
# "Make-whole" clauses under Ch 11 and Pt 26A restructuring plans

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While the Pt 26A restructuring plan has been in existence in English law for five-years, and daily expands its depth of case-law, we still often look across the Atlantic Ocean to the American Ch 11 restructuring fights to see issues not yet addressed on these shores. One such hot topic in the American sphere is the treatment of "make-whole" clauses and post-insolvency interest, and whether such matters can and should be considered within a restructuring plan.

## MAKE-WHOLE CLAUSES

As a brief reminder, a "make-whole" clause is a provision in a debt instrument to compensate a lender for loss of profit if a borrower repays the debt early. The reason for such a clause is that unless the debt instrument provides otherwise, a debt may only be repaid at maturity by periodic instalments of premium and interest payments, which by the end of the lending term will provide for the lender's profit by way of the total interest payments received. In contrast, early repayment removes some of the lender's expected profit, and for this reason might be barred contractually. To mitigate such a potential loss while allowing a borrower to repay a loan early, a "make-whole" clause will allow for early repayment but include a requirement for a certain level of interest/profit in favour of the lender, which is usually less than what would be expected over the course of the whole contract. Make-whole payments are typically calculated using one of two methods:

- A fixed percentage of the prepaid amount; or
- A yield maintenance formula designed to approximate the lender's damages resulting from the prepayment.

A related cousin to the "make-whole payment" is an "acceleration clause," which brings forward the future contractual liability upon a particular occurrence. Make-whole clauses might be triggered by any number of events, and are at the discretion of the contracting parties, some examples are: insolvency events, early repayment, acquisition of the borrower's shareholding, and so forth.

## THE AMERICAN CHAPTER 11 POSITION

The role played by "make-whole clauses within American restructurings under Ch 11 has been a hot-topic over the last 15 years, with varying results.

The guiding case in the US was the decision of the Court of Appeals for the Fifth Circuit in the matter of *Ultra Petroleum* in October 2022.[1] Ultra Petroleum was a petroleum group, which had issued unsecured notes worth around $1.5bn and borrowed a further c$1bn via a revolving facility. The unsecured notes contained a "make-whole" payment provision, which employed a yield maintenance formula, and which was triggered with immediate effect if the company petitioned for bankruptcy. In April 2016, the group petitioned under Ch 11 for a reorganisation, which ultimately resulted in a proposed plan that would pay all creditors their principal debts (due to the rise in oil prices during the Ch 11 period), but which did not provide for payment of the "make-whole amount of around $390m. The creditors objected to the plan on the basis that the failure to pay the "make-whole" clause monies was unlawful.

In its decision, the court held that the "make-whole" clause was not applicable due to s 502(b)(2) of the US Bankruptcy Code, which prevents claiming "unmatured interest". As the purpose of a "make-whole clause" was to compensate a lender for future interest, then the court considered it fell within the ambit of "unmatured interest". The court noted that the bar on recovery by creditors of interest accruing after a bankruptcy filing predates the enactment of the US Bankruptcy Code and is derived from a fundamental principle of English bankruptcy law, which is itself the basis of the US system. However, the matter did not end at that stage, as the court once again applied historical English law principles of exceptions to the unmatured interest rule. One of those was the "solvent debtor" exception, which provided that interest would continue to accrue on a debt after a bankruptcy filing if the creditor's contract expressly provided for it, and would be payable if the bankruptcy estate contained sufficient assets to do so after satisfying other debts – in essence, if it was a fully solvent insolvency then post-petition interest must be paid.

More recently, on 10 September 2024, the US Court of Appeals for the Third-Circuit considered a similar question in the matter of the Ch 11 bankruptcy of the Hertz rental company.[2] In May 2020, Hertz filed under Ch 11, but as with Ultra Petroleum it saw a financial boon so that its bankruptcy became solvent. Pursuant to the enacted plan, Hertz paid all its creditors in cash in full, and in respect to unsecured bondholders, who had the benefit of "make-whole" clauses, it included provision for post-petition interest at the federal interest rate (which was less than the contractual make-whole rate equivalent to c.$270m). The plan also included a payment to shareholders of $1bn. In July 2021, the bondholders disputed the lower rate of interest and contended that Hertz should pay at the contract rate included in the "make-whole" clause.

