where creditors "*provide some additional benefit or accommodation to assist the achievement of the purposes of the restructuring in the interests of creditors as a whole*"). In the first instance decision in *Adler*, Leech J's failure to respect the *pari passu* ranking of the SUNs in the relevant alternative was arguably the most important factor in the context of the appeal succeeding – on the basis that in an insolvency all SUNs with different maturity dates would have ranked the same whereas in the plan the later SUNs would still be repaid later with a greater risk of non-payment.

  However, despite offering certain select examples (such as the provision by creditors of new money), the Court of Appeal in *Adler* was not prescriptive about what a "good reason" for departing from the *pari passu* principle is and therefore the court will need to determine on this on a case by case basis. As noted in that case, this is "likely to be highly fact sensitive" but it is hoped that future judgments will provide more clarity on this point.
- ***Retention of equity***: the Court of Appeal provisionally held that, under a restructuring plan, any retention of equity by existing shareholders does not automatically infringe the *pari passu* principle. This means that there is no "absolute priority" rule (ie in contrast to plans under Chapter 11 of the US Bankruptcy Code, junior creditors/classes can receive recoveries before senior creditors have recovered in full). However, where the claims of "in the money" creditors are being

6. *Re Virgin Active Holdings Ltd, Virgin Active Ltd and Virgin Active Health Clubs Ltd* [2021] EWHC 1246 (Ch) (§259)

compromised, there has to be a justification for equity retaining a share (eg the provision of additional funding) although the Court of Appeal did not make it clear what constitutes a sufficient level of support/justification.

The very fact that a majority of in the money creditors have voted to 'share' value with out of the money creditors or shareholders may usually be sufficient. As noted by Snowden LJ previously in both *Re Noble Group*[7] and the *Virgin Active* case, ultimately it will be up for the "in the money" classes to determine how value is allocated (with the court giving little weight to the "out of the money" creditors) and this may include choosing to give equity to shareholders that may receive nothing in the applicable relevant alternative. This was emphasised by the court in *Aggregate*, where it was held that it was "none of the concern" of the "out of the money" subordinated creditors how the relevant "in the money" senior creditors ultimately decided to allocate the restructuring surplus.

In *McDermott* however, the original plan envisaged Reficar being compromised whilst equity remained unimpaired. Following a recommendation from the Dutch restructuring expert in the parallel WHOA proceedings however, the group ended up offering between 10.9% and 19.9% of equity to Reficar. This was ultimately sufficient for the court to find that the allocation of the restructuring surplus under the relevant plan was "fair" in the circumstances – without any detailed consideration as to the basis on which the restructuring expert had arrived at those specific percentages other than the judge's statement that counsel for Reficar "*... accepted that she could not argue that 19.9% of MIL's ordinary share capital was not a fair distribution to Reficar from the restructuring surplus; and she struggled to maintain that 10.9% would not also be a fair distribution.*"

So whilst UK plans do not involve an absolute priority rule, stakeholders proposing plans that do not follow existing priorities in the capital structure will need to demonstrate why the proposed allocation is appropriate in the circumstances.

- ***No cancellation of claims***: even if a party has no economic interest in the relevant alternative, a restructuring plan cannot provide for the compulsory cancellation, transfer or extinguishment of debt or equity interests for no consideration – there has to a “modest amount” of compensation for “out of the money” stakeholders (but Snowden LJ did not prescribe what this should be).

