CR-2025-001156

Neutral Citation Number: [2025] EWHC 2129 (Ch)

Case No: CR-2025-001156

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INSOLVENCY AND COMPANIES LIST (CH D)

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 15/08/2025

Before:

MR JUSTICE RICHARD SMITH

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IN THE MATTER OF
MADAGASCAR OIL LIMITED

AND

IN THE MATTER OF PART 26A OF
THE COMPANIES ACT 2006

- -
- -

Mark Phillips KC, Matthew Abraham and **Rabin Kok** (instructed by **Shoosmiths LLP**) for the **Plan Company**
Matthew Weaver KC and **Katie Longstaff** (instructed by **Trowers & Hamlins LLP**) for **Outrider Master Fund LP** as **creditor of the Plan Company**

Hearing dates: 27 and 30 June 2025

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Approved Judgment

This judgment was handed down remotely at 10.30am on 15 August 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MR JUSTICE RICHARD SMITH

Mr Justice Richard Smith:

Introduction

1. This judgment follows the trial and sanction hearing (**Sanction Hearing**) of the Claimant's Part 8 claim for orders pursuant to s.901F in Part 26A of the Companies Act 2006 (**Act**) sanctioning the terms of a proposed restructuring plan (**Plan**).

2. The Claimant, Madagascar Oil Limited (**MOL**), is registered in Mauritius as an "Authorised Company". It is the 99.8% shareholder of Madagascar Oil S.A. (**MOSA**). MOL's principal assets comprise its shares in MOSA and the amounts due to it from MOSA under certain intercompany loans.

3. MOL's immediate parent company is BMK Resources Ltd (**BMK**), a Cayman Islands incorporated company. BMK owns 100% of the shares in MOL. BMK also owns the remaining 0.2% of shares in MOSA. MOL is therefore the intermediate holding company in this group of companies (**Group**).

4. MOSA is the trading entity within the Group. It is a Madagascar registered and headquartered company. In 2004, MOSA entered into a Production Sharing Agreement (**PSA**) with Office des Mines Nationales et des Industries Stratégiques, the Madagascan Government's natural resources agency (**OMNIS**), to explore and develop a large onshore oilfield at Block 3104, Tsimiroro, Madagascar (**Oilfield**).

5. US Holdings Limited (**USH**), a Bermudian company (formerly owned as to 82.6% by BMK) once stood in BMK's position in the former Group. BMK now occupies that position following sanction on 2 April 2024 by the Bermudian court of BMK's purchase of MOL's shares.

6. During the period of its former tenure, USH entered into a Facility Agreement originally dated 29 September 2015, successively amended until its final amendment and restatement on 7 September 2021 (**Facility**). The only remaining debt investors in the former Group by that stage were BMK and Outrider Master Fund LP (**Outrider**), a Cayman Islands company, now in voluntary liquidation.

7. The Facility had been guaranteed by MOL and MOSA up to the sum of US$80m under an Amended and Restated Guarantee, also dated 7 September 2021 in its latest iteration, in favour of Outrider and BMK (**Guarantee**).

8. The stated purpose of the Plan is, in broad terms, to restructure the indebtedness of MOL and MOSA under the Guarantee and on an intercompany basis and to enable the injection of funds to restart production at the Oilfield which has not produced oil since 2016. The Plan creditors are BMK and Outrider.

9. The Practice Statement Letter for the Plan was circulated to BMK and Outrider on 20 February 2025.

10. On 2 April 2025, the convening hearing took place before Mellor J who convened separate meetings of two classes of creditors, one comprising BMK alone, the other Outrider alone. Mellor J also ordered grounds of objection to be filed and listed a case

management conference to determine those grounds which would be permitted to be taken (**CMC**).

11. Plan meeting notices were sent to BMK and Outrider on 4 April 2025.

12. At the CMC on 2 May 2025, Meade J limited the eight grounds of objection advanced by Outrider to those concerning:-

(i) international effectiveness (**Ground 2**);

(ii) the relevant alternative to the Plan (**RA**) (**Ground 5**);

(iii) derivative of Ground 5, BMK not being an 'in the money' creditor such that there was no jurisdiction to 'cram down' Outrider's debts (**Ground 6**); and

(iv) unfairness of the Plan (**Ground 8**).

13. At the Sanction Hearing, MOL was particularly critical of Outrider's suggested change of position with respect to Ground 5 to assert a different RA to that pleaded. In the context of the RA, and other aspects argued before me, what Meade J said at the CMC concerning the importance of the Grounds (at [22]) is significant:-

> "As I said already, I regard the Grounds as having been a crucial document in the management of the determination of whether to sanction this plan. I think it would be quite wrong to allow Outrider to amplify the Grounds in this ad-hoc way in the course of Counsel's submissions."

14. Meade J's CMC Order also specifically provides (at [2]) that:-

> "Outrider must apply for permission from the Court if it intends to rely on further grounds of objection or amend the Approved Grounds also specifically ordered."

15. It is clear that Meade J was concerned to ensure that the issues to be argued at the Sanction Hearing were identified in advance and that the parties should take a proportionate approach to their resolution, not least in terms of expert evidence, the scope of which was also debated before him. I agree that such an approach was important in this case. Although aggregate Group debt runs into the hundreds of millions of dollars, the surplus cashflows from the operation of the Oilfield projected by BMK over the next 12 years (assuming sanction) are only US$8.74m in aggregate.

16. The Plan meeting of the BMK creditor class was held on 7 May 2025, with BMK voting in favour. The Outrider creditor class meeting took place later the same day, with Outrider voting against.

17. The Chairperson's report was filed on 9 May 2025.

18. I oversaw the pre-trial review on 19 June 2025.

19. I also oversaw the Sanction Hearing on 27 and 30 June 2025.

20. In addition to reading the skeleton arguments, witness statements and experts' reports, I heard oral evidence from the six witnesses mentioned below, followed immediately by oral closing argument. Although a compressed timetable, I am satisfied that the parties had a fair opportunity to present their respective cases.

21. Following the hearing, I also received brief written submissions in letter form from both Plan creditors concerning the Court of Appeal judgment in *Saipem SPA (and others) v Petrofac Limited* [2025] EWCA Civ 821 handed down on 1 July 2025. I have had regard to these as well as the parties' more detailed written and oral submissions made at and prior to the Sanction Hearing.

22. Finally, I express my gratitude to the party representatives for equipping me well for the conduct of the Sanction Hearing and for their effective written and oral submissions, not least those of junior counsel, Mr Abraham and Ms Longstaff, who undertook important aspects of the hearing advocacy effectively.

The witnesses

23. Although there were a number of witnesses, it is fair to say that the cross-examination was targeted and generally brief. Again, I am grateful to the advocates for their focused approach. I now set out my brief observations on those witnesses.

24. Mr Duncan Reynolds is MOL's manager of strategy and corporate finance and BMK's MD for oil and gas. He was an impressive witness whose explanation of the business plan underlying the Plan (**BP**) showed considerable insight into, and knowledge of, the oil production industry.

25. Mr Neil Mitchell is a director of MOL. He was a straightforward witness. As he fairly accepted, he had limited knowledge of the detail of, or rationale for, the Plan or the BP, for which purpose, he relied on the advice of others, not least Mr Reynolds.

26. Mr Njoo Kok Kiong (**Mr Njoo**) is BMK's Group CEO. He was a confident but fair witness. His oral testimony revealed certain limited matters which, although conveyed effectively, ought properly to have featured in his written evidence.

27. Mr Stephen Hope is Managing Member of Outrider Management LLC, Outrider's Managing Partner. He was a poor and at times evasive witness, including his detachment from Outrider's own case on the RA and, relatedly, Outrider's own proposal for acquiring MOSA's shares and financing the development of the Oilfield.

28. Mr Andrew Charters is a restructuring partner at Grant Thornton UK LLP. He is an experienced insolvency professional who conveyed in his evidence his opinion on the RA in a fair and measured way. I am satisfied that he understood his expert duties.

29. Mr Lakshan Saldin is a technical director for oil and gas at Hanscomb Intercontinental Ltd. He was cross-examined briefly, principally about a working capital analysis prepared for Outrider and LVIL in connection with the Oilfield, as well as his own views on the risks and adequacy of information in support of the BP. He too was a fair and measured witness who understood his duties.

30. Mr Iqbal Rajahbalee is an experienced Mauritian barrister. At times, he ex temporised about matters said to have been "in his mind" but which did not feature in his report. Outrider emphasised the assistance he had received in preparing his report, questioning whether this was his own. However, Mr Rajahbalee satisfactorily addressed the position in oral evidence. The criticism of his approach to the factual assumptions underlying parts of his evidence was also somewhat wide of the mark.

31. Mr Yudish Lutchmenarraido too is an experienced Mauritian barrister. Although he clearly wished to assist the Court on Mauritian law, he seemed to struggle to understand his role as an expert witness, his legal opinion sometimes becoming entangled with the factual analysis, making it difficult for the Court properly to evaluate what was his independent expert legal evidence as opposed to his own factual assessment.

32. The Court was assisted on relevant issues of Malagasy law by the written evidence of Maître Edouard Tricaud (instructed by MOL) and Mr Lalaina Chuk Hen Shun (instructed by Outrider) in the form of their respective reports and the joint statement. In light of the significant common ground, the parties had agreed at the pre-trial review that these aspects could be addressed at the Sanction Hearing by way submission and that their oral evidence was not required.

33. Although the Sanction Hearing was conducted courteously and efficiently, it is fair to say that there is quite some acrimony between the parties. MOL says that Outrider is acting as a 'ransom creditor', seeking to extract for itself a 'ransom' payment from BMK at the risk of causing MOL to enter liquidation. Outrider, in turn, says that the Plan entails no more than a wiping clean of both MOL's and MOSA's debt to Outrider, using the Part 26A mechanism to try and avoid both companies having to restructure their debts in their home jurisdictions through a formal insolvency process.

34. I now explain in a little more detail some of the relevant background leading to the current position of rancour.

Production Sharing Agreement

35. On 29 April 2004, OMNIS and MOSA concluded the PSA granting MOSA the exclusive right to undertake oil and gas operations in the Oilfield for a period of 25 years from 2015 (when OMNIS approved the development plan) until May 2040. After 2040, the PSA can be extended five times for a period of five years on each occasion, subject to the management committee comprised of OMNIS and MOL representatives considering commercial production from the Oilfield still to be possible. As such, the 'longstop' date for the PSA term is May 2065 (Articles 4.6 and 4.8).

36. The PSA contains various obligations on the part of MOSA, not least technical services for exploration, development and exploitation operations and financial services, including the financial contribution required to execute MOSA's obligations (Article 2.3).

37. MOSA is also required to contribute to the supply of petroleum to the local Malagasy market (Article 26).

38. The PSA can be assigned to an "Affiliated Company", subject to demonstration of fulfilment of financial and technical capacities and notification to OMNIS. Assignment

can also be made to non-affiliated companies, subject to OMNIS consent, evidence of assignee financial and technical capacities and provision of a replacement bank guarantee (Article 37.1-37.3).

39. Also of potential relevance here, particularly given the lack of commercial production at the Oilfield since 2016 and Outrider's pleaded RA (involving the proposed liquidation of MOSA), are the termination provisions of the PSA. OMNIS' termination right is triggered by, amongst other things, MOSA's non-fulfilment of its financial obligations (Article 42.1). In addition, the non-observance of the contractual provisions of the PSA affords the non-defaulting party the right to terminate for non-remedy within four months or, if the compensation offered by the defaulting party is not accepted, subject to the invocation of an arbitration process (Article 42.3). Termination of the PSA by OMNIS causes MOSA to lose all its rights and interest therein (Article 42.4).

The Oilfield

40. MOL's main asset is its shares in MOSA. The benefit of the PSA is MOSA's main asset. The Oilfield is "thermal heavy", meaning that the oil it contains is of such viscosity that the introduction of thermal energy is required to facilitate extraction, giving rise to additional cost and complexity, said to make the securing of investment for the Oilfield considerably more difficult. Mr Reynolds explains in his evidence the challenging features of the Oilfield, how this makes it difficult to explore and why only specialist investors such as BMK are able and willing to commit the necessary investment.

41. The inability to secure capital is also said to explain why only 260,000 barrels have ever been produced from the Oilfield during a test production and development phase between 2013 and 2016. Of those, MOSA's own operations have consumed 111,000 barrels, leaving 150,000 for sale. More than 70,000 barrels have been sold between 2022 and 2024, yielding US$8.5m, but that is now said to be insufficient to cover MOSA's overheads, leading to BMK funding MOSA by *ad hoc* loan, increasing the intercompany loans discussed below.

Prior financing

42. MOL says that the difficulties of securing appropriate investment for the Oilfield is borne out by the financing efforts of the former Group. According to Mr Reynolds, the former Group's first capital raising effort was led by Jefferies in 2015 when some potential external investors expressed interest and undertook due diligence but no executable investment offers were made.

43. On 29 June 2015, BMK, SEP, JPD and Outrider entered into the original Facility Agreement.

44. USH was listed on the Alternative Investment Market of the London Stock Exchange until 2016. Its principal shareholders were BMK, Outrider, the John Paul Dejoria Family Trust (**JPD**) and the SEP African Ventures Trust (**SEP**). By the time of AIM de-listing in 2016, those investors held 90.5% of USH's shares. With SEP exiting its equity position in April 2016, BMK held 82.6% of the shares, JPD the remaining 17.4%.

45. SEP exited the Facility in 2017.

46. Mr Reynolds describes further external capital raising efforts in 2021, led by Stellar Group, with all 16 parties approached said not to be interested in investing in the Oilfield.

47. On 20 August 2021, Outrider presented a winding up petition against USH in Bermuda. This was withdrawn following negotiations leading to the twelfth and final restatement of the Facility Agreement dated 7 September 2021, with JPD exiting by conversion of its loan to equity, leaving BMK and Outrider as the only debt investors.

48. Later that year, USH sought a new adviser to lead a capital raising round but this proved difficult, with 13 banks and finance houses apparently declining the mandate before Carlingford came on board. According to Mr Reynolds, only nine potential investors out of the nearly 300 approached signed NDAs to access the data room, with only one potential investor remaining by July 2022. That investor, an oil trading division of an international oil company, did not wish to invest in debt or equity rather than buy some of MOSA's oil and invest in part of its distribution infrastructure.

49. Although Mr Hope takes issue with MOL's characterisation of these capital raising efforts, including their focus on investment in the former Group controlled by BMK rather than in the Oilfield, I am satisfied that the difficulties encountered do reflect the challenging investment proposition presented by the latter.

The Guarantee

50. As noted, the Facility Agreement is supported by the Guarantee. This is a first demand guarantee, last restated on 7 September 2021, the parties thereto being MOL, MOSA, BMK and Outrider. The Guarantee is governed by English law (Clause 15).

51. Clause 2.3 provides that "the guarantee for the payment of sums due under the [Facility] Agreement will be up to a maximum amount of US$80,000,000." MOL says that this provision is an effective limit on the guarantor's liability and, therefore, on the sum that can be recovered in the insolvency of the guarantor even though the creditor might be able to prove for the entire debt. Moreover, being a guarantee of "sums due under the [Facility] Agreement" up to US$80m, MOL says that, on a normal strict interpretation of a guarantee in favour of the guarantor in the event of an ambiguity in its wording, the limit of liability provided for by clause 2.3 is properly construed as an aggregate limit on the amounts recoverable by both Outrider and BMK under the Guarantee.

52. As such, MOL says that Mr Hope is wrong to suggest that the basis on which Outrider's Plan consideration has been calculated is unfair because the interest accruing on the Facility Agreement would increase Outrider's pre-Plan claims above US$71.3m. If anything, the calculations of the Plan consideration are likely to be more favourable to Outrider than the position at law, Outrider's present claims under the Guarantee amounting to approximately US$71.3m compared to BMK's present claims of US$13.4m, exceeding the US$80m cap in aggregate, but the Plan calculations ignoring the effect of the limit in Clause 2.3. However, even if that limit did operate in favour of each lender individually, MOL says that the cap still means that Outrider's claims cannot rise significantly above the US$71.3m figure used to calculate the Plan consideration.

BMK's purchase of the MOL shares

53. Despite withdrawing its 2021 winding-up petition against USL, Outrider served a statutory demand against USH on 2 September 2022. Outrider issued letters of demand against MOL and MOSA on 6 September 2022, seeking payment under the Guarantee, albeit no statutory demand or petition was presented then. Outrider presented a winding-up petition against USH on 29 September 2022 for the (then) unpaid sum of US$45m under the Facility Agreement.

54. On 27 March 2023, USH was placed into provisional liquidation in Bermuda. Mr Michael Morris and Mr Charles Thresh of Teneo (Bermuda) Limited were appointed as Joint Provisional Liquidators of USH (**JPLs**). Following their appointment, the JPLs began approaching potential investors to realise USH's assets, principally comprising its shares in MOSA and MOL and the intercompany facilities as between USH and MOL and USH and MOSA (**Intercompany Loans**). Mr Reynolds describes the marketing process undertaken from 2 to 12 May 2023, with eight potential investors taking part in the open bidding process, five of them making bids for the assets of the former Group.

55. At the beginning of the marketing process, the JPLs' fees as well as MOSA's operational costs were funded by Outrider and, from 2 October 2023, by BMK. Outrider sought to participate in the marketing process with an entity called Al-Braik Investments LLC (**ABI**).

56. In the event, the JPLs agreed to sell to BMK USH's remaining shares in MOL and MOSA, and the Intercompany Loans for a final sale price of approximately US$2.04m, including JPL's fees of approximately US$1.8m, US$230,000 in costs and expenses and US$300,000, representing Outrider's costs as petitioner.

57. The JPLs and BMK concluded an Asset Purchase Agreement on 21 December 2023 (**APA**), conditional upon an order for sanction from the Supreme Court of Bermuda (clause 2.2(a)). Clauses 3.2(b) and 3.3 of the APA also contained provision for Outrider to agree to release MOL and MOSA from the Outrider Guarantee in return for payment of 'Contingent Consideration' (as defined in the APA). Outrider did not agree this.

58. The JPLs applied to the Supreme Court for sanction on 22 December 2023. Outrider opposed sanction. The application was heard in February 2024 before Subair Williams J. Judgment was handed down on 2 April 2024 (*Re US Holdings Ltd* [2024] SC (Bda) 11 Civ).

59. One of Outrider's main grounds of opposition was that the sale was "anything but lucrative and yields no return for which payment could be secured to satisfy the debts of any class of unsecured creditor". The Bermudian Court recognised that the price payable by BMK comprised essentially the costs, fees and expenses of the provisional liquidation without a premium and how Outrider was, at that stage, a larger creditor than BMK. It nevertheless sanctioned the sale to BMK. MOL says that this is significant in the context of the new (primary) RA advanced by Outrider at the Sanction Hearing.

60. Outrider appealed against the sanction order but withdrew the appeal on 11 April 2024.

61. Following the Bermuda sanction judgment, the APA completed, USH was dissolved and the JPLs were discharged from office.

The Group's current financing arrangements/ position

62. The Group's present financing arrangements are that the Facility Agreement remains in place, MOL and MOSA remain liable under the Guarantee for USH's debts under the Facility Agreement and the current amounts sums owed to BMK and Outrider across the Group are:-

(i) BMK's claim under the Guarantee for approximately US$13.35m;

(ii) Outrider's claim under the Guarantee for approximately US$71.25m;

(iii) BMK's claim under the MOL Intercompany Loan for approximately US$63.79m; and

(iv) BMK's claim under the MOSA Intercompany Loan for approximately US$604.33m.

