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Case No: CR-2024-005054, CR-2024-005055

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

7 Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 10 February 2025

Before :

THE HONOURABLE MR JUSTICE HILDYARD

Between :

IN THE MATTER OF AMBATOVY MINERALS

SOCIETE ANONYME

AND IN THE MATTER OF DYNATEC MADAGASCAR

SOCIETE ANONYME

AND IN THE MATTER OF THE COMPANIES ACT 2006

Hearing dates: 26th November 2024

Daniel Bayfield KC and Jon Colclough (instructed by **Sullivan & Cromwell LLP**) for **The Plan Companies**
Henry Phillips (instructed by **Millbank LLP**) for **The Supporting Creditors Group**

APPROVED JUDGMENT

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Remote hand-down: This judgment was handed down remotely at 10:30am on 11 February 2025 by circulation to the parties or their representatives by email and by release to The National Archives.

Mr Justice Hildyard:

Scope of this Judgment

1. On 26 November 2024, I sanctioned two restructuring plans under Part 26A of the Companies Act 2006 ("CA 2006"), one in respect of Ambatovy Minerals Société Anonyme and the other in respect of Dynatec Madagascar Société Anonyme (both companies incorporated in Madagascar and, together, "the Plan Companies"). In each case the restructuring plan ("the Plan")[1] has taken effect between the Plan Companies and four classes of their creditors ("the Plan Creditors").

2. This judgment elaborates the reasons for the conclusions I reached in determining that the Plan could be and should be sanctioned. I summarised my conclusions very briefly in a short ruling when the hearing concluded; but this judgment supersedes that short summary.

The Plan Companies and the purpose of the Plan

3. The Plan Companies operate the Ambatovy nickel and cobalt mine in Madagascar. Both Plan Companies are ultimately owned by Sumitomo Corporation ("Sumitomo") (54.2%) and Korea Mine Rehabilitation and Mineral Resources Corporation ("KOMIR") (45.8%) ("the Shareholders"). Sumitomo is a large Japanese trading company. KOMIR invests in energy and natural resources projects and is owned by the State of Korea.

4. The mine, which was developed and constructed between 2007 and 2011, is an important part of the Malagasy economy. The project represents the largest ever foreign investment in the country and some 25% of Malagasy exports are products from the mine.

5. Commercial production began in 2014. The mine's economic viability depends on nickel and cobalt prices, which have been extremely volatile. Unfortunately, the operation of the mine has been beset with financial difficulties throughout its history.

6. There have been three previous consensual restructurings of the Plan Companies' financial liabilities: in 2016, 2019 and 2021. The Plan Companies have continued to incur losses, which indeed have accelerated.

7. Recent increases in low-cost production in Indonesia have led to declining global prices. Despite the previous restructurings, the Plan Companies suffered indicative losses before tax[2] of US$98.2m in 2022 and US$180.5m in 2023 and are forecast to lose US$376.6m in 2024.

8. To give a sense of the scale of the losses incurred by those who have invested in the mine, and their commitment notwithstanding obvious and considerable risk, the Shareholders have contributed some US$7.0bn since 2005 and in return have been repaid US$647,000 (approximately 0.009%).

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[1] Formally, there are two restructuring plans, one for each company: but both are referable to the same Plan document. For ease of reference, I will refer to both compositely as "the Plan" (singular).

[2] Indicative because the Plan Companies report EBITDA (i.e. earnings before depreciation and financing costs) figures. Grant Thornton has taken the EBITDA figures and used them to estimate profit/loss before tax figures.

9. The mine has also recently been facing significant operational difficulties. The Plan Companies expect that they will need to replace a significant part of a 220km pipeline system which transports ore excavated at the open pit mine near the city of Moramanga to the processing facilities in the city of Toamasina.

10. The issues with the pipeline have been brought into sharp focus since the Plan was launched. On 25 September 2024, a leak was discovered at kilometre 68 of the pipeline and all production at the mine was halted. Production was restarted in the first week of November. As might be expected, the shutdown of the mine is likely to have serious financial consequences for the Plan Companies (on top of the serious financial difficulties it was already experiencing).

11. Even without the recent shutdown, the evidence put before me made clear the Plan Companies' need of significant sums of new money in order to survive. US$140m is required simply to fund the restructuring and get through a further trading period. There is some US$2.3bn of financial indebtedness within the scope of the Plan which the Plan Companies have no prospect of repaying in full (or anything like it).

