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Restructuring plans in the UK

On the knife's edge between substantive fairness and legal certainty

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Abstract

Debt fragmentation is a hallmark of the present market landscape. This feature of capital markets has dramatically altered the dynamics of debt restructurings and has placed collective-action problems into even sharper focus. With a view not to being held up by dissenting creditors, companies have increasingly resorted to regimes that make provision for majority action, chiefly schemes of arrangement and restructuring plans, under Pt 26 and Pt 26A of the Companies Act, respectively. Though focusing on Pt 26A, I assert that neither alternative provides a complete answer to the problems at the heart of corporate restructuring.

Keywords: Restructuring Plans; Schemes of Arrangement; Hold-up; Collective-Action Problem; *Adler*; *Thames Water*; *Petrofac*

1 INTRODUCTION

1. As a result of globalisation, in combination with major legislative inroads made into secured credit[1], UK companies' capital structures are becoming

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1 As argued by Armour, legislative reforms regarding the partial abolition of administrative receivership (s72A Insolvency Act) and the top-slicing of property comprised by the floating charge in various ways for the benefit of unsecured creditors (s176ZA Insolvency Act) have arguably caused a shift from concentrated lenders to specialist credit providers, thereby rendering capital structures increasingly

increasingly more complex. Consequently, the time is long gone since otherwise economically viable companies facing momentary financial difficulties were able to stave off formal insolvency proceedings by restructuring their liabilities through confidential negotiations with a syndicate of concentrated bank lenders.[2] Rather, restructuring companies now find themselves in the invidious position of having to engineer a workout with a myriad of different types of investors with heterogenous interests. The shift in the protagonists of high-profile restructurings could not be starker: as the long-term relational lender, which would generally see to it that the debtor remained a going concern through a combination of forbearance and debt forgiveness, walks off stage, the short-term driven, yield-seeking hedge fund burst onto the scene. In addition to having different -and often undisclosed- interests inter se, specialized investors of this kind are much more likely to take a more contentious stance.[3] The heightened risk of hold-up is therefore apparent.

2. Against this backdrop, schemes of arrangement and, more recently, restructuring plans (RPs) have come into sharp focus, as they should facilitate bargaining by providing courts with a flexible power to cram down arrangements and

more fragmented - John Armour, 'Should We Redistribute in Insolvency?' in J. Getzler (ed), *Company charges: spectrum and beyond* (OUP 2006).

2 During most of the 20th century, negotiations over the restructuring of debtors took place out of court in accordance with a set of market norms which became known as the 'London Approach', the tenets of which were first comprehensively set out in a 1992 speech by Pen Kent, who was then the Bank of England's Director for Finance and Industry. According to 'London Approach' principles, banks would refrain from enforcing their claims and continued to provide ongoing support to customers in financial difficulties; in the context of a tightly knit market of syndicated lenders, populated by repeat players, the 'London Approach' was informally enforced through reputational sanctions, thereby preventing hold out. Only if restructuring efforts failed, would banks, being secured lenders, appoint an administrative receiver to get in and realize the customer's assets, distributing the proceeds. The mechanics of the 'London Approach' are considered in John Armour and Simon Deakin, 'Norms in Private Insolvency: The "London Approach" to the Resolution of Financial Distress' [2015] The Journal of Corporate Law Studies 21 – see also Sarah Paterson, *Corporate Reorganization Law and Forces of Change* (OUP 2020), at 21 et seq.

3 Illustratively, Premier Oil's attempts at restructuring its liabilities were fiercely opposed by Asia Research and Capital Management Ltd (ARCM), a hedge fund based in Hong Kong famous for assaults to other beleaguered oil companies. The incentives underlying ARCM's opposition were nevertheless unclear – this is because, in addition to holding over 15% of Premier Oil's debt, ARCM also held a jumbo short position on 17% of Premier's stock, which it had secretly built over the span of two years (Nathalie Thomas, 'Premier Oil's battle with hedge fund set for vote showdown' (*Financial Times*, 11 February 2020) accessed 13 August 2025).

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compromises onto dissenting creditors, regardless of whether the company is insolvent or not.[4]

3. Whereas schemes, which are currently governed by Pt 26 of the Companies Act, have been available for over a century, RPs under Pt 26A were only introduced much more recently, as part of legislative changes enacted as a response to the Covid19 pandemic by the UK's Corporate Insolvency and Governance Act 2020 (CIGA). As observed by Van Zwieten, the fact that CIGA was approved at an unprecedented break-neck pace and, thus, did not benefit from wider industry consultation was likely the key reason for fundamental aspects of Pt 26A to have been almost entirely left to be fleshed out by the courts.[5] In explanatory notes to Pt 26A, the lack of detailed legislative guidance was explained on the basis that the new rules were largely modelled after the regime governing schemes. Accordingly, courts were invited to build upon the already existing jurisprudence where appropriate.[6] As I assert below, the grafting of scheme caselaw onto Pt 26A is a main reason behind the difficulties in its practical application.

