

Petrofac: English Court Approves Restructuring Plan Despite Major Challenge From JV Partners; Appeal Likely

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At a Glance

The English Court today handed down its judgment approving Petrofac's restructuring plan, in the first case to follow the Court of Appeal's ruling in *Thames Water* regarding the treatment of stakeholders who are out of the money in the relevant alternative to the plan.

This was a major multiday challenge on several issues that raised some interesting elements; however, there is little new in the judgment as a matter of law.

The plan was opposed by two of Petrofac's joint venture partners, Samsung and Saipem, who are also direct competitors of Petrofac. They are expected to seek — and obtain — permission to appeal today's judgment.

Petrofac's financial difficulties stemmed from a 2017 investigation by the Serious Fraud Office. Liabilities to shareholders, directors and D&O insurers relating to the SFO investigation were among the claims compromised under the plan.

The court held as follows.

- ▶ **Relevant alternative:** The correct relevant alternative to the plan was a disorderly liquidation, as the plan companies had contended. It was not an alternative consensual restructuring on the basis of an open settlement offer¹ by the challengers (**Plan B**) — principally on the basis that the group's other creditors would not agree to the terms of such a deal (*see quote, right*).
- ▶ **"No worse off" test:** Indirect economic benefits for the opposing creditors in a hypothetical liquidation of Petrofac — resulting from the removal of Petrofac as their competitor — were too remote to warrant consideration under the "no worse off" test (which is required for the court to have jurisdiction to approve a plan which not every class has approved). Instead, the "real world impact" of such benefits were considered — but ultimately discounted — as a matter of the court's discretion.
- ▶ **Discretion:** The court was prepared to sanction the plan as a matter of its discretion. Differences in treatment between different classes of creditors were defensible and fair, principally based on the sizeable quantum of the new money, the liquidation comparator, the competitive nature of the return and the fact that not all secured creditors elected to inject new money.
- ▶ **Appeal:** The court is expected to grant the challengers permission to appeal against sanction of the plan. That appeal is expected to be heard on 2-4 June, in conjunction with an existing appeal of the convening order for the plan (for which the Court of Appeal granted permission to appeal in April). We consider that certain aspects of the judgment would benefit from clarification in the Court of Appeal.

See Key Takeaways on next page.

"Although the ... Opposing Creditors presented Plan B as a fully formed alternative to the Plan, this contention was predicated on a more-or-less immediate acceptance by all other creditors of a variation to the Plan which benefited only limited classes of creditor.