63. There is also a large intercompany loan balance due from MOSA to MOL. According to the Plan documentation, the amount outstanding is approximately US$203.19m.

64. Against that background, MOL says that the Group is in clear financial distress, with MOSA generating insufficient revenue to cover its operational costs, let alone service the debt either at MOSA or MOL level. MOL says that the survival of the Group, including making up the revenue shortfall to pay operational costs, is currently dependent on BMK's *ad hoc* funding, increasing the debt due under the Intercompany Loans. However, Mr Njoo has confirmed that its present funding of MOSA's operational expenses is temporary and that it will cease all funding to the Group in its present form if the Plan is not sanctioned because the Group's debt capital structure will remain unsustainable in that situation. Mr Charters of Grant Thornton explains in his RA report that:-

"3.10 BMK has confirmed to the Plan Company that it is no longer prepared to provide unconditional funding to the Plan Company or MOSA if the Plan is not sanctioned. BMK has also confirmed that it only intends to fund the costs associated with an eventual liquidation of MOL which may arise if it ceases to provide any funding to MOL.

3.11 Whilst I am conscious that BMK may perhaps be motivated to make this statement simply to assist the Plan Company in furthering its objectives under the Plan, I have no evidence to suggest it is untrue, and in my professional judgment it is not an unreasonable position for BMK to adopt given the financial position of the Plan Company and MOSA and the Guarantee Liabilities owed to Outrider by the Plan Company and MOSA."

Outrider/ ABI co-operation

65. BMK says that it has made a number of offers to Outrider over the years to compromise the Guarantee liabilities and facilitate Outrider's exit from the Group's capital structure on reasonable terms, the latest being the cash payment of US$2.315m incorporated into the APA which Outrider rejected.

66. While awaiting the outstanding sanction decision from the Bermudian court, Outrider and Linkvalue Investment Limited (**LVIL**), an affiliate of ABI, entered into an Asset Purchase and Cooperation Agreement (**APAC**) dated 4 March 2024 by which they expressed their wish to acquire the MOSA shares and the MOL and MOSA assets required for the operation of the business.

67. Outrider and LVIL agreed that a sanctioned agreement between them and the JPLs was a preferred outcome but recognised that "such outcome may not be feasible as a result of timing or financial constraints" and indicated their willingness to proceed with other options including (i) the calling of the Guarantee and/ or initiation of a liquidation of MOL and (ii) appealing an order from the Bermudian court for the sanction of the APA.

68. In the meantime, LVIL would continue to lead the process of engagement with various candidates with the intent of securing a "Further Party" who would support the funding obligations of LVIL in return for some portion of LVIL and Outrider assets. LVIL agreed to fund the first US$8m of MOL's and MOSA's working capital requirements and corporate expenses (as set out in the working capital budget attached to the APAC) following the transfer to LVIL by the JPLs or any liquidator of MOL of 75% of the shares and assets of MOL and MOSA.

Mauritius proceedings

69. On 14 March 2024, Outrider issued a statutory demand (**Statutory Demand**) against MOL in Mauritius under s.180 of the Mauritius Insolvency Act 2009. The amount demanded was US$61m, representing the then outstanding sum under the Guarantee. Unlike UK insolvency law, a statutory demand is a precursor to a winding up petition in Mauritius. If the statutory demand is set aside, no petition can be presented.

70. On 27 March 2024, MOL applied to the Supreme Court of Mauritius to set aside the Statutory Demand (**Set Aside Application**) under s.181 of the Mauritius Insolvency Act 2009 on various grounds.

71. On 3 June 2024, Outrider applied for, and obtained, an interim injunction from the Supreme Court of Mauritius, restraining and prohibiting MOL from selling, transferring, burdening, pledging, assigning, leasing or otherwise disposing of and/ or dissipating the assets of MOL pending the outcome of the Set Aside Application (**Injunction**).

72. The Set Aside Application and Injunction Application were case managed together and heard on 24 February 2025 before The Hon Justice MJ Lau Yuk Poon (**Justice Lau**). Judgment was reserved at the time of Convening Hearing before Mellor J on 2 April 2025.

73. On 9 May 2025, MOL applied *ex parte* to the Supreme Court of Mauritius to have Mellor J's Convening Order recognised pursuant to Article 15 of the UNCITRAL Model Law on Cross-Border Insolvency (**Model Law**) as enacted in Mauritius by the Insolvency Act 2009 (**Recognition Application**).

74. Justice Lau dismissed the Recognition Application on paper without a hearing, handing down her related judgment on 12 May 2025. The judgment was analysed by the parties' respective Mauritian law experts, with Mr Rajahbalee SC explaining why he is of the

opinion that it was wrong and that the Plan remains capable of recognition in Mauritius, including upon a fresh application for recognition of any sanction order from this court or following an appeal of the judgment.

75. On 14 May 2025, Justice Lau handed down judgment dismissing the Set Aside Application and maintaining the Injunction. Those judgments have not been appealed. However, the Recognition Application judgment was appealed on 22 May 2025 and is apparently now listed for hearing on 24 November 2025.

76. Finally, on 18 June 2025, very shortly before the Sanction Hearing, Outrider presented a winding-up petition against MOL for non-compliance with the Statutory Demand. At the Sanction Hearing, MOL expressed some concern that there was a forthcoming hearing in the petition on 9 July 2025 and canvassed the possibility that the Court's sanction decision, alternatively some form of injunctive relief, might be required quickly.

77. Following correspondence between the parties, Outrider undertook to this Court on 3 July that it would (i) not obtain a winding-up order against MOL on 9 July 2025 and (ii) update MOL and the court on the next procedural steps in the winding-up proceedings within 3 days following 9 July 2025.

78. The position appears to be that no winding-up order was made against MOL on 9 July 2025 and the Mauritian court has now asked Outrider to "take a stand" by 23 July 2025 on MOL's request for a stay of the winding-up proceedings pending the sanction decision in this jurisdiction. Outrider's local lawyers say that it is unlikely that the petition will be resolved before the Mauritian court returns for a new term in September.

79. It is understood that Outrider has not yet taken enforcement action against MOSA in Madagascar.

The Restructuring/ Plan

(a) Main points in outline

80. The Plan provides for the following in relation to **BMK**:-

(i) The BMK/ MOL Guarantee claim will be compromised and released in full for US$1;

(ii) The BMK/ MOL Intercompany Loan will be compromised in full for one ordinary share of US$1 in MOL (BMK owning all the MOL shares already in issue);

(iii) The BMK/ MOSA Guarantee claim will be released through a third-party release for US$1;

(iv) The BMK/ MOSA Intercompany Loan will remain outstanding; and

(v) BMK will enter into a new loan agreement with MOL, providing (a) a committed loan facility of US$7.5m and (b) subject to satisfaction of certain discretionary conditions, an uncommitted loan facility of US$12.5m.

81. The Plan provides for the following in relation to **Outrider**:-

(i) The Outrider/ MOL Guarantee claim will be compromised and released in full for either of the following options, at Outrider's election:-

(a) The default option of an upfront cash payment of US$200,000 (**Outrider Cash Payment**), reversible by election; or

(b) A right to enter a revenue share agreement for payment to Outrider of 1.25% per annum of MOSA's net revenues for the period of up to 12 years, subject to an aggregate limit of US$1.45m (**RSA**);

(ii) The Outrider/ MOSA Guarantee claim will be released through a third-party release for US$1; and

(iii) The benefit of an "anti-embarrassment" clause (under either option) such that Outrider will receive 19% of the cash or cash equivalent received by the Group following any change of control within three years (such as a sale or listing).

(b) Calculation of the Plan consideration

82. MOL explained how the amounts Outrider would receive under the Plan had been calculated in a manner attributing the maximum value to Outrider's claims, both in MOL and MOSA. In legal terms, Outrider's Guarantee claim against MOL (US$71.25m) represents approximately 48.01% of MOL's debt and, the corresponding Guarantee claim against MOSA, 8.02% of MOSA's debt. However, the debts due to Outrider from MOL and MOSA have been 'aggregated' to attribute a maximum value to Outrider's debt in both, including Outrider's 'share' of the (US$203.19m) MOL/ MOSA intercompany loan. Applying this calculation, MOL has calculated that Outrider is entitled to the economic benefit of 19.01% of MOSA's debt, reflected in the allocation to Outrider of 19% of the benefit of any sale or disposal of the Group under the "anti-embarrassment" clause.

83. Likewise, the US$1.45m aggregate revenue cap under the RSA represents a 19% share (plus 6% uplift) of the forecast operational cash surplus over the next 12 years (US$8.74m) less the interest cost on BMK's new loan (US$2.96m). That sum is paid by way annual payments over that period until the cap is reached, those yearly payments calculated as 1.25% of MOSA's 'Net Revenue', representing oil sales less (i) diluent costs (ii) customer delivery costs and (iii) all royalties, fees, duties and taxes imposed by the Madagascan Government under the PSA.

84. The US$200,000 Outrider Cash Payment represents the net present value of the aggregate revenue cap of US$1.45m, accounting for the time value of money and risk factors identified in the BP.

85. As noted, clause 2.3 of the Guarantee caps the total guaranteed sum at US$80m. Given BMK's related claim under the Guarantee and the suggested aggregating effect of that clause, MOL says that the true value of Outrider's claim against MOL is likely to be less than US$71.3m. However, the Plan calculation ignores that effect so as to calculate Outrider's interest on a more favourable basis than at law.

(c) New money

86. The new BMK committed loan facility (US$7.5m) is not conditional on MOL's financial performance and is intended to allow MOL to fund (i) the Plan costs (ii) any payments to Outrider and (iii) MOSA to continue to operate and undertake capital expenditure to restart production and drill wells to increase output to 500 barrels per day. Given Outrider's complaints in this context, it is helpful to summarise some of its important terms, including:-

(i) The requirement for the new loan to be fully repaid after five years (Clause 6);

(ii) MOL's ability fully or partially to prepay the new loan (Clause 7.2);

(iii) MOL's obligation to prepay the new loan to the extent of the excess cashflow forecast for any quarter (which excludes required reserves to service the revenue share payments or Outrider Cash Payment) (Clause 8.2);

(iv) The accrual of interest on the new loan at the rate of 20%, capitalised quarterly (Clause 10.1(a)), payable on the final repayment date of the loan (Clause 10.2); and

(v) The restriction against MOL declaring any dividend on its own share capital (Clause 17.8(a)(i)), albeit not applicable to (a) revenue share payments or (b) MOSA declaring dividends (Clause 17.18(b)).

87. The new BMK uncommitted loan facility (US$12.5m) will be available at BMK's discretion, with drawdown taking account of a number of factors, including (i) satisfaction of the basic assumptions in the BP (ii) agreements and improvements relating to Oilfield infrastructure (iii) increased production and (iv) no material adverse changes to the PSA, albeit BMK can still provide the facility at its discretion based on overall Group financial performance.

(d) Non-party releases

88. Although MOSA is not a party, the Plan provides for the release of the MOSA Guarantee liabilities directly and through a power of attorney, authorising MOL to sign deeds of release on behalf of both Outrider and BMK.

89. The other main releases would operate in favour of the directors, advisors and other such persons under the Plan in respect of claims made by Plan creditors relating to the implementation and preparation of the Plan, but not those made by MOL itself.

(e) Deed of Subordination

90. In parallel with the Plan, BMK, MOL and MOSA will enter into a deed of subordination, the effect of which will be to subordinate the existing MOL/ MOSA intercompany loan and BMK/ MOSA Intercompany Loan to Outrider's rights under the Plan.

91. The effect of the deed is that, until MOL's obligations to Outrider under the RSA or the Plan are fully performed or have ended, MOSA will not be able to 'upstream' payments to

MOL or BMK in respect of the existing indebtedness, save to fund the obligations to Outrider or certain of MOL's miscellaneous costs falling due after the new BMK committed loan facility has been drawn down and lent on to MOSA.

Outrider's recent offer

92. Finally, on 17 June 2025, Outrider's solicitors wrote a "subject to contract" letter, said to reflect Mr Hope's evidence as to Outrider's intention to work with a suitable investor to acquire and invest in the Oilfield. The letter explained that Outrider was already in commercial discussions with ABI and LVIL. The proposed acquisition would take the form of the purchase of MOL's shares in MOSA, either by agreement with MOL or in MOL's liquidation. Outrider said that it would be fairer for MOL to be placed into liquidation, affording Outrider, BMK and any other interested parties the opportunity to acquire MOSA on the best possible terms for all creditors, and then invest in it, compared to wiping out Outrider's creditor rights if the Plan were sanctioned.

93. According to the letter, Outrider and LVIL are working with CG International Petroleum Corporation (**CGIP**), which "has agreed to provide funding for the acquisition of the Oilfield and to operate the Oilfield. CGIP have extensive experience in oilfield restart and are presently working in the Republic of Chad for restart of Belanga and Lara [sic] oilfields. CGIP will work with Outrider and LVIL to invest in the restart of production of Oil. CGIP is, like LVIL, well placed to invest in the acquisition and development of the oilfield so that oil can be produced."

94. Outrider offered to purchase MOL's shares in MOSA for US$700,000, the offer being made on an open basis " … to demonstrate Outrider's fixed and settled intention to acquire MOSA and, ultimately, the Oilfield with the benefit of funding via LVIL and CGIP." If the offer was not accepted, it was intended to make "the same or substantially the same offer to the joint liquidators of [MOL] if [MOL] enters liquidation." Outrider considered this outcome a significantly better alternative for it than the consequence of the Plan. The offer did not include an offer to buy the intercompany loans due from MOSA to MOL and BMK. Outrider considered it unlikely that BMK would risk the termination of the PSA through the enforcement of BMK's own debt interest but, even if it did, new terms could be discussed with OMNIS.

95. On 25 June 2025, very shortly before the Sanction Hearing, CGIP sent a letter to Outrider which included the following:-

> "This letter is to confirm CG International Petroleum ("CGIP") is interested in investing in the Madagascar Oil and Gas project in Madagascar in conjunction with Outrider Master Fund, LP ("Outrider") and Linkvalue Investments Limited ("LVIL")."

96. After explaining the project in Chad, CGIP stated that:-

> "CGIP has received over 15 MM USD in private investment from our shareholders and additionally has received an offer for prepay financing (a loan backed by pre-sale of hydrocarbon) from an international trading house for $15 MM USD. Similar financing for the project in Madagascar is available from our backers."

97. The letter concluded that:-

> "We have engaged with Outrider and LVIL with the purpose of investing in the project, assuming operational control and revitalizing the underlying assets."

98. Outrider has provided a CGIP multi-currency balances account statement with Corpay, indicating a credit balance of just short of US$750,000 as at 30 May 2025. In addition, Outrider produced a letter dated 25 June 2025 on the headed notepaper of a Canadian firm of barristers and solicitors, signed by the corporate secretary of CGIP stating that:-

> "Reference is made to a backstop commitment agreement (the "Backstop Commitment Agreement") dated as of the 19th day of February, 2025, made among the Corporation and certain of its management and shareholders (the "Backstop Parties").
>
> This letter confirms that pursuant to the terms and conditions of the Backstop Commitment Agreement, the Backstop Parties have committed to advance up to USD$7,000,000 of additional funds to the Corporation within 30 days after a funding request is made by the Corporation to such Backstop Parties.
>
> As of today's date no capital has yet been drawn under the Backstop Commitment Agreement."

Conditions for sanction

99. Part 26A of the Act applies where two conditions are met (s.901A(1) to (3)):-

(i) Condition A is that the company has encountered, or is likely to encounter, financial difficulties that are affecting, or will or may affect, its ability to carry on business as a going concern; and

(ii) Condition B is that (a) a compromise or arrangement is proposed between the company and its creditors, or any class of them, and (b) the purpose of the compromise or arrangement is to eliminate, reduce or prevent, or mitigate the effect of, any of those financial difficulties.

100. Pursuant to s.901C, the Court may order a meeting of the creditors or classes of creditors to be summoned in such manner as the Court thinks fit, although by s.901C(4), the Court can exclude from participation in meetings creditors who have no "genuine economic interest in the company".

101. The Court's discretion to sanction a plan under Part 26A is found in s.901F(1):-

> "If a number representing 75% in value of the creditors or class of creditors or members or class of members (as the case may be), present and voting either in person or by proxy at the meeting summoned under section 901C, agree a compromise or arrangement, the court may, on an application under this section, sanction the compromise or arrangement."

102. By s.901G, however, the Court may sanction a plan even though one or more of the classes fails to approve it by the requisite majority (the exercise of this power often described as "cross-class cramdown" or "cramming" of dissenting classes):-

"(1) This section applies if the compromise or arrangement is not agreed by a number representing at least 75% in value of a class of creditors …. ("the dissenting class"), present and voting either in person or by proxy at the meeting summoned under section 901C.

(2) If conditions A and B are met, the fact that the dissenting class has not agreed the compromise or arrangement does not prevent the court from sanctioning it under section 901F.

(3) Condition A is that the court is satisfied that, if the compromise or arrangement were to be sanctioned under section 901F, none of the members of the dissenting class would be any worse off than they would be in the event of the relevant alternative (see subsection (4)).

(4) For the purposes of this section "the relevant alternative" is whatever the court considers would be most likely to occur in relation to the company if the compromise or arrangement were not sanctioned under section 901F.

(5) Condition B is that the compromise or arrangement has been agreed by a number representing 75% in value of a class of creditors …. present and voting either in person or by proxy at the meeting summoned under section 901C, who would receive a payment, or have a genuine economic interest in the company, in the event of the relevant alternative."

Principal legal authorities

103. The leading authorities on the exercise of the class cram-down power are *Re AGPS Bondco plc* [2024] Bus LR 745 (CA) (at [115] *et seq*.) (***Adler***), *Re Thames Water Utilities Holdings Ltd* [2025] EWCA Civ 475 (at [99] *et seq*.) and, most recently, *Saipem* (at [79] *et seq*. - 'no worse off' test (relevance of indirect benefits) and at [106] *et seq*. – fair allocation of restructuring benefits). I refer to these cases not for the conclusions on the different facts (and plans) presented rather than as recent and authoritative guidance on matters of principle arising in this case too, particularly on the question of fairness of the Plan. As they all make clear, Part 26A is a developing jurisdiction in which the approach to be adopted to sanctioning a plan is to be developed on a case-by-case basis.

Class composition

104. Starting with *Adler*, Snowden LJ analysed the extent to which the principles applicable to Part 26 schemes of arrangement applied in a Part 26A restructuring plan context.

105. As for class composition, Snowden LJ confirmed (at [109]-[114]) the cross-application of the basic principles applicable to Part 26 schemes, namely that a class "must be confined to those persons whose rights are not so dissimilar as to make it impossible for them to consult together with a view to their common interest"

(*Sovereign Life Assurance v Dodd* [1892] 2 QB 573 (at [583]), a test requiring an exercise of judgment on the facts of each case (*In re Telewest Communications plc (No 1* [2005] 1 BCLC 752)). A broad approach is taken, with the di erences in rights being material - certainly more than *de minimis* - without leading to separate classes.