4. Keeping this in mind, in the ensuing paragraphs, *first*, I set out how both mechanisms work in outline, underscoring their differences (Part II); *second*, I explain why schemes of arrangement are a flawed response to the collective action problem identified above (Part III); *third*, I then go on to consider certain issues that remain unresolved by the growing body of caselaw on Pt 26A (Part IV); *fourth*, in conclusion, I assert that the attendant uncertainty as to the law on Pt 26A invites challenges to RPs by dissenting creditors, undermining the finality of (often protracted and expensive) restructurings and, at bottom, calling into question its effectiveness as an alternative to Pt 26 schemes (Part V).

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4 Schemes and Pt 26A plans are also particularly attractive to foreign parties due to flexible jurisdictional rules. Even where the centre of the company's main interests or registered office is not in the UK, a company can still benefit from Pt 26 or Pt 26A as long as it can show some connection with the jurisdiction, such as, for example, that the bulk of its liabilities is governed by English law (*Rodenstock GmbH, Re* [2011] EWHC 1104 (Ch)*, Smile Telecoms Holdings Ltd, Re (Part 26a of the Companies Act 2006)* [2022] EWHC 740 (Ch)) – crucially, this allows directors of foreign companies to cherry-pick the applicable insolvency regime, whilst not being subject to the same types of duties existing under English company law.

5 Kristin van Zwieten, 'Mid-Crisis Restructuring Law Reform in the United Kingdom' [2022] ECGI Law Working Paper No. 679/2023.

6 Explanatory Notes to CIGA, at 16: 'While there are some differences between the new Part 26A and existing Part 26 (for example the ability to bind dissenting classes of creditors and members), the overall commonality between the two Parts is expected to enable the courts to draw on the existing body of Part 26 case law where appropriate.'

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2 PT 26 AND PT 26A IN OUTLINE

5. Both Pt 26 schemes and Pt 26A RPs are debtor-in-possession procedures[7], albeit with no automatic stay, aimed at effecting a compromise or an arrangement between, on the one hand, the debtor company, and, as the case may be, its creditors or members (or one or more classes thereof), on the other. Neither procedure requires the company to be insolvent (in the sense of s123 of the Insolvency Act), though Pt 26A does require the company to be in financial difficulty. Additionally, both types of procedure may be used "surgically", by targeting only a specific slice of the company's capital structure.[8] Added flexibility also arises from the fact that the terms 'compromise' and 'arrangement' are broadly construed to mean *any* accommodation at all, provided it deals with the rights of creditors qua creditors[9] and 'implies some element of give and take'[10]. Crucially, this means that, unlike other statutory mechanisms (i.e. the company voluntary arrangement - CVA), schemes proposed under either Pt 26 or Pt 26A bind secured and preferential creditors, thereby enabling the restructuring of more sophisticated capital structures.

6. Schemes under both Pt 26 and Pt 26A can be proposed by the directors of eligible companies, the liquidator (where the company is in liquidation), the

7 That is to say, in contrast to administration and liquidation, the board of the company is not displaced as part of its restructuring procedure.

8 The availability of targeted restructurings in the UK stands in stark contrast to the regime under Ch 11 of the US Code, whereby all creditors are formally included. The added flexibility of the UK system is neatly illustrated by the recent successful restructuring of Fossil Group, the American fashion retailer, where it used a Pt 26A RP, "stapled" to a Ch 15 proceeding in the US, as a backstop to a public exchange offer of certain senior unsecured notes, predominantly held by US investors: *Fossil (UK) Global Services Ltd, In the Matter Of* [2025] EWHC 3058 (Ch). By binding all noteholders to the RP, Fossil avoided the need for a full blown restructuring under Ch 11, which would otherwise have involved a protracted process with likely reduced chances of success. Fossil later successfully obtained recognition of the RP in the US.

9 *Re Lehman Brothers International (Europe)* [2009] EWCA Civ 1161, at [65], where the court held that, under Pt 26, a scheme must be an arrangement between the company and its creditors, and in consequence it must 'deal[] with their rights inter se as debtor and creditor'. As such, the court denied jurisdiction to sanction a scheme of arrangement under Pt 26 which purported to vary or extinguish property rights over assets held or controlled by the company on trust for its creditors.

10 For schemes: *Re T&N Ltd and Others (No 3)* [2006] EWHC 1447 (Ch), at [50]; for restructuring plans: *Re AGPS Bondco plc* [2024] EWCA Civ 24 ('*Adler*'), at [275].

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administrator (where it is in administration), as well as by members or creditors.[11] In the same vein, they are nearly identical in terms of structure:

- *first*, the proponent must petition the court to order meetings of classes of creditors to be summoned (the "convening" stage);[12]
- *second*, creditors, having been provided with the information required by the relevant practice statement and associated case law, will consult together in classes and vote on the compromise or arrangement being proposed;
- *third*, if the scheme is approved by a majority of 75% in value of the creditors in each class present at the meeting, in the case of RPs, and, in addition, by a majority in number, in case of Pt 26 schemes, the proposed arrangement may then be sanctioned by the court (the "sanctioning" stage).[13]
- *fourth*, the court has nearly unfettered discretion in this respect (albeit constrained by the recognized principles) and shall deny sanction to the scheme if it is found to be unfair (the "discretionary" stage).