12. The Plan in each case has two basic features: (i) introducing new money to enable the Plan Companies to continue operations and to enable the mine to continue in production; and (ii) discharging most of the "out of the money" financial debt so as to put the Plan Companies onto a stable financial footing.

13. The evidence was that only the Shareholders are prepared to provide the new money that is required; but that they were only prepared to provide the money on terms that involve the discharge of the Senior Debt and the Recovery Financing Debt (as defined below).

14. The purpose of the Plan is to enable that result and thereby avoid the Plan Companies' collapse and liquidation.

Attitude of other stakeholders

15. As elaborated in paragraph [47] below, at the time of the first class convening hearing heard before Mr Justice Richard Smith in early September 2024 the Plan was opposed by the Senior Lenders and the Recovery Financing Lenders (as defined in paragraphs [30] and [32] below). Further to negotiations following that hearing, a resolution was agreed between them and the Super Senior Lenders, although certain of the Recovery Financing Lenders continued to oppose the Plan. By the time of the Hearing before me for sanction, the majority of the creditors had locked up and agreed to support the restructuring as a result of a commercial agreement reached after the first hearing before Richard Smith J.

16. No-one appeared before me at the Hearing to put forward and articulate any objections to the Plan. However, at the four class meetings directed by the Court (see below), one substantial creditor voted against the Plan in the class comprising Recovery Financing Lenders, resulting in the votes in favour at that class meeting falling short of the statutory minimum for class approval of the Plan.

17. It was in those circumstances that, to enable the Plan to take effect, the Plan Companies needed and sought an order 'cramming down' that single class of creditors called the Recovery Financing Lenders: that is to say, an order binding that class of creditors into the Plan at the instance of another class of creditors notwithstanding that the class (here, of the Recovery Financing Lenders) has not approved the Plan by the statutorily prescribed majority. Such an order is ordinarily referred to as a "cross-class cram down" order.

The 'cross-class cram-down' jurisdiction in summary

18. The 'cross-class cram-down' jurisdiction is a relatively new one. It is provided for in Part 26A CA 2006, which was inserted into the 2006 Act by Schedule 9 of the Corporate Insolvency and Governance Act 2020 in June 2020. Part 26A, as described by Snowden LJ at paragraph [3] of his seminal judgment in *In the Matter of AGPS Bondco plc* [2024] EWCA Civ 24 (*"AGPS Bondco"*),

> *"was intended to provide a new restructuring tool to supplement the existing regimes for schemes of arrangement under Part 26 of the 2006 Act."*

19. As Snowden LJ went on to explain, there are very considerable similarities between a scheme of arrangement under Part 26 and a restructuring plan under Part 26A. Both types of procedure apply where a *"compromise or arrangement"* is proposed between the company and its creditors (or any class of them) or its members (or any class of them). Both procedures also involve a three-stage process consisting of (i) a convening hearing at which the court considers (among other things) the appropriate composition of the classes of creditors that are to be invited to meetings to vote on the proposed scheme or plan and to receive and consider a statement explaining its effect; (ii) the holding of these class meetings; and (iii) a sanction hearing at which the court has a discretion whether to sanction the scheme or plan: see sections 896 to 899 and 901C-901F CA 2006.

20. However, he also highlighted a number of important differences, and in particular:

    (1) First, a company that wishes to propose a restructuring plan under Part 26A must satisfy two threshold conditions set out in section 901A which restrict the use of Part 26A plans to companies which have encountered or are likely to encounter financial difficulties affecting their ability to carry on business as a going concern. There is no such restriction in Part 26, which can be used by solvent companies and frequently is so to implement takeovers and other changes to their capital structures.

    (2) Secondly, unlike Part 26, under which all members or creditors whose rights against the company are to be affected by a scheme of arrangement must be summoned to a meeting or class meetings to vote on the scheme, section 901C(4) CA 2006 gives the power to exclude any class of plan creditors or members from being summoned to a meeting if the court is satisfied that none of the creditors or members in that class has a *"genuine economic interest"* in the company.

    (3) Thirdly, the court may sanction a restructuring plan under section 901F(1) in Part 26A if it is approved by 75% in value of those present and voting (either in person or by proxy) at their respective court-convened class meeting or meetings. Unlike

schemes of arrangement under Part 26, there is no additional requirement to obtain a majority in number of those present and voting at each class meeting.

