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CASE NOTE

PETROFAC Court of Appeal (CoA) judgment of 1 July 2025 [2025] EWCA Civ 821[1]

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Abstract

"Petrofac is the most recent RP CoA judgment in the trilogy that started with Adler on 23 January 2024[3], followed by Thames Water on 15 April 2025[4]. Misconceptions in UK practice are exposed, and clarifications are given on fair allocation of benefits preserved or generated by the restructuring, the position of "out-of-the-money" creditors and the rationale behind the cross-class cram down in UK RPs."

Keywords: UK Restructuring Plan, New money returns, Petrofac

1. Petrofac is only the third CoA judgment on restructuring plans (or RPs) since this tool, 5 years ago in the summer of 2020, was added to the UK restructuring toolbox[5]. The judgment has already been widely reported[6]. Together with the recent consultation on the 8 May 2025 draft Revised Practice Statement

1 In this Case Note referred to as the "Petrofac CoA judgment". The parties involved were: (1) Saipem S.P.A., (2) Saipem Singapore PTE Ltd, (3) Samsung E&A Co, Ltd and (4) Samsung E&A (Thailand) Co, Ltd (collectively "Saipem and Samsung") v. (1) Petrofac Limited and (2) Petrofac International (UAE) LLC (collectively "Petrofac").
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3 [2025] EWCA Civ 821.
4 [2024] EWCA Civ 24.
5 Part 26A Companies Act 2006, introduced by Schedule 9 to the Corporate Governance and Insolvency Act 2020 ("CIGA").
6 See, for example, Kirkland & Ellis Client Alert "Petrofac: Court of Appeal Overturns Restructuring Plans" of 1 July 2025; A&O Shearman Client Alert "Petrofac restructuring plan overturned by Court of Appeal" of July 2025; Latham & Watkins Client Alert "Redressing the Balance of Power in Restructuring Plans: Petrofac in the Court of Appeal" of 7 July 2025; Freshfields Client Alert "Petrofac in the Court of Appeal: "no worse off" test clarified, but fairness of benefit allocation brings down restructuring plan" of 11 July 2025; K&L Gates Client Alert "Back to the drawing board for Restructuring Plans – part 26A of the UK Companies Act 2006" of 16 July 2025.

(Companies: Schemes of Arrangement under Part 26 and Part 26A of the Companies Act 2006) which on 18 September 2025 was adopted and replaced the Practice Statement (Companies: Schemes of Arrangement under Part 26 and Part 26A of the Companies Act 2006) dated 26 June 2020 (the "Revised Practice Statement")[7], the trilogy of CoA RP judgments shows that the UK RP practice is slowly maturing[8]. The two main conclusions reached in the Petrofac CoA judgment can be summarised as follows, but will be further addressed in more detail below in the Case Note:

I. When, in the context of a cross-class cram down, the court assesses whether the dissenting class member is "no worse off" under the RP than in the relevant alternative, the court is primarily concerned with the financial value of the rights of the creditor against the plan company, not with the advantages that would accrue to the creditor from a loss of the plan company as a competitor.

II. To satisfy the jurisdictional requirement that the RP amounts to a "compromise or arrangement", there is, in the context of a fair distribution of the benefits preserved or generated by the RP, no hard and fast rule holding that offering out-of-the-money creditors only a minimal portion of the surplus value created by the RP is always sufficient to meet this requirement.

Court discretion to sanction an RP following cross-class cram-down

2. The so-called "cross-class cram down"[9] in particular distinguishes RPs from the traditional UK Schemes of Arrangements in which approval, by the requisite majority, of each class is required. The cross-class cram down applies[10]

7 Revised Practice Statement can be accessed using the following link: https://www.judiciary.uk/guidance-and-resources/practice-statement-from-the-chancellor-of-the-high-court-part-26-of-the-companies-act-2006/

8 See in this context also the article by Mark Phillips KC "Restructuring Plans A 5 Year Re-Set" in South Square Digest August 2025.

