Akin

Restructuring Litigation Alert

McDermott Restructuring Plan Sanctioned: Reflections on the Judgment

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Marking the first restructuring plan and cross-class cram down sanctioned since the Court of Appeal's seminal decision in Adler[1] (***see our alert here***), the English High Court sanctioned the McDermott restructuring plan on 27 February 2024[2]. In this short article, we summarise the key takeaways from the judgment following a contested and eventful sanction hearing.

Brief Background

CB&I UK Ltd (the **Plan Company**) is an English subsidiary of the Texas headquartered McDermott group (the **Group**), which provides energy, procurement and construction services in the energy sector across a number of jurisdictions.

The Restructuring Plan is part of a broader global restructuring which includes two Dutch *wet homologatie onderhands akkoord* restructuring plans (the **WHOAs**) which are inter-conditional with one another, as well as with the Restructuring Plan.

The Restructuring Plan—the terms of which include an extension of the maturity date of certain of the Group's debt facilities, as well as the compromise of certain unsecured judgment debts held by Refineria de Caragena S.A.S. (**Reficar**) and Contraloria General de la Republica (**Contraloria**)—was heavily contested by Reficar in a six-day sanction hearing.

Key Takeaways

- **"Modest value" and the "compromise or arrangement" requirement**. Citing Snowden LJ's obiter comments in *Adler* on paying a "*modest amount*" in return for extinguishing debt of out-of-the-money creditors, Green J found that the Restructuring Plan satisfied the jurisdictional requirement of being a "*compromise or arrangement*", even though under the plan, a minimum of £800,000 was being offered to Reficar and Contraloria in return for the release of their claims of more than US$2 billion. The decision adds further weight to the view that out-of-the-money stakeholders are in practice unlikely to be able to successfully challenge a plan that provides them with some value, even if minimal, on this ground.
- **Relevant alternative challenges are challenging**. Reficar sought to argue that the relevant alternative put forward by the Plan Company (being a worldwide liquidation) was incorrect, and originally argued that, if the Restructuring Plan failed, the parties would negotiate terms with Reficar which would provide them with equity (albeit during the course of the sanction hearing, Reficar also put forward two additional relevant alternative scenarios in response to the Plan Company's and supporting creditors' evidence). Ultimately, the Court accepted the Plan Company's evidence that the relevant alternative was a worldwide liquidation. The decision highlights some of the practical

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difficulties in mounting a challenge to a plan company's stated relevant alternative, and persuading the Court that the company's and supporting creditors' evidence should not be accepted. Although Green J noted that the Court should "*carefully scrutinise*" evidence on the relevant alternative, as it is "*often in the interests of a plan company (and senior supporting creditors) to present a 'doomsday' scenario*", he also recognised previous cases in which the Court had held that plan companies' directors are "*uniquely well-placed*" to give evidence on the relevant alternative.

- **Consideration offered in parallel restructuring processes is relevant to discretion in sanctioning UK plan**. In exercising his discretion to effect a cross-class cram down, Green J ultimately relied on the enhanced consideration being offered to Reficar in the parallel (and inter-conditional) WHOAs (namely preferred equity convertible into a 19.9% stake in the Group's equity or, if Reficar voted against the Restructuring Plan and/or the WHOAs, convertible into a 10.9% stake in the Group's equity). The English Court was notified of the terms of the enhanced consideration being offered to Reficar on the last day of the sanction hearing, which, in the Court's view "*completely undermined all of Reficar's arguments on discretion*" as it became "*really impossible for Reficar to argue that it [would] not be receiving a fair distribution if the Plan [was] sanctioned*". That also meant that a number of issues which would otherwise need to have been considered by the Court before the terms of the consideration under the WHOA were improved were no longer relevant.
  - For example, Reficar had argued that it was not appropriate for the equity (held by the secured creditors) to remain unimpaired where creditors' debts were being extinguished; however, Green J noted that those arguments fell away once the equity offer was made to Reficar pursuant to the amended WHOAs as, given the resulting dilution, the existing equity **would** be impaired. This was the case notwithstanding the fact that the "*fair distribution*" was being offered to Reficar under the parallel WHOAs and not under the Restructuring Plan.
  - The Judge noted that at the start of the hearing he had a lot of sympathy for Reficar and its position, and that it should have been obvious that Reficar was not going to just accept an extinguishment of its debt. However, the Judge expressly stated that he had lost sympathy for Reficar during the course of the hearing, as the negotiations played out in real time before the English Court and Reficar was effectively offered the equity consideration it had originally been seeking. In particular, the Judge noted that Reficar had "*severely undermined*" a number of its points raised in opposition to the Restructuring Plan by refusing to agree to the equity proposal during the course of the hearing.
- **The English Court may not wait for a foreign decision in a parallel plan**. Despite a request from Reficar, the Court did not feel the need to wait for a final decision on the WHOAs to be handed down by the Dutch courts before sanctioning the Restructuring Plan.
- **Horizontal comparator: out-of-the-money creditors vs. shareholders**. Picking up on *Adler*'s Court of Appeal ruling on the need to consider the horizontal comparator when cross-class cram down is sought, the Court noted that (whilst it was not necessary to opine on in this case given the "*fair distribution*" being offered to Reficar) it could see that there should be some scope for carrying out a 'horizontal comparison' between out-of-the-money creditors and shareholders in testing the fairness, as between them, of the proposed distribution of the restructuring surplus under a plan.
- **Due process**. There were echoes of the theme of due process from the *Adler* Court of Appeal decision, with the Court acknowledging the need for fair consideration to be given to each case, in particular where there is serious opposition to a cross-class cram down. However, the Court also noted that much of the extensive factual and expert evidence which was filed was not ultimately relied on in Court and some of it was duplicative and unnecessary.