7. The general rule applicable to class composition is the same across both regimes: creditors within the same class must be able to consult together on the proposal with a view to their common interest.[14] Whether this is the case will depend on the analysis of creditors' *legal rights*, including both the rights to be released or varied under the scheme and any new rights offered in exchange; creditors' *individual interests* are irrelevant at the convening stage. Thus, proper class constitution seeks to ensure that each class is composed of similarly situated creditors, such that a majority is not able to coerce the minority and, conversely, the minority does not have a veto right over the

11 Companies Act ss 896 (Pt 26) and 901C (Pt 26A). While in most cases RPs are sponsored by the company, acting through its directors, *GoodBox* provides an example where the court sanctioned a creditor-proposed RP. The judge nevertheless acknowledged the difficulties facing creditors, noting that, insofar as creditors will invariably lack detailed information on the company, creditor-promoted plans will often 'not get off the ground' (*NGI Systems & Solutions Ltd v The Good Box Co Labs Ltd* [2023] EWHC 274 (Ch) at [72]). Indeed, when considering the introduction of a debtor-in-possession restructuring procedure into English law, the Government, pointing to the same challenges later identified by the judge in *GoodBox*, had already cast doubt on the viability of proposals 'put forward (in the first place) by anyone other than the company acting through its directors (or a statutory office-holder acting in an insolvency procedure)' (*see* Insolvency and Corporate Governance: Government response (2018) at [5.136]).

12 Id.

13 Companies Act ss 899 (Pt 26) and 901F (Pt 26A).

14 For schemes: *Sovereign Life Assurance Co (In Liquidation) v Dodd* [1892] 2 Q.B. 573, at [583]; for restructuring plans: *Re Virgin Active Holdings Ltd* [2021] EWHC 1246 (Ch) ('*Virgin Active*'), at [62] and *Re Gategroup Guarantee Ltd* [2021] EWHC 304 (Ch), at [183].

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proposal.[15] The upshot is that, within assenting classes, creditors acting in their own self-interest are deemed to be the best-judges of fairness, such that approval of the scheme is considered to amount to sufficient evidence of its commercial reasonableness.[16] On that basis, courts are slow to second-guess the majority's decision. If, however, a majority creditor is influenced by collateral interests this may lead the court to deny sanction to the scheme or RP.[17]

8. Notwithstanding the many similarities between each regime, a fundamental difference consists of the following: s901G of Pt 26A affords the power to the court to sanction a RP even in cases where it has been rejected by one or more classes of creditors (called a "cross-class cramdown"). In turn, Pt 26 schemes can only be crammed down onto dissenting creditors if all classes of affected creditors approve the RP on the basis of both the value and headcount requirements.

3 PT 26 SCHEMES OF ARRANGEMENT

3.1 The rise of the "Transfer Scheme"

9. On closer inspection, however, the latter difference is more apparent than real. This is because Pt 26 schemes have been recently refashioned to effect a *functional* cross-class cramdown of dissenting creditors by being used selectively and in tandem with pre-packaged administration proceedings. This makeshift procedure, which, for the sake of simplicity, is here conveniently referred to merely as the "transfer scheme",[18] comprises the following steps:
   - Without consulting its junior creditors, an insolvent company would enter into a scheme with its senior creditors providing for a debt-to-equity swap, whereby creditors would exchange their claims by shares in a new entity holding assets equal in value to the discharged liabilities.[19]

15 *Re Hawk Insurance Co Ltd* [2001] EWCA Civ 241, at [33].
16 For schemes: *Re Noble Group Ltd* [2018] EWHC 3092 (Ch), at [17]; for restructuring plans: *Adler*, at [128].
17 *Adler*, at [131].
18 While the author is aware that the term might have a different meaning in other contexts, it is used here to refer to a scheme of arrangement twinned with a pre-packaged administration, aimed at effecting an actual transfer of the company's assets to a separate entity owned by its senior creditors.
19 The mechanics of a typical transfer scheme are considered in: John Armour, 'The Rise of the "Pre-Pack": Corporate Restructuring in the UK and Proposals for Reform' in Fady JG Aoun (ed), *Restructuring Companies in Troubled Times: Director and Creditor Perspectives* (Ross Parsons Centre, 2012);

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- As consideration for the transfer of the company's assets, the new entity would, in turn, promise to procure the discharge of the senior creditors' claims.
- Upon approval of the scheme, the company would be put into administration and immediately sold off,[20] leaving junior creditors stranded within a mere shell, stripped of its assets.

10. This functional, or "de facto", cross-class cramdown received immediate judicial endorsement.[21] This is because, to the extent junior creditors would receive nothing in the relevant alternative (namely, liquidation or a sale in administration), they were considered by early authorities to be out of the money, and in consequence to have no genuine economic interest in the company's assets.[22] Standing on the shoulders of the said out-of-the-money rule, transfer schemes (i.e. schemes of arrangement twinned with a pre-packaged administration) soon became a staple feature of English corporate insolvency law.[23]

3.2 A flawed compromise to the absence of a cross-class cramdown power

11. The transfer scheme requires a convoluted arrangement involving the opening of formal insolvency proceedings (i.e. administration), with the obvious

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Sarah Paterson, 'The Conceptual Foundation of Cross-Class Cramdown' (2024) Working paper available at SSRN (*see* here) ('*Paterson*').

