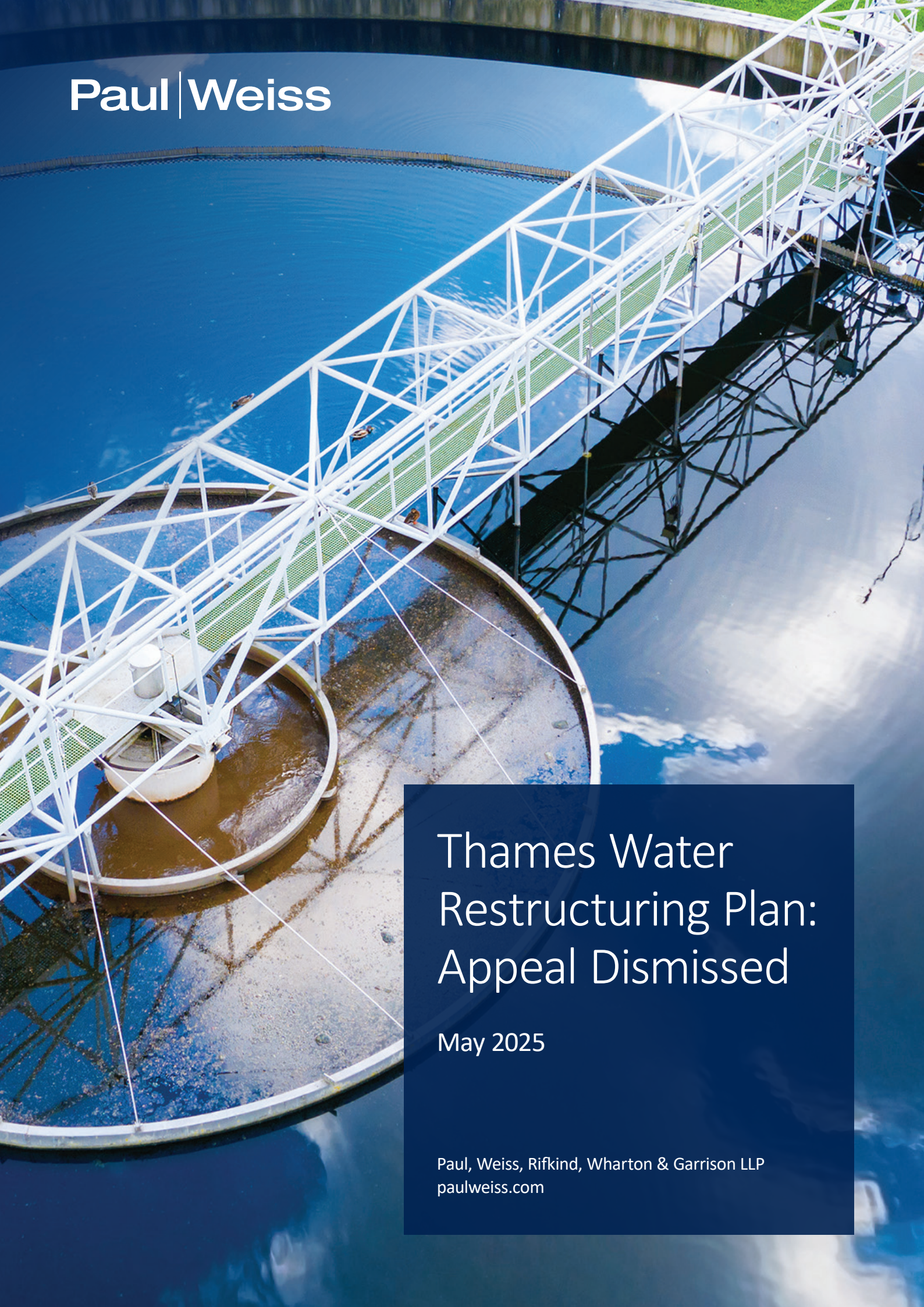

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Thames Water Restructuring Plan: Appeal Dismissed

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Key takeaways

On 15 April 2025, the English Court of Appeal published its judgment dismissing the appeals against the Thames Water restructuring plan. One of the appellants, Mr Maynard MP, has reportedly sought permission to appeal further to the Supreme Court.

What did we learn from the judgment?