(4) Fourthly, and most significantly in this case, as indeed in *AGPS Bondco*, a scheme of arrangement under Part 26 can only be sanctioned by the court if each of the classes of creditors or members have voted in favour of the scheme by the required majorities at their respective class meetings. This gives any class a potential right of veto over the scheme. However, by virtue of section 901G CA 2006, the court's discretion to sanction a restructuring plan under section 901F may be exercisable notwithstanding that the plan has not received the requisite approval of one or more classes of creditors or members: that is the Court's "cross-class cram down" power.

21. Where the exercise by the court of its cross-class cram down power is sought by the proponents of a plan under Part 26A, the court at the sanction hearing will adopt a further three-stage analysis: see *Re Virgin Active Holdings Ltd* [2021] EWHC 1246 (Ch), a decision of Snowden J (as he then was), and one of the first in respect of Part 26A. The first two stages concern two additional preconditions to be satisfied, being (a) Condition A in section 901G, which is that the creditors would not be *"worse off"* if the plan is implemented by the use of the cram-down power than they would be in the *"relevant alternative"* (that is, if the plan is not implemented at all); and (b) Condition B in section 901G, which is that the plan has been approved by at least one class who would receive a payment, or have a *"genuine economic interest"* in the company in the *"relevant alternative"*. The third stage at the sanction hearing is for the Court to consider the restructuring plan, its context and effect, and any opposition to it, in the exercise of its discretion whether to exercise its cross-class cram down power and sanction the plan.

22. At that third stage, the Court is likely to adopt a very similar approach under Part 26A in its consideration of the view of the <u>assenting</u> class or classes, that is to say, the classes in which the requisite statutory majorities have been achieved, as its settled approach in the context of Part 26. The classic statement of this approach, as explained by David Richards J (as he then was) in *Re Telewest Communications plc (no 2)* [2004] EWHC 1466 (Ch) at paragraph [22], which Snowden LJ adopted in *Re AGPS Bondco* at [122], is sometimes described as "the rationality test": provided that the creditors have been properly consulted by reference to adequate information and with sufficient notice, the Court does not impose its own view of the commercial merits of the scheme, but asks a more limited question in relation to each class whether the compromise or arrangement embodied in the scheme is one that *"an intelligent and honest man, a member of the class concerned and acting in respect of his interest, might reasonably approve"*.

23. However, as Snowden LJ emphasised in *Re AGPS Bondco* at paragraphs [129] to [134], where there is a <u>dissenting</u> class as defined by section 901G, the court cannot simply apply the rationality test, either (i) as regards the voting with in the dissenting class, or (ii) as regards the overall voting across the different classes. It must itself examine the commercial reasons why the plan might be thought to be in the interests of the dissenting class because (*per* Snowden LJ at [132] and [134] in *Re AGPS Bondco*)

> *"… there can be no assumption that the assenting classes that have voted in favour of the plan have any commonality of commercial interests with the dissenting class…*
>
> …

Accordingly, I do not consider that court can, when deciding whether it is fair to impose a plan upon a dissenting class under Part26A, Apply some form of rationality test based upon the level of voting in an assenting class or classes, or upon the overall value of claims voted in favour of the plan across the assenting and dissenting classes as a whole."

24. Thus, in the context of a Part 26A plan, the Court must assess the commercial validity of any objection within the dissenting class, as well as the weight of the objection in terms of any economic interest that the dissenting creditors consider will be denied them unfairly or with insufficient recompense.

25. It follows that a plan which requires exercise of the cross-class cram down power engages the Court much more fully in an assessment of the commercial rationale of what is proposed, and a more detailed review accordingly. I shall return to discuss each aspect of the requisite review in more detail in due course.

26. In the meantime, I return to set out the Plan Companies' indebtedness and their creditors in detail below.

The Plan Companies' debts and their creditors in more detail

27. The table below summarises the Plan Companies' financial indebtedness (for which they are jointly and severally liable) as of 15 September 2024. The compromise which the Plan embodies extends to all this indebtedness.