106. According to *re Hawk Insurance Co Ltd* [2001] 2 BCLC 480 (at [30] and [34]), the dissimilarity of rights test is to be applied based upon an analysis of (i) the rights to be released or varied under the scheme and (ii) of the new rights (if any) which the scheme gives by way of compromise or arrangement to those whose rights are to be released or varied. Where a scheme of arrangement is proposed as an alternative to a formal insolvency process, the application of the first limb of the "similarity of rights" test requires the court to identify the rights that the creditors would have in that insolvency process, rather than those that they would have if the company were to carry on business in the ordinary course (*Hawk* at [42]).

107. Based on MOL's submission that BMK was putting in new money and being locked into the Group's capital structure and the bulk of its debt in the Group written off (or subordinated to Outrider's interests in the structure) to support the Group, with Outrider, by contrast, being offered a better exit from the Group's capital structure than it would get if MOL entered a Mauritian liquidation, Mellor J found in his Convening Judgment that it would be impossible for Outrider and BMK to consult together in a single class. Moreover, the negotiations which had occurred to that point indicated that Outrider and BMK were unable to find common ground. Finally, he concluded that, were he to order a single meeting, it would kill the Plan, it seeming inevitable that the requisite majorities would not be achieved such that the Plan could never reach the sanction stage. As such, it was appropriate for separate meetings of creditors.

Discretion to sanction under Part 26A

108. As to the exercise of discretion, *Thames* distilled (at [100]-[111]) the further principles gleaned from *Adler*, before then going on to consider (at [112] *et seq*) the position (not present in *Adler*) where the dissenting creditor was 'out of the money':-

> 100. Where there is no cross-class cram-down, the principles established in the context of schemes of arrangement remain applicable (§115 to §117). Those were summarised by Snowden J in *Re Noble Group* (No.2) Ltd [2019] 2 BCLC 548, at §17 as follows:
>
> > "(i) At the first stage, the court must consider whether the provisions of the statute have been complied with. This will include questions of class composition, whether the statutory majorities were obtained, and whether an adequate explanatory statement was distributed to creditors.
> >
> > (ii) At the second stage, the court must consider whether the class was fairly represented by the meeting, and whether the majority were coercing the minority in order to promote interests adverse to the class whom they purported to represent.
> >
> > (iii) At the third stage, the court must consider whether the scheme is a fair scheme which a creditor could reasonably approve. Importantly it must

be appreciated that the court is not concerned to decide whether the scheme is the only fair scheme or even the 'best' scheme.

(iv) At the fourth stage the court must consider whether there is any 'blot' or defect in the scheme that would, for example, make it unlawful or in any other way inoperable."

101. The same principles continue to apply within an assenting class, as the basis of an exercise of discretion to impose the plan on the dissenting minority within that class: §128.

102. The first and fourth of those principles continue to apply even where the cross-class cram-down power is engaged: §119.

103. In any case where the cross-class cram-down power is engaged, however, the Court cannot simply apply the rationality test (i.e. the third of the above principles summarised in *Re Noble Group*) either (i) as regards voting within the dissenting class, or (ii) as regards the overall vote across different classes: §129. The logic that drives the rationality test in a scheme of arrangement - that a majority of those who share materially the same rights against the debtor are in the best position to consider their own commercial interests - is lacking when the question is whether to impose the plan on one or more of the classes which have not approved the plan by the requisite majority: §125 to §127 and §140 to §141.

104. Nor is it sufficient to establish that a dissenting class is no worse off under the plan than in the relevant alternative (the so-called "vertical comparator" test borrowed from CVAs). That is a necessary requirement for the exercise of the cross-class cram-down power, embodied in Condition A in s.901G(3) of the 2006 Act, but is clearly not in itself sufficient to justify the exercise of the power: §153.

105. It is, however, obviously appropriate to conduct some form of "horizontal comparison" in deciding whether to sanction a plan where the cross-class cram-down power is engaged: §156 to §158.

106. That requires the Court to examine whether the Plan provides for differences in treatment of the different classes of creditors *inter se*, and whether those differences can be justified: §159. In doing so, an obvious reference point is the treatment of the creditors in the relevant alternative. Departure from that treatment within the Plan is not, however, fatal to the plan, and nor is the exercise to be carried out merely by restating the "no worse off test": §159 to §160.

107. For example, where a "wind down" plan is proposed as an alternative to a formal insolvency in which the claims of creditors would rank equally for a *pari passu* distribution of the debtor's assets, as in *Adler*, the Court would normally approve a plan which replicated that *pari passu* distribution, but a departure from the principle of *pari passu* distribution could be approved, provided it was

justified, in the sense that there was a good or proper reason for doing so: §165 to §166.

108. Of particular importance is the following passage from §160:

> "As a matter of principle, when the court exercises its discretion to impose a plan upon a dissenting class, it subjects that class to an enforced compromise or arrangement of their rights in order to achieve a result which the assenting classes of creditors consider to be to their commercial advantage. In my judgment, that exercise of a judicial discretion to alter the rights of a dissenting class for the perceived benefit of the assenting classes necessarily requires the court to inquire how the value sought to be preserved or generated by the restructuring plan, over and above the relevant alternative, is to be allocated between those different creditor groups."

109. One example of a justification for giving a class of creditors some priority or proportionately enhanced share of the benefits is where it has provided some additional benefit or accommodation to assist the achievement of the restructuring in the interests of creditors as a whole: §167. Put another way, in considering whether there has been a fair distribution of the benefits preserved or generated by the restructuring, it may be relevant to take account of the source of those benefits: §167, endorsing the comment made in *Re Houst* [2023] 1 BCLC 729, at §31.

110. Other examples are where the supply of goods or services from certain creditors is essential to the continuation of the business, and thus the success of the plan, which justifies the exclusion of those creditors from impairment under the plan, and the long-standing 'salvage' principle, under which liabilities to a creditor in respect of property which is retained and used for the benefit of the insolvent estate are satisfied in full: §170 to §172.

111. In considering whether the allocation of assets within a plan is fair, in contrast to the approach taken in relation to a scheme of arrangement, the Court may be required to consider whether a different allocation would have been possible: §180 to §181."

109. *Saipem* makes clear that the "the burden of establishing that a plan is fair, so as to justify the exercise of the Court's discretion to sanction a plan notwithstanding the presence of a dissenting class or classes, rests squarely on the plan company. Whether it has discharged that burden is a question of fact to be determined on the specific facts of the case" (*Saipem* at [183]).

'No worse off' test/ releases

110. As to the 'no worse off' test, *Saipem* also makes clear that the focus is on the valuation of rights affected by the plan such that the indirect benefits asserted in that case did not form part of that assessment. However, as the court also noted (at [98]), "any broader prejudice that a creditor contends it would suffer as a consequence of a plan being sanctioned which is not encompassed in the valuation of its rights, goes to the issue of discretion."

111. In the context of the 'no worse off' test, *Saipem* made clear (at [79] and [92]) that, where a plan compromises or releases other rights of the creditors, the 'test extends to those other rights such that they are brought into the enquiry as to the assessment of financial value which a creditor's existing rights would likely have in the RA compared to the financial value of the new or modified rights offered by the plan in return for the compromise of the former.

112. On the specific subject of releases, *Thames* held at ([240]) that the overriding consideration is that releases against third parties are permitted where necessary in order to give effect to the arrangement proposed for the disposition of debts and liabilities of the company to its own creditors.

'New money'

113. In relation to discretion, *Saipem* went on to consider the introduction of 'new money', including the participation of creditors in such provision, the court concluding (at [121]) that if " … the returns offered to those providing new money are such that it costs materially in excess of that which could be obtained in the market, and existing creditors are invited to participate in the new money, then the excess cost is better analysed as a benefit conferred by the restructuring" rather than a restructuring cost.

114. Again as to burden, since it is the plan company seeking the exercise of the court's discretion, "the burden of showing that the returns on new money are either equivalent to that which could be obtained in the market (and hence not a benefit of the restructuring), or justifying the fair allocation of those benefits must rest with the plan company" (*Saipem* at [122]).

115. Cogent evidence would be required to explain why allocating the lion's share of the value preserved or realised by the restructuring to the providers of 'new money' was a fair reflection of the cost at which funding could be obtained in the market (*Saipem* at [180]), most obviously comprising evidence from a market expert or of market testing (*Saipem* at [166]-[168]).

116. Saipem also noted (at [123]) Snowden LJ's comments in *Adler* (at [169]) concerning the possibility that returns on new money might be structured by way of an elevated return on plan creditors' existing claims:-

> "It should be acknowledged, however, that to date such cases have not been the subject of adverse argument and are likely to be highly fact sensitive. There might, for example, be no such justification for the elevation of existing debt if the opportunity to provide the new money was not in reality available on an equal and non-coercive basis to all creditors; if the new money was provided on more expensive terms than the company could have obtained in the market from third parties; or if the extent to which the existing debt was elevated was disproportionate to the extra benefits provided by the new money."

117. Those providing new money to facilitate a restructuring can properly expect to be repaid that money in priority to the existing indebtedness of the company. The same applies to the return on the new money, insofar as that return reflects the price for

new money that would be obtainable in a competitive market. However, whether, and if so, to what extent, the providers of new money should also be entitled to share - above and beyond market rates for such funding - in the benefits generated by the restructuring is dependent on the facts of each case (*Saipem* at [136]).

118. When considering the returns on new money, *Saipem* explained that "[i]n assessing whether the returns on the New Money are in excess of those that could be obtained in the market, it is critical to appreciate that the New Money is only being committed conditional upon the sanction of the Plans and completion of the restructuring, and will be invested in the restructured Group. As we will explore in greater detail below, much of the evidence from the Plan Companies seeking to justify the cost of the New Money relied on the difficulties in obtaining funding from the market in the very different context of considering alternatives to the proposed Plans, i.e. obtaining funding for the insolvent Group. What matters, however, is what price could be obtained in the market for new debt and/ or equity funding in the restructured Group, once it was freed of virtually all of its debt". " … [T]he correct question is the cost at which new money could be raised by the Group on day one after the restructuring and conditional upon the sanction of the Plans which would remove the existing liabilities from the Plan Companies' balance sheets and hence avoid liquidation" (*Saipem* at [151]).

119. Finally, and in a sense drawing some of the above points together, the proper use of the cross-class cram down power is to enable a plan to be sanctioned against the opposition of those unreasonably holding out for a better deal, where there has been a genuine attempt to formulate and negotiate a reasonable compromise between all stakeholders. In *Saipem*, the plan company had failed to justify the returns in respect of the proposed new money by reference to the rate for such new money as might be available on the market immediately post-plan. As such, the formulation of the relevant plans, and any related negotiation, had proceeded on a false premise ([191]).

Outrider's objections

120. With that long introduction and exposition of some of the overarching principles, I now turn to the Plan in issue here and the objections relied on by Outrider as these were refined in submission in the skeleton argument for, and oral submissions at, the Sanction Hearing.

(a) Ground 5 - The RA

121. As to the RA, it is common ground that, without Plan sanction, MOL will enter into liquidation. The issue is what would be likely to happen in MOL's liquidation.

122. There was no dispute as to the test for establishing the RA. As Michael Green J explained in *Re CB&I UK Ltd* [2024] BCC 551:-

> "The determination of the Relevant Alternative is made at the time at which sanction is being considered. If there are a number of alternatives, the Court must select the alternative which is more likely to occur than the other alternatives: see Virgin Active at [106]-[108]. At [107], Snowden J said:

> "… the Court is not required to satisfy itself that a particular alternative would definitely occur. Nor is the Court required to conclude that it is more likely than not that a particular alternative outcome would occur. The critical words in the section are what is "most likely" to occur. Thus, if there were three possible alternatives, the court is required only to select the one that is more likely to occur than the other two."

123. BMK says that there will most likely be a sale to it of the MOSA shares, with BMK paying the liquidation costs and a small additional US$10,000 premium for the benefit of MOL's creditors, resulting in Outrider receiving in the RA a small dividend of US$4,802 and BMK US$5,198.

124. Although Outrider emphasised the burden of proof on MOL to satisfy the court as to what the most likely RA would be, it advanced a positive case that there are two more likely alternatives, its primary case being an offer from Outrider for the MOSA shares, alternatively, as already pleaded under Ground 5, Outrider putting MOSA into liquidation.

125. Although the former alternative does not appear in Outrider's pleaded case, there was no offer at the time this was advanced. The bid came on 17 June 2025, but with Mr Hope having said for some time beforehand that this is what Outrider would do. MOL understood this, even applying at the PTR for disclosure from 2023 concerning Outrider's bid to the JPLs for MOL's shares, submitting that these were relevant to the genuineness of Outrider's latest offer.

126. As to the (now alternative) RA being the liquidation of MOSA, Outrider fairly accepted that, in his oral evidence, Mr Hope was not vehemently in favour of this more dramatic option. However, his written evidence has made clear for some time that this was a very real one. Mr Charters also accepted in his evidence that the liquidation of MOSA by Outrider was a risk. Although not Outrider's preferred choice, if the only other option was to put MOSA under, that is something Outrider is prepared to do, seeking to negotiate a new contract with OMNIS to develop the Oilfield. It would have nothing to lose.

127. According to Outrider, one important reason why MOL's suggested RA is not the most likely is the current and real risk of OMNIS terminating the PSA with MOSA, putting an end to any value in its shares. The correspondence from OMNIS in 2022 and Mr Thresh's sixth affidavit concerning his dealings with OMNIS in October 2023 confirm OMNIS' palpable disquiet. Although Mr Reynolds, Mr Charters and Mr Mitchell all say that they do not think OMNIS would terminate, none of them has actually spoken to OMNIS and there is nothing in the evidence to suggest that it would simply carry on with MOSA under the PSA if MOL was put into liquidation.

128. An obvious problem is that OMNIS have had enough of both MOSA and BMK. Mr Njoo made clear that, if MOL went into liquidation and OMNIS terminated the PSA, BMK would not bid to buy the MOSA shares such that there would be no new funding under the Plan. Although MOL says that OMNIS would engage in some sort of discussion to try and resurrect production on the Oilfield, there is no evidence from OMNIS as to whether it is even attracted by what is currently proposed, namely the

resumption of production at 500 barrels per day. This is likely to be unattractive when the existing Oilfield development plan envisages much higher production volumes.

129. As for Outrider's US$700,000 offer, this has been described by BMK as not real or lacking in credibility or a tactic by a 'ransom' creditor. However, on its face, it is an offer to buy BMK's shares in MOSA for US$700,000. The latest offer is *bona fide*, not, as has been portrayed, a cynical attempt to support its own RA. As for proof of funding, the documents show CGIP's account with a sufficient balance to cover the US$700,000 offer. CGIP is a credible organisation, with existing oil exploration experience in Chad, and has also caused its Canadian lawyers to produce a letter stating that it has US$7m funding available to it. Although Mr Hope fairly said that he did not know whether that US$7m was ring-fenced for this offer, the obvious inference from the production of the letter is that it is, at least in part. Although Mr Charters was permitted in re-examination to critique the Outrider offer, he does not have the expertise to determine its viability. He did a good job of advocating MOL's corner but the credibility of the offer is a matter for the court's assessment without regard to his views.

130. MOL drew a comparison with Outrider's offer for MOL's shares in 2023 also being similarly last minute. However, Mr Hope explained in his evidence that, in 2023, it was not sufficiently incentivised to make that offer until all other bidders had dropped out, leaving only BMK. When Outrider then joined the bidding process, it ran out of time to produce proof of funds given the unnecessary deadlines imposed by the JPLs to complete the sale. It would not, as MOL suggest, simply have been a matter of funding the provisional liquidation for longer, Outrider having by that point already put in more than US$2m into the liquidation process.

131. Outrider also says that, taking Mr Charters' evidence that he would expect the costs of MOL's liquidation to be a few hundred thousand dollars, Outrider's more likely RA of the US$700,000 offer would still leave a healthy surplus for creditors, therefore beating BMK's US$200,000 cash proposal in the Plan. As such, Outrider would be worse off under the Plan than the (actual) RA such that Condition A in s.901G would never be met.

132. Finally, as pleaded under Ground 6, in the (now alternative) RA of MOSA's liquidation, BMK would not be 'in the money' such that condition B in s.901G would not be satisfied and the jurisdiction to cram down would simply not arise.

(b) <u>RA - discussion</u>

133. Outrider was critical of Mr Charters' evidence that BMK would be the only likely purchaser of MOSA's shares with the ability to invest to restart operations at the Oilfield and that Outrider would be unlikely to seek MOSA's liquidation. Mr Charters fairly accepted in his oral evidence that the only person who knew Outrider's intentions in this regard was Outrider. However, Mr Hope himself seemed to have quite some difficulty associating meaningfully with Outrider's own posited RAs. So, for example, in relation to Outrider's recent offer:-

(i) Mr Hope seemed to struggle to recall his input into Outrider's 17 June 2025 offer letter, sent two weeks before the Sanction Hearing;

(ii) Mr Hope did not seem to think he had seen the letter the following day from Outrider's solicitors concerning the level of CGIP's knowledge of, or involvement with, MOL;

(iii) Mr Hope did not know how long ABI had been speaking to CGIP but knew it had been for months;

(iv) Mr Hope did not know about CGIP's backstop commitment agreement and whether the commitment to advance up to US$7m in funds was Madagascar-specific but he believed it was not; and

(v) Mr Hope had "no idea" as to the identity of Corpay despite Outrider relying on its account statement for proof of funds purposes.

134. Moreover, when asked what Outrider would do with the BMK/ MOSA Intercompany Loan for more than US$600m if it bought the MOSA shares, Mr Hope said that "[w]e will deal with that when the time comes" and, when pressed further about it, he responded "[s]orry, that is privileged, I think". It wasn't.

135. As to the documentary support recently presented by Outrider, it was not necessary for me to accept or reject Mr Charters' evidence in re-examination concerning what this showed. The documents rather spoke for themselves. The subject to contract letter dated 17 June 2025 sent on behalf of Outrider, LVIL and CGIP offered to purchase 100% of MOSA's issued share capital for US$700,000. It was said to demonstrate Outrider's "fixed and settled intention to acquire MOSA and, ultimately, the Oilfield with the benefit of funding via LVIL and CGIP" and confirmed that CGIP "has agreed to provide funding for the acquisition of the Oilfield and to operate the Oilfield". However, Outrider's solicitors also confirmed the next day that Outrider had not shared any financial information or documents relating to MOL with CGIP, that Outrider had not been involved in any due diligence by CGIP in relation to MOL's current or future trading and financial position and that CGIP had not been involved in the proposed sale by the JPLs in Bermuda or, as far as Outrider was aware, in previous funding rounds. As Mr Hope confirmed, all the bidders in Bermuda undertook due diligence, at least to a certain degree. It seems unlikely that CGIP (or its own backers) would have "agreed" to provide funding without apparently having done any due diligence itself.

136. Moreover, although the offer letter indicated that a bank letter confirming the availability of the US$700,000 offer price would follow, the Corpay balances report seems only to show that CGIP had a balance of just over US$850,000 as at 30 May 2025. It does not show that those funds have been earmarked for Outrider's offer to buy the MOSA shares. Nor does CGIP say that it had "agreed" to fund the purchase of the Oilfield and its operation. The letter from CGIP's CEO dated 25 June 2025 indicates CGIP's interest in investing in MOL, its engagement with Outrider and LVIL for that purpose, and the suggested availability from its backers of financing for the Madagascar project similar to that it has previously obtained. The letter from CGIP's Corporate Secretary the same day refers to the backstop commitment agreement from February 2025 by which the backstop parties had committed to advance up to US$7m of additional funds within 30 days of CGIP requesting this. However, as noted, Mr Hope did not believe that this was Madagascar specific.