20 Notwithstanding guidance in the *Cork Report* to the effect that 'so far as practicable' the administrator should inform the creditors' committee 'in advance of any *important action* which he proposes to take' (emphasis added, Report of the Review Committee on Insolvency Law and Practice (1982) at para 956), the power of the administrator to, once appointed, immediately dispose of all, or substantially all, of the company's assets without first consulting unsecured creditors or seeking directions from the court was first held to exist in *Re T & D Industries plc* [2000] 1 BCLC 471 (relying, in turn, on prior dicta by Millet J, as he then was, in *Re Charnley Davies (No. 2)* [1990] BCLC 760, at 767). While this case was decided prior to the coming into force of a suite of amendments to the English insolvency regime introduced by the Enterprise Act 2002, it was later held in *Re Transbus International* [2004] EWHC 932 (Ch) that the power had been carried over to the amended version of the Insolvency Act. The existence of the power has since been reaffirmed in subsequent authorities (eg *DKLL Solicitors v Revenue and Customs Commissioners* [2007] EWHC 2067 (Ch)).

21 *Mytravel Group Plc, Re Companies Act 1985* [2004] EWHC 2741 (Ch); *Re Bluebrook Ltd* [2009] EWHC 2114 (Ch).

22 In this respect, the statement by Mann J in *Bluebrook* at 25 went on to become highly influential: '[I]n promoting and entering into a scheme, it is not necessary for the company to consult any class of creditors (or contributories) who are not affected, either because their rights are untouched or because they have no economic interest in the company.'

23 According to a Government report on the topic, between 2016 and 2019 there were several high-profile pre-pack sales in administration – *see* Pre-pack sales in administration report (October 2020).

concomitant costs to the restructuring company. It is also premised on the transfer of assets to a new entity, what may not always be possible.[24] For example, transfer schemes will not be viable in cases where a change of control would trigger cross-defaults or cause the collapse of key licenses. In particular, given the complex regulatory environment and paramount importance of license assets in certain settings, this is expected to be a critical consideration in the oil and mining industries, as well as in cases involving utility providers. Even putting these issues to one side, however, I argue that transfer schemes are ill-suited to facilitate fair bargains. This is because, relying on the artificial basis that creditors would be out-of-the-money in the relevant alternative, they shut out junior classes from sharing in the restructuring surplus (defined as 'the value sought to be preserved or generated by the [scheme], over and above the relevant alternative'[25]).

12. To be sure, while the duty of the administrator under para. 3 of Schedule B1 to the Insolvency Act to reasonably achieve the highest possible price for the business on a third-party sale supplies a baseline level of protection to junior creditors[26], there are no guardrails to the allocation of the restructuring surplus across self-identified "in-the-money" creditor classes. Where there is no realistic prospect of a quick sale, as will often be the case in a depressed market, the administrator will have no choice but to allow the transfer scheme to proceed. In this case, the upside generated by the restructuring will be wholly captured by the senior creditors; in turn, even classes of creditors that would be *in* the money under the scheme, though *out* of the money in the relevant alternative, will be denied recovery.

13. As such, questions going to the valuation of the restructured entity and to the allocation of the restructuring surplus, which are germane to the collective action problem at the heart of corporate restructuring, are assumed away by the ingenuity of the scheme-cum-pre-pack contraption. As a consequence, by focusing on the value of creditors' entitlements in the "non-scheme" world (by reference to a sale in administration), transfer schemes arguably enable

24 In contrast to transfer schemes, one key practical advantage of Pt 26A is that it enables parties to implement equity restructurings whilst keeping the original group structure in place.

25 *Adler*, at [160].

26 Notably, the administrator will generally be expected to provide creditors with a detailed justification of why a pre-packaged sale was undertaken and all alternatives considered, with an explanation of the possible outcomes and basis for the valuation of the business ultimately adopted, in the form of a SIP 16 Statement.

debtors to shake off liabilities that they would be otherwise able to service, owed to creditors that would otherwise be in-the-money under the scheme, whilst providing only limited recourse to affected classes.[27] Hence, quite apart from their underlying mechanics, the out-of-the-money rule is the fundamental reason why transfer schemes are an imperfect way to unlock bargaining in the context of the restructuring of distressed companies.

4 PT 26A RESTRUCTURING PLANS

4.1 Innovations and uncertainty

14. In an attempt to cure the defects outlined above, the court's cross-class cram-down power under Pt 26A will only be engaged where the RP leaves dissenting creditors no worse-off than in the relevant alternative and at least one class of in-the-money creditors voted in favour of it.[28] Moreover, as indicated, even where these two jurisdictional conditions are met, the court retains a broad discretion to deny sanction to a RP on the basis that it is unfair. Courts apply a different fairness test to RPs, however. Whereas, under Pt 26, it will only take into account the overall level of support for the scheme (including turnout) and whether the majority acted rationally (that is, was not influenced by any collateral interests), under Pt 26A, borrowing from the jurisprudence on CVAs,[29] the touchstone of the court's enquiry rests on a comparison of creditors inter se, such that any differential treatment of like creditors must be adequately justified (i.e. courts perform a so-called 'horizontal' comparison).[30] As clarified by the Court of Appeal in *Adler*, the focus should lie not on a sale of the company to its senior creditors (as in a transfer scheme), but, instead, on the fair allocation of the restructuring surplus.[31]

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27 Drawing on empirical evidence, Mokal and Nocilla argue that 'the businesses being disposed of through pre-packs often do not realise their true market value' (Riz Mokal and Alfonso Nocilla, 'Rehabilitating the UK Pre-Pack: A Critical Analysis and Proposals for Reform' [2024] Banking and Finance Law Review).