9 For a more detailed discussion of the cross-class cram down, see, for example, the September 2024 paper "The Conceptual Foundation of Cross-Class Cram Down" by professor Sarah Paterson (London School of Economics) which is cited by the High Court in its RP judgment of 19 August 2025 (paragraphs 157-158) in the matter of Waldorf Production UK Plc [2025] EWHC 2181 (Ch) (the "Waldorf Judgment"). Please note further that the Waldorf Judgment has been leapfrogged appealed to the UK Supreme Court to challenge in particular the conclusions reached in the Petrofac CoA Judgement, as well as those in Thames Water and Adler.

10 Section 901G Companies Act 2006.

when there is a dissenting class that voted against an RP. In other words, there is a class in which not at least 75% in value of that class voted in favour of the RP. This, however, does not prevent the UK court from sanctioning the RP provided Condition A and Condition B are met. Condition A requires that no dissenting class member is "worse off" under the RP than in the "relevant alternative"[11]. Condition B is met when at least one class with a genuine economic interest in the relevant alternative (meaning a class that will make a recovery on its claim in the relevant alternative, rather than getting nothing and thus being "out-of-the-money" in the relevant alternative) has approved the RP by the requisite 75% majority. However, even if Conditions A and B are satisfied, the court retains a broad discretion as to whether to sanction the RP. There is further no presumption in favour of sanction simply because Conditions A and B are satisfied.

3. In Thames Water[12] the CoA explicitly observed that Part 26A is silent as to the approach the court should take when exercising its discretion to sanction an RP. The approach was left to be worked out on a case-by-case basis, building on jurisprudence developed under Part 26.[13]

The Appeal Grounds

4. Reference is made to paragraphs 11-68 of the Petrofac CoA judgment for the factual background. In first instance, the High Court Judge, Mr Justice Marcus Smith, sanctioned the RPs following a cross-class cramdown. Saipem and Samsung appealed that judgment on the basis of the following two grounds[14]: (i) The judge was wrong to hold that even though Saipem and Samsung will be "worse off" under RPs, they will not be worse off in a way that is relevant for the purposes of the statutory "no worse off" test under section 901G(3) (in other

11 Relevant alternative means whatever the court considers would be most likely to occur in relation to the plan company if the RP would not be sanctioned.

12 Paragraph 91.

13 The CoA further made the following preliminary comments in this context (paragraphs 94-98): (1) It is not for the court to assume the legislator's role and lay down principles of broader application. Development on a case-by-case basis is an inevitably slower process; (2) One must recognise the limitations of the guidance offered in previous cases, many of which have not been tested by adversarial argument; and (3) As RPs can be used in a variety of situations and can be structured in many ways, it is important not to divorce guidance in an earlier decision from the circumstances of that case. Guidance developed in one RP context may not read across directly to another RP context.

14 Paragraph 69.

words, according to Saipem and Samsung, the "no worse off" test isn't met and they are worse off under the RPs than in the relevant alternative)("First Appeal Ground"); and (ii) The judge was wrong to sanction the RPs because the benefits preserved or generated by the RPs are not being fairly shared between plan creditors ("Second Appeal Ground").

5. In support of the First Appeal Ground, Saipem and Samsung argued[15] that in applying the "no worse off" test, the judge should have had regard not only to the direct monetary returns that they would make on their claims against the plan companies, but also to any indirect economic benefits which would accrue to them if Petrofac went into liquidation. Their case was that they – freed of a competitor – stood to make profits of circa $340m. The CoA dismissed the First Appeal Ground[16] and clarified the "no worse off" test as follows[17]:

> *"(…) the court is required to determine the financial value which a creditor's existing rights would likely have in the relevant alternative, and to compare it with the financial value of the new or modified rights which the plan offers in return for the compromise of those existing rights. The scope of that enquiry is primarily concerned with the financial value of rights of the creditor against the plan company, but where a plan compromises or releases other rights of the creditor, it extends to those other rights.* ***In the instant case, the loss of a competitive advantage upon sanction of the Plans is clearly beyond the scope of that test.****" (emphasis added)*

6. The Second Appeal Ground was allowed by the CoA and the order of the High Court sanctioning the RPs was set aside.[18] The reasons for this are further discussed below.

