Clients&FriendsMemo

European Restructuring: 2024 in review and outlook for 2025

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Market overview

Whilst Europe did not witness the flood of restructuring and insolvencies some had predicted at the start of the year, 2024 was a significant year nonetheless. Many commentators now predict an extended down-cycle with multiple waves of activity over the coming years. However, the general consensus is that there will not be any dramatic peaks and troughs, particularly in a covenant-lite climate in which asset managers are sitting on funds which need to be deployed to generate returns. That being said, it is the prevalence of covenant-lite documentation (and perhaps the more debtor-friendly insolvency regime in certain European jurisdictions) which has encouraged a number of names in the European market, including Altice, Ardagh, and Hunkemöller, to implement, or threaten to implement, aggressive liability management transactions of the type previously reserved for the US market, leading to expectations that there might be greater activity in this space in 2025 and beyond. Whether such expectations prove to be correct will likely depend on the impact of recent developments in the US market, with renewed uncertainty surrounding the continued viability of liability management transactions following the ruling in *Serta* (see our commentary on this issue here).

The Part 26A restructuring plan ("RP") once again took centre stage in 2024 with a number of foreign and domestic debtors choosing the UK courts to restructure. The year opened with the Court of Appeal's hotly anticipated judgment in the *Adler* case (see our coverage on the appeal judgment here),[1] Snowden LJ's leading judgment in favour of the appellants being the first time the sanctioning of an RP had successfully been appealed by a dissenting class of creditors. As the curtain came down on 2024, the convening hearing of the *Thames Water* plan[2] was held with Trower J approving the creditor classes and the convening of the creditor meetings proposed by the ad-hoc group of "Class A" creditors. The *Thames Water* sanction hearing (listed for early February 2025) has the potential to shape future restructurings in this sector and further refine and develop the increasing body of precedent following the launch of a competing RP by an ad-hoc

[1] *Re AGPS Bondco plc* [2024] EWCA Civ 24.

[2] *Re Thames Water Utilities Holdings Ltd* [2024] EWHC 3310 (Ch).

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group of "Class B" creditors. Overall, 2024 saw 15 RPs and seven Part 26 schemes reach the courts with an increasing number of RPs being employed to cram-down landlord creditors.

RPs vs schemes

RPs are increasingly becoming the preeminent restructuring tool of choice due to their ability to cram down dissenting classes of creditor. Other than in the smallest cases where the cost/benefit analysis makes pursuing an alternative more efficacious, this tool has proved very versatile having been used, among other things, to transfer ownership of a regulated healthcare provider (see *Lifeways*[3]), compromise arbitration claims (see *McDermott*[4]) and aircraft leases (see *Re Hong Kong Airlines*[5]), and attempt to amend PFI contracts (see *Consort Healthcare*[6]). We have repeatedly seen the tool used to compromise landlord creditors (in *Cineworld,*[7] *Lifeways* and *Virgin Active*[8]), and more recently, an RP was used to compromise contingent contractual liabilities in *Chaptre Finance.*[9]

Following *Adler*, there was a stream of cases delivering a number of firsts – in terms of substantive and procedural law – for RPs. We summarise below four key other notable plans to come before the courts this year.

Plan Overview	Notable Features
McDermott	The first RP to compromise an arbitration claim. Ongoing negotiations between one of the opposing unsecured creditors (holding $1.3 billion of the debt) continued until the final day of the six-day hearing (this being the longest sanction hearing for an RP to date); when sanctioning the plan, the court criticised the relevant creditor's conduct. The plan was also notable as the court deemed payments of £800,000 offered to two unsecured creditors to whom $2 billion was owed constituted a

3 *Re Listrac Midco Limited and others* [2023] EWHC 460 (Ch).

4 *Re CB&I UK Ltd* [2024] EWHC 398 (Ch).

5 *Re Hong Kong Airlines Ltd* [2022] EWHC 2975 (Ch).

6 *Re Consort Tameside (Healthcare) plc* [2024] EWHC 1438 (Ch).

7 *Re Cine-UK Ltd and others* [2024] EWHC 2475 (Ch).

8 *Re Virgin Active Holdings Ltd, Virgin Active Ltd and Virgin Active Health Clubs Ltd* [2021] EWHC 1246 (Ch).

9 *Re Chaptre Finance plc* [2024] EWHC 2908 (Ch).