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[1] *Ultra Petroleum Corp. v Ad Hoc Comm. of OpCo Unsecured Creditors (In re Ultra Petroleum Corp.)*, 51 F.4th 138 (5th Cir. 2022).
[2] *In re Hertz Corp.*, 117 F.4th 109 (3d Cir. 2024).

The Third-Circuit held that as Hertz was a solvent debtor under its plan, then while the "make-whole" clauses would ordinarily be disallowed as claims for unmatured interest, Hertz was obligated to pay the contractual sums before making any payment to shareholders pursuant to s 1129 US Bankruptcy Code (the absolute priority rule that for a plan to be "fair and equitable" a debtor must pay its creditors in full before equity holders). Ultimately, the court considered the US Bankruptcy Code from a "holistic" perspective which "disfavours nonconsensual distributions to equity over creditors".

## THE CURRENT ENGLISH POSITION OF MAKE-WHOLE PAYMENTS AND POST-PETITION INTEREST

As noted in the *Ultra Petroleum* decision, the historical roots for the treatment of post-petition interest reach back into the hallowed antiquity of English law. William Blackstone in his mid-18th century Commentaries noted, in the case of commissions of bankruptcy for traders that:

"*Though the usual rule is, that all interest on debts carrying interest shall cease from the time of issuing the commission, yet, in case of a surplus left after payment of every debt, such interest shall again revive, and be chargeable on the bankrupt*."[3]

Primary and secondary legislation has provided further guidance in English law:

- Section 189 Insolvency Act 1986 states that in a winding-up any surplus after payment of proved debts must be applied to post-insolvency interest. At s 189(3), it further states that all such interest ranks equally despite the ranking of the underlying debts being of different status, ie post-insolvency interest on secured debts and unsecured debts must Primary and secondary legislation has provided further guidance in English law:
- Section 189 Insolvency Act 1986 states that in a winding-up any surplus after payment of proved debts must be applied to post-insolvency interest. At s 189(3), it further states that all such interest ranks equally despite the ranking of the underlying debts being of different status, ie post-insolvency interest on secured debts and unsecured debts must be paid pari passu. The rate of interest is the higher of the judgment rate (8%) or the contractual rate.
- The Insolvency Rules 2016 at r 14.23(1) mirror s 189 when addressing the issue of provable debts and interest, and stipulate that only interest preceding the "relevant date" of an insolvency is provable.
- In the case of administrations, which are not covered by s 189, but fall within r 14.23(7), any surplus following payment of provable debts must be applied to post-insolvency interest in a *pari passu* fashion, and the rate of post-insolvency interest is the greater of either the statutory rate of 8% or the contractual rate (again, mirroring s 189).

[3] Applying *Bromley v Goodere* (1743) 26 Eng. Rep. 49, 52; 1 Atk. 75, 80 ("*Supposing there should be a surplus, it would be absurd to say the creditors should not have interest*"), and *Ex parte Rooke* (1753) 26 Eng. Rep. 156, 157; 1 Atk. 244, 245.

English case-law on “make-whole” clauses, and the way in which the sums due under such clauses will be treated in an insolvency or restructuring, is relatively sparse, but it seems likely that, in line with the American authorities, where a “make-whole” clause is triggered by an insolvency event such as presentation of a petition or entry into administration, then any resulting sums would likely be considered post-insolvency interest using similar logic to that of *Ultra Petroleum* and *Hertz*. The situation would likely be different where the “make-whole clause” is triggered by a preceding event other than insolvency, such as an acceleration clause for default or acquisition of shareholding. While some have postulated that there is a potential penalty clause defence against a “make-whole” clause under English law, we concur with earlier thoughts in this journal that such an argument would likely receive short shrift from an English court.[4] Assuming no defence against the “make-whole” clause could be found, then any “make-whole” sums arising in an insolvency event would be bound by the statutory regime of the 1986 Act and 2016 Rules and be payable out of any surplus in advance of shareholders, but unlike under the American system, the rate of interest is explicitly set out as the higher of the judgment rate of 8% or the contractual rate.

## THE POTENTIAL IMPACT ON RESTRUCTURING PLANS

“Make-whole” clauses potentially raise interesting issues within English Pt 26A Restructuring Plans either at the convening or sanctioning stages, although they have not yet been addressed in any judgment in significant detail.