Category	**Amount (US$)**
Super Senior Debt	c.71,000,000
Senior Debt	c.842,000,000
2021 NM Debt	c.565,000,000
Recovery Financing Debt	c.814,000,000
TOTAL	**c.2,292,000,000**

28. The debts were subject to an intercreditor agreement called the Restructuring Creditors Agreement. In that regard:

(1) The pre-enforcement payment waterfall was: (i) the Super Senior Debt; (ii) the Senior Debt and 2021 NM Debt on a *pari passu* basis and (iii) the Recovery Financing Debt.[3]

(2) The post-enforcement payment waterfall was: (i) the Super Senior Debt; (ii) the Senior Debt; (iii) the 2021 NM Debt; and (iv) the Recovery Financing Debt.[4]

If, as was submitted, the relevant alternative is insolvent liquidation (for which, see below), it is the post-enforcement payment waterfall ("the assumed post-enforcement waterfall") that is of relevance.

[3] Clause 2.1 of the Restructuring Creditors Agreement.

[4] Clauses 2.2 and 2.3 of the Restructuring Creditors Agreement, read alongside the turnover provisions in clause 3.2.

29. The outstanding amount of Super Senior Debt as of 15 September 2024 was c.US$71m[5]:

(1) The Super Senior Debt was provided pursuant to an agreement dated 22 April 2024, apparently in order to meet the Plan Companies' urgent liquidity needs. The opportunity to participate in the Super Senior Debt was extended to all financial creditors, but only the Shareholders were willing to provide the necessary funding (in the case of Sumitomo, via a wholly owned subsidiary called Summit Ambatovy Mineral Resources Investment B.V.). The Shareholders in their capacity as the holders of the Super Senior Debt are the Super Senior Lenders.

(2) The Super Senior Debt was (at the date of the hearing) due to mature, as a result of a series of extensions, on 15 December 2024; it accrued payment-in-kind interest of 21.3% p.a., with the Super Senior Lenders having the benefit of direct security over substantially all of the Plan Companies' assets outside Madagascar.

(3) The Super Senior Lenders also had: (i) the right to become direct beneficiaries of the onshore security over the Plan Companies' assets in Madagascar; and (ii) turnover rights[6] under the Restructuring Creditors Agreement in respect of the proceeds of the onshore security.

(4) It was submitted, and I have accepted, that there was no prospect of the Plan Companies being able to repay the Super Senior Debt on 15 December 2024.

30. The outstanding amount of Senior Debt was c.US$842m:

(1) The Senior Debt was originally advanced in 2007 in the sum of US$2.1bn but had been partially repaid and restructured down to c.US$842m as a result of the previous consensual restructurings. There were 18 Senior Lenders.[7]

(2) The Senior Debt was scheduled to mature on 15 December 2033, with interest payable semi-annually at the "CME Term SOFR Reference Rate" (a widely used replacement for USD LIBOR) plus margin.

(3) The Senior Lenders had the benefit of onshore and offshore security over the Plan Companies' assets and the Senior Debt ranks behind the Super Senior Debt, but above the 2021 NM Debt and Recovery Financing Debt, in the assumed post-enforcement payment waterfall.

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5 The evidence is that an additional US$13m was drawn down in November 2024 due to the pipeline leak.

6 A turnover right requires a junior creditor to "turn over" payments received from e.g. enforcement to the senior creditor: see clause 3.2 of the Restructuring Creditors Agreement.

7 Japan Bank for International Cooperation, KEXIM, Export Development Canada, African Development Bank, European Investment Bank, BNP Paribas (Tokyo Branch), BNP Paribas (Seoul Branch), Crédit Agricole CIB (Tokyo Branch), Crédit Agricole CIB (Seoul Branch), ING Bank N.V. (Tokyo Branch), ING Bank N.V. (Seoul Branch), Mizuho Bank, Ltd., MUFG Bank, Ltd., Shinhan Bank, Société Générale (Tokyo Branch), Société Générale (Seoul Branch), Sumitomo Mitsui Banking Corporation and Woori Bank. The explanatory statement lists 14 rather than 18 Senior Lenders. That is because the explanatory statement treats each of BNP Paribas, Crédit Agricole, ING Bank and Société Générale as single Senior Lenders. In fact, those four commercial banking groups are Senior Lenders through both their Tokyo and Seoul branches.

(4) Interest of c.US$33m was due on 15 December 2024. It was submitted, and I have accepted, that there was no prospect of the Plan Companies being able to repay that interest on 15 December 2024.

