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Petrofac Ruling Shifts Focus To Fairness In Restructurings

By **Patrick Schumann, Jonathan Swil and Ben Gray** (August 18, 2025, 3:26 PM BST)

On July 1, the U.K. Court of Appeal overturned the High Court's sanction of Petrofac Ltd.'s restructuring plans.[1]


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As only the third appellate decision on Companies Act 2006, Part 26A, restructuring plans, the decision in Saipem SpA v. Petrofac Ltd. offers important guidance for practitioners.

The judgment provides a timely reminder that the primary purpose of the cross-class cramdown power is to override the exercise of an unjustified veto by holdout creditors; it is not a tool to enable supporting creditors to appropriate to themselves an unfair share of the benefits of the restructuring.


Jonathan Swil

Petrofac, a global oil field services provider with over 8,000 employees, operates through more than 100 entities across 30 jurisdictions. Prior to launching the plans, it had faced mounting financial pressure following a series of events, including a major Serious Fraud Office investigation and the COVID-19 pandemic.

In broad terms, Petrofac's proposed restructuring involved the injection of new money, a substantial debt-for-equity swap and the near write-off of debts owed to its joint venture partners, Saipem S.p.A and Samsung E&A Co., Ltd.


Ben Gray

The restructuring was fiercely contested. Saipem and Samsung led the opposition, arguing that the plans unfairly allocated the benefits of the restructuring. The appeal hearing lasted several days and ultimately resulted in the overturning of the High Court's sanction. Petrofac is reportedly contemplating an appeal to the Supreme Court.

The Trend to Date

On the basis that out-of-the-money creditors are no longer economic owners of the business and therefore not entitled to share in the benefits of the plan, many restructuring plans have to date essentially focused on removing unwanted liabilities from the balance sheet, with little regard being given to the value created by their discharge.

For a court to sanction a restructuring plan, the dissenting creditors must be no worse off than in the relevant alternative.

Plan companies, i.e., companies seeking the court's sanction of a Part 26A restructuring plan, typically claim that the relevant alternative is insolvent liquidation, in which, by definition, the out-of-the-money creditors recover nothing.

In such circumstances, in 2021, the High Court in Re Virgin Active Holdings Ltd., one of the earliest plans, stated that little regard needs to be given to the interests of out-of-the-money creditors, given that their views carry "little or no weight."[2] This incentivizes plan companies to formulate a relevant alternative, which is the worst possible outcome for creditors.

In assessing the relevant alternative, the courts have determined that the directors of the plan company are best placed to identify what would happen if the plan is not sanctioned.

In many instances, the directors in turn rely on statements made by supporting creditors as to what they would do if the plan were not approved, e.g., accelerate their debts, leading to insolvency.

While dissenting creditors in such cases often argue that the proposed relevant alternative is not the most likely counterfactual, given that it is typically the most value-destructive outcome for all stakeholders, the courts will require sufficient reason for doubting the plan company's evidence.[3]

In practice, the dissenting creditors have faced an uphill struggle to convince the courts that another relevant alternative is the more likely outcome.

In addition, the absence of a rule equivalent to the absolute priority rule, found in U.S. bankruptcies, which states that lower-ranking creditors are not entitled to any recovery unless each prior ranking class of creditors has been repaid in full, means that dissenting creditors cannot rely on the ordinary priority of distribution. This would apply in the relevant alternative to capture value ahead of junior ranking classes.

As economic owners of the business, in-the-money creditors can gift value to other stakeholders, such as shareholders, thereby bypassing the ordinary priority of distribution.

These principles have resulted in plan companies and their supporting creditors having significant control over the allocation of post-restructuring value in the company.

There is some justification for that approach, given that the restructuring plan was designed as a debtor-friendly tool to rescue struggling businesses, save jobs and preserve value. However, the net effect is that the claims of creditors who would be out of the money in the relevant alternative have typically been discharged with no upside mechanism.

It is true that a restructuring plan must be a compromise or arrangement, and cannot simply amount to a confiscation. This, however, is a low jurisdictional threshold, typically satisfied by a de minimis payment, according to Re CB&I in the High Court in 2024.[4]

This contrasts with the approach taken in company voluntary arrangements, in which creditors subject to the arrangement are often granted some option, however small, to participate in the recovery of the business, such as turnover leases for landlords that increase rental payments if the business improves.

A Change of Direction?

Based on a recognition that the release of rights by the out-of-the-money creditors creates value in the restructured business by allowing the company's balance sheet to be cleaned up, the pendulum has recently started to swing in the opposite direction.

In Re Thames Water Utilities Holdings Ltd. earlier this year, the Court of Appeal sought to move away from Virgin Active as a hard-edged rule.[5]

It stated that the fact that a creditor would be out of the money in the relevant alternative is not in itself a reason to exclude that creditor from the consideration of whether the restructuring surplus, i.e., the value preserved or generated by the restructuring plan, is fairly allocated among all creditor classes.[6]

While the position of creditors in the relevant alternative is the obvious reference point for the court in exercising its discretion to impose a plan upon dissenting classes, such discretion involves the court scrutinizing the fairness of the plan, by inquiring how the restructuring surplus, over and above the relevant alternative, is to be allocated between the different creditor groups.