15 Paragraphs 72-73.
16 Paragraph 102.
17 Paragraph 79.
18 Paragraph 194.

To what extent are "out-of-the-money" creditors entitled to share in the benefits of the restructuring?

7. In Thames Water[19] the CoA already clarified that no rigid rule exists in respect of "out-of-the-money" creditors:

> *"(…) While it may well be right in some case 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 restructure preserves or generates,* ***that will not necessarily always be so****. (….) there are myriad reasons why a company might be suffering financial difficulties, and why a plan may be proposed, and a variety of structures that it might adopt.* ***The nature of the benefits preserved or generated by a plan and the extent to which a fair distribution of those benefits will require consideration to be given to those who would be out of the money in the relevant alternative are likely to vary accordingly.*** *(…)" (emphasis added)*

8. The early RP case of *Virgin Active*[20] led to an assumption in practice[21] that in most cases an out-of-the-money class can fairly be excluded from the benefits of a restructuring and need only be given a *de minimis* amount necessary to satisfy the jurisdictional requirement that the RP should amount to a "compromise or arrangement".[22] This misconception in UK practice prior to Thames Water, is, following the Petrofac CoA judgment, also clearly exposed by the High Court in the Waldorf Judgment.[23]

19 Paragraph 149.

20 In re Virgin Active Holdings Limited [2012 EWHC 1246 (Ch).

21 As Mark Phillips KC, *supra* note 8, concisely explains: "*(…) This approach misunderstood the nature and value of junior debt. At its most fundamental level, if the junior debt was worthless, there wouldn't be any need for it to be restructured. If it needed to be restructured, it had value (…) The fact that the junior debt might receive nothing in an immediate liquidation does not determine what might be a fair compromise for their debt. The "out of the money" answer was a simple answer to a more nuanced question; it looked at the starting point of the analysis; i.e. what would they get in an insolvent distribution absent a restructuring; and made it the end point. That was misconceived. (…)*"

22 Paragraph 117.

23 *Supra* note 8 at paragraphs 166-170. See also, Freshfields Client Alert "Waldorf: the trilogy of Court of Appeal cases applied – restructuring plan not sanctioned" of 21 August 2025.

Rationale behind the cross-class cram down

9. In Petrofac the CoA clarified the cross-class cram down as follows[24]:

> *"(...) the primary purpose of the introduction of the cross-class cramdown power under Part 26A was to allow the Court, in the appropriate case, to override the absence of assent in each class and thereby* ***to prevent any one or more classes of creditors from exercising an unjustified right of veto****. The cross-class cram down power was not designed as a tool to enable assenting classes to appropriate to themselves an inequitable share of the benefits of the restructuring. (...)" (emphasis added)*

10. While there may not be a jurisdictional precondition for the plan company to have pre-plan negotiations with dissenting creditors[25], the proper use of the cross-class cram down power is to enable an RP 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.[26]

Rewards on new money – restructuring cost or benefit & burden of proof

11. In paragraph 118 of the Petrofac CoA Judgment, it is explained that[27]:

> *"The continuation of a business as a going concern will often depend upon the company being able to access new funding. From first principles, new money which is made available to a post-restructured company can be analysed in various ways, depending on the circumstances.* ***In some cases, the purpose of the restructuring is to remove sufficient of the company's debt burden, so that it is better able to access new funding at more advantageous rates in the market. In such a case, the new money does not in itself form part of the RP****. (emphasis added)"*

24 Paragraph 131.
25 Waldorf Judgment, *supra* note 9, at paragraph 183.
26 Paragraph 191.
27 See also paragraphs 119-122.

12. However, in instant case of Petrofac, the restructuring itself includes new money being committed so that it is available to the restructured company immediately following sanction of the RP. In that case it must be determined whether the returns on the new money are either a restructuring cost[28] or a restructuring benefit[29]. Since the plan company seeks the exercise of the court of its discretion to sanction the RP following a cross-class cram down, the burden of showing that returns on new money are either equivalent to that which could be obtained in the market (and hence not a restructuring benefit) or justifying the fair allocation of those benefits amongst the creditors rests on the plan company.