137. Based on Mr Hope's own evidence and CGIP's own documents, I found this 'proposal', such as it was, vague, with the former seemingly distant from it, unable to bring clarity and unwilling or unable to explain how any investor in a transaction involving the purchase of MOSA's shares would be willing to invest to develop the business of that company when it is still burdened by the US$600m BMK/ MOSA Intercompany Loan. As Mr Reynolds said when Outrider put the CGIP documents to him, "[i]t seems evidence to me that they have access to capital, but I do not know whether they have appetite, interest, or an understanding."

138. This proposal also bore some of the hallmarks of Outrider's approach in Bermuda. At the hearing, a number of the documents concerning the marketing process for the former Group undertaken by the JPLs and Outrider's own 'bid' were put to Mr Hope. Although Outrider's earlier efforts do not necessarily reflect its position a year or so later, they are, in my view, insightful.

139. The documents showed that BMK and Outrider received information from the JPLs concerning their marketing process, including about the various bids, the positions of the bidders and the related requirements of the JPLs in the process. BMK and Outrider therefore knew about the JPLs' marketing process from April 2023, how that was progressing and, by June 2023 at least, that proof of funding and production of KYC information were significant matters. On 8 September 2023, the JPLs received a bid (and asset purchase agreement) from BMK. By 20 September 2023, interaction with external bidders had diminished. Mr Hope said that it was in around September 2023 that they realised an external investor might not be found and that it sought a technical counterparty to work with to make a bid of its own which they submitted on 23 October 2023.

140. According to Mr Hope, as at 7 November 2023, ABI affiliates, Lamar Commodity Trading DMCC and Energi Afrique S.A., were two entities expected to provide funds for the Outrider/ ABI bid. Not being his role, Mr Hope said that he did not recall whether they provided proof of funds.

141. On 12 November 2023, the CEO of ABI wrote to the JPLs to inform them that "[w]e are, with our bankers and Advisers optimizing the selection of Affiliate(s) that will provide the source of funds for the APA transaction", that process to be completed within the next week, with KYC/ AML information to be provided on request.

142. On 24 November 2023, Lindor Martin wrote to the JPLs stating that they intended to partner with ABI subject to satisfaction of various conditions, including satisfactory due diligence, confirming sufficient funds to meet the US$4.66m required for the asset purchase and attaching a letter from EFG Bank AG stating that Mr Jose Manzano has a four year long relationship with the bank, the account having at least US$5m. According to Mr Hope, Mr Martin was the representative of Mr Manzano, an Argentinian businessman and founder of the investment firm, Integra Capital. Mr Manzano had confirmed his interest in working with ABI to invest in the Oilfield. However, the JPLs considered the financing conditions to be heavily caveated.

143. A further funding entity, Link Value Lamar Resources Ltd (**LVLR**), was subsequently introduced during a call with the JPLs on 13 December 2023. LVLR has the same ultimate beneficial owner as LVIL. Having proposed certain payments of US$850,000 required by the JPLs on account of a funding agreement, ABI followed up that day, noting that "[a]s Steve is not a position to fund/ advance/ sequester on behalf of the deal, we will need to mobilize funds from other Al Braik subsidiaries over the coming days. We shall know by tomorrow morning and will confirm the timing by which the additional funds can be made available through LVLR." However, as at the date of Mr Thresh's affidavit (22 December 2023), the JPLs still had not received proof of funding from Outrider. BMK's bid being significantly more advanced than Outrider's, the JPLs therefore decided to proceed with BMK.

144. Mr Hope explained in his evidence that Outrider had started well behind in the bidding process and it was running to catch up. ABI's business structure was complex, it was considering various options for funding and it wanted to have an appropriate partner in place. The difficulties were the timing and the demands of the JPLs, not an inability to prove funds. I found this evidence unpersuasive. It appears from these 2023 exchanges that any investment into the Oilfield would not be made by Outrider itself rather than from funding to be provided by other "partners". Outrider appears to have had little involvement in the sourcing of that funding, seemingly dependent for that purpose on ABI as introducer, with ABI discussing those funding arrangements with the "partner" concerned to secure the best terms for itself and Outrider having little knowledge of the detail of those discussions or the proposed arrangements.

145. Although Outrider and ABI may wish to invest in the Oilfield, they depend on third parties in relation to an asset which, as Mr Hope accepted, would only generate interest from a small group. That is borne out by the prior marketing processes summarised above. The APAC from March 2024, more than four months after Outrider's bid, continued to indicate that a sanctioned agreement between Outrider, LVIL and the JPLs might not be possible due to both timing and financial constraints.

146. That position in 2023 and Mr Hope's related evidence has significant resonance with Outrider's latest offer and, again, Mr Hope's related evidence. More than a year after the APAC between Outrider and LVIL and 18 months after Outrider made its bid to the JPLs, Outrider has again come forward with a proposal, this time supposedly backed by CGIP. However, this is again vague and inchoate, indicating little more than a potential investment interest. I have no reason to believe that CGIP will look at matters any differently from those who have previously declined to invest once it digs further into the prospect, not least given the unanswered question of why CGIP would invest with the BMK/ MOSA Intercompany Loan still outstanding. In this context, the observations of Bermudian court in its ruling dated 2 April 2024 (at [65]) are noteworthy (**emphasis** added):-

> "I have no reason to conclude that an obviously better decision is open to the JPLs to make. **The alternative proposals put forth by the Petitioner are broad ideas as to an approach for possible solutions, much of which has already been explored through previous restructuring efforts**. … To withhold this Court's sanction would be tantamount to accelerating the Company's journey to what would be an inevitable commercial dead-end. I see

> no reason why the JPLs should be compelled to gamble and conjure the expense of a second bidding process without any real prospect for a more optimal result. I accept that the APA is the only rescue vessel in sight".

147. In my view, these observations are just as relevant today to Outrider's new primary RA. Although Outrider expresses a continuing interest in bringing investment into the Oilfield, I have no confidence that it is able to do so. Moreover, even if Outrider's US$700,000 offer were viable, I was far from satisfied that it would yield an outcome more beneficial than under the Plan. Mr Charters' evidence was that the costs of MOL's liquidation would be hundreds of thousands of dollars. Mr Njoo confirmed his view that the liquidation costs would be US$1m or less. Even if, as Mr Njoo also contemplated, a liquidation of MOL in Mauritius might turn out to be more straightforward than USH's in Bermuda, one can see that the US$700,000 could quickly be consumed by liquidation costs, leaving no dividend for distribution to Outrider and BMK, or certainly less than what could be achieved under the Plan.

148. As to Outrider's original pleaded RA, namely the enforcement by Outrider of its MOSA Guarantee claim, causing MOSA to enter formal insolvency in Madagascar, removing all value in MOL's shares in MOSA and the inter-company debt between the MOL and MOSA, rendering unlikely a sale of those shares and debt to BMK by MOL's liquidators and any dividend to MOL creditors:-

(i) When put to him, Mr Hope initially seemed unfamiliar with Ground 5, going on to say that "I do not understand exactly what the thought process is here";

(ii) Mr Hope also went on to say that, if the Plan is not sanctioned, Outrider would proceed with the Mauritius claim (having just filed the MOL winding-up petition the week before) and then, "conceivably", would move "further down against MOSA" but did not know whether it would "immediately move to exercise the guarantee" - "[w]e might – it just depends on the facts";

(iii) Mr Hope did not know whether OMNIS would terminate the PSA in the event of MOSA's liquidation but thought it a "fair assumption"; and

(iv) Albeit in the context of the BMK/ MOSA Intercompany Loan, in failing to answer the question asked of him, Mr Hope did question whether BMK would itself "threaten to destroy our value in the company", doubting whether they would "do that for the same reason we have not done. We are trying to preserve the asset."

149. In my view, this evidence shows significant uncertainty as to the manner and circumstances in which Outrider might resort to the liquidation of MOSA given what it accepts is the "fair assumption" that OMNIS might terminate the PSA and the apparent desire to protect MOSA's principal asset, the Oilfield. Indeed, I would agree with Mr Hope's assumption and, further than that, accept the evidence of the witnesses for MOL that termination of the PSA would be much more likely were Outrider to take this step, effectively destroying value in MOL and MOSA. Even if termination of the PSA could be avoided such that, in principle, Outrider (and/ or its 'partners') might be considered as a prospective assignee from any MOSA liquidator, given what I have said about Outrider's inability to establish its own financial standing to invest in the

project, that prospect and (or, indeed, the grant of a new PSA in Outrider's favour) presently seem remote. That is rather reinforced by the terms of the PSA itself, requiring any non-affiliated assignee to demonstrate its financial and technical capacities and provide a replacement bank guarantee. I am far from persuaded that Outrider could do either.

150. Accordingly, the scenarios posited by Outrider at the Sanction Hearing appear to reflect either an aspirational investment, or a high stakes, but self-harming, strategy. Neither is, in my view, a likely RA, let alone the most likely. This was rather reinforced by Outrider's inability to settle on a single RA from the outset and to stick to it, moving from the pleaded version (Ground 5), to an effort at the CMC to say that Outrider would attempt to buy MOSA's assets from its liquidators, to the latest offer from only a few weeks ago to buy MOSA's shares. Indeed, the eleventh hour provision of the Outrider offer (and CGIP materials) and the issue of the MOL winding-up petition shortly before the Sanction Hearing rather smacked of an effort to improve Outrider's position before the court.

151. I accept the evidence of Mr Reynolds, Mr Njoo and Mr Mitchell as to BMK's and MOL's intended actions and the likely outcome if the Plan is not sanctioned, namely that (i) BMK would no longer be willing to provide unconditional funding to MOL or MOSA (ii) with its operating costs no longer being met, MOL would enter liquidation (iii) BMK would seek to agree with the liquidators the costs for the liquidation procedure and the level of funding which BMK would make available to ensure the survival of MOL and MOSA during that procedure (iv) BMK would make an offer for MOL's assets, comprising principally the MOSA shares and MOL/ MOSA intercompany loan (v) that offer would comprise (a) BMK's payment of the liquidation costs (b) a waiver by BMK of preferential claims against MOL in respect of the provision of the liquidation costs and funding and (c) the payment of US$10,000 to the liquidators for the benefit of MOL's creditors (vi) a viable third party offer would not be forthcoming given the complexity of the Oilfield and MOSA's debt burden (vii) such an offer would not be forthcoming from Outrider either given its own dependence on third party funding (viii) BMK's offer would likely be accepted by the liquidators (ix) Outrider would receive a small dividend of US$4,802 in MOL's liquidation, with BMK receiving US$5,198 and (x) BMK would then seek to implement a restructuring at MOSA level to facilitate performance of its obligations under the PSA.

152. In my view, this alternative is realistic, commercially sensible and readily capable of implementation by BMK (unlike Outrider's tentative offer for the MOSA shares described above). As noted, MOL's witnesses fairly acknowledged that there would be a heightened risk of termination of the PSA in MOL's liquidation. However, I accept their further evidence that OMNIS would not be likely to terminate in these circumstances but would (as it did with the JPLs in Bermuda) engage with MOL's liquidators and BMK to understand the liquidation and restructuring process and with a view to resumption of Oilfield production.

153. As such, I accept that MOL's formulation of the RA is the most likely. I reject Ground 5 and Ground 6 falls away.

(c) 'No worse off' in the RA

154. Outrider also argued in its skeleton argument that, even if (as I accept) MOL's suggested RA was the most likely in the absence of Plan sanction, no corresponding RA has been posited for MOSA despite Outrider's MOSA Guarantee claim also being compromised under the Plan. As such, Outrider says that:-

> " … it is impossible for either Outrider or the Court to know whether the US$1 offered for the compromise of Outrider's US$71.25m claim against MOSA is more or less than it would likely receive in a liquidation of MOSA."

155. I accept that the enquiry as to the 'no worse off' test encompasses not only the financial value of rights of the creditor against the plan company but also the other rights of creditors released by the plan (*Saipem* at [79] and [92]). Although Outrider would continue to enjoy its rights as creditor under the MOSA Guarantee in MOL's RA, Outrider's suggestion that it may receive more in MOSA's liquidation than under the Plan was problematical for a number of reasons, including:-

(i) Outrider's failure to advance this point in the Grounds or to apply for permission for their amendment to that end;

(ii) Outrider's own pleaded Grounds 5 and 6 to the (inconsistent) effect that there would be no dividend to either Outrider or BMK in the liquidation of MOSA;

(iii) Mr Reynolds' unchallenged evidence as to the effect of MOSA's liquidation, including the likely termination of the PSA and absence of any returns for either of BMK or Outrider;

(iv) Mr Hope's evidence which confirmed Outrider's reluctance to place MOSA into liquidation;

(v) My reasons above for rejecting Outrider's original RA in the form of Ground 5; and

(vi) Outrider receiving under the Plan not only US$1 for release of the MOSA Guarantee but also the Outrider Cash Payment (US$200,000) or revenue share payments (up to US$1.45m), compared to US$4,802 in the RA.

156. Accordingly, even if had been open to Outrider to run this further point, I would have rejected it. I am satisfied that, taking into account Outrider's rights against MOSA in the RA, Outrider would be better off under the Plan.

Ground 8 - Fairness

157. The question of the fairness of the Plan was perhaps less straightforward, arising at it does in the context of a significant proposed restructuring of the MOL and MOSA balance sheets, a principal asset (the Oilfield) which, although important, has not been generating revenue for a number of years, and its ability to do so, and what any revenues might look like, dependent on a number of unpredictable factors.

158. Outrider's overriding objections as to the (un)fairness of the Plan can be summarised as:-

(i) whether the genuine purpose of the Plan was to eliminate, reduce or prevent, or mitigate the effect of MOL's financial difficulties in line with the BP, the focus here being on whether the BP was realistic; or

(ii) even if (which Outrider denies) the Plan did have that purpose, it achieved a fair distribution of the restructuring surplus as between the Plan creditors.

(a) Business Plan overview

159. Before considering those objections, I summarise here key aspects of the BP and the circumstances of its preparation. As to the latter, I accept Mr Reynolds' evidence that this was prepared by BMK, largely by Mr Reynolds himself but supported by others within BMK, with FRP Advisory Ltd acting as a 'sounding board', reviewing the document, critiquing it and the model and challenging its assumptions. Its purpose was to show MOSA's likely performance if the Plan was sanctioned and to inform Outrider's decision whether to enter into the RSA and to evaluate the likelihood of receiving any revenue share payments.

160. As to the BP itself, this identifies a number of risk factors that might impinge on the BP being carried out successfully. Those risk factors include macro, government, revenue, production volume and cost price risks. Individually or cumulatively, they could have an impact on the BP, negative or positive. According to Mr Reynolds, BMK did not seek to assess in the BP the likelihood of risks coming to fruition since investors would perceive them differently. Having been invested in the business since 2011, and with a good understanding of MOSA and oil and gas production, he considered that Outrider would be able to assess those risks, its own opinion being most relevant to its own decisions.

161. The BP envisages that the existing 25 wells would be tested and rehabilitated as required in readiness to restart production, with the nine former steam injection wells upgraded. Capex for restart production is expected to be US$1.25m, with first oil production targeted for December 2025.

162. After operational restart, seven new wells will be drilled. Completion of drilling is targeted for March and April 2026, with an associated capex of US$2.66m. First oil production from those new wells is targeted for June 2026.

163. Five new wells will then be drilled, with completion targeted for April and May 2027, with an associated capex of US$1.44m. First oil production from those new wells is targeted for July 2027. The capex for these new wells will be cheaper than the prior seven because they can take advantage of the existing plant.

164. Production restart and the drilling of 12 new wells will establish peak production of 550 barrels per day by June 2028 but this is expected to decline to 150 by Q3 2031, requiring a continuity drilling programme to maintain oil production levels, albeit at a higher cost due to the new location of the wells further from the existing drilling sites. The associated capex is expected to be US$11.45m spread over 6 years between 2028 and 2034. Part of the oil production will be burnt to generate the steam necessary for the production process.

165. The analysis of the number of wells required to maintain optimum production levels was contained in the excel model produced with the BP.

166. Operational cashflows from the implementation of the BP are forecast as rising from a closing balance for H1 2025 of -US$1.695m to US$8.738m by the beginning of 2028 (before finance costs under the BMK new loan). Cashflows in the first four years are boosted by an accrued VAT credit of approximately US$8m, with limited growth from 2029 due to utilisation of the VAT credit, continuity drilling capex and increased payments to the Government.

167. The forecast assumes (i) a flat price average for Brent Crude over 12 years of US$80 per barrel (the approximate price in January 2025 when the BP was prepared) (ii) no changes to the PSA or applicable taxes and (iii) and a particular percentage split of sales by reference to product viscosity.

168. The forecast sales prices are linked to expectations for future market price for fuel oil in Madagascar, with the oil forecast to be sold at a small discount to the import price. As Mr Reynolds fairly accepted, in the absence of long term forecasts for the local import price, Brent Crude serves as a somewhat blunt proxy. BMK did not hire a consultant to forecast the oil price, one reason being that the BP seeks to forecast the price in Madagascar. To that end, the output from the forecast is tested against Arabian Gulf prices. This was again evident from the excel model supporting the BP which could be adjusted to reflect a different price input.

169. The forecast assumes the primary levy for taxes as set out in the PSA, it not being known (nor expert advice sought on) whether these might be changed in the future.

170. The forecast also assumes a flat currency exchange rate based on an approximation of the rate at the time the plan was prepared. Again, no expert exchange rate input was sought to forecast that rate over 12 years.

171. In addition to questioning these assumptions of static oil price, local taxes and exchange rates over 12 years, it is fair to say that Outrider was also sceptical of the ability of BMK and MOL more generally to produce oil from the Oilfield, having only been able to do so for pilot test period 2013 and 2016. Mr Reynolds explained in his evidence that there were a number of reasons why the Oilfield did not come to production in the past, including the long period of Covid when restrictions on movement were (but are no longer) in force.

172. As to the costs involved in restarting production, these are set out in the BP. Although there appeared to be some criticism that the method of cost calculation was not set out in the BP powerpoint, Mr Reynolds explained that they key aspect - capex - was based on quotations, contract proposals and front end engineering design studies with associated costs estimates. The costs figures include added contingencies of 20%, with in-house estimates for some of the smaller items an added 20-40% contingency.