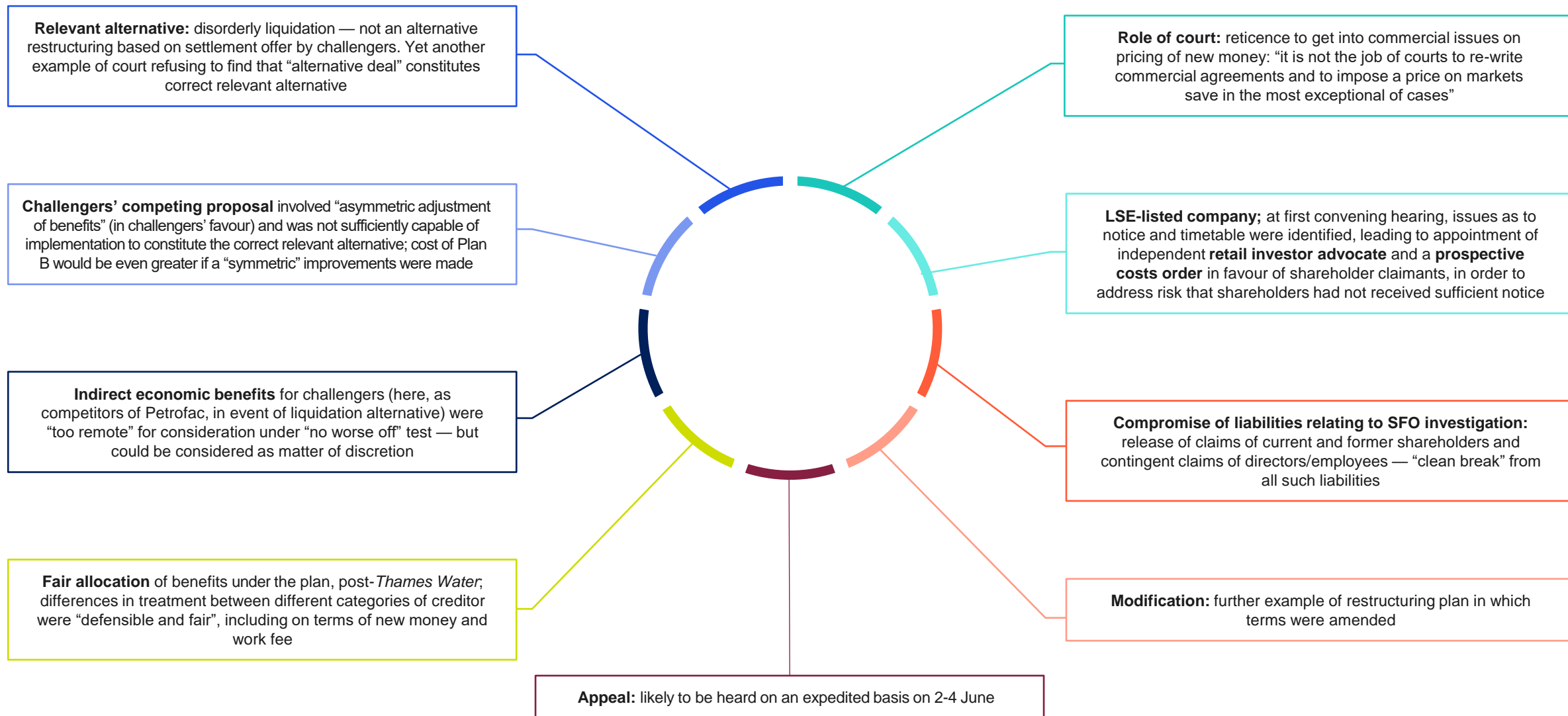
For the reasons I have given, I do not consider that there would have been such an immediate and unqualified acceptance of Plan B.

Viewed in this light, **Plan B is simply a further effort at negotiation in circumstances where a "fully-baked" Plan is now before the court.**"

Extract from [judgment](#), 20 May 2025

1. Specifically, the open offer was to withdraw opposition to the plan in exchange for additional consideration, namely \$25m cash (by end 2027) and additional warrants; the challengers estimated the combined value of the additional consideration to be c.\$61 million to \$69.5 million. The plan companies contended that their supporting creditors did not and would not support the challengers' proposal.

Key Takeaways



Background, Terms of and Voting on the Plan

- ▶ **Plan Companies:** Petrofac Ltd (LSE-listed parent) and its indirect subsidiary, Petrofac International (UAE) LLC
- ▶ **Purpose of Plan:** To rescue the plan companies and produce a better result for creditors than in the relevant alternative, via:
 - debt-for-equity swap, in which most of the equity would be allocated to secured creditors, with a larger allocation for those who elected to provide new money;
 - write-off of various unsecured liabilities of the UAE plan company, including those relating to a project in Thailand; and
 - provision of \$355 million new money, in the form of debt and equity.
- ▶ **Relevant Alternative:** The plan companies asserted — and the court agreed — that the relevant alternative to the plan was disorderly liquidation. However, this was disputed by Saipem and Samsung, who argued that the correct relevant alternative was instead a different restructuring under which the challengers would receive more than under the plan.
- ▶ **Class Constitution:** Saipem and Samsung contended — unsuccessfully — that there should not be a single meeting of the senior secured funded creditors, but that the members of the ad hoc group should be convened in a separate meeting (principally based on fees payable to the AHG). The challengers received permission from the Court of Appeal to appeal the convening order. The Court of Appeal refused an application to stay the convening order in order to procure an adjournment of the sanction hearing.