28 Companies Act s901G.

29 In *Prudential Assurance*, Etherton J considered that the fairness of a CVA fell to be tested in accordance with, ***first***, whether or not it left the dissenting creditor worse off than he or she would have been if the CVA were rejected ('vertical' comparison) or, ***second***, in a worse position vis-à-vis other creditors or classes of creditors (dubbed the 'horizontal' comparison) – *Prudential Assurance Co Ltd v PRG Powerhouse Ltd* [2007] BCC 500, at [75].

30 *Virgin Active*, at [223].

31 Or, after *Re Thames Water Utilities Holdings Limited* ('*Thames Water*'), the 'benefits of the restructuring' – at [147].

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15. Nevertheless, in contrast to other jurisdictions, the novel power of cross-class cramdown under Pt 26A is not subject to either a relative or an absolute requirement that senior classes be paid in full before more junior classes are entitled to receive any value or keep an interest under the plan (i.e. a relative or absolute priority rule).[32] Pt 26A likewise does not supply rules on super-priority financing to the restructuring company.[33] In addition, given the reliance on scheme jurisprudence, the shortfalls identified in Part III above have been partly carried through to cases under Pt 26A.

4.2 The developing case law

4.2.1 Stuck in old ways: the early cases

16. In the first wave of decisions on Pt 26A, courts, relying on the same rationale used in Pt 26 cases, held that the mere fulfilment of the jurisdictional requirements for sanction (namely, the no-worse-off test and approval of the statutory majority of in-the-money creditors) was sufficient evidence of the fairness of the RP.[34]

17. Later cases, however, made it clear that the satisfaction of jurisdictional requirements merely enlivened a discretion to sanction the RP, which, in turn, hinged on an analysis of the substantive fairness of the allocation of the restructuring surplus across both assenting *and* dissenting classes. Moreover, Snowden J in *Virgin Active* also considered that departures from a strict *pari passu*/absolute priority rule could be sometimes justified (e.g. where creditors or shareholders provide new money).[35]

18. That notwithstanding, in stark contrast to the position in other jurisdictions providing for similar debtor-in-possession restructuring procedures (chiefly the US)[36], courts continued not to fully engage with the company's valuation

32 Under a strict *pari passu* or absolute priority rule junior classes of creditors are only entitled to receive any value after payment in full of more senior classes. *See* 11 USC §1129 and Article 11 of the Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019 (Directive on restructuring and insolvency).

33 By way of comparison, in the US restructuring companies may incur debt with priority over existing liabilities, including by way of "priming" – that is, by granting charged assets as security to lenders (11 USC §364).

34 *Re DeepOcean I UK Ltd* [2021] EWHC 138 (Ch), at [49].

35 *Virgin Active*, at [278].

36 The legislative history of Ch 11 of the US Bankruptcy Code, the US counterpart to Pt 26A, confirms that 'a valuation will almost always be required under section 1129(b) in order to determine the value

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evidence. The valuation material of the plan company, which would invariably point towards the relevant alternative being either a distressed sale in administration or outright liquidation, was taken at face value, provided there were no manifest errors or inconsistencies.[37] Hence, echoing the reasoning used in the transfer-scheme cases, courts clung to the ritual incantation that the views of out-of-the-money creditors should be wholly discounted as having little to no weight.[38]

4.2.2 A new dawn: the trilogy of Adler, Thames Water, and Petrofac

19. ***Determining the relevant alternative.*** The caselaw on RPs is, however, slowly starting to show signs of its coming of age. Starting with *Adler*, the Court of Appeal recently confirmed that the fact that the requisite majority of in-the-money classes has voted in favour of the RP is not an important factor at the discretionary stage, let alone a decisive one.[39] In addition, in assessing what is the relevant alternative, which remains the cornerstone of fairness, the decision in *Adler* clarified that the court is entitled to consider whether there is a fairer or better plan available.[40]

20. Notwithstanding these developments, in *Adler* the Court of Appeal provided little clarity as to when it will be open to the court, in determining the relevant alternative for the purpose of assessing the fairness of a RP, to consider a reference point other than a sale in a formal insolvency proceeding. The decision therefore gives wide leeway to dissenting creditors to substantiate their claim that the RP being proposed is unfair.

21. ***Non-money benefits and the out-of-the-money rule.*** The Court of Appeal later held in *Thames Water* that, in calculating the 'restructuring surplus' to be distributed under the RP for the purpose of carrying out the relevant fairness test, courts should take into account non-money benefits.[41] It also held that there is no 'hard-edged' rule that objections of out-of-the-money creditors

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of the consideration to be distributed under the plan' – H.R. Rep. No. 95-595, at 413-414 (1977). Moreover, under Ch 11, instead of looking at the position of creditors in the relevant alternative, the court considers whether the claim is out of the money in the context of the value available for distribution under the restructuring plan, as of the effective date of the plan, as per section 1325(a)(4).