173. Mr Reynolds fairly accepted that, if OMNIS terminated the PSA, the BP can effectively be torn up since what it envisages could not then be achieved over the next 12 years. In this regard, Mr Reynolds also accepted that OMNIS has been frustrated

that the Oilfield has not been brought into production in accordance with the original plan, as evidenced by correspondence sent in 2022, including MOL's lack of responsiveness to OMNIS' enquiries. He also acknowledged that MOL had been unable to bring the Oilfield into production despite its purchase of the MOSA shares from the JPLs. Nevertheless, his view was that the dealings with OMNIS since 2022, although limited, have been cordial and that it awaits the outcome of the restructuring before sitting down with the parties to agree a plan going forward. Although the BP envisaged a significant reduction from the production levels contemplated by the PSA, the Oilfield was currently not in production but 500 barrels per day would contribute significantly to the fuel market in Madagascar which is currently experiencing issues. Although Mr Reynolds had had no personal dealings with OMNIS himself as to renegotiation of the development plan for the Oilfield, Mr Njoo explained in his evidence that he talked regularly to its Chairman and had other sources in Madagascar and that there was no indication of potential PSA termination. They understood that (with BMK support) MOL was a competent operator and able to execute the development, they recognise the macroeconomic difficulties experienced and the recent local political problems experienced have been overcome. Although, as Mr Njoo himself recognised, some of this evidence was not set out in his witness statement as it should have been, and despite the concerns expressed by OMNIS in 2022 including as to the lack of production from the Oilfield, I accept that MOL and BMK nevertheless have a good basis for believing that OMNIS will continue to partner with MOL and BMK and not terminate the PSA if the BP is put into action.

174. As to the criticisms of the BP, a number of these were directed to the level of information contained in the powerpoint BP document and whether this would enable Outrider to identify and test the different inputs and assumptions reflected in the BP forecasts. However, as Mr Reynolds pointed out, that ignored the significant underpinning of the BP found in the underlying model provided to Outrider from which many of these matters could be discerned. I am satisfied that sufficient information has been provided to enable Outrider to assess the financial aspects of the Plan and that it would not have found this a difficult task.

175. Indeed, Outrider is a sophisticated investor. It understands the MOSA business in its own right. In 2024 at least, it had access to the former CEO of the MOSA business who had been designated in the APAC as an Outrider appointed director of MOL. On its own case, it also has current access to others knowledgeable in the oil and gas market. When it comes to the BP, I was satisfied that there was not an information deficit. That was rather underscored by the detailed schedule of the working capital requirements for the Oilfield annexed to the APAC between Outrider and LVIL. Although now somewhat historical and obviously different from the BP forecast including, for example, with respect to the proposed capex investments, it did not seem insignificant that the US$8m funding requirement indicated by that schedule was not far off the amount of the new BMK loan.

176. Likewise, Outrider is perfectly able to understand and take a view on the risks and assumptions associated with BP's forecasting including, for example, oil price, exchange rate and restart and new drilling costs. These matters were explored at the Sanction Hearing, both with MOL's witnesses and Mr Saldin for Outrider, but that enquiry seemed to reveal little more than obvious fact of such risks, variables and uncertainties being inherent in a 12 year cashflow forecast for the restart and

development of a challenging hydrocarbons project. None of the matters explored, including the failure to obtain more specialist advice in certain areas (for what that might be worth with such a long term forecast), revealed that the BP's assumptions were unreasonable, let alone that the BMK was not genuinely seeking to mitigate the financial difficulties of the MOSA business in accordance with the BP.

177. Finally, as for the prospect of termination of the PSA, again, the evidence appeared to reveal little more than that this was a risk, not least given MOL's inability to achieve production at the Oilfield beyond the pilot test period. However, despite Outrider's efforts to suggest otherwise, I accept that BMK and MOL are genuinely and reasonably of the view that OMNIS would wish to avoid that course.

178. In light of the evidence, particularly that of the principal contributory to the BP, Mr Reynolds, I am satisfied that the genuine purpose of the BP is to turn around the fortunes of the MOSA business. Moreover, I am satisfied that MOL and BMK are also genuinely and reasonably of the view that the forecasts are realistic and achievable, albeit, as they recognise, there is uncertainty given the inherent risks of a business of this nature and the inevitable difficulties of forecasting 12 years hence. Finally, I accept that Outrider has been provided with ample information to allow it fairly to assess the viability of the BP and, not least with its own knowledge and resources, that it is capable of doing so. As such, the Plan cannot be said to be unfair on account of these matters.

(b) <u>Allocation of the Plan surplus</u>

179. As to the Plan's suggested unfairness in its allocation of the restructuring benefits, Outrider noted, and relied on, a number of important points gleaned from *Adler*. First, where, as here, there is a dissenting class, the rationality test is not engaged as between the creditor classes. Nor is there a 'just and equitable test'. Moreover, although satisfaction of the 'no worse off' test is a necessary jurisdictional requirement, it may be insufficient when it comes to the exercise of the cram down power. Similarly, as the court noted in *Saipem*, bare satisfaction of the requirement for a compromise or arrangement by, for example, payment of a *de minimis* benefit to an out of the money creditor may also be insufficient.

180. The court's enquiry is into how the value sought to be preserved or generated by the restructuring plan over and above the RA is to be allocated between those different creditor groups, including whether any alternative allocation is possible and better. The treatment of the dissenting creditors in the RA is a reference point but only the starting point. Referring to how that enquiry has been encapsulated previously (summarised in *Adler* at [161]), Outrider says that BMK is getting "too good a deal (too much unfair value)."

181. Although *Thames* indicates that differential treatment may not be fatal, and the investment of funds by a particular group of creditors, for example, may justify such differential treatment, it is unlikely to be a justification if the funding is not at market rate. In this case, MOL has not produced any evidence to support the proposition that there is no other source of funding available or that, if it were, the 20% interest rate on BMK's proposed new committed loan, and related interest capitalisation and prepayment provisions, reflect available market terms. The only evidence is Mr Njoo's throwaway comment in his oral evidence that the loan is "cheap". It is not for Outrider

to prove that this is not the market rate but for MOL to establish the contrary. It is unsurprising that, with a vested interest, BMK might make the loan. However, it not enough simply to assert that there would be no other source of funding or that the BMK loan is on market equivalent (or beating) terms.

182. Another unfair element of the Plan is that, if sanctioned, Outrider would be giving away claims for US$71.25m against both MOL and MOSA under the Guarantee whereas BMK would be retaining its claim for more than US$600m under the MOSA Intercompany Loan. MOL's argument in oral submission that the former is contingent and the latter not was misconceived. As Mr Hope explained in his witness statement, Outrider has, in fact, demanded repayment of the sums due under the Guarantee from both MOL and MOSA.

183. Accordingly a simple comparison of the rights being compromised shows that Outrider would be giving up claims for more than US$71m against each of MOL and MOSA, amounting to some US$142m in aggregate. On BMK's side, it would compromise its claim under the MOL Intercompany Loan (US$63m) and its claims for US$13m each against MOL and MOSA under the Guarantee, meaning that it is giving up claims for approximately US$90m but retaining the US$600m due under the MOSA Intercompany Loan. Although subordinated, that is only to payments to Outrider - the US$200,000 or the 1.25% capped revenue share. The disparity is stark.

184. Moreover, because it is the only other stakeholder, with Outrider potentially receiving 1.25% of the net revenue, BMK is necessarily retaining the other 98.75%. Although MOL draws a distinction between net revenue and net profit, the net revenue figure already takes out a number of costs and, on any view, the value that is being generated by the business is almost exclusively retained by BMK. Although not immediately cash generative, the whole point of the Plan is to enable returns to be generated from the Oilfield. Since BMK's shareholding is not affected and there is no restriction on the payment of dividends, BMK will keep the vast majority of the value in the business which MOL is seeking to restart and operate.

185. Furthermore, the so-called "anti-embarrassment" clause entitling Outrider to a 19% sum of the consideration of any sale or listing within three years does not actually protect against over-performance. As such, there is no sharing with Outrider of any upside from the Plan.

186. Accordingly, Outrider's debt is being entirely wiped out, BMK is retaining its sole shareholding, most of BMK's debt is not being wiped out, the only sum paid to Outrider is US$200,000 or the capped 1.25% of net revenue over 12 years and BMK keeps the value of the business going forward without having to share it at all if it holds onto it for more than three years. Moreover, under the Plan, the net revenue is referable to the PSA such that payment could be avoided by entering into a new production sharing agreement with OMNIS. In these circumstances, it cannot be fair to remove from Outrider its ability to enforce its debt against MOL or MOSA in return for a small payment or share of revenue.

(c) Fairness - discussion

187. The restructuring surplus in this case comprises the potential returns available in the event of the Oilfield production restart following BMK's investment. The PSA term runs until 2040 and potentially beyond. However, the forecast economic limit, or point at which the expected revenue from Oilfield operations in accordance with the BP becomes insufficient to cover operating costs, is 28 February 2037. Although, inevitably, the inherent risks and uncertainties associated with operation of the Oilfield will mean that actual performance will differ from that forecast, and its underlying assumptions may well be shown to be wrong, as noted, I am satisfied that the projection of future cashflows based on the indicated investment from BMK's new loan is reasonably considered to be realistic and achievable.

188. As to Outrider's potential share of that surplus, Mr Hope suggested in his witness statement that the Plan did not accommodate the claim to interest on Outrider's claim against MOL and MOSA under the Guarantee. However, without needing to decide the point for these purposes, I accept MOL's submission that there is a strongly arguable case that Outrider's claim would, by dint of BMK's claim under the same Guarantee and the operation of the US$80m cap, be slightly less than US$71m. If that is right, by the adoption nonetheless of a principal figure of US$71m, Outrider would, in fact, be treated somewhat more favourably under the Plan. However, even if that were not right, such that the cap under the Guarantee operated separately for each of Outrider and BMK, given the level of MOSA's overall indebtedness, the difference on that account would not, in my view, be sufficiently material to render unfair Outrider's treatment. More significantly, however, I am satisfied that Outrider is being treated fairly by attributing the maximum value to its debt in both MOL and MOSA to identify a 19% economic benefit in MOSA's debt. That share is augmented by a further 6% uplift in Outrider's favour in the operation of the RSA and Outrider Cash Payment under the Plan.

189. As to the suggestion that Outrider will only receive 1.25% of MOSA's net revenues under the RSA, with BMK therefore receiving the other 98.75%, Mr Njoo explained effectively in his evidence how that is an oversimplification. First, if Outrider elects to enter into the RSA, its entitlement is to receive a sum not exceeding the Revenue Cap, being 25% (Outrider's 19% share of the debt in MOSA, plus 6% uplift) of MOSA's forecast total net cash generation over the period to 28 February 2037 as reflected in the BP (after payment of interest on BMK's new loan facility). That entitlement will be satisfied through the annual payments to Outrider of 1.25% of MOSA's net revenues, comprising sales less certain direct costs of sale and OMNIS levies. Accordingly, payment of the revenue share is not affected by the range of other costs, overheads and capex items indicated in the forecast. However, as Mr Njoo noted, the value of MOSA lies in its cashflows which are, in fact, eaten up by costs, production being small but associated costs high. Indeed, the surplus cashflows over the 12 years of the BP are projected to be relatively modest. Although Outrider says that it should share in any upside if the actual cashflows exceed those forecasts, given the way in which the revenue share payments are funded from MOSA's net revenues, MOL bears the risk the other way that its actual cashflows over the period may not meet those indicated in the forecast, for example on account of larger than expected overhead or capex. I am therefore unable to conclude that the Plan is unfair on this account.

190. BMK is also proposing to take the funding risk for the restart and development of the Oilfield through the BMK new loan. Outrider says that the fairer

course would be to allow others, including Outrider itself, to bid to purchase MOSA's shares in any liquidation of MOL and to permit them to make the necessary investment. However, given the unsuccessful efforts to date to secure such investment, including what I have found in the context of the RA to be Outrider's own inability to fund the Oilfield, and the ever narrowing window for MOSA's survival, the prospect of a restructuring surplus may well disappear completely if that course were taken. Indeed, I accept that the new money to be injected by BMK, the write off of BMK's debt and BMK's expertise and resources to develop the Oilfield are critical to MOSA's survival. As such, I am satisfied that it is appropriate for the Plan to be proposed on terms which lock BMK into the Group and secure the injection of new money, albeit providing Outrider with an exit on terms fairly reflecting its economic interest. I agree that this is not simply a case of BMK seeking the exercise in its favour of the class cram down power but that BMK too will be adversely affected by MOL's insolvency and substantially impaired by the Plan (*Re Houst Ltd* [2022] BCC 1143 at [20]).

191. As for the proposed BMK new loan agreement, this is repayable after five years, together with accrued interest, albeit the BP anticipates that the loan will be repaid within four through excess cashflows (beyond any reserve maintained to service revenue share payments or the Outrider Cash Payment). For the purpose of calculating Outrider's entitlement to the maximum of the US$1.45m cap under the RSA, that interest has already been deducted from the total cashflow surplus. In my view, such treatment reflects the risk of new lending to a financially distressed and technically complex project such as this which has no ability to generate returns without it. Nor, for the reasons already given in relation to Outrider's inability to secure funding, do I consider that there was a realistic prospect of Outrider being able to participate in, and therefore benefit from the terms of, that loan.

192. Moreover, although Outrider was somewhat sceptical of the BMK uncommitted loan facility (US$12.5m) and its discretionary and conditional nature, it was clear from the evidence of Mr Njoo and Mr Reynolds that BMK did anticipate further lending to MOL, possibly early in the forecast period. Although it is not possible now to say how likely or when that might occur, or how much might end up being drawn down, I accept that BMK is genuinely willing to provide such funding if the commercial circumstances warrant it and that its potential availability too is relevant to my assessment of the fairness of the Plan.

193. Specific aspects of the new committed BMK loan did come in for some criticism, particularly the 20% interest rate, but also the provision for mandatory prepayment from excess cashflows, the quarterly capitalisation of interest and the MOSA guarantee of the BMK new loan. Although other elements of the Plan are identified in Ground 8 as unfair, these aspects are not. As such, I consider that it is not open to Outrider to rely on them. I come to that view notwithstanding what was said in *Saipem* as to "the burden of showing that the returns on new money are either equivalent to that which could be obtained in the market (and hence not a benefit of the restructuring), or justifying the fair allocation of those benefits [resting] with the plan company." The fact that the burden of proof might lie with MOL in this regard does not avoid the need for Outrider to put in issue any relevant matter(s) in the first place. Indeed, as noted, Meade J placed considerable store by the importance of identifying in advance the grounds of objection, rightly so in my view given the need for this claim to be disposed of in a proportionate manner, to ensure that any areas of expert evidence

reasonably necessary for that purpose were identified, and to give MOL a fair opportunity to address those issues that were, in fact, live.

194. If these matters had been properly in issue, I agree that Mr Njoo's observations in oral evidence as to the suggested cheapness of the BMK new loan would not be sufficient to discharge MOL's burden of proof in this regard. However, Mr Reynolds did give evidence in his witness statement to the effect that:-

> "I believe that the Plan Company has little to no prospect of borrowing in the region of USD $7.5m for significantly less than the 20% interest rate offered by BMK, in its current state or post restructuring. I do not believe that there is any prospect of a commercial bank lending to a restructured MOSA, certainly not without the USD $7.5m investment which is required to bring the Group to a minimum marketable position."

195. Since the new loan terms were not in issue in the Grounds, MOL cannot be criticised for not adducing expert evidence as to what lending might have been available in the market and on what terms. The court's permission would have been required for that purpose and MOL could not have known that it might be. Moreover, although Mr Reynolds does not expressly indicate any market testing for alternative terms, Outrider did not challenge Mr Reynolds in cross-examination as to the basis for his belief as to the unavailability of significantly cheaper lending post-restructuring. To pray in aid unfairness of the Plan on account of matters not raised as a ground of objection or in cross-examination of the obvious witness with whom they should have been traversed, would itself be unfair in a different sense.

196. The same is true of the points about quarterly interest capitalisation, mandatory prepayment and the MOSA guarantee. Although canvassed briefly with Mr Njoo, he did not think that the "restructuring plan benefits BMK enormously". Rather, based on his prior banking and restructuring experience, he considered that the benefits were "pretty fair" and "what is on the table is pretty standard." Given the way in which these issues were developed by Outrider, and the other elements of the Plan already considered, the court is in no position to conclude otherwise or to say, as Outrider urges, that MOL has not met its burden.

197. As to BMK retaining all the value in MOSA, as I have already indicated, that value lies in the surplus cashflows generated from the Oilfield following restart and in which Outrider does have the opportunity to participate. However, to maintain those cashflows after reaching the point of peak oil production under the BP in 2028, a programme of continuity drilling is required such that significant costs continue to be expended thereafter until the Oilfield reaches its forecast economic limit in 2037.

198. In relation to the US$600m BMK Intercompany Loan, I accept Mr Njoo's evidence to the effect that advice received from MOSA confirms that its write-off would result in a significant charge to tax for MOSA and its conversion to equity a significant share registration fee. I also agree that neither would be efficient in the context of the restructuring. Although not compromised, the BMK Intercompany Loan will, however, be subordinated to all payments due to Outrider under the Plan, potentially until the end of the forecast period itself. The suggested value retained by BMK in MOSA, including its continued 100% equity stake and the BMK Intercompany

Loan, falls to be assessed in light of all these matters, not least the economic limits of the Oilfield indicated by the BP.

199. Another of Outrider's objections was the fact that there was no restriction on payments of dividends. As set out in the Explanatory Statement, it is envisaged that revenue share payments will be made at MOL level to take advantage of the favourable withholding tax regime applicable between Madagascar and Mauritius, including with respect to dividends. I did not understand Outrider to find this aspect objectionable. Rather, Outrider's objection appeared to be to the possible payment of dividends from MOL to BMK. This does not appear to be permitted during the currency of the BMK new loan agreement (clause 17.18(a)). Moreover, the ability to declare a dividend from MOL to BMK does not affect the liability of the former to make the payments to Outrider required under the Plan.

200. Finally, as to the "anti-embarrassment clause", this permits Outrider to participate in the value of MOSA were it to be crystallised in another way, namely through a 'Relevant Event'. That concept encompasses a broad range of transactions occurring within the first three years of the Plan, including any one or more of (i) the listing of the MOL or MOSA shares on a recognised stock exchange (ii) the sale or disposal of (a) the MOL shares (b) the MOSA shares (c) the PSA (d) the MOSA Intercompany Loan or (e) the MOL/ MOSA Intercompany Loan (iii) MOL's change of control such that another person obtains a direct interest of at least 50% in MOL's shares and (iv) an option granted or agreement concluded within the three year period which becomes exercisable or binding thereafter.

201. Although I accept that, even in the restructured Group, the prospect of a 'Relevant Event' occurring in that period may be slim, I consider that it affords an effective protection against MOL (and therefore BMK) obtaining 'too good a deal' by requiring the payment to Outrider of 19% of the transaction value (less any amounts due to new debt or equity investors into MOL) if occurring or agreed within the first three years of Plan operation. I was not persuaded by the suggestion that BMK or MOL might 'sit out' the chance of such a deal for three years so that it could keep all the 'spoils' for itself if a willing purchaser of the Oilfield business could be identified. Commercially, this seemed unlikely. Nor was I persuaded that this protection should endure beyond three years, it seeming to me that, if BMK's actions in the early 'turnaround' phase when the bulk of the investment is made bore fruit in terms of potential acquisitive interest, it would be appropriate for Outrider to share in that, but not beyond in circumstances in which I accept, including based on the evidence of Mr Reynolds and Mr Njoo, that BMK may be required to invest further in the development of the Oilfield.

202. In the RA, Outrider and BMK rank *pari passu* as unsecured creditors in respect of both the Guarantee claims and BMK's Intercompany Loans, with the former being paid a dividend of US$4,802, the latter US$5,198.

