

**IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INSOLVENCY AND COMPANIES LIST (ChD)**

**NEUTRAL CITATION NUMBER
[2024] EWHC 3310 (Ch)**

7 Rolls Buildings
Fetter Lane
London

Before THE HONOURABLE MR JUSTICE TROWER

**IN THE MATTER OF THAMES WATER UTILITIES HOLDINGS AND
IN THE MATTER OF THE COMPANIES ACT 2006**

**MR TOM SMITH KC, MS CHARLOTTE COOKE and MR ANDREW SHAW
instructed by Linklaters LLP appeared on behalf of the Applicant Plan Company**

**MR ADAM AL-ATTAR KC and MR EDOUARDO LUPI instructed by Akin Gump
LLP appeared on behalf of a Group of Class A Plan Creditors**

**MR MARK PHILLIPS KC, Mr TONY SINGLA KC, MR MATTHEW ABRAHAM
and MR JAMIL MUSTAFA instructed by Quinn Emanuel Urquhart & Sullivan UK
LLP appeared on behalf of a Group of Class B Plan Creditors**

**MR WILLIAM WILSON instructed by Hogan Lovells International LLP appeared on
behalf of Lloyds Bank Corporate Markes and BNP Paribas**

**MR ANDREW THORNTON KC instructed by Freshfields Bruckhaus Deringer LLP
appeared on behalf of Thames Water Limited and certain creditors of Kemble Water
Finance Limited and Thames Water (Kemble) Finance Plc**

**APPROVED JUDGMENT
17 DECEMBER 2024**

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MR JUSTICE TROWER:

1. This is an application by Thames Water Utilities Holdings Ltd, (the “Plan Company”) for permission to convene seven meetings of its finance creditors (the “Plan Creditors”) to consider and if thought fit, approve a restructuring plan (the “Plan”) under part 26A of the Companies Act 2006 (“CA 2006”). Its purpose is to provide interim bridge funding pending a more substantive restructuring. The Plan Company is represented by Mr Tom Smith KC, Ms Charlotte Cooke and Mr Andrew Shaw instructed by Linklaters.

2. In light of the public interest which this application has attracted, I should stress at the outset that it is not the purpose of this hearing to consider whether the Plan should or should not be sanctioned by the court. Now is not the time to reach any conclusion on whether what is proposed is fair, nor is it the time to consider whether the relevant alternative with which the Plan must be compared if the cross-class cram down power under section 901G of CA 2006 is to be exercised, is a special administration or something else.

3. The purpose of this hearing is limited to the court giving directions for the calling of class meetings and for the determination of such other matters as may be required to ensure that the sanction hearing, when fixed, proceeds as smoothly as practicable for the benefit of those with a legitimate interest in the outcome. I have already given my rulings in relation to the directions for the trial of the Plan’s Company’s proposed application for sanction. This judgment deals with the matters that are conventionally decided at the conclusion of a convening hearing.

4. The group of which the Plan Company forms part (the “Group”) is the largest provider of water and sewerage services in the United Kingdom, serving 24% of the UK population. The size of its undertaking is well illustrated by the fact that the Group owns a network of over 32,000 kilometres of water mains and 109,000 kilometres of sewers covering London, the Thames Valley and the Home Counties. It has some 354 wastewater and treatment sites and 88 water treatment works. It employs approximately 8000 people.

5. The services provided by the Group are supplied through Thames Water Utilities Ltd (“TWUL”), a direct subsidiary of the Plan Company. TWUL is licensed to provide these services by the Secretary of State for the Environment and the Water Services Regulation Authority (“Ofwat”). TWUL is also an issuer, borrower or hedge counterparty of much of the Group debt, as is its own direct subsidiary, Thames Water Utilities Finance Plc (“TWUF”).

6. The Plan Company’s own parent is Thames Water Ltd (“TWL”). Its ultimate shareholders are a group of institutions, many of which are pension funds and sovereign wealth funds. TWL appears separately at this hearing by Mr Andrew Thornton KC, who also represents some creditors and entities higher up in the Group structure.

7. The Group operates under what is called a whole business securitisation financing structure, i.e. one in which the issue of debt is secured against substantially all of the Group's income-generating assets with a common security package and a common set of representations, covenants and events of default applicable to all secured creditors. The evidence divides the Group debt with which the Plan is concerned (the "Plan Debt") into a number of separate categories:

- a. The Liquidity Facilities comprising the Class A DSR Liquidity Facility, the Class B DSR Liquidity Facility and the O&M Reserve Facility. The full amount of £550 million is undrawn and I say no more about it for these purposes.
- b. The Class A Debt comprising Class A RCFs, Class A term loans, Class A Private Notes and Class A Public Bonds, all borrowed or issued by TWUL or TWUF. There are more than 60 different issues of Class A debt with different maturity dates and carrying different rates of interest. An Ad Hoc Group of holders (the "Class A AHG") has been represented at the hearing by Mr Adam Al-Attar KC and Mr Edoardo Lupi, instructed by Akin Gump. The evidence is that the amount outstanding as at the end of March 2024 was some £14.747 billion.
- c. The Class B debt, comprising Class B RCFs, Class B Term loans and Class B Public Bonds all borrowed or issued by TWUL or TWUF. An Ad Hoc Group of holders of Class B debt holders (the "Class B AHG") has been represented at the hearing by Mr Mark Phillips KC, Mr Matthew Abraham and Mr Jamil Mustafa, instructed by Quinn Emanuel. As at the end of March 2024, the amount outstanding in respect of the Class B debt is said to be some £1.366 billion.
- d. Debt arising out of interest rate and index hedging agreements. Certain hedging counterparties were represented at the hearing by Mr William Wilson, instructed by Hogan Lovells. Approximately £1.7 billion was the mark-to-market figure in respect of that debt as at the end of March 2024.
- e. Debt arising out of currency hedging agreements.
- f. Subordinated loans, which are owed by the Plan Company to TWL in the total figure of about some £3.4 billion.

8. The Plan Company has guaranteed all obligations of TWUL and TWUF under the relevant finance documents and TWUL and TWUF has each guaranteed all the obligations of the other under the finance documents. As part of the process of developing the Plan, the Plan Company has entered into a deed of contribution with TWUL and TWUF to contribute to amounts paid by those entities towards their obligations under any of the debt ranking in priority to the Group's subordinated debt (the "Secured Debt"). The totality of the Group's total outstanding, non-hedging debt as at 28 November 2024 is said to amount to some £19 billion.

9. The Plan Creditors' rights in respect of the Plan Debt are governed by, amongst other agreements, the terms of a security trust and intercreditor deed, originally dated 30 August 2007 (the "STID"). All of the Secured Debt is secured by first fixed charges over assets and shares in subsidiaries, real property and intellectual property and floating charges over the undertaking of each Group company.

10. The STID provides for a complex ranking of priorities as between the holders of the Plan Debt. The essential elements of the waterfall are in the following order of priority:

- a. the fees, interest and principal under the liquidity facilities

- b. scheduled amounts payable under the interest rate and index hedging agreements
- c. interest and certain fees and commissions under the Class A debt, all amounts under the interest rate and index hedging agreements, some amounts under the currency hedging agreements and all underwriting commission under the Class A debt
- d. the principal under the Class A debt and the remaining amounts under the currency hedging agreements
- e. any make-whole amount under the Class A debt
- f. any interest and commission under the Class B debt
- g. principal under the Class B debt; and
- h. any make-whole amount under the Class B debt.

11. The subordinated loans are junior and subordinated to the rights and claims of all holders of Secured Debt.

12. The Group is in serious financial difficulties. It is neither necessary nor appropriate for the court at this hearing to make any findings as to the reasons the Group finds itself in this situation. But the Plan Company says that relevant factors include operating in the most densely populated region of the United Kingdom with the oldest average age of waterpipes in the country and with some of the most complex assets in the industry. They also include what the Plan Company calls regulatory factors, which have compelled the Group to increase substantially its capital expenditure. This expenditure is required to upgrade its infrastructure to adopt new technologies and to adhere to stringent standards on water quality, environmental sustainability and infrastructure resilience in order to meet regulatory benchmarks.

13. The Plan Company says that the regulatory regime does not permit TWUL to increase charges to cover this increased expenditure, which has therefore required the Group to obtain increased level of debt to enable it to take steps towards compliance with those requirements. Its evidence asserts in no uncertain terms that, because the charges which Ofwat has permitted TWUL to make in recent years have been below the industry average, it has been underfunded with the consequence that the Group has had to source increasing levels of debt. TWUL has also been subject to penalties, fines and remediation costs as a result of its underperformance and other regulatory breaches. It is also said by the Plan Company that a further pressure on the Group is the material uncertainty arising out of Ofwat's periodic price reviews. It says that its ability to implement a restructuring to address these issues has been constrained by the uncertainty around what is called the PR24 final determination, which is now expected to be published by Ofwat on 19 December. Amongst other matters, this will set limits on TWUL's revenue collection from customers during the period 2025 to 2030, having regard to the Group's capital expenditure proposals.

14. The most recent injection of equity funding into the Group occurred in March 2023 when its ultimate shareholders provided some £500 million but the possibility of further investment from that source has not transpired. It is said that this is because Ofwat's early 2024 response to the Group's provisional business plan made TWUL what its shareholders called "unfinanceable" and "uninvestable", with the consequence that the conditions for new funding, about £3 billion in the short to medium term, were not satisfied. This led to the Group instructing Rothschild and Co to assist in the process of seeking new equity and a means of extending its liquidity runway.

15. The current position is that a deterioration in the Group's forecast financial ratios on 12 July 2024 caused a trigger event to occur under the Group's financing documents, as a result of which it has not been permitted to incur further financial indebtedness, other than drawdowns, extensions and rollovers under the existing authorised credit facilities. Furthermore, the ratings of Group debt with Moody's and Standard & Poor's have now been downgraded to below investment grade, which also means that the Group is operating under what is called a "cash lockup" under its licence to operate. This restricts its ability to pay dividends and make other payments from associated companies without the consent of Ofwat.