- The benefits made available under a plan which are not available under the relevant alternative should be thought of as the "*benefits preserved or generated by the restructuring*" rather than the "*restructuring surplus*", given that those benefits may not always be quantifiable or measurable in monetary terms.
- There is no "*hard-edged rule*" that the views of out-of-the-money creditors should carry minimal weight. Instead, the relevance of their views will vary depending on the context.
- The costs of the Thames Water restructuring plan (being those costs related to the plan itself and costs of the interim financing made available under the plan) were not a "blot" on the plan, nor an impediment to its implementation.
- Given the interim nature of the plan, the proposed releases of claims by the plan company and Thames Water Utilities Limited (the regulated entity within the group) against their officers and advisers were not necessary, and the Court directed specific amendments.
- A restructuring plan cannot be used to expropriate an out-of-the-money stakeholder's claim or shares, even those stakeholders who are out-of-the-money – a compromise is always required.

While the plan was the first to be challenged (and appealed) on a public interest basis, the Court of Appeal did not consider that it was required to decide whether the public interest would be better served by a special administration.

What remains open?

- Although demonstrably unimpressed with the time pressure put on the Courts in this case, the Court of Appeal refrained from outlining clear expectations for timing and case management. While a prospective new Practice Statement may go some way to providing clarity on that procedural aspect, clearer direction from the Court would have been welcome.
- The Court was invited, but declined, to opine on whether, if a plan company seeks to disenfranchise a class of stakeholders from voting on a plan, the test of that class having a "genuine economic interest in the company" is to be determined by reference to the relevant alternative. That clarification is thus awaited with the next disenfranchisement application.

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Refresher: The story so far

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On 18 February 2025, the High Court approved the restructuring plan ("**Plan**") proposed by Thames Water Utilities Holdings Limited ("**Plan Company**"), the parent company of three companies, including Thames Water Utilities Limited, an entity regulated by Ofwat (the water industry regulator of England and Wales) ("**TWUL**" and the group being "**Thames Water**").

The Plan will provide interim financing on a super senior basis to extend Thames Water's liquidity runway, following which the group will implement a more holistic recapitalisation of the business via an equity raise and a second restructuring plan known as "**RP2**", expected later in 2025, which will right-size Thames Water's capital structure. The Plan was supported by an ad-hoc group of Thames Water's largest creditors, the Class A creditors (the "**Class A AHG**") but was heavily opposed by an ad-hoc group of Class B creditors (the "**Class B AHG**"), together with the Plan Company's parent company, Thames Water Limited ("**TWL**") and Charlie Maynard MP ("**Mr. Maynard**").

The High Court found that the relevant alternative to the Plan was entry by TWUL into water special administration and concurrent administrations of other group companies (the "**SAR Scenario**"), and that the statutory requirements to cram-down the dissenting Class B creditors and TWL were satisfied. For an overview of the Plan and its key challenges, please see our previous article.[1]

Shortly after the High Court approved the Plan, the Class B AHG, TWL and Mr. Maynard were granted permission to appeal on certain grounds (see below, ***Understanding the Appeal***). The Court of Appeal heard the appeal on an expedited basis from 11 to 13 March 2025.

Understanding the Appeal

The primary focus on appeal was the fairness of the Plan, including emphasis on the following aspects:

- The Class B AHG argued that the High Court was wrong to conclude that:
  - the Plan was fair, in light of certain rights given to the Class A creditors but not the Class B creditors under the Plan (with additional sub-grounds advanced in relation to horizontal fairness and the position of "out-of-the-money creditors"); and
  - the releases under the Plan were not a "blot" on it and/or unfair.
- TWL argued that the Court was wrong to conclude that, having found the dissenting creditors to be out-of-the-money, it did not need to consider whether the Plan was fair towards those stakeholders. TWL also raised issues around horizontal fairness and the cost of the new money to be provided under the Plan.
- Mr. Maynard appealed on multiple grounds, including in relation to the costs of the new money and the weight to be given to public and consumer interests, given that the relevant alternative to the Plan was the SAR Scenario.

Appeal dismissed

On 17 March 2025, the Court of Appeal dismissed the appeal, upholding the Plan (subject to a modification to the releases, explored at ***Patching up the leaks: Releases*** below). Their reasoned judgment followed on 15 April 2025.

1. Paul, Weiss: Three's a Crowd? The Thames Water Restructuring Plan(s) (February 26, 2025).

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What did we learn?

1 Fairness clarified

Restructuring surplus in a horizontal comparison: it's not all about the money!