	"compromise or arrangement" as required to sanction a plan.
Aggregate	The first amended plan to be sanctioned, taking account of lessons learned from the Adler judgment. The court initially refused to sanction the plan on the basis it did not have jurisdiction to do so in circumstances where creditors' rights would be compromised for zero consideration, nor did it have jurisdiction to amend the plan to take account of this defect. The court convened a further meeting of creditors to vote on an amended plan and disenfranchised the subordinated creditors on the basis they were deemed to be "out of the money".
Consort Healthcare[10]	The first PFI company to propose a plan and the first instance of an application for security for costs in the context of an RP. The court did make a security for costs order (being the first such order in the context of an RP). However, this case is fact-specific, and it remains to be seen how the court will treat any future instances of security for costs applications. A settlement was eventually reached between the parties, and the RP was therefore discontinued.
Thames Water[11]	The plan company is proposing, among other things, an injection of up to £3 billion of new money on a super senior basis to extend its liquidity until at least October 2025 (with the possibility to extend through to May 2026) to create a stable platform for a comprehensive restructuring. The new money is to be provided in up to three tranches (the latter two subject to satisfaction of certain conditions), and maturities of the Class A and Class B debt are also to be extended by two years.

[10] *Consort Healthcare (Tameside) Plc v Tameside and Glossop Integrated Care NHS Foundation Trust* [2024] EWHC 1702 (Ch).

[11] [2024] EWHC 3310 (Ch).

	The court has approved the convening of creditors meetings in January 2025. The sanction hearing is to be held over four days from 3 February 2025. However, the "Class B" ad-hoc group have opposed the proposed plan and intend to challenge on the basis of a competing RP. The "Class B" ad-hoc group propose a fully underwritten injection of £3 billion at a lower interest rate, arguing that the company's plan is unnecessarily expensive and grants those creditors participating in the super senior new money an effective veto right over a portion of the new money. This is the first instance of a group of opposing creditors filing a competing RP.

RPs as litigation

As RPs have become more commonplace, creditors have shown an increasing willingness to mount substantive and procedural challenges to them using a variety of techniques and angles of attack. Notably, we have seen creditors oppose plans on the basis of what they assert to be the correct relevant alternative for the court to consider, the value (or perceived lack thereof) attributed to the debt of certain creditor classes, and on the basis that they consider there to be a more favourable plan. While such matters are for the courts to determine, what is clear is the need for debtors to approach RPs with a litigation mindset.

Whilst "shouting from the spectators' seats" (*Smile Telecoms*[12]) has from an early stage not been an adequate response to express opposition to a plan, guidance from recent cases has confirmed that dissenting creditors should engage fully with the process and, when seeking to challenge a proposed RP, deal with the provision of expert evidence as it would be dealt with in ordinary civil litigation. Evidence should be compliant with Part 35 of the Civil Procedure Rules and, when seeking to challenge any expert evidence, the relevant witnesses should be cross-examined, without which the court will be unable to properly attribute weight to such challenge. *Chaptre Finance* confirmed this is the case regardless of the possible timing and costs constraints on affected parties, with the court noting its ability to award costs in favour of objecting parties, including pre-emptive security for costs awards (see *Tameside*[13]).

[12] *Re Smile Telecoms Holdings Ltd* [2022] EWHC 740 (Ch), Para [53].

[13] *Consort Healthcare (Tameside) Plc v Tameside and Glossop Integrated Care NHS Foundation Trust* [2024] EWHC 1702 (Ch).

While previous decisions had provided guidance regarding the court's expectation of timely and adequate disclosure (see, for example, *Virgin Active*[14]) and a fair timetable for dealing with the matter, the developments arising out of *Chaptre Finance* underline the importance of a party's case being fully presented and appropriately evidenced. The court in *Chaptre Finance* also emphasised the need for proper case management, including the early identification of points of dispute.[15]

Directors' duties

Directors in distress: Wrongful trading and misfeasance

Away from RPs and schemes, 2024 saw the joint liquidators (the "Liquidators") of the British Home Stores Group ("BHS") succeed with wrongful trading and misfeasance claims against the former directors under sections 212 and 214 of the Insolvency Act 1986 ("IA").[16]

Wrongful Trading

A successful claim required proof that (i) BHS had gone into insolvent liquidation, (ii) the respondents were directors of BHS at the time; and (iii) each director "*knew or ought to have concluded that there was no reasonable prospect that [BHS] would avoid going into insolvent liquidation*".[17]

In this case, the key consideration was the third limb (the "Knowledge Condition"), which the court deemed to have arisen on 8 September 2015 (the last of six proposed dates).

In determining this, the Court provided guidance on other considerations for wrongful trading claims:

1. directors can continue to trade should they *rationally* (emphasis added) conclude that there is "*light at the end of the tunnel*",[18] but any such "rationale" will not hold up if by continuing to trade, the directors fail to minimise the losses to creditors (adopting the modified section 172 Companies Act 2006 ("CA") "creditor duty" formulated in *Sequana*[19]);[20]

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14 [2021] EWHC 1246 (Ch).