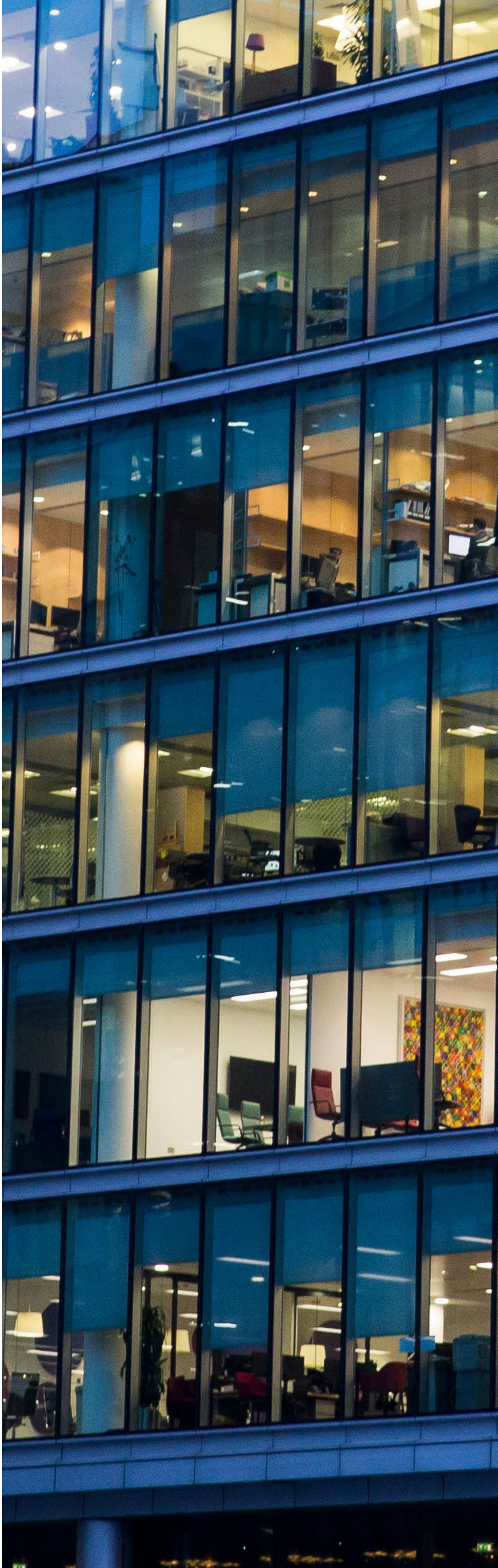
  This point has already been firmly emphasised in the recent judgment in *Aggregate* where the court refused to sanction the relevant restructuring plan as (in the form it was originally proposed and voted on) the applicable subordinated debt was being cancelled for no consideration.

  In terms of guidance as to what will constitute a "modest" amount, in *Re Smile Telecoms Holdings Limited*[8], Snowden LJ was willing to sanction a restructuring plan where certain of the out of money creditors were receiving 0.025% of their claims.

  More recently, in *McDermott*, the court sanctioned the relevant restructuring plan where one of the major creditors (whose claim was approx. US$1.3 billion) would receive a minimum of only £800,000. The Judge considered whether such a low return amounted to what was in reality a cancellation or expropriation of a claim, but (relying on *Smile*) found that even a very small return could constitute sufficient compromise. In *Aggregate*, the court was ultimately willing to sanction a modified version of the relevant plan where the relevant "out of the money" creditors received approximately 0.1% of their claims as consideration.

  What all of these cases emphasise is that the amount of the consideration being provided to "out of the money" creditors under a restructuring plan can be genuinely negligible/*de minimis* (relative to the overall amount of the claims being compromised) but still be sufficient to constitute a "compromise".

7. [2018] EWHC 3092 (Ch) (§79)
8. [2023] 1 BCLC 352



8 Procedural developments

In *Adler*, *McDermott* and *Aggregate*, we now have three contested cases which give greater guidance on the process that should be followed.

- ***Timing***: the courts remain keen to be pragmatic and accommodating where possible (as evidenced by the flexibility it demonstrated in *Aggregate* where it allowed a new plan meeting for the senior creditors to be held at very short notice and disenfranchised the "out of the money" subordinated creditors (with a second sanction hearing then following very shortly thereafter).

  However, as per Snowden LJ's remarks in previous cases (such as *Re Noble Group*), this willingness to be flexible should not be abused. Compressing the timetable involves the risk of compromising basic procedural fairness and putting a strain on the courts with plans that could be dealt with more efficiently had a sensible approach to timing been taken. Moving forward, a clear distinction should be drawn between (i) circumstances where financial distress has arisen as a result of a foreseeable event (eg an impending maturity date), and (ii) situations where any need for expedition is due to more unexpected events (such as the Covid-19 pandemic in *Virgin Active*).

  Additionally, plan companies need to ensure that there is sufficient time for the court to deliberate/consider any evidence properly. Given that restructuring plans are (as demonstrated by *Adler*, *McDermott* and *Aggregate*) now increasingly beginning to resemble major pieces of commercial litigation (albeit usually without much of the formal processes undertaken in such litigation, including in particular broad-ranging disclosure typically seen in commercial disputes having similar economic value), it will be particularly important to build in sufficient time for a contested sanction hearing and subsequent judgment into any proposed timetable in situations where it is anticipated that there will be major challenges to the plan in question.

  In reality, the timetable tension is likely to stay. Distressed debtors will commonly need the engagement of other stakeholders in order to agree terms. Focusing divergent stakeholders on a realistic timetable may well remain a key issue for plan companies.