203. Under the Plan, Outrider will receive US$200,000 or up to US$1.45m of MOSA's forecast cashflow surplus over 12 years, the latter calculated after the interest on the BMK new loan but paid in priority to BMK's share of the same forecast cashflows by reference to MOSA's net revenues. In addition (regardless of the option

chosen), Outrider will receive 19% of the value of a transaction taking place within the next three years.

204. Against this, BMK will receive no upfront payment and a forecast share of surplus cashflows of US$4.334m over 12 years through the maintenance of its MOL shareholding. However, BMK's share might not materialise to the extent forecast (or might exceed it). BMK will retain the MOSA Intercompany Loan (subordinated to sums due to Outrider under the Plan) and receive 20% interest on the US$7.5m lent as new money (that interest excluded from the cashflow surplus figure used for the revenue share calculation).

205. BML will inject that new money and, assisted by its specialist knowledge, allow Oilfield operation to restart. As such, I accept that they are the key contributors to the restructuring benefits, whether taken by Outrider through the Cash Payment or revenue share payments. Without that new money (which I accept Outrider could not provide in whole or in part by itself or with its so-called 'partners'), MOL would be unlikely to obtain funding. With the ongoing risks facing MOL and MOSA and the difficulties of implementing of the BP, but its willingness to inject new funds for that purpose, I accept that BMK should enjoy a larger share of the future upside of the business, if generated. However, the risk of BMK getting 'too good a deal' is mitigated by Outrider receiving 19% of the value received from a sale or change of control.

206. I also have considered whether a better deal might be achievable. However, in the circumstances of an Oilfield production project effectively mothballed since 2016, in the absence of any realistic chance of investment from Outrider or any other investor and in light of BMK's stated unwillingness to fund the Oilfield unconditionally if the Plan is not sanctioned, which I accept is not an idle threat or ultimatum but a commercial reality, I am satisfied that a better deal is not realistically achievable. In this regard too, I am satisfied that BMK and MOL have sought to reach a reasonable compromise with Outrider. That is evident from the significant offer made by BMK to Outrider in the APA. I am also satisfied that Outrider is unreasonably holding out for a better offer. That is evident from Outrider's equivocation as to its own pleaded RA and its inability (as in Bermuda) credibly to back up its suggested investment intentions. With ever more resource diverted towards the rancour previously described, it seems to me that Outrider is seeking to 'kick the can down the road' in the hope of extracting a better offer. However, by taking that course, the prospect of securing such value as might still be capable of generation from a complex business mothballed eight years ago becomes increasingly remote.

207. Finally, the possibility of including a mechanism for the release of claims against third parties that might otherwise give rise to 'ricochet' claims back is now well-established (*Re Lehman Brothers International Europe (No.2)* [2010] Bus LR 489 ([45]-[55] and [65]). As for the release of the MOSA Guarantee claims by BMK and Outrider, in addition to the general common law rights of contribution as between co-sureties, MOL and MOSA have entered into a deed of contribution such that MOL will be required to pay MOSA such sums as MOSA might be required to pay under the MOSA Guarantee. Given MOSA's critical role as operating (and only revenue generating) company within the Group, I accept that this was done with a view to achieving the best possible outcome for creditors as a whole (*Re E D & F Man Holdings Limited* [2022] EWHC 687 (Ch) at [67]-[68]). On either basis, a 'ricochet' claim may

arise. Although no specific objections were taken by Outrider to this aspect of the Plan, I am satisfied that the MOSA releases are necessary and appropriate in this case to give effect to the arrangement proposed for the disposition of MOL's debts and liabilities to its own creditors (*Thames* at [240]). Indeed, even if there were no ricochet claims, I would still be satisfied as to its necessity by analogy with *Re Fitness First* [2023] EWHC 1699 (Ch) (at [115]-[117]) in which the court sanctioned the release of a parent company guarantee on the basis that enforcement against the plan company's parent would "*seriously destabilise the Group*". The same instability would also arise here from enforcement against the Group's operating company.

208. The other principal set of third party releases are of directors and advisers from claims by the Plan creditors. In *Thames*, the Court of Appeal overturned the judge's decision to sanction releases of claims against directors by the plan company itself. However, that issue does not arise here. Moreover, the relevant liabilities are limited to those in relation to the preparation, negotiation or implementation of the Plan. Finally, claims for gross misconduct, wilful neglect, fraud or dishonesty are excluded from the scope of the release. Such releases are designed to prevent Plan creditors from undermining the Plan by suing the officers and advisers responsible for implementing it. They have become standard provisions (*Re Ignition Midco BV* [2024] EWHC 1063 (Ch) at [17]). I am satisfied that such a release is appropriate in this case too.

209. Accordingly, having analysed the individual elements to which objection has been taken, and having stood back and considered its overall effect, I am satisfied that the Plan does represent a fair allocation of the restructuring surplus between the Plan creditors.

Ground 2 - International effectiveness

210. Ground 2 of Outrider's grounds of opposition is expressed in the following terms:-

> "Outrider does not accept that the Restructuring Plan would be effective in the various foreign jurisdictions, particularly in view of ongoing insolvency proceedings and injunctive orders currently in force against the Plan Company in Mauritius."

211. The two jurisdictions implicated are Mauritius and Madagascar.

(a) Legal principles

212. There was no real difference between the parties as to the proper approach of the English court in considering this question. Where the plan has an international element, the plan company must satisfy the court that there is a reasonable prospect that the plan will be recognised internationally so as to bind creditors in relevant jurisdictions to give it full effect. This has been expressed as the court needing to be satisfied that it would not be acting in vain by sanctioning the plan. In *Re Tele Columbus AG* [2024] B.C.C. 428, the court held (at [71]-[72]) that:-

"71. …… I agree that in the context of the international recognition of a scheme of arrangement the court does not need to decide whether the scheme of

arrangement is certain to be given effect in every relevant jurisdiction. Rather, the question for the court is whether there is a reasonable prospect that the scheme will be recognised internationally so as to bind creditors in relevant jurisdictions and give full effect to the scheme: see DTEK Energy BV, Re [2022] 1 B.C.L.C. 260 at [27] per Sir Alastair Norris. He said:

'The relevant principles are, I think, clear although the language in which they have been expressed has occasionally differed. But the words of a judgment are not to be treated in the same way as the words of a statute: and the concepts behind the modes of expression are clear. The principles seem to me to be these:

i) The Court will not generally make an order which has no substantial effect and will therefore need to be satisfied that the scheme will achieve its purpose: Magyar Telecom BV, Re [2014] B.C.C. 448 at [16] per David Richards J.

ii) The Court will therefore need to be satisfied that the scheme will achieve a substantial purpose in the key jurisdictions in which the scheme company has liabilities or assets: Sompo Japan Insurance Inc v Transfercom Ltd [2007] EWHC 146 (Ch) at [18]-[26] per David Richards J.

iii) The English court does not need certainty as to the position under foreign law, but it does require some credible evidence that it will not be acting in vain: Van Gansewinkel Groep BV, Re [2015] Bus. L.R. 1046 at [71] per Snowden J.

iv) Such credible evidence must show that the scheme is "likely, or at least will have a real prospect, of having substantial effect" or "at least a reasonable prospect that the scheme will be recognised and given effect": Codere Finance 2 (UK) Ltd, Re [2020] EWHC 2683 (Ch) at [34] per Falk J, KCA Deutag UK Finance Plc, Re [2020] EWHC 2977 (Ch) at [32] per Snowden J. This is not the "real prospect" standard that it is applied in procedural applications for striking out or for the grant of summary judgment or permission to appeal. Rather it is the degree of persuasion of which Hoffmann J spoke in Harris Simons Construction Ltd, Re [1989] 1 W.L.R. 368 at 370-371 and is now regularly applied (for example) in the administration context in relation to paragraph 11(b) of Schedule B1 to the Insolvency Act. "Reasonable prospect" captures it without further elaboration'.

72. Put another way, the court needs to be satisfied that it would not be acting in vain in sanctioning the scheme of arrangement before it".

213. Although the source of the 'reasonable prospect' test lies in scheme case law, it is equally applicable in a restructuring plan context (*Re Smile Telecoms Holdings Ltd* [2022] B.C.C 808 at [91]). Whether there is a reasonable prospect of recognition is a question of foreign law. The court will scrutinise the evidence of foreign law relied upon but will not undertake its own researches. However, the court is not inhibited from using its own intelligence and common sense (*Bank Mellat v HM Treasury* [2019]

EWCA Civ 449 at [53]). In *Project Lietzenburger Straße Holdco S.À.R.L.* [2024] EWHC 468 (Ch) (at [136]-[138]), Richards J found each expert's opinion to be tenable and reasonable such that neither was to be clearly preferred over the other. However, the reason given by one of the German law experts for the recognition in Germany of any English sanction order being "clear and cogent", he therefore concluded that there was a reasonable prospect of the plan being so recognised.

(b) The issues arising on international effectiveness

214. Ground 2 can be distilled to the following Mauritian law issues, namely whether:-

(i) there is a reasonable prospect that the Mauritian courts will recognise the Plan under the Model Law;

(ii) there is a reasonable prospect that the Mauritian courts will recognise the Plan by the *exequatur* procedure; and

(iii) in light of these matters, the court would be acting in vain were it to sanction the Plan.

215. As noted, the court was assisted on these issues by the evidence of Mr Rajahbalee (instructed by MOL) and Mr Lutchmenarraido (instructed by Outrider), including their respective reports and joint statement (**JS**). Both gave oral evidence.

216. Ground 2 also gives rise to the following issues concerning Malagasy law, namely whether:-

(i) there is a reasonable prospect that the Malagasy court will recognise the Plan; and

(ii) in light of this, the court would be acting in vain were it to sanction the Plan.

217. As noted, the court was assisted on these issues by the written evidence of Maître Tricaud (for MOL) and Mr Chuk (for Outrider), including their respective reports and joint statement (**JS**). Given the significant common ground, they did not give oral evidence.

Recognition in Mauritius

218. The parties agreed that the Model Law applies under Mauritian law by reason of its incorporation through Schedule 9 of the Mauritius Insolvency Act 2009 (**Schedule**). Outrider advanced certain different arguments to say that any judgment or order of this court sanctioning the Plan would not be recognised in Mauritius under the Model Law.

(a) Effect of refusal of recognition in Mauritius of the Convening Order

219. One of those arguments concerned the effect of the refusal of the Mauritian court to recognise the Convening Order. MOL says that, despite events in Mauritius,

including the issue of the Statutory Demand by Outrider against MOL on 14 March 2024, the grant by the Mauritian court of the Injunction in support of the Statutory Demand on 31 May 2024, the court's refusal of the Set Aside Application on 14 May 2025 and its dismissal of the Recognition Application on 12 May 2025, there is nevertheless a reasonable prospect of the Plan being recognised there. As to that prior dismissal, it is fair to say that Justice Lau was critical in her reasons of the manner in which MOL had gone about the Recognition Application, her order recording that:-

"(3) I note with concern that when in 2025 the board resolution was taken for this proposed course of action and when the application was made and the order obtained, an interim order as described above had already been issued as far back as 31 May 2024;

(4) furthermore, being the Judge concerned with all the two cases for which a stay order is being sought as per the motion paper, I also note with concern that the application before the UK Court was made on 20 February 2025, that is, 4 days before I heard the two connected cases on 24 February 2025 and for which judgments are reserved;

(5) I note that the said application was not disclosed to me when I heard the two connected cases to the present application;

(6) the present application suggests and indicates that it is being brought to circumvent and bypass the due process of the law and the Court and the rule of law, which this Court cannot entertain as otherwise it will bring the administration of justice in disrepute. What is most astonishing is nowhere is it averred that it has been disclosed to the Court in the UK that an interim order had been issued as at 31 May 2024 and the nature of the injunction issued against MAGASGASCAR OIL LTD and VENTURE CORPORATE SERVICES (MAURITIUS) LIMITED;

(7) notwithstanding the fact that there is a need for MAGASGASCAR OIL LTD to be restructured, the fact remains that the nature of the interim order issued against it is such that it has to be considered for the time being despite the process of restructuring is taking place and cannot be simply stayed. The more so that the two cases have been adjudicated upon and heard prior to the order of the Court in UK and judgments are being awaited; and

(8) if as averred by the applicant at paragraph 62 of the affidavit that the Foreign proceedings will have a direct impact on the debts of MAGASGASCAR OIL LTD to BMK and Outrider, such application should have been disclosed to the Judge at the time of hearing on 24 February 2025 and not seek an order behind the back of the Court in Mauritius and now imposing the UK Court order by the nature of such an application.

For all the reasons set forth above, I set aside the present application which is completely devoid of merits."

220. MOL says that this order rests on the basis of two key suggested shortcomings, both factually incorrect. As to the suggested failure to disclose to the

Judge at the hearing on 24 February 2025 the application before this court, MOL says that its Mauritian attorneys, in fact, wrote to the Judge's clerk on 21 February 2025, the day after the Part 8 claim form was issued in England, in the following terms:-

> "*We wish to inform Your Ladyship that on 20 February 2025, the Applicant has lodged a Part 8 Claim before the High Court of Justice, Business And Property Courts of England and Wales, Insolvency & Companies List (ChD), pursuant to Part 26A of the English Companies Act 2006, for an order convening meetings of creditors, and if thought fit, sanctioning, a restructuring plan of the Applicant. Such restructuring plan intends to compromise the debt pursuant to which the Statutory Demand was issued by the Respondent and the said debt is now subject to the jurisdiction of the English Courts. The Part 8 Claim lodged before the English Courts has a direct impact on the present proceedings and the Applicant therefore wishes to file a short supplementary affidavit to place such application on record. A copy of the said supplementary affidavit, which has been duly sworn by the Applicant's representative, is herewith enclosed for Your Ladyship's reference.*"

221. The Judge's clerk responded on 24 February 2025 in the following terms:-

> *"I am directed by Hon. Lau Yuk Poon, Judge to inform you that Her Ladyship has taken cognizance of your letter dated 21 February 2025 and the letter (of even date) from Mr. Attorney N. Ramasawmy appearing for the respondent.*
>
> *Kindly note that since the present matter has already been fixed for arguments today, your motion, which is being objected to by the respondent, cannot be entertained on the e-filing system.*"

222. MOL relies on the word "*cognizance*" to show that, by 24 February 2025, the Judge had read the letter from MOL's attorneys, if not the affidavit, such that she knew about the Plan and its general effect. MOL also says that the Judge was wrong to suggest that the Injunction was not disclosed to the English court, Mellor J quoting it (at [72]) in his Convening Judgment from 28 April 2025:-

> "*72. On 3 June 2024, Outrider obtained an interim injunction from the Supreme Court restraining and prohibiting the Plan Company from selling, transferring burdening, pledging, assigning, leasing or otherwise disposing of and/ or dissipating the assets of the Plan Company pending the outcome of the Set-Aside Application.*"

223. Because Justice Lau's reasons for dismissing the Recognition Application did not consider the underlying merits and were based on obvious mistakes of fact, Mr Rajahbalee concludes that her judgment is wrong and likely to be overturned on appeal. Outrider, however, says that Mr Rajahbalee's focus is narrowly on whether the Mauritian and English courts were notified of the proceedings in the other and "glosses over" the following aspects of the reasoning, namely (i) the relevance of the Injunction to the Mauritian court's jurisdiction to recognise the Plan (ii) the importance of the timing of the Recognition Application, made only four days before the connected applications were due to be heard in Mauritius (iii) the finding that the Plan Company had attempted to "*circumvent and bypass the due process of the law and the Court of*

the rule of law" and (iv) the Recognition Application being " … *completely devoid of merits*". Not having been instructed to do so, Mr Lutchmenarraidoo expressed no views on the prospects of the appeal, now apparently due to be heard in November this year.

224. Finally, but very importantly in this context, both experts agree that an application for the recognition of any sanction judgment will be different from the Recognition Application such that the Judge's order from 12 May 2025 will not affect the former or the Plan itself. As such, MOL says that the order does not assist Outrider. Outrider emphasised (including by reference to the evidence of Mr Lutchmenarraidoo) that this agreement between the experts says nothing about the likely outcome of any further recognition application, submitting that the Judge's order provides good evidence as to how the Mauritian courts might approach matters. Indeed, Mr Rajahbalee himself was of the view in his evidence that, if raised, the Mauritian court would consider questions of *res judicata* and abuse of process, albeit he went on to say that the prospect of success on such arguments would be limited.

225. Although I recognise that there may well be consideration of Justice Lau's order and/ or its reasoning on any future recognition application, given this important common ground between the parties, I certainly cannot say on the evidence before me that the dismissal of the Recognition Application, even in the forceful terms expressed by the Judge, means that there is no reasonable prospect of Mauritian courts recognising any sanction order and the Plan.

(b) <u>MOL's COMI</u>

226. A further substantive ground relied on by Outrider for saying that the Mauritian court would not recognise an order of the English court sanctioning the Plan was that there was no reasonable prospect of the former concluding that MOL has its centre of main interests (**COMI**) in England. As such, it said that the Mauritian court would not consider these English proceedings 'foreign main proceedings' for the purpose of the Model Law.

227. Related to this argument was Mr Lutchmenarraidoo's further argument that, although already registered as such in Mauritius, MOL was not, in fact, an 'Authorised Company' (**AC**) within the meaning of s.71A of the Financial Services Act 2007. An AC is a form of Mauritian registered offshore company which conducts business, and has its central management and control, principally outside that country.

228. Mr Mitchell's relevant evidence for COMI purposes was set out briefly in his witness statement in the following terms:-

> "77. In addition, I am advised that the Plan Company has its centre of interests in the United Kingdom, because:
>
> 77.1 While the Plan Company's registered office (under Mauritian law) is in Mauritius, it has its head office in the United Kingdom at Silverstream House, Fitzrovia, London, W1T 6EB. The Plan Company's head office was moved to Silverstream House on 31 May 2024 for the purpose of shifting the Plan Company's COMI to facilitate the wider restructuring. I am advised that there is nothing unlawful nor objectionable about effecting a 'COMI-shift' in this way

under English law for the purpose of using the restructuring tools available under English law for the benefit of the Company's creditors.

77.2 Communications by the Plan Company with its creditors reflect its presence in London:

77.2.1 The Plan Company's website and email addresses of the Plan Company's directors and representatives end in '.co.uk' and carry the corporate head office on their signature block; and

77.2.2 The company's letter head reflects the corporate head office.

77.3 I am a director of the Plan Company and reside in England. The other director (Mr Udhin) resides in Mauritius, because Mauritian law requires one director of every Mauritian company to be resident in Mauritius."

229. This was developed in oral evidence when Mr Mitchell confirmed that:-

(i) His fellow (Mauritian resident) director, Mr Udhin, was fully involved in MOL's management;

(ii) Board meetings were conducted virtually, with Mr Reynolds also attending a number of them;

(iii) MOL's business was previously undertaken in Mauritius;

(iv) MOL's business shifted from Mauritius to England on 31 May 2024;

(v) MOL's business shifted so that it could avail itself of a Part 26A restructuring plan;

(vi) This took place after service of the Statutory Demand against MOL and MOL's Set Aside Application;

(vii) The move was nothing to do with trying to avoid the consequences of MOL being wound up in Mauritius;

(viii) The Mauritian public register still shows a Mauritian address for service;

(ix) MOL's website shows a Mauritian registered office, London corporate headquarters and an operational office in Madagascar; and

(x) MOL's letter dated 31 May 2024, notifying the change of its principal address to London and requesting all business communications to be sent there (or via e-mail to a usual contact), also showed its Mauritian registered office.