37 *Re Great Annual Savings Company Ltd* [2023] EWCH 1141 (Ch), at [64].

38 Id., at [64].

39 *Adler*, at [147].

40 Id., at [182].

41 *Thames Water*, at [116]-[119].

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should carry no weight; it all depends on context, not least where forbearance by wiped-out creditors is essential for the successful restructuring of the company (as was the case in *Thames Water*, where the ultimate, broader restructuring envisaged by the company hinged on the additional liquidity runway afforded by an interim RP, which, in turn, involved the compromise of out-of-the-money claims).

22. By the same token, these findings, however, beg the crucial question of what precisely are the circumstances in which the views of out-of-the-money stakeholders must be taken into account (and, conversely, of what are the circumstances in which the plan company need not engage with them). To be sure, *if*, *first*, as held in *Adler*, consideration of a better or fairer plan is, in principle, always open to the court; and *if*, *second*, to the extent it preserves the company as a going concern any RP always gives rise to intangible benefits, this must mean that the claims of out-of-the-money creditors are *never* worthless. If so, why are their objections not *always* relevant for the purpose of identifying and isolating the restructuring surplus?

23. Reflecting this self-evident conclusion, the developing jurisprudence on RPs appears to be edging closer and closer to, at least so far as Pt 26A is concerned, excising the out-of-the-money rule from English insolvency law altogether. Within less than three months of the Court of Appeal's decision in *Thames Water* and only a few days after the fifth-year anniversary of the enactment of CIGA, the issue once again arose for determination in *Petrofac*.[42] Here, the court held that the assertion that a creditor that would be out of the money in the relevant alternative is not an economic owner of the business and is for that reason not entitled to any of the benefits created by the RP 'contains a *non sequitur*': namely, the value being preserved by the RP is itself premised on the compromise of the claims of creditors voting on it, including those who would be out-of-the-money in the relevant alternative.[43] The logical corollary is that the correct counterfactual to determine questions of fairness should be what is *the future upside being made possible* and what *value is being preserved* through the implementation of the RP; as such, a RP will only be crammed down onto dissenting classes if these 'are unreasonably holding out for a better deal'.[44]

42 *Saipem and others v Petrofac* [2025] EWCA Civ 821 ('*Petrofac*').
43 *Petrofac*, at 128 et seq.
44 Id., at [191].

24. The court continued to offer little concrete guidance, however, as to precisely *when* it will be (un)reasonable for them to do so – though the RP at issue was struck down for allocating over two-thirds of the restructuring surplus to creditors that provided new money, the court underscored that every case falls to be considered on its own facts.[45]

25. ***The new money exception to the pari passu rule.*** Lastly, considerable uncertainty remains as to what are the recognised bases for equity holders and creditors to retain value in excess of what they would be entitled to under *pari passu* distribution. Consistently with the commercial reality that refinancing companies have the benefit of only a limited pool of lenders, management and senior creditors typically being the most willing to continue to advance additional funding, according to *Adler* new money and continuing support by trade creditors and employees clearly warrant differential treatment. Alive to the risk of abuse by insiders, in *Petrofac* the Court of Appeal definitively confirmed, however, that the court will closely interrogate the cost and conditions on which additional funds were advanced.[46] Specifically, calibrating the need to limit value extraction by lenders with that for facilitation of ongoing support to plan companies, the fairness of the terms on which new money was provided falls to be tested in accordance with the cost for which *the post-restructured company* could have obtained further finance in the market on *a going concern basis* – that is, on the premise that the RP was approved by creditors and sanctioned by the court.

26. Important questions nevertheless remain: do "sweat equity" (i.e. equity given to the managers and directors responsible for turning the company around) or "gifting" by creditors further up in the waterfall also qualify and, if so, what precise guardrails, if any, apply? While it is commonplace for these questions to arise in complex restructurings, the authorities provide little concrete guidance on how to solve them apart from Thompsell J's matter-of-fact observation in *Sino-Ocean* that, in considering whether deviations from *pari passu* distribution are warranted, 'the court takes a pragmatic view, focused on the overall interests of creditors.'[47]

45 Id. at [136].

46 At [136] et seq. - consistent with previous obiter statements made by Snowden LJ in *Adler* at [169].

47 *Sino-Ocean Group Holding Limited, Re* [2025] EWHC 205 (Ch) at [119]. Further guidance on "gifting" was more recently supplied in *Re Argo*, where Hildyard J recognised its continued relevance and held, somewhat cryptically, that 'the party entitled to make a gift is ***the party which contributes the greatest share of the restructuring benefit*** rather than the parties which are "in the money" under

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4.2.3 Living with uncertainty: High Court decisions after Petrofac

27. In the wake of *Petrofac*, courts have had the occasion to rule on challenges to RPs in four separate cases.[48] The one common thread running through these decisions was the requirement of meaningful engagement with out-of-the-money creditors.[49] Companies are therefore expected to show, through revenue forecasts and cash flow and liquidity projections that the RP cannot accommodate the requests of dissentient classes. As such, similarly to the US, English courts are increasingly being compelled to submit the company's valuation evidence to rigorous assessment (which is something they had so far been chary to do). However, in sharp contrast to their peers across the pond, who have the absolute priority rule as their lodestar, English courts are running blind. This has led to seesawing outcomes. While in *Madagascar Oil, River Island*, and *Poundland* the court appears to have strayed from the strong creditor-regarding guidance set out in *Petrofac* (producing lopsided results in favour of "insiders"), the decision in *Waldorf* arguably favoured an unattainable ideal of fairness over commercial reality.