16. On 20 September 2024, TWL published an RNS announcement explaining that the available liquidity runway would expire in May 2025, but that if the creditor consent necessary to access restricted cash reserves was not forthcoming, and if it was not possible to draw the Class A debt committed facilities and Class B debt committed facilities, its available cash and cash equivalents would expire at the end of December 2024.

17. Before this announcement was made, the Group was already in negotiations with representatives of its major creditors, together with their respective advisors, directed at agreeing what has come to be called an interim platform transaction to extend the Group's liquidity runway and provide a bridge to allow time to implement a substantive restructuring once the outcome of the PR24 Final Determination is known. Evidence filed on behalf of the Class B AHG is to the effect that the interim creditor group with which the Group was negotiating included representatives of holders of both the Class A and the Class B debt.

18. It is evident that, once the September announcement had been made, there was a more urgent need to agree a stable platform from which to implement a more holistic recapitalisation for the Group. It also appears that, by mid-October 2024, a conflict of interest had arisen, as a result of which the Class B representatives were what they described as "ejected" from the interim creditor group and Quinn Emanuel were instructed for a number of creditors holding Class B debt, who have now formed themselves into the Class B AHG. There is evidence that Quinn Emanuel is now formally engaged by holders of approximately £450 million of Class B debt with what are described as certain arrangements in place with the holders of approximately £300 million of Class B debt, amounting on aggregate to 75% of Class B debt. It is said on behalf of the Class B AHG that the reason for this conflict of interest is that the preferred proposals of many at least of the Class A creditors for the introduction of a stable platform was the provision of new debt on terms that were prejudicial to their interests.

19. As soon as they were instructed, Quinn Emanuel started the process of agreeing non-disclosure agreements with the Plan Company's advisors. On 18 October, which was shortly before the terms were announced by the Group (something to which I will come onto shortly), they wrote to TWUL and TWUF raising questions and concerns in relation to the proposed interim platform transaction. They and the Class B AHG then moved with commendable speed because, by 22 October, they had written to Linklaters with a term sheet, proposing £3 billion of debt funding in which the holders of both the Class A debt and the Class B debt would be able to participate.

20. Two days later, Quinn Emanuel and some of the members of the Class B AHG were granted access to the virtual data room containing the financial information required to provide a legally binding offer of funding to the Group. At the same time, discussions were continuing between Quinn Emanuel and Linklaters in relation to the merits of the Class B

proposals and what came to be called the STID proposals and the interim platform transaction, which was being formulated by the Class A AHG.

21. On 25 October, the Group issued a consent solicitation memorandum for the STID proposals, which sought the release of £400 million from certain restricted reserve accounts, subject to certain conditions and a waiver by the majority Class A creditors of certain defaults. At the same time, TWUL and TWUF announced that they and the Plan Company had entered into a transaction support agreement with certain of its creditors (the “TSA”). This was presented as what was called the more stable platform to implement a more holistic recapitalisation solution for the Group. It was the culmination of the negotiations between the relevant Group companies and the Class A Ad Hoc Group.

22. The parties to the TSA agreed to support the implementation of the interim platform transaction. This appended a term sheet, which contemplated as a transaction milestone, a sanction order for the Plan being made by 31 January 2025. If a transaction milestone is not achieved, 50% or more of the locked-up Class A debt may terminate the TSA with immediate effect. At the same time, the Group and certain creditors entered into a backstop agreement with creditors who had also signed the TSA. The Group received commitments, which exceeded the amount of the super senior funding. Until 11 November 2024, any Class A or Class B creditor, which was not an original backstop creditor had a right to backstop a proportionate share of the super senior funding by acceding to the backstop agreement. A backstop fee of 1.5% of £1.5 billion is payable to the original backstop providers and a further 2% is payable to all backstop providers whatever the time of their accession.

23. The core of the proposals involved an injection of £1.5 billion of new super senior funding with the potential for a further £1.5 billion and a two-year extension of the final maturity dates and scheduled amortisation payment dates for all Class A debt, Class B debt, and subordinated loans. The proposals also provided that payments under the hedging agreements would continue to be made, and all undrawn amounts under the Class A debt, the Class B debt, and the liquidity facilities would be cancelled. The hedging agreements will remain in place on their current terms, with the amounts under the currency hedging agreement ranking ahead of the Class A debt. The position in relation to the interest and index linked hedging agreements has changed since the original proposal, and it is now proposed that, in consideration for the removal of their right to terminate their SWAPs, they will receive certain fees, the detail of which will be included in the explanatory statement.

24. In addition to these economic terms, the proposal involves changes to the covenant regime, the maintenance of certain directors on the board, and certain amendments to the common terms agreement, relating, amongst other matters, to voting rights and payment priorities. By these proposals, the Plan Company seeks to mitigate the risk of TWUL entering special administration under section 25 of the Water Industry Act 1991, and other members of the group entering ordinary administration under schedule B1 of the Insolvency Act, both of which are considered by the Plan Company to be the most likely alternative to the Plan.