13. In the present case[30] the new money is only being committed conditional upon the sanction of the RPs and completion of the restructuring and will be invested in the restructured Petrofac group. Therefore, what matters is what price could be obtained in the market for new debt and/or equity funding in the restructured Petrofac group, once it was free of virtually all of its debt. On that basis, the CoA provides the following guidance:
   - A reasonable starting point in considering the price at which new money might be obtained in such circumstances is the value ascribed to the post-restructuring Petrofac group by an independent expert, such as the Teneo valuation report.[31]
   - As would be expected of competent valuers, the key risks associated with the Petrofac group business, and its ability to meet its forecasts and business plan, were taken into account by Teneo in arriving at its conclusions on valuation.[32]
   - Although there is no absolute correlation between an independent expert's conclusion as to the equity value of the Petrofac group and the price at which investors in the market might be prepared to invest in return for debt

28 If the new money is provided from independent third parties following a competitive process in the market, then the proper analysis is that returns for the providers of new money are simply a cost of the restructuring. A similar analysis applies where existing creditors of the company are invited to participate in lending new money. If the returns to such creditors are equivalent to what it would cost the company to obtain funding in the market, the provision of new money should be regarded primarily as a cost of, as opposed to the benefit arising from, the restructuring.

29 If the returns offered to those providing new money are such that it costs materially in excess of that which would be obtained in the market, and existing creditors are invited to participate in the new money, then the excess cost is better analysed as a benefit conferred by the restructuring.

30 Paragraph 151.

31 Paragraph 152.

32 Paragraph 164.

or equity, the fact that Teneo has arrived at such a large valuation in this case is, at the very least, something which calls for an explanation, rooted in credible evidence, as to why the RPs should give what appears to be an immediate three-fold or even higher return on the new money.[33]

- The most obvious way of demonstrating this would be evidence from a market expert as to the range of prices that debt or equity might be obtained by the restructured Petrofac group. Another way would be evidence of market testing.[34]

14. The CoA held that the judge in first instance addressed the wrong question, focussing as it did on pre-restructuring risks faced by Petrofac group. The correct question is the cost at which new money could be raised by the Petrofac group on day one *after* the restructuring and *conditional upon* the sanction of the RPs which would remove the existing liabilities from the plan companies' balance sheets and hence avoid liquidation.[35]

15. Circa 67.7% of the post-restructuring equity in Petrofac was allocated to the providers of the $350m new money. Based on Teneo's low case post-restructuring equity valuation of $1.5bn, this equity will be worth about $1bn. Depending on how it is presented, the return on investment for the new money providers is between 211% and 266.8%.[36] In this context it is further significant that the plan companies evidence showed[37] that the allocations of new equity to the new money providers were set prior to Teneo's valuation report being available, based on a notional post-restructuring equity value of only $351m. Subsequently, these new equity allocations were never adjusted, so the significantly higher Teneo valuation also significantly increased the price for the new money.[38]

33 Paragraph 165.
34 Paragraphs 166-167.
35 Paragraph 178.
36 Paragraphs 140-141.
37 Paragraphs 184-185
38 The same applies to the Work Fees. If the RPs were sanctioned, the Work Fees would be paid in new equity. It was fixed as a percentage (2.5%) of the AHG's aggregate holding of Senior Funded Debt and the number of Ordinary Shares issued for that purpose was fixed in late December 2024 based on a notional post-restructuring value of $351m. This equalled $7.1m. However, since the subsequent Teneo post-restructuring value was much higher, the Work Fees would be worth between $24.1m and $29.2m, rather than the initially agreed $7.1m. This means an increase between 339% and 421% of the agreed value of the "work". (paragraphs 61-64).