31. The outstanding amount of 2021 NM Debt was c.US$565m:

(1) The 2021 NM Debt was provided pursuant to an agreement dated 15 June 2021 in order to meet the Plan Companies' (then) liquidity needs. As with the Super Senior Debt, the 2021 NM Debt was provided by the Shareholders. The Shareholders in their capacity as the holders of the 2021 NM Debt are also the 2021 NM Lenders.

(2) The 2021 NM Debt did not have a fixed maturity date but, in broad terms, was required to be paid in as close an amount as possible to the Senior Debt prior to the satisfaction in full of the Senior Debt or on the taking of enforcement action. The 2021 NM Debt accrued payment-in-kind interest of 21.3% p.a..

(3) The 2021 NM Debt was unsecured but, as a result of turnover provisions in the Restructuring Creditors Agreement, ranked above the Recovery Financing Debt in the assumed post-enforcement payment waterfall.

32. The outstanding amount of Recovery Financing Debt was c.US$814m:

(1) The Recovery Financing Debt was former Senior Debt that was reconstituted during the 2021 consensual restructuring of the Plan Companies' liabilities. There were 10 Recovery Financing Lenders,[8] all of whom were also Senior Lenders.

(2) The Recovery Financing Debt was scheduled to mature on 15 December 2045 and was required to be repaid on a pay-if-you-can basis prior to its maturity date to the extent there was cash available. A portion of the Recovery Financing Debt was convertible into deeply subordinated perpetual fixed rate bonds in certain circumstances. The Recovery Financing Debt accrued payment-in-kind interest of 3% p.a..

(3) The Recovery Financing Debt was secured but, as explained above, certain turnover provisions in the Restructuring Creditors Agreement mean that it ranked below the 2021 NM Debt in the assumed post-enforcement payment waterfall.

33. Certain other liabilities are excluded from the Plan:

(1) Local working capital facilities granted by domestic and regional banks.
(2) Liabilities owing to local trade creditors.
(3) Unsecured liabilities owing to the Shareholders.

[8] Japan Bank for International Cooperation, KEXIM, African Development Bank, European Investment Bank, Crédit Agricole CIB (Tokyo Branch), Crédit Agricole CIB (Seoul Branch), Mizuho Bank, Ltd, Shinhan Bank, Sumitomo Mitsui Banking Corporation and Woori Bank. The explanatory statement lists nine rather than 10 Recovery Financing Lenders. That is because the explanatory statement treats Crédit Agricole as a single Recovery Financing Lender. In fact, the Crédit Agricole group is a Recovery Financing Lender through both its Tokyo and Seoul branches.

34. The Plan Companies submitted, and I have accepted, that these liabilities have been excluded for good commercial reasons. In the first two cases, that is because local working capital facilities and relationships with suppliers are essential to the ongoing viability of the mine and are needed to ensure the continued trading of the Plan Companies. In the third case, it is because the Shareholders (who are to provide all the new money under the Plan and who are also, in their capacity as the Super Senior Lenders, the sole "in the money" creditors) made clear that they would not support the restructuring and/or will bring certain commercially beneficial arrangements to an end if the liabilities are compromised. The evidence of Mr Luc Olivier Nouvian ("Mr Nouvian", the deputy Chief Executive Officer and Chief Financial Officer of both Plan Companies), which I have accepted, is that without these arrangements, the Plan Companies would require an additional new money injection of approximately US$50m through to 2026.

The relevant alternative

35. I shall return later to the significance of the *"relevant alternative"* later, since that is a crucial aspect of the statutory tests in Part 26A CA2006. It is the lens through which the fairness of the Plan and the weight to be given to dissenting creditors is assessed.

36. Put shortly, the Plan Companies submitted that the *"relevant alternative"* if the Plan were to fail was clear: the enterprise would collapse. The Plan Companies would be left in a position where they would not be able to pay c.US$122m that is due to the Super Senior Lenders and the Senior Lenders on 15 December 2024. In addition, they would have no access to the substantial new money needed to keep the mine operational.