25. The Group has also considered whether it would be possible to receive a new money liquidity injection as Class A debt. However, it was thought to be uncertain as to whether prospective creditors would be willing to provide significant new funding without super senior status. It was also considered that any amendment to the payment priorities and any extension to maturities of existing financial indebtedness could only be achieved through a

restructuring plan, as a number of different categories of creditor would have entrenched rights sufficient to veto any such change.

26. It is proposed that the super senior funding will mature two years and six months from the initial funding date. It will be issued with a 3% discount, and will attract interest at 9.75% payable in cash semi-annually. It will benefit from the same shared security package as the existing Secured Debt. Holders of Class A and Class B debt will have the right to participate in the super senior funding, pro rata to their respective shares. The proposed structure requires the consent of Ofwat, for various reasons. It has indicated that that consent will be forthcoming.

27. The potential for a further £1.5 billion of new super senior funding is through what is called an (uncommitted) accordion option, under which an additional £1.5 billion of super senior funding on identical terms to the original super senior funding, may be provided if two conditions are satisfied. The first condition is that TWUL has required Ofwat to refer an AMP8 regulatory period determination to the CMA. The second is satisfaction of the June Release Condition, which requires that, by 30 June 2025, 66.6% of the participants in the super senior funding and 66.6% of the holders Class A debt have locked up in respect of what is called a holistic recapitalisation solution for the Group to be implemented through a further restructuring plan.

28. The TSA provides that each hedging provider and each holder of Class A and Class B debt, will be entitled to certain consent fees in return for accession. These consent fees will each be payable as non-interest-bearing notes, loans, or a deferred fee arrangement, which will be due and payable in full upon the expiry of the stable platform period. The amounts are 0.75%, where a creditor accedes by 5 o'clock on 11 November, and 0.5% if it does so by the day before the plan record date.

29. On 18 November 2024, the Group announced that a majority of holders of Class A debt had consented to the proposals, with the consequence that the waivers extended the Group's liquidity runway until 24 March 2024. It was also announced that the Group was intending to propose a restructuring plan, which took the form of the interim platform transaction. For the most part, the interim platform transaction then proposed was in the form now proposed in the Plan. As of 10 December 2024, the TSA had been signed or acceded to by creditors representing (by value) 68.5% of the liquidity debt, 23.4% of the amounts owed to all interest rate and index hedging providers, 78.82% of amounts owed to all currency hedging providers, 90% of the holders of the make-whole Class A debt, 91% of the holders of non-make-whole Class A debt and 7.4% of the holders of Class B debt.

30. Meanwhile, on 22 October 2024, Quinn Emanuel had presented an indicative alternative proposal in the form of the term sheet I have already mentioned. The terms included the provision of £3 billion of new money by certain Class B creditors with the same ranking as the super senior funding proposed under the interim platform transaction; an interest rate of 8% per annum payable in cash semi-annually; a 2% issue discount; a backstop fee of 1.25%; no-make-whole amount on any voluntary or mandatory redemption or acceleration of the Class B proposed funding (although a fee is payable on voluntary prepayment); no restrictions on the ability of the Plan Company to refinance the funding; and what would appear to be a more permissive covenant package than the new super senior funding proposed by the interim platform transaction the subject of the TSA. On 7 November, Quinn Emanuel sent a form of backstop agreement, pending a transaction support

agreement and a term sheet. The proposal was that the Class B creditors' proposal should be implemented as an alternative restructuring plan.

31. The Plan Company's position in relation to the Class B proposal is summarised in its evidence as follows:

“As explained in Part 1 ... paragraph 4.38 of the explanatory statement... , following careful consideration of the Class B Proposal, and confirmation in correspondence that a significant majority in value of the Class A Creditors did not consider the Class B proposal to be implementable, the Thames Water Companies have concluded that the Class B proposal is not a viable, implementable, or deliverable alternative to the Interim Platform Transaction.”

32. It appears that one of the Plan Company's most substantial objections to the Class B proposal relates not to the terms of the proposed financing, per se, but rather that its implementation would be likely to lead to an event of default arising under the finance agreements. The argument with which the Plan Company is concerned, is that an event of default will arise where an insolvency event or insolvency proceeding occurs in relation to the Plan Company. It is said that an application for a convening order is, arguably, an insolvency proceeding, because an “insolvency event” includes “the initiation of or consent to insolvency proceedings”, and the definition of “insolvency proceedings” includes “the seeking of ... reorganisation ... arrangement, adjustment”.

33. As it has been decided that a Part 26A restructuring plan can, anyway in some contexts, be an insolvency process, see *Re Gategroup Guarantee Ltd* [2021] EWHC 304 (Ch), the Plan Company has confirmed that any application for a convening order, in circumstances in which the consequences are not waived by the majority creditors, may crystallise an event of default under the finance documents. On any view, it is plain that this is a significant risk. The Plan Company is also concerned that, if it actively pursues or supports the Class B proposal, rather than the Plan, it will be in breach of the TSA, with the consequence that the existing waivers of events of default relating to the issue of the claim form in respect of the Plan, and the use of cash from the restricted reserve accounts will lapse. There may be a similar consequence if the Plan is not sanctioned before the expiry of the applicable transaction milestone; likewise, if the Plan fails and there is such uncertainty in relation to the execution of the Class B proposal, that the Group companies become unable to pay their debts as they fall due.