Following the Court of Appeal's decision in *Adler*,[2] the Court will conduct a "horizontal comparison" analysis in deciding whether to exercise its cross-class cram-down power. This analysis requires the High Court to consider whether any differences in treatment of creditors under a plan are justified. Typically, horizontal fairness particularly references the treatment of the creditors in the relevant alternative.

The High Court had concluded that there was no issue of horizontal fairness in the Plan because, as an interim plan, it did not generate a "restructuring surplus", but instead gave breathing room for Thames Water to implement RP2. However, the Court of Appeal considered this approach too narrow, preferring the term "benefits preserved or generated by the restructuring" rather than (the often used) "restructuring surplus" as the latter suggests something of a quantifiable value that exists in the restructuring plan and not in the relevant alternative. However, often relevant benefits of a plan (as in this case) are more intangible or non-quantifiable benefits.

Here, a benefit of the Plan was the preservation of Thames Water as a going concern in order for it to implement RP2, which would likely benefit (at least) the Class A Creditors. The Court of Appeal held that this should be regarded as a relevant benefit in a horizontal comparison, and one that would be lost if (for example) the Class B Creditors were permitted to enforce their existing rights.

Out-of-the-money creditors: weightier than we thought…

The Class B AHG and TWL argued that the High Court was wrong to conclude that it had no obligation to assess fairness of the Plan by reference to the horizontal comparison because the Class B creditors (and TWL) were out-of-the-money.

The Plan Company submitted that, when considering issues of fairness, "little or no weight" should be given to the views or objections of the out-of-the-money creditors because they are not the economic owners of the business, which the Plan Company argued was supported by a number of authorities in the context of restructuring plans. Accordingly, the out-of-the-money creditors are not entitled to a share in the benefits created by the Plan but merely had to be offered some form of consideration in the Plan which needs to be no more than *de minimis*.

The Court of Appeal did not accept this proposition. It concluded that there is no "hard-edged rule" to suggest the views of out-of-the-money creditors should be given little weight in assessing the fairness of a plan. They added that as a matter of principle, such an approach is too rigid and that rigidity may not always be appropriate.

A note on the Class A creditors' rights

The Class B AHG also took issue with what they perceived as certain disproportionate rights given to the Class A creditors under the Plan.

The June Release Condition (or "**JRC**") restricts the release of further super senior funding to the group unless, by 30 June 2025, a lock-up agreement in respect of an equity raise process and RP2 has been entered into by at least 66.6% of the super senior funding lenders and 66.6% of the Class A creditors. The Class B AHG argued that the JRC was effectively a veto right over RP2 and the broader future of Thames Water.

The High Court rejected this argument on the basis that the purported "veto" was not materially different from the rights the Class A creditors already had under the existing finance documents. The Court of Appeal agreed with the High Court and was unpersuaded that there was unfairness in the Class A creditors preserving their pre-existing practical influence via the JRC.

The Plan also provided Class A creditors with the right to receive certain documentation, as well as an ability to require Thames Water to engage with them in relation to RP2. While the Court of Appeal did not consider these rights to confer an unfair advantage on the Class A creditors, they emphasised that as part of RP2, the group will be required to demonstrate to the Court that it has engaged with any reasonable proposals and communicated fairly to *all* Plan creditors.

2. *Re AGPS Bondco plc* [2024] Bus LR 745

2 A compromise is a two-way street

As part of its reflections on the weight to be given to views of out-of-the-money stakeholders, the Court was clear that a restructuring plan cannot be used to extinguish claims or expropriate shares for no value.

In outlining that conclusion, the Court drew a clear distinction between plans and schemes of arrangement. It has long been recognised that a scheme, if combined with a pre-pack admin sale, can transfer assets to a new company in which only those with a genuine economic interest in the scheme company can participate. In that scenario, the rights of stakeholders that lack a genuine economic interest against the company are not interfered with: those rights remain post-sale, with at least potential value, as it would be open to those residual creditors and shareholders to pursue remedies in connection with the failure of the company, and the sale itself would be carried out at a value determined by an independent officer of the Court.

No such safeguards exist in the restructuring plan context, the Court of Appeal emphasised, and there was nothing to suggest in the legislation (or Parliament's preparation for it) that a new power of confiscation was envisaged. Although it has been clear since the *Aggregate* restructuring plan in early 2024 that some form of *de minimis* consideration must be provided to ensure a compromise, this is a strong and clear statement to the contrary, from a higher Court on the matter.