16. The CoA concluded that the plan companies failed to justify the returns in respect of the new money as a cost of the restructuring. As a result[39]:

> *"(…) **the formulation of the Plans – and such negotiation as there may have been between the different classes of creditors – has taken place on a false premise. It failed to address at all the appropriate allocation of such part of the return on the New Money that constitutes a benefit preserved or generated by the restructuring**. Moreover, the absence of evidence as to the price at which equivalent funding for the restructured Group could have been obtained in the market means that we could only speculate as to what part of the return on the New Money should be regarded as a benefit of the restructuring, the fair allocation of which falls to be considered." (emphasis added)*

Practical implications

17. Proper pre-plan negotiations with all relevant stakeholders will be key in any RP process going forward. As already evidenced following Petrofac in the Waldorf Judgment[40], the results of pre-plan negotiations could be material for the plan company in the context of proving fair distribution of the restructuring benefits in a RP for which the court is asked to exercise its discretion to sanction the RP following a cross-class cram down. The pre-Thames Water UK practice of completely excluding out-of-the-money creditors from restructuring benefits, or only given them *de minimis* amount, must change as it has been exposed by the CoA as misunderstood and misconceived.[41] This means that in future RP processes, also more junior creditors will have a seat at the table.

18. The Revised Practice Statement (which essentially is a judicial guide from the Chancellor of the High Court that sets out procedural rules for the use of court-supervised restructuring tools such as RPs and Schemes of Arrangement) also contemplates more extensive cooperation between the plan company and its stakeholders. With the requirement to issue a Part 8 Claim form and the need to file a new Listing Note[42], the court is keen to encourage

39 Paragraph 191.

40 *Supra* note 9.

41 As Mark Phillips KC, *supra* note 8, highlights in this context, the "genuine economic interest" test in 901C(4) and 901G(5) CIGA are different. The former only refers to "a genuine interest in the company", while the latter refers to "a genuine interest in the company" in the event of the "relevant alternative".

42 Paragraphs 6 and 7 of the Revised Practice Statement

the plan company to do more preparatory work earlier on in the RP process. The Listing Note needs to briefly set out (a) time estimate for the convening hearing, (b) a time estimate for the sanction hearing, (c) an indicative timetable for proceedings overall, to include time for any appeal if considered likely, (d) a description of any matters likely to have an impact on the proposed timetable, including in particular (i) a description of matters relevant to the financial position of the plan company, and (ii) a description of any matters which it is anticipated may give rise to contested issues in the proceedings, and (e) if there is any perceived urgency, what the factors are giving rise to the urgency and when such factors first came to light. As a result, the plan company must front load its preparation, including discussing matters with its stakeholders. The Revised Practice Statement also imposes additional responsibilities on the plan company for the convening hearing, in particular if it is envisaged that the court will be asked to exercise its discretion to sanction the RP following a cross-class cramdown[43].

19. While it is undisputed that providing new money is frequently essential for successful restructurings and therefore entitles its providers to a return that reflects this, the sky is, however, not the limit. In Petrofac the CoA focused on the "true" level of risk that is taken by new money providers in case they only provide new money after the restructuring and conditional upon the sanctioning of the RPs. In that case, it is not pre-restructuring risk, but post-restructuring risk that should dictate the new money returns. While the new money has the top spot in the ranking and payment waterfall post-restructuring and will be repaid first, as part of the restructuring, the other existing creditors did also contribute to the restructuring by releasing significant sums of existing debt to allow for a clean balance sheet of the plan companies post-restructuring.

20. The burden of proof rests firmly on the plan companies to show that new money returns are either equivalent to what could be obtained in the market or

43 In that case, the evidence of the plan company should explain (i) whether, and if so to what extent, those promoting the plan have engaged with the plan company's creditors and members, (ii) where there has been any discrepancy in the level of engagement with particular creditors or members, why that is so, (iii) whether any objection to the proposed restructuring has been made by any of the plan company's creditors or members and, if so, the nature of the objection or alternative proposal and any remaining disagreement; and (iv) what information has so far been provided to different creditors or members and. Where there is any difference in the level of information provided to different creditors or members, why that is so (paragraph 17(d) of the Revised Practice Statement).

justifying the fair allocation of those benefits. This evidence can most easily be provided by either a market expert or by evidence of market testing. However, in collating this essential post-restructuring market evidence, it will be interesting to see to what extent (if at all) the post-restructuring plan company will, in the perception of the market, still be "tainted" by the restructuring it just went through?