34. It follows from this that the Plan Company's attitude to the Class B proposal is driven, anyway in part, by its concerns that the Class B proposal has not been shown to have the support of the Class A creditors. For their part, the members of the Class A AHG have confirmed that they have significant commercial, economic, and implementation concerns about the Class B proposal, and that they would not be likely to support it, even if the Plan is not sanctioned.

35. The Plan Company submitted that, at this hearing, the court does not need to reach a decision as to whether the Class B proposal is a viable or deliverable alternative to the interim platform transaction, which it says, now, has the support of almost 91% by value of the holders of Class A debt. That is correct as far as it goes, but this hearing is concerned (anyway to some extent) with questions relating to the Class B proposals for two reasons. First, it is said by the Class B AHG that their proposals will be the relevant alternative at the sanction stage. It follows that, at this stage, it is necessary to consider whether there is any distinction between the proper comparator for class purposes and what will or might turn out

to be the relevant alternative in due course. Secondly, the court is concerned at this hearing to ensure that appropriate directions are given for the conduct of the sanction hearing in light of the nature of the opposition to the Plan which is foreshadowed by the Class B proposal.

36. As I mentioned at the outset of this judgment, the function of the court at this hearing is emphatically not to consider the merits or fairness of the Plan. Those are issues which will arise for consideration at the sanction hearing: see *Telewest Communications PLC* [2004] BCC 342 at paragraph 14, per David Richards J. Rather, its function is to consider a number of preparatory matters relating to the convening and conduct of the Plan meeting and to the court's jurisdiction to sanction the scheme.

37. A preliminary question is whether the Plan Creditors have been given sufficient notice of the convening hearing. The appropriate period of notice depends on matters such as the complexity of the Plan, the urgency of the Plan Company's financial position and the sophistication of its creditors. In the present case, the Practice Statement Letter ("PSL") was circulated to the Plan Creditors on 22 November 2024 which was 25 days before the convening hearing. Prior to the sending out of the PSL, the term sheet had been on the Plan website since 25 October. In addition, an RNS had announced the proposals in the circumstances I have already described. In my view, the PSL contains a clear explanation of what is proposed and is otherwise sufficient to comply with the requirements of the Practice Statement. It was served in sufficient time to enable Plan Creditors, who are sophisticated investors, to consider what is proposed, to take appropriate advice and, if so advised, to attend the hearing.

38. The next question is whether the court will have jurisdiction at the sanction hearing to grant the relief sought by the Plan Company. It is plain that the Plan Company is a company within the meaning of Part 26A of CA 2006 and that none of the international jurisdiction issues which sometimes arise in relation to the sanctioning of restructuring plans fall for consideration. To that extent, jurisdiction is established.

39. As often arises in the context of a scheme or a restructuring plan where the creditor constituencies include bondholders and noteholders, there is a question as to whether those who comprise the ultimate beneficial owners of the relevant bonds or notes are creditors for the purposes of Part 26A. The Plan Company has prepared a schedule which identified that, in relation to each of the issues of Class A public bondholders and Class B bondholders, the relevant beneficial owners are entitled to call for the issue of a definitive bond or note in certain circumstances. It is now well-established (see e.g. *Re Noble Group Limited* [2018] EWHC 2911 (Ch) at [161] to [164], a principle applied in a Part 26A context in *Re Pizza Express Financing 2 PLC* [2020] EWHC 2873 (Ch)) that, although the beneficial owner of the bond or note will not be the legal creditor of the issuer of the debt, the entitlement I have identified means that it will be a contingent creditor for the purposes of the scheme jurisdiction. In the light of the evidence and the authorities, I am therefore satisfied that those whom the Plan Company seek to summon to Plan meetings are indeed creditors within the meaning of the statute.

40. It is also necessary for the court to be satisfied that conditions A and B are met in relation to the Plan Company (s.901A(1) of CA 2006). In order to satisfy condition A it must be established that the Plan Company has encountered or is likely to encounter financial difficulties that are affecting or will or may affect its ability to carry on business as a going concern. As Zacaroli J said in the *Re Hurricane Energy PLC* [2021] EWHC 1418 (Ch) at

[22], this is a relatively low threshold. The evidence (some of which I have already recited) is clear that the threshold is satisfied in the present case.

41. In order to satisfy condition B it must be established that a compromise or arrangement is proposed between the Plan Company and its creditors or any class of them and that the purpose of the compromise or arrangement is to eliminate, reduce or prevent or mitigate the effect of any of the financial difficulties mentioned in condition A. A question has arisen as to whether the court can be satisfied that the provision of bridge finance of the type proposed in the Plan satisfies the requirements of condition B. I consider that it does. In my view, the language of condition B is broadly drafted, and deliberately so. I do not see why as a matter of ordinary language the bridge finance in the Plan does not have as its purpose mitigation of the effect of the financial difficulties which the Plan Company has encountered or is likely to encounter.