37. As explained in Mr Nouvian's first statement, and also in the first expert report made by Mr Olivier Ribot ("Mr Ribot", an expert on Malagasy law), when a Malagasy company cannot pay debts that fall due, its representatives are required, unless there is a viable and reasonable prospect of addressing the debt within a reasonable period of time, to make a declaration of a situation of "cessation of payments" to the Malagasy commercial court. An improper failure to make a declaration exposes the company's representatives to potential civil and criminal sanctions. Upon such a declaration, the court will consider whether to appoint a receiver or a liquidator.

38. It appeared from the evidence and was submitted on behalf of the Plan Companies that, absent or failing the Plan, there would be no viable and reasonable prospect of addressing the c.US$122m of debt that is due next month, and the Plan Companies' representatives would therefore have no choice but to make a declaration to the commercial court. As Mr Nouvian states in his first statement:

> "*[81] I have discussed matters with my fellow directors Gus Gomes (CEO) and Hansina Valaydon (Senior Legal Counsel for the Project) and can confirm the following:*
>
> > *(a) If the Restructuring Plans fail, then we will make a declaration of a situation of "cessation of payments" either: (i) on or shortly after 30*

> *September 2024 (if the plan fails before then); or (ii) upon the failure of the plan (if the plan fails after 30 September 2024).*"[9]

39. Given the size and strategic importance of the Plan Companies in Madagascar, I accepted the likelihood that a liquidator or liquidators would be appointed. It was the Plan Companies' position, and for reasons I shall come on to elaborate I have accepted, that in these circumstances insolvent liquidation was the *"relevant alternative"*.

Key features of the Plan

40. The Plan is, in these circumstances, justified (it is said) by the certainty of the collapse of the Plan Companies (and in consequence of an enterprise vital to Madagascar) unless approved and sanctioned. Standing back from its details, the result of the Plan is the complete removal of all third-party lenders, leaving its shareholders (who have been the principal funders in the past and have sponsored the Plan in their capacity as Super Senior debtholders) with 100% of the equity. As such, and not least because the Super Senior creditors are seeking to invoke the cross-class cram down jurisdiction of the Court (which is in itself relatively novel in this jurisdiction) the Plan invites and requires careful scrutiny; and it may well be it would have foundered but for the successful negotiations which culminated in a substantial majority of creditors approving it.

41. In more detail, the key features of the Plan are as follows:

    (1) An additional US$140m of new money (called the "Senior NM Debt") is to be raised in order to fund the restructuring and fund operations at the mine. The Senior NM Debt is fully backstopped by the Shareholders.

    (2) The Super Senior Debt is amended and extended so that its terms correspond to the terms of the Senior NM Debt. In addition, the Super Senior Lenders (in their capacity as such[10]) have agreed to participate in 50% of the Senior NM Debt.

    (3) The Senior Debt, the 2021 NM Debt and the Recovery Financing Debt is written down to US$0. In terms of the consideration flowing to these Plan Creditors:

        (a) The Senior Lenders receive US$45,740,786.54 (5.45% of the outstanding debt owed to them) pro rata to their respective holdings;

        (b) The 2021 NM Lenders (in their capacity as such[11]) receive no cash payment at all. Instead, they have a right to participate in up to 50% of the Senior NM Debt (and they have exercised that right). Once they participate, the 2021 NM Lenders' existing 2021 NM Debt will be reinstated as a second ranking "Reinstated Junior Tranche" at a ratio of US$3 for every US$1 of Senior NM Debt provided up to 100% of the value of the existing holdings.

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9 At the time of Mr Nouvian's first statement, 30 September 2024 was the date on which the Super Senior Debt, and interest under the Senior Debt, was due to be paid. As explained above, extensions to 15 December 2024 were agreed.

10 The Super Senior Lenders are, as explained above, the Shareholders in a different capacity.

11 The 2021 NM Lenders are likewise, as explained above, the Shareholders in a different capacity.

(c) The Recovery Financing Lenders receive US$406,429.07 (0.05% of the outstanding debt owed to them), pro rata to their respective holdings.

