

KEY TAKEAWAYS FROM THE ADLER GROUP'S UK RESTRUCTURING PLAN APPEAL

In a much-awaited decision the Court of Appeal has upheld an appeal by bondholders against a restructuring plan pursuant to Part 26A of the Companies Act 2006. This is the first time the Court of Appeal has considered a restructuring plan. The Court of Appeal held that the plan departed in a material respect and without justification from the equal treatment that unsecured creditors would have received in an insolvency, which in this case would have been the relevant alternative to the plan. Furthermore, the Court of Appeal held that the first instance judge had applied the wrong approach to the exercise of his discretion to 'cram down' a dissenting class of noteholders.

The key lessons from the case are as follows:

- **Difference between schemes and restructuring plans where cross-class cram down used:** We now have Court of Appeal confirmation that a different standard of fairness applies to restructuring plans with cross-class cram down than to schemes or plans approved by each class of creditors. When overriding dissenting creditor classes, the Court must consider if there is a 'fairer' allocation possible and conduct a horizontal comparison with other creditor classes. The Court does not need to make such an assessment for schemes of arrangement (where the approval of each class is required) or restructuring plans where each class in fact approves the plan.
- **Importance of the relevant alternative:** The appeal judgment highlights the necessity of comparing the proposed plan with the 'relevant alternative'. This will often (but may not always) be insolvency.
- **When it is justified to depart from allocation in relevant alternative:** The Court of Appeal accepts that departures from a *pari passu* distribution may be justified – as they were in this case – for at least the class of noteholders who had provided additional support to the Company. However, the Court did not provide an exhaustive list of criteria for when deviation may be justified. Justifiable deviations may include new money contributions, essential trade creditors and payments to employees.

- **Voting:** The overall level of support in the classes voting in favour of the plan is not a relevant factor for considering whether the plan should be imposed on a dissenting class.
- **No rule that shareholders' rights are confiscated / no absolute priority rule:** The decision affirms the flexibility of the English system compared to other processes (including, for example, US Chapter 11 bankruptcy), which require strict adherence to an absolute priority rule (i.e., requiring that a subordinate class of stakeholder cannot receive any recovery until more senior dissenting classes have been paid in full). The judgment endorses a more nuanced approach, allowing for context-specific solutions while ensuring fairness to all stakeholders.
- **Conditions relating to 'no worse off' and approval by 'in the money' class:** Restructuring plans must leave dissenting classes 'no worse off' than in the relevant alternative and must be approved by at least one class with an economic interest in the relevant alternative (often referred to as the 'in the money' test). The Court confirmed that these are minimum requirements for the Court to sanction a restructuring plan. They do not establish any presumption that the Court will sanction a plan.
- **Issuer substitution not within the scope of the Court of Appeal's decision:** The decision explicitly states it does not address or endorse the issuer substitution technique used for establishing jurisdiction.
- **Practical reminders:** The decision underscores the importance of timing and adequate disclosure in restructuring plans. It warns against approaching the Court at the last minute and encourages timely cooperation between parties.

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