42. It is also well-established that, as is the case with a scheme of arrangement proposed under Part 26 of the CA 2006, what is required for a proposal to constitute an arrangement within the meaning of Part 26A, is some form of give and take between the Plan Company and each of the classes of Plan Creditor. An amend and extend scheme will normally be such an arrangement, and it is sufficient for these purposes if, as in the present case, the Plan restates the existing rights of Plan Creditors and gives a return which is intended to be at least as good as that which the Plan Company could give in the relevant comparator. In my view, the requirements of condition B are satisfied in this case.

43. The next question for the court at a convening hearing is whether it is obvious that it has no jurisdiction to sanction the Plan or whether there are other factors, sometimes called road blocks, which would unquestionably lead the court to refuse to exercise its discretion to do so in due course. If that is the case, the court will decline to direct the convening of Plan meetings. I agree that no such road blocks arise in the present case.

44. The next and in many cases, the most important consideration is whether the class meetings proposed by the Plan Company are properly constituted. The basic principle is very well known. It is that a class of creditors “must be confined to those persons whose rights are not so dissimilar as to make it impossible for them to consult together with a view to their common interest”: *Sovereign Life Assurance v Dodd* [1892] 2 QB 573 at 583 per Bowen LJ. If it is impossible for them to do so, separate class meetings must be convened.

45. Later authority, helpfully summarised by Zacaroli J in *Re Gategroup Guarantee Ltd* [2021] EWHC 304 at [183] has confirmed that:

- a. the creditor’s rights that fall to be considered are both their existing rights against the company and the rights conferred by the scheme or plan which is before the court;
- b. the existing rights must be assessed in the context of the relevant comparator described by Hildyard J in *Re APCOA Parking (UK) Ltd* [2014] EWHC 997 (Ch) at [32], as “what would be the alternative if the scheme does not proceed”;
- c. it is rights not interest that fall to be taken into account for the purposes of class composition. Without attempting an exhaustive definition, rights of the creditors against third parties (for example, against guarantors of the company’s debts) will generally constitute interests as opposed to rights
- d. even if there are differences in rights as between different groups of creditors, that is not necessarily fatal to them being placed in the same class. It is still

necessary to consider whether the differences are such that it is impossible for them to consult together with a view to their common interest, or whether there is more that unites than divides them.

46. In the present case, the Plan Company seeks the convening of seven class meetings. It does so on the basis that the comparator for class purposes is a special administration for TWUL, with the consequence that the other Group companies, including the Plan Company, enter ordinary administration. The likelihood of this eventuality is supported by the expert evidence as to the relevant alternative which the Plan Company has adduced from Mr Matt Cowlshaw of Teneo Financial Advisory Limited.

47. The proposed classes are:

- a. the liquidity facility lenders;
- b. the interest rate and interest hedging providers;
- c. the Class A lenders, the Class A private noteholders and the Class A public bondholders in respect of the Class A debt instruments (Make-Whole);
- d. the Class A lenders, the Class A private noteholders and the Class A public bondholders and the Class A accretion agreement providers in respect of the Class A debt instruments (Non-Make-Whole);
- e. the Class B lenders and the Class B public bondholders
- f. the currency hedge providers
- g. the subordinated creditor

48. So far as their existing rights are concerned, each of these seven classes falls into a different place in the payment priorities debt waterfall, apart from the two classes of Class A creditor which rank together. It follows that from the purest form of ranking perspective, they all had different rights against the Plan Company apart from (on one analysis) the two classes of Class A lending. I agree with the Plan Company that these differences and rights are class-creating.

49. As far as economic terms are concerned, Plan Creditors within each of the classes apart from the hedging providers hold debt with differing terms as to maturity and applicable interest rates. However, save as regards the Class A make-whole amounts, these different terms would not give rise to different rights in an insolvent administration of the Plan Company, because the relevant debt will be accelerated (or if undrawn, cancelled) and the relevant Plan Creditors will then acquire accrued liquidated claims for outstanding amounts ranking *pari passu* with the claims of other Plan Creditors in their respective class. To that extent, the classes will not be fractured.

50. The position within the Class A debt is complicated by the make-whole provisions which provide for additional make-whole amounts to fall due to the relevant Class A creditors. Any such amounts will rank behind all interest and principal on the Class A debt. The total of these make-whole amounts would be substantial although the recovery, if any, may not itself be significant. Nonetheless, the Plan Company considers that the difference in rights and the prospect of recoveries in respect of the make-whole rights means that it is appropriate to place Class A creditors into two separate classes being those Class A creditors with make-whole rights and those without.

51. In theory, the position is similar for the Class B debt but with an important distinction. Although those make-whole provisions give the relevant holders of Class B debt an additional right that certain other Class B creditors do not have, the Plan Company does not

consider that the difference is material, since no recovery in respect of Class B make-whole amounts can be expected in the relevant alternative, whatever that may be. I accept that submission.