- ***Valuation/other evidence***: plan companies must make valuation evidence and the material which underpins it available in a timely manner, and parties/advisers should cooperate and delineate the issues at play in order to make sanction hearings more manageable. As restructuring plans become more litigious, there is likely to be an increased focus on the quality and robustness of evidence and disclosure, with satellite skirmishes and intense pressure on creditors to review, digest, identify gaps in and respond to potentially very significant amounts of information in short timeframes. Accordingly, debtors proposing a restructuring plan should ensure that (i) there is sufficient evidence to support any key propositions underpinning that restructuring plan (eg with regard to what constitutes the relevant alternative) and (ii) any evidence is capable of surviving a sustained and rigorous challenge in court.

- ***Co-issuer/co-obligor technique***: the Court of Appeal did not express a view on the appropriateness of the issuer substitution structure used in the restructuring plan in *Adler* (where, to ensure there was sufficient jurisdiction, the group used existing contractual provisions in the relevant bond documents to substitute the original Luxembourg-incorporated issuer with an English-incorporated SPV).

  Nevertheless, despite the technique having been approved previously (such as in *Re Codere Finance (UK) Limited*[9] and *Re Gategroup Guarantee Limited*[10]), Snowden LJ emphasised that the judgment did not address the issue and therefore should not be taken as an endorsement of the technique in future cases. This may create additional scope for challenges and increased appeal risk in future cases where a co-issuer/co-obligor structure is used.

  Having said that, in *Aggregate*, the court was prepared to sanction a scheme where the relevant plan company used a deed of contribution and a COMI shift to (very artificially) create sufficient jurisdiction, which suggests that the court is still willing to apply the previously established principles in this respect despite Snowden LJ's remarks in *Adler*. What *Aggregate* also made clear is that, in situations where there has been "forum shopping", the court will be particularly focussed on establishing that there is a sufficient prospect of the relevant restructuring plan being recognised in other jurisdictions (especially any jurisdictions that may previously have had jurisdiction absent the relevant "forum shopping").

- ***Scope for making amendments to a restructuring plan at the sanction hearing***: the court is unlikely to accede to requests to make material amendments to a restructuring plan at a sanction hearing in order to remedy any defects that may prevent the court exercising its discretion to sanction the relevant restructuring plan.

  This was highlighted in *Aggregate*, where, to deal with the "lack of consideration" issues arising from *Adler*, the court was asked (but refused) to amend the plan in question to permit the relevant payments to be made to the "out of the money" creditors, at least where the court would not have sanctioned the plan as originally proposed and voted on. In refusing the relevant request, although the court noted it had the power to make amendments "where the court had power to sanction the Part 26 scheme or Part 26A plan in its unamended form", it did not have the inherent jurisdiction to amend the plan and turn "something that the court has no power to sanction into something that the court can sanction". According to Richards J, such an amendment would be outside of the scope of the court's power or be an improper exercise of it.

  That notwithstanding, *Aggregate* has demonstrated that, in such a situation, it may be possible to quickly reconvene plan meetings in order to vote on an updated form of a restructuring plan.

- ***Stay pending appeal***: parties contemplating appealing a sanction order should also consider whether an application (i) for a stay should be made or (ii) for the judge to direct that the order should not be delivered to the registrar of companies until after reasons for the decision have been given and any application for permission to appeal has been determined (although it is questionable this would work in practice in a situation where there is a genuine "burning platform" and a restructuring plan had to be implemented almost immediately following the relevant sanction hearing to avoid the occurrence of the applicable relevant alternative).

  The scheme case *Re Link Funds Solutions Limited* is an example of a judge responding to the comments in *Adler* as Mr Justice Richards delayed sealing the scheme sanction order to give investors further time to consider whether to appeal and seek an interim stay.

9. [2015] EWHC 3778 (Ch)
10. [2021] EWHC 304 (Ch)

9 Areas of continued uncertainty

Mirror, mirror on the wall...

Despite the helpful clarifications in the three cases, the court's obligation to consider whether a "fairer" restructuring plan is available or possible in circumstances where it is being asked to exercise its discretion to use its cram down power, introduces an element of further uncertainty.

In a sense, *Adler* is an easier set of facts to apply this concept. It involved the appropriateness of departing from the statutory order of priorities in a wind down plan.

A large number of plans that follow will attempt to preserve viable businesses that will continue to trade post-sanction and be the fruit of negotiations between stakeholders in ever increasingly complex capital structures (not to mention competing relevant alternatives...). The scope for different stakeholders arguing about the fairness of the proposal is significant and in response the courts must engage with the "underlying commercial issues" when assessing whether the allocating of the "restructuring surplus" is fair.

From a practical perspective, debtors proposing a restructuring plan may now have to demonstrate to the court that, not only is the allocation of the value under a restructuring plan "fair", it is also potentially the "fairest" allocation possible in the circumstances. By definition, a plan that is not the "fairest" risks failing as there is a "fairer" alternative. This means that there is likely be even more of an emphasis on having particularly robust evidence and valuations to justify why the "restructuring surplus" has been allocated in a particular way.