3 Clarifying costs

The appellants criticised the costs incurred (and to be incurred) by Thames Water by the Plan, arguing that the SAR Scenario would be cheaper and that such costs should constitute a "blot" on the Plan.

(Not a) "blot" on the Plan
The Court of Appeal restated what may constitute a "blot" on a plan or scheme which should cause it to fail. A "blot" may:

- include a technical defect rendering the plan or scheme unworkable or incapable of achieving what was intended; or
- arise when the scheme or plan requires the company to take, or contemplates it taking, a step which is illegal, *ultra vires* or in breach of some other obligation owed by a company (even where the obligation is owed to a person other than a creditor).

The Court of Appeal held that the costs of the Plan borne by Thames Water so far (and which it will subsequently bear) do not constitute a "blot" and that these costs would be "at least equalled" by the likely financial consequences of a SAR Scenario.

Are the costs worth it?
Mr. Maynard argued on appeal that the High Court was not given "sufficient assurance" that the costs of the Plan would lead to a successful RP2 and that the High Court should not have approved the Plan as it did not have "clear and cogent evidence that the equity raise would be achieved and that it could only be achieved at the price paid by the Plan Company".

The Court of Appeal also rejected these submissions. While the likelihood of RP2 succeeding needed to be considered when deciding whether to approve the Plan, the Court of Appeal held that the courts do not need to be satisfied to a particular standard that RP2 will succeed. This is an important consideration for any future interim plans.

4 Patching up the leaks: Releases

The Plan included certain releases of liability, which the Plan Company argued were customary. These releases extended to the Plan Company, all creditors subject to the Plan and their respective directors, officers and referenced advisers in relation to actions "arising directly or indirectly out of or in connection with the negotiation, preparation, sanction or implementation of the Plan and/or the Interim Platform Transaction (including the negotiation, preparation, sanction or implementation of any Transaction Documents)."

The Class B AHG argued that these releases were unnecessary for the purposes of the interim Plan, and so were a blot and/or unfair. Mr. Maynard argued that the releases should be removed or qualified. The High Court disagreed with both parties. While the arguments against the releases were persuasive to the judge, he did not consider that they should be removed. In particular, the judge thought that the directors might find it difficult to proceed with RP2 if subject to potential claims in the future.

In contrast, the Court of Appeal emphasised that one of the rationales for third party releases in plans or schemes is that those releases are necessary to give effect to what is proposed and in this case, the Court did not consider that the releases by the Plan Company and TWUL of claims against their respective officers and advisers satisfied that "necessity" test. If the Plan Company and TWUL were permitted to release such claims, they would be relinquishing subsequent claims of a special administrator or an insolvency office-holder and the Court of Appeal concluded that "…in this context….the interim nature of the Plan is of particular relevance, because the Plan Company and TWUL will remain insolvent following its implementation, and it is far from clear that either company could grant effective releases in these circumstances".

As a result, the Court of Appeal required the Plan Company to modify the Plan to include a carve-out in the releases clause for any claims that might subsequently be brought by a special administrator of TWUL or an insolvency officeholder of the Plan Company. With the carve-outs only applying in a subsequent SAR Scenario (i.e., if RP2 fails), the Court of Appeal considered the directors to be adequately protected to continue to prepare for RP2.

While noteworthy, these modifications should be considered in context. This was an interim plan which (as the Court identified) would not immediately result in the restoration to solvency of the relevant companies. The scope of releases in future schemes and plans will be a point for reflection in each case (as it is presently) and it remains to be seen if this same approach will be taken in non-interim plans, or where solvency will be restored.

5 Public interest? Not a question for the Court

This was the first restructuring plan opposed (and appealed) on a public interest basis. Although interesting, this is unlikely to be a common ground of challenge in future restructuring plans, unless they operate in similar sectors subject to equivalent regulation.

Mr. Maynard's appeal mainly alleged that the first instance judge had failed to take proper account of public interest in approving the Plan. The Court of Appeal considered there to be two aspects to public interest here: (i) the aggregated private interests of the customers of TWUL, including the uninterrupted provision of water and sewerage services; and (ii) the wider public interest which includes maintaining a clean water supply and preventing the discharge of untreated sewage into rivers. The public interest includes the higher debt burden on Thames Water in this case given the potential impact on the long term delivery of public services.