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The factual background to the Restructuring Plan is set out in an Appendix below, which adopts the definitions used above.

Appendix

The Plan Company is an English subsidiary of the Group, which provides energy, procurement and construction services in the energy sector across a number of jurisdictions. As part of its business, the Group relies on the issuance of letters of credit (**LCs**) to its customers as a form of security for the performance of the Group's obligations.

Following a reorganisation of the Group's indebtedness under chapter 11 of the US Bankruptcy Code in 2020, the Group entered into four secured credit facilities for over US$2 billion dollars, including two letter of credit facilities (the LC Facilities). Three of those secured facilities (including the **LC Facilities**) mature in June 2024. As part of the chapter 11 process, the Group's equity was transferred to the Group's financial creditors. An additional secured LC Facility, also maturing in June 2024, was entered into by the Group after the chapter 11 process.

Certain Group entities were also liable, in respect of certain historic Group contracts in Colombia, to (i) Reficar, under an ICC Arbitration Award of c. US$1.3 billion; and (ii) Contraloria, in respect of a Columbian claim of c. US$700 million (together, the **Judgment Creditors**).

Against the backdrop of a number of financial difficulties cited by the Group, the obligors under the LC Facilities are subject to a looming cash collateralisation obligation of US$2.2 billion payable to the LC issuers under the LC Facilities at the end of March 2024.

I. The Restructuring Plan

On 24 September 2023, the Plan Company commenced restructuring plan proceedings pursuant to Part 26A of the Companies Act 2006, requesting that the sanction hearing be listed in early November 2023. The Plan Company stated that in the relevant alternative (i.e. the most likely alternative to the Restructuring Plan if it is not sanctioned), the Group would quickly fall into a worldwide liquidation.

In order for the restructuring to be binding on certain Dutch Group entities, the Group also commenced two parallel WHOAs in the Netherlands. The Restructuring Plan and the WHOAs are inter-conditional, such that the Restructuring Plan and the WHOAs are all required to be sanctioned in order for any one of them to become effective. A restructuring plan expert (the **Dutch Plan Expert**) was appointed by the Dutch Court following the request of opposing creditors, in order to facilitate the negotiations between the parties (including, if necessary, by proposing an alternative to the WHOAs).

At a very high level, the Restructuring Plan proposed:

- Extending the LC Facilities and certain other secured credit facilities by three years.
- Providing a financial performance linked payment to the Judgment Creditors with a minimum distribution of £800,000 (and a maximum total entitlement under the linked restructuring processes of US$8 million) in return for compromising the unsecured judgment debt by extinguishing their debts.

The Plan Company estimated that in the relevant alternative the value would break in the LC Facilities.

II. Voting

The secured creditor classes unanimously voted in favour of the Restructuring Plan. The unsecured plan creditors (including Reficar) did not approve the Restructuring Plan. It was therefore clear that if it decided to sanction the Restructuring Plan, the Court would have to exercise its discretion to effect a cross-class cram down of the Judgment Creditor classes pursuant to section 901G of the Companies Act 2006.

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[1] *Re AGPS BondCo PLC* [2024] EWCA Civ 24.

[2] [2024] EWHC 398 (Ch). Akin acted for one of the ad hoc groups of creditors.