In Petrofac, the Court of Appeal further developed that principle, stating that an assessment of the fair distribution of the restructuring surplus requires an analysis of whether any class of creditor is getting "too good a deal (too much unfair value)," citing Justice Richard Snowden in Re AGPS Bondco PLC.[7]

In overturning the Petrofac restructuring plan, the Court of Appeal held that the plan company had failed to justify the 211% post-restructuring return to the principal new money providers.

Where the return exceeds the company's expected cost of capital in the open market post-plan, such return must be regarded as a benefit of the restructuring, the allocation of which needs to be specifically justified.

Such allocation also needs to be kept under review. The allocations of the restructuring surplus in Petrofac were fixed prematurely, having seemingly been set in stone in December 2024 on a notional post-restructuring equity value and not adjusted in light of much higher updated valuations.

An offer to dissenting creditors to participate in the new money on the same terms as the supporting creditors may be a commercial solution to prevent objections, but it does not necessarily result in a fair outcome sufficient for the court to sanction the plan or remove the need to properly consider and justify the allocation of the restructuring surplus.

Creditors may have good reasons not to participate in the new money and hence their failure to do so may not justify depriving them of a share in the benefits of the restructuring to which they would otherwise be entitled.

The Court of Appeal also made clear that the burden of establishing that a plan is fair, so as to justify the exercise of the court's discretion to sanction a plan notwithstanding the presence of dissenting classes, rests squarely on the plan company.

The Court of Appeal's decision in Petrofac requires plan companies to fundamentally reconsider the approach to the allocation of value in restructuring plans that had prevailed until recently.

Plan companies will need to think carefully about allocating post-plan value and how to justify that allocation. Such justification will need to be rooted in solid evidence and market testing and be able to withstand the scrutiny of the court. Any seemingly extravagant returns to stakeholders that are not properly explained may well result in the court refusing to exercise its discretion to sanction the plan.

Postscript on No-Worse-Off Test

A further, but unsuccessful ground of appeal in Petrofac was that the High Court was wrong to consider only direct economic benefits when determining whether the dissenting classes would have been worse off in the relevant alternative, i.e. the insolvent liquidation of the Petrofac group.

The dissenting creditors argued that the court should have had regard not only to the direct monetary returns that they would make on their claims against Petrofac, but also to any indirect economic benefits that would accrue to them if Petrofac went into liquidation.

In that event, the dissenting creditors would be freed of a competitor and would stand to make substantial profits from future business that would otherwise have gone to Petrofac.

As a result, Petrofac's plan, so the dissenting creditors argued, underestimated the positive financial impact of the proposed relevant alternative on the dissenting creditors. The High Court, however, discounted this indirect benefit as being too remote.[8]

The Court of Appeal agreed with the High Court's decision, but disagreed with its reasoning, stating that there was no such test of remoteness. It was no accident that previous authorities invariably used the term "rights," because the focus on rights rather than interests is fundamental.

The court is required to determine the financial value that a creditor's existing rights would likely have in the relevant alternative, and to compare it with the financial value of the new or modified rights that the plan offers in return for the compromise of those existing rights.

Where a plan compromises or releases other rights of the creditor, it extends to those other rights too. However, the loss of a competitive advantage upon sanction that would otherwise accrue in the relevant alternative was deemed beyond the scope of that test.

Key Takeaways

The decision in Petrofac once again highlights the fact that restructuring plans are still a nascent restructuring tool, whose outer bounds and inner workings will continue to be developed by the courts for some time to come. That said, the decision has given restructuring professionals plenty to think about. Some of the key points to take away are that out-of-the-money creditors may well have a seat at the table.

The fact that out-of-the-money creditors have no economic interest in the distressed business prior to implementation of the restructuring plan does not, of itself, mean that they are not entitled to a share of the value created by the plan.

Also, plan companies need to remain flexible, and continuously review their assessment of the post-plan outcome and the fair treatment of the different creditor classes. The benefits of the restructuring must be assessed on the basis of the plan company having achieved sanction and the restructuring having been implemented.

The burden of proof falls on the plan company to show that returns on new money are either equivalent to that which could be obtained in the market, or to justify the allocation of those benefits. This will likely require rigorous market testing and/or the submission of expert evidence. We may see more challenges to plans by out-of-the-money creditors in due course as a result.

The chances of the court sanctioning the plan increase if the plan company can show that there has been a genuine attempt to formulate and negotiate a reasonable compromise between all stakeholders, and that the dissenting creditors are unreasonably holding out for a better deal.

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[1] Saipem SpA v. Petrofac Ltd. [2025] EWCA Civ 82.

[2] Re Virgin Active Holdings Ltd [2021] EWHC 1246 (Ch), §311.

[3] Re ED&F Man [2022] EWHC 687 (Ch), §39.

[4] Re CB&I [2024] EWHC 398 (Ch), §86.

[5] Re Thames Water Utilities Holdings Ltd. [2025] EWCA Civ 475, §124.

[6] Saipem SpA v. Petrofac Ltd. [2025] EWCA Civ 82, §108.

[7] Re AGPS Bondco PLC [2024] EWCA Civ 24, §252.

[8] Re Petrofac Ltd. [2025] EWHC 1250 (Ch), §70.