52. A number of other matters have been drawn to the court's attention on class constitution issues. The first is whether the classes for the holders of Class A or Class B debt might be further fractured by the question of whether or not they do in fact participate in the super senior funding. I agree with the Plan Company's submission that what matters is the right to participate and because that right continues to exist on a pro rata basis until after the Plan meeting, this factor does not fracture the classes.

53. The next question is whether accession to the TSA further fractures any of the classes as between those who did and those who did not accede. I agree with the Plan Company's submission that entry into an agreement such as the TSA, which includes an obligation to vote in favour of a scheme or plan does not of itself fracture the class, any way where there is no additional benefit not available to other members of the class (see *Re Telewest Communications Plc* [2004] BCLC 356 at [52]-[54]). This will not normally be the case where the ability to accede has been open to all members of the class. Likewise it is now well established that obtaining a consent fee will not of itself fracture a class where, as in this case, it was available to all who have acceded to the relevant lock-up agreement. I also accept that the different levels of consent fee in the present case, 0.5% or 0.75%, depending on when accession takes place is not material when compared to the principal amount of each Plan Creditor's locked up debt.

54. There is also a question which arises in relation to the backstop fee. Might it be said that a class is fractured as between those who have and those who have not received a backstop fee in relation to the underwriting of the new debt? In my view the answer to this question depends on whether it is established that the relevant backstop fee is a commercial fee paid in consideration for a commercial underwriting service which is required by the Group. If it is, the fact that some Plan Creditors will also have obtained the benefit of a commercially set backstop fee is not of itself class creating. It goes to interest not rights.

55. In the present case all holders of Class A and Class B debt have been given an equal opportunity to participate in, and backstop, the super senior funding proposed in the Plan, and I am satisfied that the premium is payment in return for the provision of a commercial service. There is, however, a question over the significance of the fact that only some of the Class A and Class B creditors were given the opportunity to participate in the initial backstop of the super senior funding, with the consequential right to an enhanced backstop fee. This has given me some pause for thought. But in the end I have reached the conclusion that, because the payment is for a service provided at the outset, and because the amounts in issue are limited as compared to the amount of the outstanding debt, and because the differences in the position of class members probably still go to interests not rights, the backstop fee arrangements are not class creating. I should add that, even if they are properly to be analysed as a difference in rights not interests, the differences are insufficiently material to give rise to an impossibility as between members of the same class to consult together.

56. I should also mention the amendment of the voting mechanics for debt held by public bondholders in Classes A and B. These amendments are designed to align the majorities required for a written resolution with those required at a meeting. This is essentially to ensure that any resolution can then be passed in writing without having to convene a meeting. I am satisfied that this is a mechanical change which does not affect substantive rights in a

manner which makes it impossible for there to be consultation between those members of the class who are and those who are not affected by it.

57. It follows that, on the assumption that the correct comparator for class constitution purposes is administration, I am satisfied that the seven class meetings sought by the Plan Company are appropriate. It also seems to me that this would be the case even if, as the Class B AHG contends, the relevant alternative for section 901G cross-class cram down purposes (i.e. for showing that no member of the dissenting class would be any worse off than they would be in the relevant alternative) is in fact another restructuring plan. This point requires a little more explanation.

58. The relevant alternative (as defined in section 901G(4) of CA 2006) is whatever the court considers would be most likely to occur in relation to a plan company if the compromise or arrangement were not to be sanctioned under section 901F. It is the position of Mr Phillips' clients that, by the time of the sanction hearing, it is likely that the relevant alternative for the purposes of the court's jurisdiction to exercise the cross-class cram down power under section 901G will not be an administration, but will in fact be their own Class B proposed plan. Does that possibility give rise to a problem in identifying the correct comparator (as to which see Chadwick LJ in *Re Hawk Insurance Co Ltd* [2002] BCC 300 at [29]) for the purposes of constituting the correct class meetings?

59. In support of what he has to say about what is likely to occur at the sanction hearing Mr Phillips submitted that at that stage his clients, as members of a likely dissenting class, will have been able to adduce expert evidence to challenge the Plan Company's case that they will be in no worse a position under the Plan than they would be in the relevant alternative. In making that argument it will be one of the central pillars of his case that, on its own evidence, the Plan Company cannot satisfy the no-worse-off test, even if the relevant alternative is administration. But it will also be another of the core pillars of his case that in any event the plan intended to be proposed by the Class B AHG is in fact the correct relevant alternative for cross-class cram down purposes. If that turns out to be the situation, it might be said (although no one makes that submission today), that the court adopted the wrong approach to class constitution at the convening hearing, because it adopted administration as the correct comparator for carrying out the exercise contemplated in *Hawk* at [29].

60. There are a number of reasons why there are currently some obstacles to the outcome sought by Mr Phillips, most particularly if the Class A creditors remain opposed to the Class B proposal. They include the difficulties for the Plan Company in taking any steps in pursuance of the Class B proposals whilst still bound by the terms of the TSA. They may also include overcoming any principle that the court has no jurisdiction to sanction an arrangement to which the Plan Company does not consent (c.f. *In re Savoy Hotel Ltd* [1981] Ch 351).