CREDITOR CLASSES

For both plans

- 1 Two secured noteholders providing \$80 million cash collateral for new cash-backed guarantee facility
- 2 Other senior secured funded creditors
- 3 ABN (claims re clean fuels project)
- 4 Argonaut (claims re clean fuels project)

Parent's plan only¹

- 5 Thai Oil (claims re clean fuels project) plus director claimants and insurance restitutionary claimants²
- 6 Shareholder claimants²
- 7 Samsung and Saipem (JV partners) and PSS (JV contractor)

UAE subsidiary's plan only

- 8 Samsung, Saipem and PSS, plus Thai Oil

TREATMENT UNDER PLAN

- ▶ Full debt for equity swap (though partial reinstatement for those providing new money notes)
- ▶ Greater proportion of post-plan equity for new money providers
- ▶ Plan consideration in respect of contingent claims (of ABN and Argonaut) issued only if and when relevant contingency occurs

APPROVALS (BY VALUE, OF THOSE VOTING)

100%

88%

100%

100%

Released for share of £1 million non-shareholder claims settlement fund plus warrants

0% — i.e., **rejected**

Released for share of £1 million shareholder claims settlement fund plus warrants

99.99%

Assumption of c.\$1 billion of plan companies' JV liabilities (to Thai Oil). Claims released for share of £1 million plus warrants (two tranches, together representing 3.5% of the listed parent's share capital)

0% — i.e., **rejected**

110% of return in insolvency alternative (in cash or equity)

0% — i.e., **rejected**

1. A claims adjudication process will be used to determine entitlements of these classes to receive distributions.

2. These were potential claims of directors and employees and shareholders and potential restitutionary liabilities to Petrofac's former D&O insurers, relating to conduct which resulted in an SFO investigation.

“No Worse Off” Test

Challengers’ Argument

The challengers argued that the “no worse off” test was not satisfied because the challengers would be worse off under the plan than in the relevant alternative.

1. The **relevant alternative was not a group-wide insolvency but a different restructuring** under which Saipem and Samsung would receive more

Challengers had made an open offer under which they would receive a larger share of the benefits preserved or generated by their assumption of c.\$1 billion of the plan companies’ liabilities under the plan

2. Even if the relevant alternative was a group-wide insolvency, they would be **worse off** under the restructuring plan.

This was because, if the relevant alternative was insolvency, then the **Petrofac group would be eliminated as a market competitor** such that the challengers would have a better chance of winning (and profiting from) new construction contracts in future. The marginal direct financial benefits to them of the plan over liquidation were outweighed by what the court termed the **“indirect economic benefits”** to the challengers of the Petrofac group going out of business.

Court’s Ruling

1. Relevant alternative

- ▶ The financial position of the Petrofac group was “precarious in the extreme”. The key question was whether, faced with a choice between liquidation and Plan B, there would be **sufficient support for Plan B over liquidation**. This turned on the attitude of two important and overlapping groups: the secured creditors and the providers of new money.
- ▶ This was a high-risk restructuring and the rewards to the providers of new money were considerable. However, this was **“reflective of risk, not a gouging of a company that is going bust”**. It was key that some providers of new money had no existing exposure to Petrofac. The court accepted the evidence of Petrofac’s CFO that Petrofac would not be able to obtain the new money required on the basis of the alternative restructuring put forward by the challengers.
- ▶ Plan B would not be adopted without ensuring fairness across similarly-placed classes of creditor. **A shift to Plan B “would simply be the beginning of further negotiation by other creditors”**. Therefore the true cost of Plan B was not limited to the benefits being provided to the challengers; the cost would be greater if a “symmetric” improvement were made. Based on the evidence, there was no appetite on the part of the secured creditors and/or the new money providers to reopen the plan.
- ▶ Accordingly, the **correct relevant alternative to the plan was liquidation** and not Plan B.
- ▶ Although the challengers presented Plan B as a fully-formed alternative to the plan, this contention was predicated on a more-or-less immediate acceptance by all other creditors of a variation to the plan which benefited only limited classes of creditor. The court did not consider that there would have been such an immediate and unqualified acceptance of Plan B.
- ▶ Viewed in this light, **Plan B was simply a further effort at negotiation** in circumstances where a “fully-baked” plan was now before the court.