Settlement negotiations

As *McDermott* demonstrated, the existence of a viable alternative to a restructuring plan (eg in the form of a settlement offer or consensual restructuring proposal) can complicate the discussions at sanction. Stakeholders will therefore need to be mindful that settlement negotiations and offers may become highly relevant at sanction. It remains to be seen whether this prompts sensible early engagement or a reluctance to emerge from entrenched positions once a plan is in contemplation.

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Restructuring effective dates – often the point at which the transactions contemplated by a plan are fully effective – may now be more commonly drafted to occur *after* any appeal risk has passed. In practice, this would extend the plan timetable, since new money may not be made available until after the restructuring effective date. This may result in even more timetable pressure.

Post-Adler, is there a greater likelihood of appeals?

There is potentially now a higher risk that more restructuring plans will end up being considered before the Court of Appeal or unsuccessful challenging stakeholders at first instance seeking parties immediately seeking stays

Where there is a real risk of an appeal, it is likely that the court will wish to stay the relevant restructuring plan becoming effective prior to any appeal in order to ensure that any potential subsequent overturning of the sanction order will make a practical difference (to the extent this is not already catered for in the plan drafting). As evidenced by *Adler* (where the delay in the appeal being heard has meant that, at least in the short term, the overturning of the sanction order is likely to have little obvious immediate difference to the group in question), it is likely to be very difficult to unwind a restructuring plan once it has been implemented (especially if new money has been provided and other creditors may end up being "unfairly" prejudiced by a reversal of the relevant restructuring plan terms or where there are equivalent restructuring steps being taken in foreign courts).

Additionally, in situations where time is genuinely of the essence (which is (not unsurprisingly) often the case in restructuring plans), the court is going to have to try to find a compromise between preserving a creditor's legitimate right to appeal and ensuring that allowing the appeal does not thwart the relevant restructuring plan and bring about the occurrence of the relevant alternative by default (which could lead to worse outcomes for most stakeholders).

In light of the relevant timing restraints on appeal, there would also appear be a relatively limited likelihood of cases ultimately going all the way to the Supreme Court in the United Kingdom. It therefore remains to be seen whether the Court of Appeal is able to elaborate on or (where necessary) differentiate from the conclusions of Snowden LJ in *Adler*.

10 Security for costs

More recently, further uncertainty has been created by the novel and interesting decision of Mr Justice Richards in *Consort Healthcare*, which has set a precedent for security for costs orders being made in the context of restructuring plan proceedings. Given that the provision of funding by certain third parties appears to have been a decisive factor in the judge's decision to make a security for costs order, the possibility that a plan company may now be ordered to provide security for costs in favour of some or all of creditors challenging a restructuring plan is likely to be of particular concern in situations where creditors, shareholders or other interested parties are partially or fully funding the relevant plan.

However, it is worth noting that the facts of this application were highly specific. The judge attached particular weight to the fact that, with only one dissenting creditor (out of a total of three creditors, each of which was in their own class), the proceedings were more akin to standard adversarial litigation than other restructuring proceedings (with the judge regarding the restructuring plan as effectively being a continuation of the earlier adjudication between the plan company and the NHS trust). It remains to be seen how a court would react to an application for security for costs in a more customary restructuring plan, where there were significantly more creditors in each class and potentially multiple different groups of creditors attempting to challenge a plan.

Another unusual factor was that ProjectCo's costs in relation to the restructuring plan were being almost completely funded by the two funds which owned ProjectCo (and who were also covering the restructuring costs of the creditors who voted in favour of the plan). Prior to the relevant hearing, these funds did not provide in evidence an unequivocal refusal to pay a security for costs order, which led to the judge noting that, on balance, he believed there was a significant possibility that the relevant funds would in fact be willing to contribute further resources to the proceedings if a security for costs order was made (meaning that the plan would not in fact be stifled in such a situation).

It is unclear whether the court would hold it to be appropriate to make a security for costs order in cases where the plan company is paying its own costs and could provide evidence that it would be unable to pay any requested security for costs. Given that the judge made the order on the basis that it would not be likely to stifle the plan, there is likely to be an emphasis in any future security for costs applications on the plan company to conclusively demonstrate that the making of a security for costs order will in fact stifle the plan.

In light of the very specific fact pattern in *Consort Healthcare*, the wider impact of the decision in this case therefore remains to be seen and it will be interesting to see how the court deals with the seemingly now inevitable security for costs applications in future restructuring plans.

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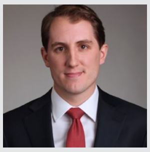

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