Mr. Maynard argued that the High Court was required to consider whether the public interest would be better served by a SAR Scenario. In a SAR Scenario, the interests of creditors would be subordinated to the public interest objectives, making it necessary for the Plan Company to justify that "those priorities" were being respected under the Plan and if not, why not.

The Court of Appeal disagreed that the Court was bound to decide if the public interest would be better served by a SAR Scenario than by the Plan. Mr. Maynard's suggestion that the Court should not defer to Ofwat (the UK's water regulator) on public interest issues was also rejected. The Court of Appeal further held that Ofwat and the Secretary of State were the "guardians of the public interest" and that the Court's role in a restructuring plan, other than ascertaining whether statutory conditions were satisfied and whether there was a "blot" on a plan, was limited to considerations of fairness between those affected by the applicable plan.

5 Public interest? Not a question for the Court *(continued)*

Public to bear the costs (?)

Mr. Maynard also contended that it was incorrect to assume that TWUL or its customers would not be affected by the cost of financing and advisory fees under the Plan and that the suggestions by the High Court, the Class A creditors and the Plan Company that the costs were, in fact, to be borne by the Class A creditors (given they would take a "*very substantial haircut*" if the equity raise / RP2 were to be successful) was not supported by evidence.

The Court of Appeal accepted that the Plan Company's suggestion that it was "*plain common sense that no-one would be prepared to acquire equity in the Plan Company while it had a negative balance sheet*" was not a "*complete answer*" to this point. If the group was burdened with unnecessary cost, it would be unable to invest in infrastructure and other projects, prospectively putting it in breach of its regulatory obligations to the detriment of its customers. However, the Court of Appeal held that Mr. Maynard's argument was speculative (referencing the fact that Ofwat and the Secretary of State did not believe that this would be the case).

6 How relevant is precedent?

The appeal judges reflected on the relevance of prior cases when exercising discretion to approve a plan, and provided two helpful comments on the limitation of prior authority:

- the Courts and practitioners should recognise that many applications to approve schemes (in particular) and restructuring plans are uncontested and, as a result, points are not always tested by adversarial arguments; and
- guidance from earlier decisions should be separated from the circumstances of the case in hand. Restructuring plans and schemes are used in a number of scenarios and contexts, from facilitating interim financing to a balance sheet restructuring, or as a route to avoid formal insolvency. Guidance from a judgment given in relation to one plan may not always be read across directly to another plan, which is designed for a different purpose.

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What remains unanswered?

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While an instructive, and welcomed, judgment, a few points remain for another day:

Timing

In its judgment (and at the hearings preceding it), the Court of Appeal reiterated the importance of timely case management, as well as the need for parties to be respectful of the Court's time when proposing restructuring plans. The Court described the position that the first instance judge was put in as "*unacceptable*", and that there had been a "*wholesale failure by the parties to comply with the guidance given*" by the Court of Appeal on timing and the Court's expectations in relation to it in *Adler*.

However, beyond that, the Court did not give specific guidance on timing expectations, including the need for (or ability of) parties to accommodate a prospective appeal timeframe. That said, it is understood that a new Practice Statement to address case management in contested plans is due to be published by the end of July. Reportedly, this new Practice Statement will address adequate disclosure and is designed to prevent the High Court from being put under extensive time pressure. The Practice Statement is likely to be a welcome addition for practitioners and market participants.

901C(4) applications – what is the "genuine economic interest" tested by reference to?

It is open to a plan company to seek to disenfranchise a class of stakeholders from voting on a plan where that class does not have a "genuine economic interest in the company" (a "**901C(4) application**"). In the context of the weight to be given to out-of-the-money views, the Class B AHG suggested that the 901C(4) test of genuine economic interest was not to be determined by reference to the relevant alternative, drawing a distinction between their interpretation of that test and whether a stakeholder was out-of-the-money in the relevant alternative (and the implications of that). However, the Court did not consider it necessary to determine whether that interest should be determined by reference to the relevant alternative to a plan (or not), because no such application was made in this case. Such helpful clarification will have to wait for another day.

And for Thames? The Court of Appeal gave the parties until 25 April 2025 to apply for permission to appeal to the Supreme Court. Mr Maynard has reportedly sought the Court's permission to appeal, although the Class B AHG has not. As at the date of this memo, it is not clear whether the Court of Appeal has granted that permission. And RP2 also looms in the relative near term. So watch this space.

This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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