15 [2024] EWHC 2908 (Ch), Para [77].

16 *Re BHS Group Ltd* [2024] EWHC 1417.

17 Insolvency Act 1986, s 214(2)(b).

18 [2024] EWHC 1417, Para [473(2)].

19 *BTI 2014 LLC v. Sequana SA and Others* (2022) UKSC 25.

20 [2024] EWHC 1417, Para [473(4)].

2. reliance on professional advice may provide an "*evidential basis*"[21] for defending a wrongful trading claim, but alone it is not enough to get the directors 'off the hook'; it is for the directors to decide whether the company has a reasonable prospect of avoiding insolvency; and

3. section 214 does not impose a time limit in which an insolvent liquidation has to occur following the satisfaction of the Knowledge Condition, but the time which passes will be taken into account.[22]

Misfeasance

The Liquidators' asserted that, in breach of their statutory duties, the former directors continued to trade when BHS ought to have entered administration (described as "trading misfeasance").

Applying *Sequana*, Leech J found that, from 26 June 2015 onwards, the directors owed a duty to the creditors which was breached by the failure to place the company into administration.

Key Takeaways

The judgment underlines the difficult balancing exercise directors must undertake when experiencing financial distress and the risks of not complying with statutory requirements.

Despite the significant overlap between wrongful trading and trading misfeasance, the trading misfeasance claim was deemed to arise prior to liability for wrongful trading. Insolvency practitioners may therefore see trading misfeasance as an easier route to pursue when seeking to recover compensation from former directors.

Revisiting Sequana: The "Creditor Duty"

As shown in the BHS case, two years on from the Supreme Court's ruling in *Sequana* (see our key takeaways here), the elusive "creditor duty" remains a hot topic. In *Hunt v Singh*,[23] the liquidator issued proceedings against the directors of a company for misfeasance, alleging a breach of the section 172 CA "creditor duty" for compensation payments made to the directors under a conditional share scheme (the "Scheme") despite HMRC scrutiny of such schemes.

The Court distinguished *Hunt v Singh* from *Sequana* on two key grounds: (i) the company's liability to HMRC was disputed (but not contingent); and (ii) there was no dispute that the company was insolvent during the period in which payments under the Scheme were made.

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[21] [2024] EWHC 1417, Para [906].

[22] [2024] EWHC 1417, Paras [475] – [477].

[23] *Hunt v Singh* [2023] EWHC 1784 (Ch).

As the company's solvency depended on its ability to successfully challenge its HMRC claim, the correct test in determining when the "creditor duty" arose was whether it "*knew or ought to have known that there was a real prospect in the challenge failing*".[24] Therefore, the "creditor duty" was engaged when the company received a claim from HMRC, as from this moment, the economic interest vested in the creditors rather than shareholders.[25]

Get your NED in the game: Lessons from Carillion

Looking further back, at the end of 2023, and on the eve of trial, the Insolvency Service (acting on behalf of the Secretary of State for Business and Trade) scrapped the disqualification proceedings against five of Carillion plc's former non-executive directors ("NEDs"). However, uncertainty remains as to the true scope and duties of the NED function.

The Insolvency Service had alleged that each NED had a strict legal duty to know the true financial position of the company at all times. Had it proceeded, the case would have been significant in defining the role of a NED and the scope of their duties under the CA. It remains unclear how this argument would have been received by the Court, but NEDs should not be quick to rejoice; they should remain diligent when performing their roles, especially given the growing pressure to codify corporate governance standards for NEDs.

Trends in European liability management transactions

Another development in 2024 has been the advent of aggressive liability management transactions ("LMTs") in Europe. LMTs have become an established feature of the US market, but the consensus has long been that they would not feature in the smaller, relationship-driven European market. However, the continued strain faced by a number of European credits in 2024 has invited stakeholders in the European market to genuinely consider, and in some cases make use of, the techniques developed in the US.

In March, Altice, the French telecoms company, utilised flexibility in its debt documents to designate key subsidiaries as "unrestricted" (and therefore outside the scope of the covenants in the debt documents). It then invited creditors to participate in a transaction requiring creditors involving a haircut to delever the group, failing which the creditors would be deprived of access to the proceeds of sale of assets sitting within the "unrestricted" part of the group. In using the flexibility in its debt documents to, instead of repaying debt obligations, extract value for its own benefit, the company has taken a much more aggressive approach to dealing with its creditors than the European market is used to.

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[24] [2024] EWHC 1417, Para [51].

[25] [2024] EWHC 1417, Paras [53] and [60].