28. In *Madagascar Oil*, the first lower court judgment to have its reasons published after *Petrofac*, though first underscoring that the use of the cross-class cram-down power is premised on there being 'a genuine attempt [by the plan company] to formulate and negotiate a reasonable compromise between all stakeholders'[50], Richard Smith J approved a RP that allocated the lion's share of the restructuring surplus to an "insider" creditor (here, the plan company's parent).[51] Also at odds with the direction given in *Petrofac*, the judge referenced the reasonableness of the terms of new lending by the parent company to the

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the relevant alternative' – the question nevertheless remains as to how contributions of creditors should be valued (emphasis added - *Re Argo Blockchain plc* [2025] EWHC 3395 (Ch) at [170]).

48 *River Island Holdings Limited, Re* [2025] 2276 EWHC (Ch) ('*River Island*'); *Madagascar Oil Ltd, Re* [2025] EWHC 2129 (Ch) ('*Madagascar Oil*'); *Waldorf Production UK PLC, Re* [2025] EWHC 2181 (Ch) ('*Waldorf*'); *Poundland Limited, Re* [2025] EWHC 2755 (Ch), ('*Poundland*').

49 Notably, reflecting guidance by the Court of Appeal, the New Practice Statement applicable to both schemes and RPs now requires companies to make evidence available to affected creditors/members regarding the nature and level of prior engagement with affected parties and of whether any objection to the proposed restructuring has been put forward as soon as practicable, and no later than 14 days before the convening hearing. The revised rules will apply to all cases as of 2026.

50 *Madagascar Oil* at [119].

51 Notably, the cramdown of Madagascar Oil's plan was only made possible because of the votes of the insider, an outcome which would have been inadmissible under 11 USC §1129(a)(10).

distress value of Madagascar Oil, rather than to a solvent, post-restructured entity.[52]

29. In the same vein, Norris J had also previously approved River Island's (the high-street fashion retailer) RP despite fierce landlord opposition in the face of steep rent cuts, sweeping store closures, and, again, differential terms afforded to "insiders", which provided new money (here, the company's founders). In *River Island*, Norris J distilled nothing less than eleven guiding principles from the trilogy of Court of Appeal cases in *Adler*, *Thames Water*, and *Petrofac* for the exercise of the court's cross-class cram down power, as follows:[53]
    1. *Fair sharing of the burden and benefits.* The burden and benefits of a RP should be fairly distributed across compromised creditors.
    2. *Perspective of dissenting classes.* Fairness should be assessed from the perspective of dissenting creditors.
    3. *Burden on plan company.* The plan company bears the burden of establishing fairness.
    4. *Relevant alternative as starting point.* The starting point to establish fairness is the treatment of dissenting classes in the relevant alternative.
    5. *Pari passu expectation.* The expectation in an insolvency process (i.e. administration or liquidation) is *pari passu* distribution within each creditor class.
    6. *Differential treatment*. Differential treatment of creditors within the same class is permissible bust must be properly justified.
    7. *Exclusion of collateral interests.* When assessing fairness, the focus of the court should rest upon the interests of creditors *qua* creditors.
    8. *Broader effects*. The court is entitled to take into account the effect of the RP on stakeholders whose rights are not directly affected by it.
    9. *Source of benefits*. The court is entitled to take into account the source of the benefits arising from a RP.
    10. *Substance over form*. The court looks at substance, not form; it will therefore place the terms upon which new money has been provided under close scrutiny to determine whether it in reality consists of an actual contribution to the plan or only a benefit being conferred to the lender (e.g. where funding could be otherwise obtained in the market under more favourable terms).
    11. *Genuine attempt*. The court will inquire into whether the RP constitutes a genuine attempt to formulate a fair and reasonable turnaround solution

52 Id. at [195].
53 *River Island* at [43].

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to the plan company's financial difficulties or merely an attempt to benefit from a critical situation to extract value from creditors.

30. Following the framework laid down in *River Island*, in a later decision by Norris J, the court once again exercised its cross-class cram down power to approve another retailer's RP in *Poundland*.[54] Similarly to *River Island*, the RP in *Poundland* was only able to clear the threshold requirements set out in section 901G due to support by insiders. However, despite wide opposition by landlords,[55] the failure by dissenting creditors to muster a credible alternative to Poundland's RP was again found to be determinative. The judge was critical of dissenting classes, pointing out that they ' "must stop shouting from the spectators' seats and step up to the plate"'[56] by putting forward 'a coherent and comprehensive plan which has a real prospect of implementation'[57]. As such, according to Norris J, provided the RP was the subject of engagement with creditors, 'a jumble of incoherent requests for different treatment' will not be sufficient to block it, however broad the opposition across dissenting classes.[58] Considering that they will invariably have only limited access to information on the company, it nevertheless remains to be seen what level of financial detail dissenting creditors will be expected to put forward in order to mount successful challenges.[59]

31. *River Island* and *Poundland* also marked the first two cases in which the company deployed expert reports on the allocation of the restructuring surplus with a view to meeting its burden of proof regarding the horizontal comparison test. Though the judge emphasised that such 'benefits reports' are a helpful tool in addressing questions of fairness, he underlined the inherent evidential limitations of this kind of exercise insofar as 'of necessity it piles assumption upon hypothesis'[60] and, thus, can only serve as an 'approximate guide to horizontal comparisons'[61].