230. As to the expert evidence, Mr Rajahbalee concluded that MOL's COMI was in England. This was based on MOL's instructions that (i) MOL's corporate head office is in the UK (confirmed by its website) (ii) one of MOL's two directors is UK resident (iii) the domain name for MOL's website is www.madagascaroil.co.uk (iv)

communications with stakeholders reflect MOL's presence in London, including the e-mail addresses of MOL representatives ending in ".co.uk" and carrying the corporate head office on their sign off and MOL's letterhead reflecting the corporate head office (v) MOL board meetings are held mostly from London and strategic decisions regarding MOL taken in London (vi) London is the location for MOL's operations and dealings with third parties and (vii) MOL has undertaken significant restructuring-related activity in London.

231. Mr Lutchmenarraidoo concluded that MOL's COMI was in Mauritius. Despite his helpful articulation of the principles underlying the Model Law as enacted in Mauritius, it was somewhat difficult to discern from his report the basis on which he had come to that view. The JS is somewhat more illuminating in that regard, his view as to the location of COMI in this case seemingly largely informed by his further view that MOL would not qualify as an AC under Mauritian law:-

> "At para 63ff (of YL Report), the Plan Company's COMI is not in England, noting (at para 71) that the Plan Company cannot be deemed to have its effective management outside Mauritius and must be deemed to be a Mauritian domestic company, having its effective management in Mauritius. The following factors are taken into account:
>
> a) the Extract of File of the Plan Company obtained from the Registrar of Companies of Mauritius dated 26 May 2025, which states that: the Company has only two directors and both have their address of service in Mauritius (their residential address is not mentioned) [sic]16; does not mention any different "business address"; and that the Registered address of the Plan Company is: c/o Venture Corporate Services (Mauritius) Limited Level 3, Tower 1, Nexteracom Towers, Ebene, Mauritius [sic]17.
>
> b. the absence of evidence of any income tax return filed by the Plan Company in England with the HMRC;
>
> c. the absence of any evidence as to the Plan Company's Tax ID/ Tax Account Number in England;
>
> d. the absence of evidence of any tangible economic activity of the Plan Company in England;
>
> e. the absence of evidence that any Board meeting of the Plan Company took place in England;
>
> f. the fact that the Plan Company is an investment holding company and does not trade per se, and (at para 86 that public information available at the Companies' Registry was used to initiate proceedings in Mauritius and the Plan Company submitted itself to the Mauritian jurisdiction to dispute the debt through its application to the Supreme Court of Mauritius to set aside the Statutory Demand issued by Outrider, and it appears that the Plan Company has tried to move its deemed COMI to England as from the start of the insolvency proceeding in Mauritius in May 2024 (at para 89)."

232. Moreover, in relation to MOL's attempt to move its COMI to the UK in May 2024, Mr Lutchmenarraidoo stated in the JS that:-

> "The attempt to move the COMI was proximate to the start of proceedings in Mauritius. Because Section 181(6) of IA provides that where, on the hearing of an application under this section (application to set aside a statutory demand), the Court is satisfied that there is a debt due by the company to the creditor that is not the subject of substantial dispute, or is not subject to a counterclaim, set-off or cross-demand, the Court may dismiss the application and forthwith make an order under section 102 putting the company into liquidation. Therefore, the proceeding started right from the application to set aside a statutory demand and from that application, MOL was aware that it was facing insolvency proceedings."

233. The ultimate conclusions of each expert, based on their different factual assumptions or conclusions relating to MOL's COMI, were of little assistance to the court, not least given the close testing of those facts at the Sanction Hearing. Of greater assistance, however, was the experts' exposition of principle. Albeit based largely on familiar Model Law concepts, that exposition afforded insight into how the Mauritian courts might go about their application to those facts.

234. As to the interpretation of the Model Law as a matter of Mauritian law, it appeared to be common ground that there was no judgment of the Mauritian courts concerning the operation of the Schedule and that they may have regard to the decisions of the courts of other states which have enacted the Model Law, including England, such decisions being of potential persuasive effect in Mauritius. Moreover, s.365 of the Mauritius Insolvency Act 2009 Act permits the Mauritian court to refer to UNCITRAL materials such as the UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation (**Guide**).

235. Although not involving all MOL's creditors, Mr Rajahbalee considered that the Mauritian court is likely to consider this Part 26A claim to be a "foreign proceeding" within the meaning of Article 2(a) of the Schedule, being a "collective judicial or administrative proceeding in a foreign state, including an interim proceeding, pursuant to a law relating to insolvency in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganisation or liquidation". Mr Lutchmenarraidoo did not expressly address this point in his report. He does say in the JS that he "disagrees that the Plan is a "foreign proceeding" as defined in Article 2(a) of the Model Law". However, I did not discern his disagreement to extend beyond his view that MOL does not have its COMI or an "establishment" in the UK and that this claim is, therefore, neither a foreign *main* nor foreign *non-main* proceeding. Indeed, as Outrider accepted in closing submission by reference to Mr Rajahbalee's citation in his report of *Re Smile Telecoms Holding Ltd* [2022] EWHC 740 (Ch), "[i]t just shows that as a matter of principle, it is theoretically possible for Mauritius to recognise the Restructuring Plan. I do not think anyone is disputing that."

236. As noted, the question of MOL's COMI (and whether this claim might be considered by the Mauritian court to be a foreign main proceeding) was disputed. However, there was a large measure of agreement as to the underlying principles, Mr

Lutchmenarraidoo in particular drawing in this regard on the Guide, including the citation of the Virgo-Schmit report (at [75]) as to:-

(i) the need for the concept of 'centre of main interests' to be interpreted as the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties;

(ii) the rationale of the rule being that insolvency is a foreseeable risk such that international jurisdiction is based on a place known to the debtor's potential creditors, enabling the legal risks to be assumed in the case of insolvency to be calculated; and

(iii) the presumption for companies and legal persons that, unless proved to the contrary, the debtor's centre of main interests is the place of his registered office, this place normally corresponding to the debtor's head office.

237. As Mr Lutchmenarraidoo also noted, the Guide explains that the principal factors to ascertain the COMI are "where the central administration of the debtor takes place, and which is readily ascertainable by creditors". Only when these principal factors do not yield a ready answer regarding the debtor's COMI may a number of identified additional factors concerning the debtor's business be considered.

238. As for the movement of a debtor's COMI, the Guide notes examples of the move being intended to give the debtor access to an insolvency process, such as reorganisation, that more closely met its needs than what was available under the law of its former centre of main interests. In other cases, the move may have been designed to thwart the legitimate expectations of creditors and third parties. When there is evidence of such a move in close proximity to the commencement of the foreign proceeding, it may be desirable for the receiving court, in determining whether to recognise those proceedings, to consider the factors mentioned above and the debtor's circumstances more broadly. In particular, the test that the COMI is readily ascertainable by third parties may be harder to meet if the move occurs in close proximity to the opening of proceedings.

239. In this regard, Mr Lutchmenarraidoo says that the timing of MOL's attempted COMI move must be considered, suggesting that the issue by Outrider of the Statutory Demand and MOL's related Set Aside Application represented the commencement of insolvency proceedings in Mauritius, and noting MOL's efforts shortly thereafter to move its COMI. Mr Rajahbalee pointed out in his evidence, however, that Mauritian law would not recognise a statutory demand as the commencement of liquidation proceedings but would consider it little more than a letter of demand. MOL also pointed out that Outrider's winding-up petition against MOL was not issued until more than a year later and, only then, very shortly before the Sanction Hearing. Moreover, the evidence shows that the COMI move was not prompted by events in Mauritius rather than completion of the acquisition from the Bermuda JPLs and the need to move forward with the restructuring process.

240. In relation to when a debtor's COMI falls to be assessed, although not indicated in the Model Law, the Guide states that the date of commencement of the relevant foreign proceeding is the appropriate date, providing a test that can be applied

with certainty to all insolvency proceedings. The 'commencement approach' (as opposed to the 'filing' (of the recognition application) approach) was preferred by Leech J as a matter of English law in *Re Li Shu Chung* [2021] EWHC 3346 (Ch).

241. It is fair to say that the experts came in for some criticism on both sides for their views as to the location of MOL's COMI. Mr Rajahbalee, for example, was criticised by Outrider for (i) his suggestion that MOL's pursuit in the UK of a restructuring plan was relevant to consideration of its COMI and related reliance on *obiter* comments from a Singaporean case which took the relevant date for assessment of COMI as that of the recognition application (ii) his failure to look at the Mauritius companies' registry extract for MOL, including its Mauritius registered office address, Mauritius registered agent address and Mauritius service address for both directors (iii) his failure to look at MOL's website (although he had seen a print out) with London, Mauritius and Madagascar addresses for MOL (iv) his failure to ascertain how third parties could have been aware of the UK residence of one of the directors (v) his reliance on MOL having a 'co.uk' e-mail address even though such an address can be acquired by someone outside the UK (vi) his failure to look at any communications with stakeholders said to reflect MOL's London presence (vii) his failure to check that directors' meetings did take place in London (rather than virtually, chaired from Stourport-on-Severn) or to assess how a third party would know about this without access to the board minutes (vii) his suggestion that a Mauritian court would attach little weight to the operations undertaken in Madagascar and (vii) his reliance on *Smile Telecoms* (noted above).

242. In relation to Mr Lutchmenarraidoo's evidence, MOL pointed out that (i) Mauritian law requires an AC to have a registered agent (and file a tax return) there (ii) although a registered agent will carry out such services as are required in Mauritius, MOL is a non-trading holding company (iii) a third party would realise that, being an AC, MOL could not have its central management and control in Mauritius (iv) he had not seen the MOL website, including the 'co.uk' e-mail address and contact sheet with the London corporate head office address (albeit Mr Lutchmenarraidoo said that the corporate HQ had not been declared to the Mauritius companies' registrar under the 'business details' section of the register) (v) the registered agent was a licensed management company providing the registered office address for a fee (vi) there were no staff in Mauritius apart from Mr Udhin (vii) Mr Lutchmenarraidoo did not know where the work was done for the Plan (albeit he said that this was not MOL's economic activity) (viii) the management of MOL was conducted at the board meetings called to order in Stourport-by-Severn, with MOL's substantive activity discussed at those meetings being carried on in England, not Mauritius (ix) the letter sent to MOL stakeholders dated 31 May 2024 notified its principal business address in London and (x) the COMI change (31 May 2024) followed shortly after the Bermudian judgment on 2 April 2024 and the related appeal had been withdrawn on 11 April 2024 (the MOL Statutory Demand having been issued on 14 March 2024 between the hearing in Bermuda in February and judgment in April).

(c) Conclusion on MOL's COMI

243. Although Outrider and MOL each prayed in aid particular factors to support their respective contentions as to the place where MOL conducted the administration of its interests on a regular basis and how that place was capable of ascertainment by

third parties, this court need only be satisfied that there is a reasonable prospect that the Mauritian court would find MOL's COMI to be England as at the commencement of these Part 26A proceedings in February 2025. Although the presumption under the Model Law is that COMI will be the same as the place of a company's registered office, that presumption can be rebutted.

244. In this case, based on the evidence of (i) MOL's registration as an AC (ii) the positive steps taken by MOL to move its COMI to England when it did and why (iii) the management and substantive business activity carried out by or on behalf of MOL in England, including in relation to the Plan (iv) the more limited presence or activities undertaken in Mauritius (some required under Mauritian law) and (v) the ability of third parties to ascertain the location of MOL's COMI through, for example, its AC status being publicly known, its communications to stakeholders in May 2024 about its principal address and the address information on its website, this court has no difficulty - despite the countervailing factors relied on by Outrider - in finding that there is such a reasonable prospect and, therefore, of the Mauritian court recognising this claim as a foreign main proceeding. As such, this court would not be acting in vain on this account in sanctioning the Plan and it is not necessary to consider, additionally, the prospect of the Mauritian court finding that MOL has an establishment in England.

(d) Foreign Representative

245. Mr Lutchmenarraidoo also suggested in the JS that Mr Mitchell had not been validly appointed as a foreign representative of MOL within the meaning of Article 2(d) of the Schedule. This appeared to be based largely on MOL's COMI not being in the UK but, given my view as to the reasonable prospect of the Mauritian court finding otherwise, that argument falls away. Mr Lutchmenarraidoo also suggested that the appointment may not have been validly made on account of the relevant corporate resolution having been made in Mauritius. This argument was not explained in his report. However, I found cogent and clear Mr Rajahbalee's unchallenged evidence in his report (at [59]-[67]), including by reference to the Guide, that it is not necessary for a foreign representative to be appointed pursuant to court order, that such a representative can be a director of the debtor and that the appointment of Mr Mitchell was valid under Mauritian law. On the basis of that evidence, I am satisfied that there is also a reasonable prospect that the Mauritian court would recognise him as such.

(e) Manifestly contrary to Mauritius public policy

246. As to Outrider's further contention that recognition of these proceedings would be manifestly contrary to the public policy of Mauritius, it is common ground that the public policy exception in Article 6 of the Schedule is to be construed narrowly. In this case, Mr Lutchmenarraidoo says in the JS that the Plan would fall foul of Mauritius public policy because:-

(i) it is necessary to await the appeal against the order of the Mauritius Supreme Court dated 12 May 2025 refusing the Recognition Application;

(ii) the relief sought is different to what is available or permissible in Mauritius and/ or this proceeding was commenced on a basis not available in Mauritius;

(iii) an order sanctioning the Plan would conflict with the Injunction of the Mauritius Supreme Court dated 31 May 2024; and

(iv) implementing the Plan would contravene the Injunction.

247. As to the first point above, both experts agree that an application to the Mauritian court for recognition of any sanction order would be different from that seeking recognition of the Convening Order. They also agree that, regardless of the outcome of the appeal, the judgment refusing the Recognition Application would not affect the application for recognition of any order sanctioning the Plan. Mr Lutchmenarraidoo re-confirmed this at the Sanction Hearing. It was therefore unclear why recognition of any sanction order might be manifestly contrary to Mauritius public policy on account of a pending appeal against the refusal of a different application.

248. As to Mr Lutchmenarraidoo's second point, it was also unclear why the unavailability in Mauritius of the relief now sought in England or the commencement of these proceedings on a different basis than available in Mauritius would mean that recognition was manifestly contrary to Mauritius public policy. Looking at the references relied on by Mr Lutchmenarraidoo, these seem to concern cases in which, despite similar such arguments, the public policy exception was not applied.

249. The gravamen of Mr Lutchmenarraidoo's argument was his third and fourth points and related reliance on the decision in *In the matter of Zetta Jet PTE. Ltd* [2018] SGHC 16 in which the High Court of Singapore granted recognition of certain US Bankruptcy Court proceedings for the very limited purpose of challenging an injunction which the Singapore court had previously granted to enjoin the respondents from their pursuit. The wider recognition sought on the application by foreign representatives appointed in the US Bankruptcy proceedings enjoined would undermine the administration of justice in Singapore and contravene its public policy, albeit on a lower standard of exclusion by reason of Singapore's deliberate enactment of Article 6 of the Model Law without the word "manifestly". The exclusion enacted by Mauritian law does contain that word.

250. The starting point for Mr Lutchmenarraidoo's argument appeared to be that, based on the Statutory Demand issued by Outrider against MOL on 14 March 2024 and the related Set Aside Application in Mauritius, insolvency proceedings had already been initiated in Mauritius prior to this English claim in February 2025. However, as I have already noted in the context of COMI, the two experts disagree as to whether these did represent the commencement of insolvency proceedings. Again, I found clear and cogent Mr Rajahbalee's contrary view that insolvency proceedings in Mauritius are not commenced by the issue of a statutory demand rather than of a winding up petition. That did not take place until June 2025, with the petition only served on 26 June, the day before the start of the Sanction Hearing itself.

251. Turning to the Mauritius Injunction, this prohibited MOL, whether directly or indirectly, from selling, transferring, burdening, pledging, assigning, leasing or otherwise disposing of and/ or dissipating the assets belonging to MOL up to the value of just in excess of US$61m, pending the determination of any winding up proceedings regarding MOL. As to the nature of the suggested contravention, Mr Lutchmenarraidoo accepted that the conduct of these Part 26A proceedings did not constitute a breach of

the Injunction. He also accepted that the compromise of MOL's debts effected by the Plan, including Outrider's claim under the MOL Guarantee, would not fall within the prohibited matters since it would not take any assets away from MOL. Rather, Mr Lutchmenarraidoo's point was that the grant of the BMK new loan in favour of MOL pursuant to the Plan would result in the breach of the Injunction because the repayments of the loan by MOL would be made out of its assets.

252. Although Mr Lutchmenarraidoo acknowledged that the value of the assets frozen by the Injunction reflected the amount of Outrider's claim under the MOL Guarantee, the mere fact that such claim would be compromised by Plan sanction would not alter the continued subsistence of the Injunction pending the conclusion of any winding up proceedings that Outrider might issue. The Injunction is a court order and it was not in Outrider's gift to decide to maintain it. As for the loan repayments constituting a breach of the Injunction, Mr Lutchmenarraidoo considered that this would result in the burdening, pledging or disposing of MOL's assets. Even though MOL would receive an asset in the form of the monies drawn down under the BMK new loan, the repayment of that loan would still take assets away from MOL.

253. As to the effect of the Plan generally, Mr Rajahbalee's view was that:-

> "There is nothing in the presentation of the Restructuring Plan or even after - if eventually the Plan is sanctioned by the English High Court - that will be seen as a sale, transfer or disposal of and the assets of MOL contrary and amounting to a breach of the Injunction. Even the Hon Judge Lau Yuk Poon does not say so in the Judgment setting aside the Recognition Application on 12 May 2025."

254. Mr Rajahbalee maintained that position in cross-examination for two reasons:-

> "The first reason is what is being attempted to do by the restructuring plan is to have a loan that would provide the survival of the company and that does not deplete or dissipate assets, as it were. My second reading of it is that if we have come to the stage where either the restructuring plan is sanctioned, then I do not see what is the purpose of the injunction altogether as there would be a compromise of the guarantee liabilities."

255. When pressed on the payment by MOL of the US$200,000 Outrider Cash Payment representing a dissipation or transfer of MOL's assets, Mr Rajahbalee said:-

> "I do not believe, my Lord, that the way in which the restructuring plan follows a process of collective action, ending up with, if ever, with a sanction of this court, would amount to transferring of assets by MOL in the sense intended by the injunction."

256. Finally in this context, there was some reliance by Outrider on the *Zetta* case, as well as *In re Gold & Honey, Ltd* 410 B.R. 357 (cited therein), the US Bankruptcy Court in the latter refusing recognition of an Israeli receivership proceeding where the relevant company had already entered US Chapter 11 proceedings, the effect of which was an automatic stay, the appointment of a receiver in Israel violated that automatic stay and recognition of the receivership would, therefore, "reward and legitimize" such

violation. Mr Rajahbalee's view was that the terms of the injunction in the *Zetta* case in question were very different from those of the Mauritius Injunction.