In *Re Lake Distillery Co PLC* [2024] BCC 1322, Hildyard J considered a proposed scheme of arrangement and an issue of class composition and voting arising from “make-whole” clauses in convertible loan notes held by certain director/shareholders of the company. The company had run into financial difficulties, and to avoid an initial takeover bid it had sought short term financing from director/shareholders by issuing convertible loan notes that included a provision for a “make-whole” sum of 100% in the event of “change of control” of the company. A subsequent takeover purchase was agreed, the mechanics of which were to be done via a scheme of arrangement, and a single class of shareholders was summoned to vote on the scheme. The notice convening the meeting was accompanied by an explanatory statement but did not adequately set out the convertible loan note position of the director/shareholders. On 10 May, the scheme was approved by 91.02% by value and 83.43% by number. The court subsequently had to consider whether:

i. the “make-whole” clauses were triggered;
ii. whether the single class of shareholders was fractured by the convertible loan notes and their “make-whole” clauses;
iii. whether the notice to shareholders was sufficient; and
iv. whether a further set of meetings were required.

[4] Sheehan, James ‘*Make-whole payments in English financial law: an insolvency perspective*’ (2019) 6 JIBFL 374.

On 20 June 2024, the court held that in respect to each point:

i. the "make-whole" clauses were triggered by a change of control brought about by the scheme;
ii. that while the rights under the "make-whole" clauses gave the director/ shareholders a different perspective to other shareholders, the lack of any realistic alternative to the takeover rendered it possible for one class of shareholders to consider the matter together (it might have been different had there been a real alternative);
iii. the notice to shareholders was not sufficiently clear regarding the "make-whole" interest of the director/ shareholders; but
iv. in the actual circumstances of the company and its financial straits, nothing of value would be achieved by adjourning the sanctioning for further meetings of shareholders.

The judge stressed that his sanctioning despite the inadequacy of notice of the "make-whole" clauses was exceptional and a result of the particular facts of the scheme, and that the usual course in future failures to give adequate notice would be refusal of sanction.

In *Re Thames Water Utilities Holdings Limited* [2025] EWHC 338 (Ch), the learnings from Re Lake Distillery appear to have been put to practice, and the Class A creditors were split into two voting classes: those with Class A Debt and "make-whole" amounts, and those with the balance of the Class A Debt. The proposed plan included the incorporation of a new subsidiary that would issue bonds totalling £1.5bn (the liquidity runway) that would be guaranteed by the existing companies. These proposed bonds would include "make-whole" clauses concerning pre-payments, such as the anticipated recapitalisation transaction of a second restructuring plan which would result in a "make-whole" payment of £156m, and an acceleration for events of default. Finally, while it was not explored in great detail in the judgment at first instance, one of the arguments against the rival "B" plan which was raised in oral arguments and accepted by the judge was that the "make-whole" payments totalling £740m under the existing Class A make-whole sums would be payable in a special administration (the relevant alternative) but not in the "B" plan, which thus failed the no worse off test of the relevant alternative. It is not clear the reasoning behind this, and whether the Class A "make-whole" sums would be triggered only on insolvency, ie the special administration (in which case they would likely not be provable debts as per the Ch 11 examples), or whether they would be triggered by a different event preceding Insolvency.

While we are still in the early days of restructuring plans, and no plan has directly addressed the issue of "make-whole" clauses to the same extent that the American authorities have, there are some practical principles that can be derived from the above.

- Where creditors/shareholders within a particular class are split by a "make-whole" clause, then that split should be reflected in the class composition unless there is no chance of the clause being triggered or paid out. Notice of the purpose of this split must be explicitly set out in the documents preceding the voting meetings (as per Lakes Distillery), or there might be significant issues at sanctioning.

- The specific wording of the "make-whole" clause must be examined to consider whether it will be, or has been, triggered by the particular actions of the restructuring plan, and if so, whether a similar trigger would be engaged in the relevant alternative, eg liquidation or administration. This also might play a role where rival plans are proposed (as with Thames Water).
- While there is no English authority, fights over sanctioning of restructuring plans are a likely source of future authority on the issue of whether "make-whole" sums constitute post-insolvency interest within an English insolvency or otherwise. As always, specific examination of the clause itself and its triggers will be essential as the foundational work in this respect.
- Finally, it is always gratifying to see the circle completed: ancient English bankruptcy law, which gives rise to American bankruptcy principles that continued to be applied in restructurings, and English restructuring plans which might follow in-turn their American cousins.

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