

# A first of many? PFI company seeks Restructuring Plan

25 June 2024

A first in the UK – a restructuring plan under Part 26A to the Companies Act 2006 (Restructuring Plan) has been proposed by a project company in a private finance initiative (PFI) project after a convening hearing was held in the High Court in late May.

The Restructuring Plan seeks to compromise both current and future liabilities arising from a PFI project agreement with an NHS Trust. The hearing to sanction the plan will now be held in July.

If the applicant company is successful, this could create a new pathway in the world of PFI projects, where disputes and deadlocks have become common place.

This is set against a backdrop where PFI disputes have been predicted to soar over the next few years. In an interview with the Financial Times, Lord Hutton (chair of the Association of Infrastructure Investors in Public Private Partnerships), has indicated “red lights flashing” over 150 or so PFI contracts that will come to an end in the next parliament, making this a very real and very present issue.

## Background to the current proposal

Tameside and Glossop Integrated Care NHS Foundation Trust (the Trust) and Consort Healthcare (Tameside) Plc (Consort) are the parties to a PFI concession contract (the Project Agreement) to construct, maintain and manage hospital facilities/buildings in Tameside.

Consort and the Trust had been in dispute for a number of years regarding issues under the Project Agreement. Those disputes led to the Trust successfully arguing in adjudication proceedings that Consort had breached the terms of the Project Agreement as a result of various construction flaws, including fire safety defects.

As a result of the finding in the Trust's favour, Consort owe an adjudication debt of c.£9m to the Trust. Subsequent to the award, the Trust has since asserted that it is also entitled to make deductions of c.£20m from amounts due under the Project Agreement for the period from 1 January 2022 to 31 October 2022, which Consort dispute.

Consort has said that it had been seeking to achieve a commercial settlement with the Trust for a number of years but does not now believe that it is possible to achieve a consensual settlement with the Trust, on terms that are capable of acceptance by both parties.

Consort is now expected to become cash-flow insolvent by mid-July, such that without the implementation of the Restructuring Plan the likely result is Consort entering into administration.

## What is a Restructuring Plan, and why is this one significant?

A ‘Restructuring Plan’ is a relatively new form of restructuring procedure (introduced in 2020), which has some hallmarks of existing processes such as Scheme of Arrangements and Creditors Voluntary Arrangements (CVAs). It differs in the amount of flexibility the court has to ‘cram-down’ dissenting creditors where members of a dissenting class would not be worse off than under a relevant alternative. Additionally, the company proposing the Restructuring Plan does not need to be insolvent. In practice companies are proposing Restructuring Plans in order to avoid becoming insolvent.

We have seen Restructuring Plans in the [leisure and hospitality industry](#), for companies such as Fitness First and Prezzo, and other Restructuring Plans have seen the court consider the cram down of HMRC as a creditor. The Consort Restructuring Plan is the first Restructuring Plan that seeks to compromise liabilities owed to the NHS. It seeks to deal with all of the current liabilities under the Project Agreement as well as the future liabilities. Given that there are 17 years of the term remaining and the extent of the adjudication debt, it would mean a multi-million-pound compromise in the amounts owed to the Trust. The Restructuring Plan is also significant as we have not yet seen one that seeks to compromise future liabilities over that length of time.

## What will happen if Consort's Restructuring Plan is successful?

The precise details of the proposal are set out in [the public announcement it made to the London Stock Exchange](#):

Some provisions included that may be of particular interest include:

- The current and existing liabilities being compromised, and in return, the Trust will receive a settlement sum by way of sculpted reduction to the monthly service payments due to be paid to Consort by the Trust under the Project Agreement for the remainder of the project term. The settlement sum is understood to equate to between 75%-85% of the mid-point of what Consort and Trust believe the future liabilities could be.
- Certain rectification works in respect of a number of works packages, including (1) lift shafts, (2) passive fire protection, (3) fire doors, (4) smoke detectors, (5) cavity barriers, (6) render and (7) grounds and gardens will be carried out by Consort.
- Provisions shall be included in the Project Agreement in respect of a 'Centre of Best Practice' survey being undertaken by the Trust.
- Consort will be released from its obligation to reserve for certain risks in respect of a future change in law and the balance of its existing change in law reserve account shall be released to the Trust in exchange for such future risks being retained by the Trust.

As a part of the proposals, the Trust is being afforded the opportunity to terminate the Project Agreement within 30 days of the Restructuring Plan taking effect. The Restructuring Plan is also understood to allow for termination, should the implementation of the Restructuring Plan cause a potential challenge under the Public Procurement Rules.

However, termination by the Trust would trigger compensation payments under the Project Agreement from the Trust to Consort (sums believed to be over £80m). Whilst the Trust could offset the adjudication award owed, it is unlikely to be an attractive option given the potential exposure and value.

## What is likely to happen, and what might it mean for the future of PFI disputes?

The convening hearing has set three meetings, one with the Trust, one with Consort's financial guarantor and controlling creditor; and finally, Consort's loan stock subordinated creditors. With administration looking likely without implementation of the Restructuring Plan, and the costly nature of Restructuring Plans, it is assumed that the financial creditors will be on board and supportive of Consort's plan.

We expect that the Trust will mount a challenge against Consort's Plan given (1) the vast compromises it is being expected to make; (2) the length of time that the Project Agreement still has to run; and (3) the compromises of certain future liabilities that are arguably unclear, and we suspect this will likely form the basis of some of the Trust's arguments.

How the courts will ultimately treat the NHS will also be interesting to see. The courts have treated HMRC as a special interest creditor in recent Restructuring Plans, but HMRC does enjoy a preferential status as a creditor on insolvency for PAYE, VAT and certain other taxes. Therefore, how the NHS is treated as a public sector creditor, and whether they will enjoy any elevated or special treatment remains to be seen.

In the event that the Consort Restructuring Plan is sanctioned, it could be a significant development in both Restructuring Plan case law and PFI disputes. As [PFIs are nearing their expiry](#), contracting authorities will undoubtedly be seeking to enforce contractual performance in order to ensure that the assets are handed back in accordance with the requirements set out in the project agreement. There is always

a risk that enforcing that performance could trigger contractor insolvency. Only time will tell whether the Consort Plan will be sanctioned, and if so whether Restructuring Plans may become more common in PFIs.

If you have any queries about this article, PFI disputes or insolvency related issues, then please contact us.

## Contact

Chloe Poskitt

Legal Director

[chloe.poskitt@brownejacobson.com](mailto:chloe.poskitt@brownejacobson.com)

+44 (0)115 934 2058

Joe Price

Senior Associate

[Joe.Price@brownejacobson.com](mailto:Joe.Price@brownejacobson.com)

+44 (0)330 045 2864

---

## Related expertise

PFI disputes

Public contracts, projects and funding

Public law

Public private partnerships (PPP) and PFI

Public procurement

Restructuring and insolvency