At a similar time, the metal and glass packaging company, Ardagh, completed a *pari*-plus manoeuvre whereby Apollo agreed to provide €1 billion of new debt to an unrestricted subsidiary. The new debt was used to redeem the senior secured notes due April 2025 by way of on-lending to the issuer through the subscription to the new 2029 senior secured notes. This has structurally subordinated a portion of the existing debt, while Apollo reportedly has the option to purchase pre-existing junior bonds and exchange these for additional portions of the new debt (at the time of going to press, we understand this option has not been exercised). Apollo also benefits both from an indirect *pari passu* claim against the assets of the restricted group as a result of the intercompany on-lending to the issuer and from the security granted by the unrestricted subsidiary borrowing the new money, thus also comprising features of a double-dip transaction. It was also reported that Switzerland-based Oriflame Cosmetics, Dutch apparel company Hunkemöller and UK flooring supplier Victoria plc had either undertaken, or were considering, LMTs in 2024/early 2025.

Creditors have embraced cooperation agreements as a mechanism for dealing with LTMs. These seek to ensure that creditors mitigate the risk of non-*pro rata* or other "credit-negative" behaviour by preventing creditors from splintering into groups that risk acting in a way that favours a sub-set of a class of otherwise *pari passu* creditors. Whether these agreements violate stringent European anti-trust laws remains to be seen. Sponsors and their portfolio companies have argued that such agreements are collusive and abusive and/or constitute market abuse. Creditor-side parties refute this on the basis that such agreements are merely a form of protection against the abuse of permissive covenants in debt documentation. Ultimately, this is a developing area and will depend also on the express terms of the contract.

Whether LMTs continue to become a more recognised tool in the European market remains to be seen, but in the US, there is currently uncertainty as to their continued viability as a result of the *Serta*[26] ruling.

Sectoral trends

Looking ahead to the rest of 2025, we expect there might be a continuance of the increasing focus on the United Kingdom's privatised water industry and the higher education sector.

UK Water

Thames Water's difficulties have been particularly widely publicised. While Ofwat's final determinations released on 19 December 2024 in relation to PR 24 allowed price increases and expenditure allowances greater than those indicated in its earlier draft determinations, the backdrop to the pricing review was far less benign than in previous years, with the performance of the water

[26] *Excluded Lenders v. Serta Simmons Bedding, LLC In re Serta Simmons Bedding, LLC)*, Nos. 23-20181, 23-20450, 23-20363 (5th Cir. Dec. 31, 2024).

industry as a whole being heavily scrutinised and a number of companies – including Thames – receiving significant fines due to the discharge of untreated wastewater.

While it remains to be seen how the water companies will respond to the proposals (NB - the deadline for appealing is 18 February 2025), the final determinations still fell short of the amounts requested by the companies.

Thames Water's proposed RP, designed to introduce additional liquidity to allow the company to continue outside a formal insolvency proceeding, reached the convening stage with the creditors' meetings to be held in January 2025 and the sanction hearing listed for February 2025; it will be particularly interesting to see how the court will approach the issue of the competing RP.

More generally, the issues affecting Thames Water extend to the wider UK water sector, and we predict there will be other casualties, notwithstanding the price increases announced in December.

Higher Education

Higher education in the United Kingdom is also under financial pressure resulting from:

1. a reduction in the number of entrants, with the number of both domestic and international students falling, which might reduce income across the sector by as much as £3.4 billion compared against previous forecasts;[27] and

2. increased operational costs including staff salaries, burdensome defined benefit pension schemes, and greater national insurance contributions.

As a result, the Office for Students predicts that nearly half of all higher education providers in the United Kingdom could encounter liquidity issues and nearly three-quarters of providers could experience negative net cashflow.[28]

One way in which the government has tried to address the financial deterioration of the sector is to raise the fee cap for the first time since 2017 from £9,250 to £9,535 for domestic students. However, increased costs are expected to erode such increased income; notably, the changes to

[27] See Kevin Coates and Chris Petts, 'Universities: Navigating the financial challenges' (2024) <https://www.grantthornton.co.uk/insights/universities-navigating-the-financial-challenges/> accessed 10 January 2025.

[28] Office for Students, 'Financial sustainability of higher education providers in England: November 2024 update' (2024) <https://www.officeforstudents.org.uk/media/s32lw2vq/financial-sustainability-of-higher-education-providers-in-england-november-2024-update.pdf> accessed 13 January 2025.

employer national insurance contributions are expected to cost universities up to £430 million annually, according to the Office for Students.[29]

This, as with the water industry, is very much a sector to watch as we head into the new year.

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[29] Ibid 7.