257. Mr Rajahbalee's view more generally was that the Mauritian court would interpret Article 6 more narrowly than Mauritius domestic public order and by reference to 'international public policy', the court being unlikely to find that the public policy exception in Article 6 had been engaged short of something in the process of obtaining any sanction order, or in the content of the Plan itself, that would be abhorrent to the principles of international public policy. So, in the context of the potential relevance of domestic abuse of process procedures to recognition under Article 6, the Guide notes that the exception is intended to be narrowly construed and invoked only when the taking of action under the Model Law would be manifestly contrary to a state's public policy and, as a general rule, rarely the basis for refusing an application for recognition.

258. As a preliminary matter, I agree that the very object of the injunctions or orders in *Zetta* and *Gold & Honey* was the foreign insolvency proceeding for which recognition was sought. In this case, the prohibition is not concerned with these Part 26A proceedings or the Plan rather than the dissipation of MOL's assets, the related asset freezing injunction in Mauritius having been granted on the basis of Outrider's debt claim under the MOL Guarantee. Mr Lutchmenarraidoo accepted that these Part 26A proceedings and any compromise of that English law debt under the Plan, if sanctioned, would not breach the Mauritius Injunction. In light of this, and Mr Rajahbalee's cogent and clear evidence as to the purpose and effect of the Injunction, including the absence of any relevant breach before or after sanction and the likely approach of the Mauritian court more generally to the public policy exception under the Model Law, I remain satisfied that there is a reasonable prospect of any sanction order being recognised in Mauritius. As Mr Rajahbalee also explains, the effect of recognition under Article 20 is the mandatory or automatic stay of any further creditor proceedings under the MOL Guarantee.

(f) *Exequatur* of any sanction order

259. The experts also agree that any sanction order is, in principle, capable of recognition in Mauritius through the *exequatur* procedure under Article 546 of the Mauritius Code de Procédure Civile and that, in considering whether to recognise a foreign judgment through this route, the Mauritian court will seek to establish if the conditions indicated in *D'Arifat v Lesueur* [1949] MR 191 have been satisfied, namely whether:-

(i) The judgment is valid and capable of execution in the country where delivered;

(ii) The judgment was not contrary to any principle affecting public order;

(iii) The defendant was regularly summoned to attend the court proceedings; and

(iv) The court which delivered the judgment had jurisdiction to deal with the matter submitted to it (Mr Rajahbalee explaining that jurisdiction is assessed by the rules of the foreign forum, not the Mauritian court).

260. In this context, the parties again differed as to whether recognition of the Plan in Mauritius would, as Mr Lutchmenarraidoo contended, be contrary to public policy by undermining domestic insolvency proceedings in Mauritius, conflicting with the Injunction granted in support of them and bypassing domestic remedies available under Mauritian law in favour of those available from the English court with no substantial jurisdictional nexus. Mr Rajahbalee again contended that a sanction order would not give rise to a breach of, or be inconsistent with, the Injunction. Moreover, since there were no insolvency proceedings in Mauritius at the time these Part 26A proceedings were commenced, there was no abuse of process. As such, recognition of the Plan through the *exequatur* procedure would not be contrary to public policy.

261. There was also some debate in cross-examination between Mr Rajahbalee and counsel for Outrider as to whether the enforcement of foreign judgments in Mauritius would engage public policy considerations in a narrower 'international' sense, restricted to situations in which its application would be manifestly contrary to the public policy of Mauritius, or more broadly as a matter of domestic public order. Although I found this aspect of the argument somewhat inconclusive, in light of Mr Rajahbalee's clear and cogent evidence again as to the nature, purpose and effect of the Injunction and status of the Statutory Demand and related Set Aside Application, I was again satisfied that there is a reasonable prospect of the Mauritian courts recognising any sanction order through the *exequatur* procedure as well.

262. Accordingly, whether based on recognition in Mauritius under the Model Law or under its *exequatur* procedure, this court is satisfied that it would not be acting in vain by sanctioning the plan.

(g) A potential further basis of recognition in Mauritius

263. Mr Rajahbalee also posited a further and more direct avenue to the Plan, and the compromise of the MOL Guarantee claim it contemplates, being given effect in Mauritius, namely by the Mauritian courts applying English choice of law rules to the question of the proper law governing the discharge of contractual liabilities. Although the Mauritius Civil Code governs much of its private law, including the law of contract and delict, for which purpose the courts will look to French caselaw for persuasive guidance, Mr Rajahbalee says that many areas have been influenced by the common law. Moreover, the Mauritian courts are not bound to follow French law if there is good reason not to do so. The Mauritius Civil Code is also silent on matters of private international law, including as to rules governing the law of contract. In some cases, the Mauritian courts have applied English choice of law rules, including in a contractual context, Mr Rajahbalee being of the view that there is no good reason why the Mauritian courts would not follow English private international law rules on the question of the discharge of contractual obligations to apply the governing law of the contract itself (in the case of the MOL Guarantee, English law) to that question (*Ellis v M'Henry* (1871) LR 6 CP 228). It is fair to say that Outrider challenged Mr Rajahbalee closely on whether the authorities he relied on indicated a sufficiently firm basis for the proposition that the Mauritian courts would depart from resort to French law principles, including French choice of law rules, on this issue. Having considered the evidence, I was not persuaded that a sufficient basis had been made out such that I could not say that there was a reasonable prospect of the Mauritian courts giving effect to the compromise of the MOL Guarantee claim through this route. However, such a finding

was ultimately not required given my prior findings with respect to the recognition of any sanction order in Mauritius though the auspices of the Model Law and the *exequatur* procedure.

Recognition in Madagascar

264. As noted earlier, the question of international effectiveness also engages Malagasy law, not least given that the Plan seeks to release the MOSA Guarantee claim. It is fair to say that there was a large amount of common ground between the experts, Maître Tricaud (for MOL) and Mr Chuk (for Outrider). As to the former, Outrider makes the point that Maître Tricaud is not a member of the Malagasy bar rather than a French avocat, albeit also Managing Partner of an associated Malagasy law firm which operates in accordance with the legal and regulatory framework applicable to legal advisors in Madagascar, with Malagasy law being derived from French civil law. There was also some criticism by Outrider of the (machine software) method of translation of his report into English, albeit I have no reason to doubt that the interpretation was correctly undertaken given the careful checking process described in his report.

265. As to the common ground, both experts agree that Article 468 of the Madagascar Code of Civil Procedure provides that judgments rendered by foreign courts may be enforced there if they have been declared enforceable by a Malagasy court, that the *exequatur* rules for arbitral awards will be applied by analogy and that a foreign insolvency judgment can be recognised by the *exequatur* procedure. Although expressed by each expert in slightly different terms, there was again substantial common ground as to the conditions for recognition of a foreign judgment, namely:-

(i) Compliance with the principle of adversarial proceedings;

(ii) The existence and validity of the decision (explained as not manifestly non-existent, the court having jurisdiction or jurisdictional competence);

(iii) The enforceable and final nature of the decision in its country of origin; and

(iv) The absence of any conflict with Malagasy public policy.

266. Both experts also agree that the Malagasy court assessing the validity of the Plan and the sanction decision would not assess the merits or substance of the Plan when considering recognition rather than undertaking a formal review to assess whether the specific conditions for the *exequatur* procedure have been met. One exception expressed by Mr Chuk in the JS was "potentially with regard to the issue of conflict with public policy", discussed further below.

267. As to the satisfaction (or otherwise) of the first *exequatur* condition above, Mr Chuk considered that this was violated given that MOSA is not a party to these proceedings, albeit the issue would not arise if MOSA does not raise it. Maître Tricaud's view was that, any sanction judgment being in MOSA's interests, the principle of adversarial proceedings would not be challenged. However, although not necessary, it may assist recognition if MOSA confirms in writing its agreement to be bound by the sanction order. Given these views, and the fact that MOSA is unlikely to

raise any objection to the Plan, this first condition does not appear to be an impediment to recognition.

268. As to whether any sanction judgment would be regarded as legally valid and issued by a competent court, Mr Chuk opines that it would be if this court would be considered competent, albeit this appears to be contradicted by the order of the Mauritian court dated 12 May 2025 dismissing the Recognition Application. Maître Tricaud was not aware of that order before submitting his report but, in the JS, he reiterated his view that the English court is competent to make the sanction order. Even if the 12 May 2025 order were considered to contradict any English sanction judgment, the question of the competence of the English court is a matter of English law and whether the English court considers that the Part 26A jurisdictional conditions are met. Finally, there was no issue between the experts that the power of attorney and deed of release in respect of the MOSA Guarantee claim to be executed following any sanction order would be valid and enforceable in Madagascar following *exequatur*.

269. As for the finality of any sanction order, both parties agree that this would be final and enforceable, subject to any appeal brought in England within the relevant time limits. However, Mr Chuk also canvasses the risk that the ongoing proceedings in Mauritius may cast doubt on its finality given the risk of conflicting judgments. Maître Tricaud disagrees, saying that the finality and enforceability of any sanction order would not be affected by the Mauritian judgment, even if contradictory.

270. As to the question of the potential violation of Malagasy public policy, Mr Chuk states:-

> At first glance, the substance of the restructuring plan itself is not contrary to public policy. However, the risk of contradiction between the UK and Mauritian decisions constitutes a potential source of conflict with public policy."

271. By contrast, Maître Tricaud states that the proceedings related to the Plan are not contrary to Malagasy public policy, there being no violation of fundamental procedural principles or issues concerning economic stability and the judgment being subject only to formal review by the judge.

272. Outrider prays in aid the fact that Maître Tricaud was not informed about the Statutory Demand in Mauritius, the Mauritian Injunction and the prospective insolvency of MOL before presenting his report. Even if the court were to set aside his lack of Malagasy legal qualification, Outrider invites the court to disregard his evidence on the basis that someone who is not aware of all the circumstances of the case cannot meaningfully comment on the public policy exception to recognition under the *exequatur* procedure. Set against that is Mr Chuk's evidence in which he expresses his doubts as to whether an English sanction order would be recognised in the following terms:-

> "Although the restructuring decision will be rendered by an English court and will be effective as a matter of English law, in my opinion, the ongoing insolvency proceedings in Mauritius create uncertainty regarding the practical effect of that decision. … From my point of view, these ongoing proceedings and provisional measures **may cast doubt** on the perspective of a Malagasy

> judge reviewing an exequatur application, on whether the English decision is truly final and binding in a practical sense. As a result, in my opinion, this uncertainty about the finality and enforceability of the decision **could justify a refusal** to recognize or enforce the foreign decision until the legal situation in both jurisdictions is fully resolved."

273. MOL, in turn, prays in aid the tentative expression of Mr Chuk's views (as **emphasised** above) to say that there remains nonetheless a reasonable prospect of recognition sufficient to satisfy the requirement for international effectiveness. Outrider says that any equivocation on his part still does not mean that there is a reasonable prospect of recognition.

274. Although not tested in cross-examination, having considered the written evidence, I was not persuaded that Maître Tricaud's opinions should be disregarded because of his suggested lack of qualification or failure to consider in his original report the order of the Mauritian court dated 12 May 2025. As to the former, Maître Tricaud's experience and qualification is evident from his report, as to which, his exposition of the requirements for *exequatur* in Madagascar was, in my view, insightful and, in some senses, and assisted by his broader French civil law experience, more so than Mr Chuk's, including in respect of the availability of the procedure for the recognition of foreign insolvency judgments.

275. As to Maître Tricaud's suggested failure to consider the 12 May 2025 order in his report, both experts have clearly considered and discussed the position further in light of the opinion of the other and developed their views in the JS, with Mr Chuk, for example, more lately appearing to suggest that the impact of the Mauritian proceedings and the Injunction reaches beyond the condition of *exequatur* as to finality and potentially into jurisdictional and public policy questions as well. However, I accept MOL's submission that his points in that regard were tentative and equivocal, contrasted to Maître Tricaud's clear and cogent views the other way.

276. Moreover, this court has also had the benefit of the Mauritian law evidence, including as to the nature and effect of the proceedings in that jurisdiction and to which some of Mr Chuk's observations are directed. In my view, some of that evidence, not least from both Mauritian law experts as to any sanction order still being capable of recognition in Mauritius notwithstanding the prior dismissal of the Recognition Application puts some of those observations into perspective. Again, I am satisfied that there is a reasonable prospect of any sanction order being recognised in Madagascar though the *exequatur* procedure.

277. Finally, the experts appear to agree that, were Outrider to bring winding up proceedings against MOSA in Madagascar, the Malagasy court would at least be likely to stay or adjourn those pending the outcome of this Part 26A claim or any Malagasy *exequatur* proceeding.

278. Accordingly, I was also satisfied from a Malagasy perspective that this court would not be acting in vain were it to sanction the plan.

Third party discretion

279. Finally on the question of the effectiveness of the Plan, Outrider raised a new point in closing submissions, namely that this English court cannot ignore the question of third party discretion. As Trower J held in In *Re Smile Telecoms Holdings Limited* [2021] EWHC 685 (Ch) (at [54]):-

> "If the satisfaction of a condition to the effectiveness of the scheme as a whole is left to the ultimate discretion of a third party, it is capable of cutting across the requirements of creditor approval, court sanction (in which the court not any other person is required to exercise a discretion) and registration, which are the three steps for plan effectiveness for which the statute provides."

280. Outrider says that the operability of the Plan is wholly at its discretion of Outrider and, by extension, any other creditor, because the court cannot speculate as to what third parties might do in Mauritius to protect or secure their position where, as here, there are extant winding up proceedings. To the extent that MOL might say that the Mauritian courts will not wind up MOL, no Mauritian law has been served on the point. All this court does have is evidence of what the Mauritian court has done to date, namely refuse MOL's Recognition Application and its Set Aside Application. MOL says that this third party discretion point is not in the Grounds or even in Outrider's skeleton for the Sanction Hearing. More substantively, the nature of the suggested discretion here appears to be that Outrider might decide that it wants to ignore any sanction order that the English court might make and enforce its debts anyway.

281. Outrider's position in its skeleton argument, made explicit in its oral submissions, was that if, contrary to its primary case, MOL were correct on the question of recognition, "the Plan, if sanctioned, would have the effect of preventing Outrider from pursuing its insolvency proceedings against the Company in Mauritius and/ or from enforcing its debt against MOSA and putting MOSA into liquidation." I have found that there is a reasonable prospect that the Mauritian courts would treat this Part 26A claim as foreign main proceedings. As I understood to be common ground, the effect of recognition in Mauritius under the Model Law as a foreign main proceeding would be such as to give rise to a stay of the winding up proceedings under Article 20. Outrider cross-examined Mr Rajahbalee on that basis. As such, even if properly characterised as a matter of third party discretion in the sense indicated by Trower J (which seems doubtful), no question of a condition to be satisfied at Outrider's discretion arises. Nor does it seem likely to arise with respect to other third party creditors, the documents indicating, as I had understood Outrider to accept, that the other creditors concerned were MOL-related parties.

Summary and overall conclusions

282. Having rejected Outrider's Grounds, I must nevertheless consider whether all relevant conditions for sanction are met in this case, as to which:-

(i) S.901A is available to a "company". A "*company*" is any company liable to be wound up under the Insolvency Act 1986 (s.901A(4)(b)). This includes a foreign company, which is an unregistered company for the purposes of s.220 of the Insolvency Act 1986. However, that jurisdiction will not normally be exercised (whether to wind up companies or sanction a plan) unless there is a "*sufficient connection*" between the company and England;

(ii) A sufficient connection can be found where the scheme or plan debt is governed by English law even if the plan company's COMI is elsewhere. In *Re Vietnam Shipbuilding Industry Group* [2014] BCC 433, the court held that the English governing law of the facility agreement in itself established a sufficient connection with this jurisdiction. One of Outrider's prior objections concerned the undocumented nature of the BMK/ MOL Intercompany Loan which contained no express choice of governing law. However, MOL undertook at the CMC formally to document that loan. Upon that undertaking, the effect of which was that all the Plan debt would be expressly subject to English law, the relevant ground of objection was not permitted by Meade J. I accept that MOL and the Plan have a sufficient connection with England;

(iii) Outrider and BMK are clearly also both creditors of MOL for the purpose of s.901A;

(iv) Moreover, MOL has clearly encountered or is likely to encounter financial difficulties that are affecting or will or may affect its ability to carry on business as a going concern in the sense that its financial difficulties are such that MOL will be unable to carry on business as a going concern (s.901A(2));

(v) MOL is also proposing a compromise or arrangement with Outrider and BMK, the purpose of which is to eliminate, reduce or prevent, or mitigate the effect of those financial difficulties (s.901A(3)) including in the form of:-

(a) the compromise of the BMK/ MOL Intercompany Loan for one ordinary share of US$1 in MOL, the release of the BMK/ MOSA Guarantee claim for US$1 and BMK's provision of the new BMK loan to MOL, comprising a committed loan facility of US$7.5m and uncommitted loan facility of US$12.5m; and

(b) the compromise of the Outrider/ MOL Guarantee claim for either the Outrider Cash Payment or the right to receive revenue share payments, the release of the Outrider/ MOSA Guarantee claim for US$1 and the potential for Outrider to receive 19% of the cash or cash equivalent received by the Group following any change of control within three years.

(vi) The separate creditor classes were properly constituted for the reasons given by Mellor J in his Convening Judgment (at [115]-[120]), with which I agree. I need not repeat those or elaborate upon them here;

(vii) I am also satisfied that the requirements as to the content and circulation of the Explanatory Statement and notice and conduct of the creditor meetings have been complied with. That is evident from the Explanatory Statement itself, the report of the creditor meetings as well as Outrider's full participation at the meeting and in these proceedings, including at the Sanction Hearing;

(viii) As for Condition A under s.901G(3), requiring the court to be satisfied in the event of sanction that " …. *none of the members of the dissenting class would be any worse off than they would be in the event of the relevant alternative*", I have rejected Outrider's formulation(s) of the RA for the reasons given in

relation to Ground 5. In relation to MOL's formulation, which I have accepted, Outrider did not object in the Grounds on the basis of this condition and I have rejected its attempt in its skeleton argument to do so by reference to potential realisations in MOSA's liquidation;

(ix) As for Condition B under s.901G(5), having rejected Ground 5, Ground 6 falls away. BMK would, in fact, be 'in the money' in the (proper) RA;

(x) As to the fairness of the Plan, I am satisfied that that it was rational for BMK to vote in favour essentially for the reasons given in MOL's evidence for its promotion. As for Outrider, although the rationality test does not apply, for the reasons given in relation to Ground 8, I am satisfied that the Plan achieves a fair distribution of the benefits of the restructuring;

(xi) Outrider has not advanced a pleaded case that there is a 'blot' on the Plan. In its skeleton argument, it did suggest that the Plan was inoperable because of the real risk of OMNIS terminating the PSA and preventing MOSA and BMK from operating the Oilfield. However, such risk did not appear to me to be of the nature of a technical or legal defect in the Plan such that it would not work according to its own terms or would infringe some mandatory provision of the law. In any event, as I have found, I consider it unlikely that OMNIS would terminate the PSA in the event of MOL's liquidation; and

(xii) I have also found that the court would not be acting in vain in sanctioning the plan, there being at least a reasonable prospect that the Mauritian courts would recognise this court's order in accordance with the Model Law as enacted there and through its *exequatur* procedure for the recognition of foreign judgments. Likewise, there is a real prospect of the Malagasy courts recognising any sanction order through its *exequatur* procedure.

283. In all the circumstances, I am satisfied that the conditions for sanction are met in this case and that it would be appropriate for this court to exercise its discretion to that end.