42. In addition, the Shareholders have agreed to provide the Senior Lenders and the Recovery Financing Lenders with what has been called the "Deferred Payment Mechanism". The Deferred Payment Mechanism was described to me as being a form of anti-embarrassment provision: if the Shareholders sell their shares in the Plan Companies, or raise a sufficient amount of capital, prior to 30 June 2029, the Senior Lenders and the Recovery Financing Lenders will be entitled to share in any upside (subject to various conditions). The Senior Lenders and the Recovery Financing Lenders will have six months post-sanction to accede to the agreement; so that even those creditors that have voted against (i.e. KEXIM), or did not vote, will be able to benefit. It was submitted on behalf of the Plan Companies that as this is an agreement between the Shareholders on the one hand and the Senior Lenders and the Recovery Financing Lenders on the other hand (and also involves what is effectively a partial dilution of the Shareholders' interest in Malagasy companies, a matter over which the English Court has no obvious jurisdiction), it sits outside of the Plan.

Recoveries under the Plan vs the relevant alternative

43. Grant Thornton UK LLP ("Grant Thornton") prepared a report on: (i) creditors' likely recoveries in the assumed relevant alternative to the Plan, which they consider to be a liquidation; and (ii) creditors' likely returns under the Plan as amended.

44. According to Grant Thornton's analysis, all creditors will be better off under the Plan:

Creditor class	**Relevant alternative (%)**	**Plan returns (%) by net present value, or discount, rate**				
		10%	**20%**	**30%**	**40%**	**50%**
Super Senior Lenders	24.3% to 42.3%	286.12%	111.34%	52.88%	28.81%	17.25%
Senior Lenders	0%	5.45%	5.45%	5.45%	5.45%	5.45%
2021 NM Lenders	0%	38.65%	3.52%	0.43%	0.07%	0.01%
Recovery Financing Lenders	0%	0.05%	0.05%	0.05%	0.05%	0.05%

45. In respect of these returns:

(1) The Grant Thornton analysis contains different "net present value rates" or "discount rates".[12]

(2) The returns to the Senior Lenders and the Recovery Financing Lenders remain the same (5.45% and 0.05%) irrespective of the discount rate. That is because these creditors are receiving a single (or "bullet") cash repayment under the Plan.

(3) As to the returns to the Super Senior Lenders and the 2021 NM Lenders:

[12] A "discount rate" reflects the fact that $1 received in the future is (probably) worth less than $1 received today.

(a) The figures in the table above only include recoveries in respect of the Super Senior Lenders' existing holdings and the 2021 NM Lenders' Reinstated Junior Tranche. The figures do not include recoveries in respect of the Senior NM Debt (that is, the new money).

(b) As is apparent from the table, there are very significant variations in the % returns depending on the discount rate which is applied. The denominator used by Grant Thornton in calculating the returns is the value of the outstanding Super Senior Debt or 2021 NM Debt (as the case may be) as of 31 August 2024. The Super Senior Debt and the Reinstated Junior Tranche will be repaid, in full or in part, under the Plan Companies' forecast, with interest over a very considerable time period – indeed, in the case of the 2021 NM Lenders, the time period for repayment of the Reinstated Junior Tranche is September 2045 to March 2060. If a creditor is paid interest at a rate that is higher than the discount rate, then the creditor will recover more than 100% of the outstanding debt (hence the high recovery figures for the Super Senior Debt in the 10% discount rate column). The reverse is true if the discount rate is higher than the interest rate received (hence the low recovery figures in the 50% discount rate column).

Procedural background

46. A Practice Statement letter was sent to Plan Creditors on 25 July 2024. The claim forms (one for each of the Plan Companies) were issued on 27 August 2024.

47. Unusually, but in consequence of continuing negotiations, there were then two convening hearings in respect of the Plan:

(1) As foreshadowed in paragraph [15] above, the first came before Richard Smith J on 3 September 2024. Richard Smith J made an order giving the Plan Companies permission to convene two meetings of their Plan Creditors on 10 October 2024 or at such other later date or time as the Plan Companies might notify to the Plan Creditors. The reference details for Richard Smith J's judgment are [2024] EWHC 2598 (Ch). At that stage, a number of Plan Creditors intended to challenge the Plan. Directions were given for those Plan Creditors wishing to challenge the Plan: see paragraphs 16-20 of the order. (1) A list of objections was due by 4pm on 13 September 2024. (2) The Plan Companies were to file any further evidence by 4pm on 24 September 2024. (3) Opposing Plan Creditors were to file any evidence in opposition by 4pm on 15 October 2024. (4) The Plan Companies were to file any evidence in reply by 4pm on 5 November 2024. There was to be a five-day sanction hearing listed to commence on 25 November 2024: see paragraph 21 of the order.