2. Correct framing of “no worse off” test

- ▶ This was a **question of statutory construction** concerning the meaning of the “no worse off” test (which must be satisfied to engage the court’s jurisdiction to sanction a plan which not every class has approved).
- ▶ The **indirect economic benefit** to the challengers of Petrofac’s liquidation (resulting from its elimination as a competitor) was **“too remote”** to be considered at the jurisdictional stage, in part because the consequence was indirectly sustained and very hard to quantify. Factors such as this are more appropriate for consideration at the fairness/discretionary stage.

Accordingly, the “no worse off” test was satisfied.

Discretion

Challengers' Argument

The challengers argued that, even if the “no worse off” test was satisfied, the court should not exercise its discretion to sanction, as the plan unjustifiably allocated excess value to certain stakeholders (in particular, the AHG and those providing new money). Specifically, the challengers were contributing >53% of the “value” of the restructuring (the largest contribution of any stakeholder) but would receive only 2% of the benefits, whilst others would receive a disproportionate share of the returns.

1. **Work fees**¹ (a) related to work that had been done prior to agreement on remuneration for such fees and (b) were too high.
2. The challengers would be **worse off** under the plan in a “**real world**” sense (even if the court found the “no worse off” test was technically satisfied).
3. The plan companies were seeking to gain an **unfair competitive advantage** by causing two competitors to assume hundreds of millions of dollars of the plan companies' liabilities (under a JV project).
4. The challengers were being **treated unfairly as compared to other (non-AHG) creditors** who would be treated equally to (or rank below) them in the relevant alternative (of a group-wide insolvency).

Court's Ruling

1. **Work fees:** Ad hoc groups do not work for nothing; formulating and negotiating a restructuring like Petrofac's involved massive time and effort that deserves and is expected to be remunerated. **Work done without a formal agreement in place was done with a clear expectation of reward.** The **work fee merely appeared high because the ad hoc group would take their remuneration as equity and not up-front in cash.** The fairness of the plan could not be impugned on the basis of the work fee.
2. **Significance of being “out of the money”:** The challengers were *not* completely out of the money in the relevant alternative. Irrespective of whether the plan companies had disregarded the views of the challengers when framing the plan, the question was **whether the outcome of the plan was fair** in light of the approach set out by the Court of Appeal in *Thames Water*.
3. **Applying *Thames Water* to consider the plan's fairness:**
 - ▶ Unlike *Thames Water's* interim financing transaction, Petrofac's plan was a more typical restructuring. The appropriate question was to consider **how the plan allocated the value preserved by the plan amongst competing creditors, including new investors.**
 - ▶ *Prima facie* a fair allocation of preserved value involved sharing any shortfall on a *pari passu* basis; the **departure from *pari passu* distribution required justification.**
 - ▶ On the facts, **differences in treatment between different classes of creditors² were defensible and fair**, principally based on the sizeable quantum of the new money, the liquidation comparator, the competitive nature of the return and the fact that not all secured creditors elected to inject new money.
4. **Relevance of indirect economic benefit:** The challengers would benefit from **real indirect economic benefits** if the plan were not approved. **However, no special account needed to be taken of such benefits in order to render the plan fair**, principally because it was necessary for *all* unsecured creditors to give up claims in order for the plan to work.

Accordingly, the court approved the plan.

1. US\$7 million in cash which, if the plan were sanctioned, would be converted to ordinary shares which, if Petrofac delivered on its business plan, would have an estimated value of US\$23 million to \$29 million.

2. Namely (a) new money providers who were not existing creditors, (b) existing secured creditors who were providing new money, (c) existing secured creditors who were not providing new money and (d) unsecured creditors.

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