61. But, on the assumption that these difficulties are overcome, Mr Smith KC submitted that there is no suggestion that the class composition under the hypothetical Class B alternative plan is any different to that proposed in relation to the Plan and therefore no problem arises. It follows that, even if the evidence at the sanction hearing were to establish that the proposed Class B plan is in fact the correct relevant alternative, it does not necessarily follow that the classes were not correctly constituted at this stage. I agree with that conclusion.

62. In my view there are two reasons for this. The first flows from the identification of the difference in rights-out in respect of which the problem arises if the proper comparator is not an immediate formal insolvency such as an administration. The point can be illustrated by reference to the proposed extension of one issue of Class A debt from 2026 to 2028 as compared to another extension of Class A debt from 2030 to 2032. Mr Smith was right to accept that these two categories of Plan claim are treated differently as against each other pursuant to the terms of the Plan, because the second of these two groups will be exposed to a greater credit risk for a longer period than the first. That will continue the case under the Class B plan proposals where the same extensions will be given to all maturity dates. The question therefore is whether a class issue might not therefore arise within the Class A debt arising out of that type of difference.

63. The answer, with which I agree, is that the assessment of whether or not the treatment of these creditors gives rise to such a difference that it is impossible for them to consult together with a view to their common interest, has to be made having regard to the nature of the Plan, viz. the introduction of an interim funding platform. Whatever the position may be in the future (i.e. at the time a substantive restructuring is initiated by a further plan later in 2025), the question now is to identify the credit risk to which each category of Plan Creditor with different maturity dates and interest rates is exposed having regard to the limited length of the funding period. In those circumstances, it seems to me that the considerations to which all Plan Creditors will have regard are essentially the same, whether the comparator to the Plan is a notional administration in which creditor rights will be accelerated, or a Class B proposal which may or may not be an interim solution to their acceleration in due course. For that reason the fact that the maturity dates will not automatically be accelerated as they would be in an administration does not of itself mean that the differences fracture what would otherwise be a single class (whether within Class A or Class B).

64. In reaching that conclusion it is important to bear in mind the different nature of the two exercises. The question of what is the relevant alternative is a binary one. The court is required to determine on the balance of probabilities what would be most likely to occur in relation to the Plan Company if the arrangement were not to be sanctioned. Only then can it assess whether any member of the dissenting class would be worse off in the event of that relevant alternative. By contrast, although identification of the proper comparator for class purposes is an important test in its own right, it is ultimately no more than an aid for answering the basic question of whether or not it is impossible for particular creditors to consult together with a view to their common interest. That is not a binary question in the same way.

65. It is also important to bear in mind that the court has always been concerned to ensure that an unnecessary proliferation of classes does not occur. The position is summarised in the judgment of Snowden J in *Re Noble Group Limited* at [87] to [88] in which he expressed the position as follows:

“87. Different judges have sought to explain how to make this judgment in various ways, but the modern trend has certainly been to resist any tendency to increase the number of classes. So, for example, in *Re Anglo American Insurance Limited* [2001] 1 BCLC 755 at 76, Neuberger J observed in the context of an insurance company scheme that practical considerations were not irrelevant, and that the court should not get too picky about potential different classes, or one could end up with virtually as many classes as there are members of a particular group. In *Equitable Life Assurance Society* [2002] BCC

319, policyholders with a wide variety of mis-selling claims were placed into a single class. And in *Telewest Communications plc (No. 1)* [2004] BCC 342 at [40] David Richards J held that it was appropriate to place into the same class two groups of sterling and dollar bondholders who were treated differently by the use of a particular currency conversion date under the scheme than if there had been a winding-up, remarking that there is a great deal more which unites the bondholders than divides them. In making that judgment, as those cases make clear, it is also important to bear in mind that the safeguard against minority oppression is that the court is not bound by the decision of the class meeting, but retains a discretion to refuse to sanction the scheme: see, eg, *Hawk* at [33] (Chadwick LJ) and [59] (Pill LJ).”

66. Having regard to those principles, it seems to me that in the present case, the only difference in creditor rights which determines the question of whether it is impossible for Plan Creditors to consult together with a view to their common interest is ultimately the priority ranking under the debt waterfall, including for these purposes the difference between the make-whole and the non-make-whole Class A debt. In my view, on the current evidence, that remains the case whether or not an alternative proposal from the Class B creditors is advanced at the sanction hearing as a viable alternative both to the Plan and to an administration. In short, the decision on class constitution made at this hearing does not of itself determine that the relevant alternative for cross-class cram purposes is an administration, nor does a decision in due course that the relevant alternative is the Class B alternative proposal mean that the class constitutions determined at this hearing will be shown to have been wrong. In these circumstances I shall accede to the Plan Company’s application to convene the class meetings of Plan Creditors sought.

67. The other matters which are required to be dealt with at the convening hearing relate to the directions for the Plan meetings themselves on which I have heard no submissions from counsel and the preparation for the substantive sanction hearing in due course, on the assumption that the Plan Company proceeds to apply for that relief. I have already given my rulings in relation to the latter of those two categories. I will now deal with the former.

This transcript has been approved by the Judge