54 *Poundland* at [53].
55 Only a single class out of a total of 9 landlord classes approved Poundland's plan (*see* at [42]).
56 Id. at [56].
57 Id. at [57].
58 Id.
59 *See* the discussion regarding creditor-led RPs at [6] above.
60 Id. at [72].
61 *River Island* at [50].

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32. Signalling an apparent about face towards a stricter approach, in *Waldorf*, Hildyard J denied sanction to the RP on the basis that it was launched in circumstances where the plan company had refused to enter into pre-plan negotiations with creditors.[62] Remarkably, sanction was denied notwithstanding the fact that it was undisputed that the dissenting creditors would receive an upfront return more than 33 times greater under the RP than their return in the relevant alternative.[63] According to the judge, the correct reference point to assess fairness was not the relevant alternative, but, instead, what 'under water creditors … *might fairly and reasonably have negotiated for their support*'.[64] In this context, the judge paid short shrift to repeated concerns expressed by the plan company in inter-party exchanges regarding the unaffordability of the dissenting creditors' proposals;[65] insofar as the RP had not been the product of meaningful engagement, it was found to have 'been put forward on a false premise'.[66]

5 Conclusion: the road ahead amid a rapid developing caselaw

33. Though RPs are a flexible and powerful tool, affording significant optionality to companies and creditors alike, and despite recent judicial efforts to place the law on a more coherent footing, Pt 26A and the jurisprudence in relation thereto remain ridden with question marks in relation to issues that go to the very heart of restructuring. For example, unanswered questions abound in respect of consideration allocation as between creditors, distressed funding, and, most importantly, valuation (of, among other things, the post-restructured entity, security interests, and of the contributions of creditors who are out-of-the-money). While the incremental, case by case development of the law is a corollary of Parliament's decision to leave the dynamics of Pt 26A to be almost entirely judicially developed, the uncertainty surrounding RPs enables reliance on a scattershot approach to challenges, the credible threat of which

62 While Waldorf sought and was given permission to file a 'leapfrog' appeal against Hildyard J's decision directly before the UKSC, it later withdrew its appeal.

63 *Waldorf* at [134]. In denying sanction to Waldorf's RP, Hildyard J placed considerable emphasis on the fact that the case concerned only two of the company's unsecured creditors, such that negotiation ought to have been possible.

64 Id. at [169].

65 Id. at [62].

66 Id. at [189].

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can be used as a lever in negotiations with distressed companies. The incentive to out-of-the-money creditors to, for a tactical advantage, deploy challenges indiscriminately (or credibly threaten to do so) is further magnified by other features of the system – principally, the absence of an automatic moratorium and the relatively low threshold for appeals.[67]

34. To be sure, the decision in *Waldorf* serves as a cautionary tale to the effect that unless plan companies are able to marshal evidence that they have gone out of their way to meet the concerns of out-of-the-money creditors (including by way of the emerging trend of deploying 'benefits reports'), even commercially sensible RPs put forward in good faith face the risk of being struck down. Consequently, the law, as it currently stands, enables dissenting classes to extract ransom value from in-the-money creditors, whilst, at the same time, also transferring value from restructuring companies and creditors in general to their legal and financial advisors.[68]

35. This is deeply unsatisfactory. Establishing fairness should be about commercial realism, not evidential gamesmanship. Drawing the boundaries of commercial reality, however, calls for adequate benchmarking, and judicially tested market conventions on plan design remain sorely lacking.[69] The absence of a clear legal framework governing what constitutes a fair distribution of the restructuring surplus therefore strikes at the heart of effective bargaining.

36. For these reasons, this article asserts that, on the whole, if, on the one hand, the current state of the law is found wanting in terms of the protection of junior creditors in the context of transfer schemes (in the sense herein defined), on the other, it leaves companies that wish to resort to Pt 26A in an excessively precarious position.

67 Permission to appeal will be given provided the appeal has a realistic prospect of success or there is some other compelling reason why it should be heard.

68 To illustrate the point, Thames Water is expected to spend over £200mn on lawyers and other advisers – Robert Smith and Gill Plimmer, 'Thames Water burns through £15mn a month on lawyers and advisers' (*Financial Times*, 4 February 2025) accessed 13 August 2025. Likewise symptomatic of the risk of the requirement of enhanced engagement scuppering otherwise viable RPs, not least in the context of companies with limited liquidity runways, Petrofac has ultimately filed for administration shortly after striking a deal with creditors – 'Petrofac files for administration after losing major Dutch wind contract' (*Reuters*, 27 October 2025) accessed 2 December 2025.

69 As pointed out in *Paterson*.

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