(2) As I have foreshadowed, after that first convening hearing there were negotiations with a view to resolving these difficulties and avoiding an expensive, contested sanction hearing of what would have been an ambitious plan. These were in large part successful.

(3) The terms of the commercial agreement required changes to be made to the Plan. In its original form, the Plan treated the Senior Lenders, the 2021 NM Lenders and the Recovery Financing Lenders equally. They would each have received the

option to either: (i) participate in the Senior NM Debt on the terms described above (i.e. the reinstatement of their existing debt as the Reinstated Junior Tranche at a ratio of US$3 for every US$1 of Senior NM Debt provided); or (ii) share on a pro rata basis a cash payment of US$20m less the costs incurred by the Plan Companies in promulgating the Plan. As revised the Plan involves: (i) the Senior Lenders sharing US$45,740,786.54; and (ii) the Recovery Financing Lenders sharing US$406,429.07. Only the 2021 NM Lenders will have the option to participate in the Senior NM Debt but they will receive no cash payment if they do not. (The 2021 NM Lenders have elected to participate in the Senior NM Debt in full.) In short, the Senior Lenders and the Recovery Financing Lenders have, as compared to the Plan in its original form, extracted further sums from those funding the restructuring (i.e. the Shareholders): c.US$46m rather than US$20m less the restructuring costs.

(4) On 15 October 2024, a supplementary Explanatory Statement was distributed to Plan creditors via the Plan portal. The supplementary Explanatory Statement set out the amendments to the Plan and annexed, with tracked changes, amended versions of the Explanatory Statement, the Plan itself and other Plan-related documentation.

(5) Also on 15 October 2024, the majority of the previously dissenting creditors signed a restructuring support and lock-up agreement ("the RSA") pursuant to which they committed to support the restructuring. On the same date, 14 of the 18 Senior Lenders and six of the 10 Recovery Financing Lenders[13] (being the same persons) signed the RSA committing to support a restructuring on the terms of the Plan as revised.

(6) As a result of these developments (and in particular the differential treatment of the Senior Lenders, the 2021 NM Lenders and the Recovery Financing Lenders), the two-class structure was considered no longer to be appropriate. A second convening meeting was thus required.

(7) A second hearing to consider what classes should be directed by the Court was listed before me; at the hearing, the Plan Companies sought a variation of Richard Smith J's order of 3 September 2024 so as to give the Plan Companies permission to convene four, rather than two, meetings of the Plan Creditors.

(8) This appeared to me correct, and I made directions for four class meetings as sought, including directions for the exchange of evidence in the event of continued objection. I also required the Company to send out "*the Further Plan Documentation*", including a supplementary Explanatory Statement and the amended Explanatory Statement, and in addition directed that there be sent directly to four creditors who had not signed up to the RSA a letter or email (in a form which I approved).

(9) The reference details for my judgment approving class constitution and further meetings, and making these further directions are [2024] EWHC 2839 (Ch).

[13] All the lenders in footnote 7 except for KEXIM, African Development Bank, Shinhan Bank and Woori Bank.

Outcome of the Class Meetings to approve the amended Plan

48. In accordance with the order made on 22 October 2024, the Plan meetings took place on 31 October 2024. The Plan was approved by over 75% in value of those voting at three of the four meetings, that is, the meetings of the Super Senior Lenders, the Senior Lenders and the 2021 NM Lenders.

49. However, the Plan was not approved by over 75% in value of the Recovery Financing Lenders. 67.65% by value voted in favour. Only The Export-Import Bank of Korea ("KEXIM") voted against the Plan, but its debts comprised some 32.5% in value of the class.

50. The table below summarises the votes cast at the various class meetings:

Class	**Turnout by value**	**% voting for (by value)**
Super Senior Lenders	100%	100%
Senior Lenders	91.70%	77.89%
2021 NM Lenders	100%	100%
Recovery Financing Lenders	88.38%	67.65%

51. A more detailed breakdown of the voting as set out in the Chair's report of the Plan Meetings which took place on 31 October 2024 is as follows:

Class	**Number of creditors**	**Number attending meeting**	**Turnout**		**For**		**Against**	
			Number (%)	**Value (%)**	**Votes**	**Value (%)**	**Votes**	**Value (%)**
Super Senior Lenders	2	2	100%	100%	2	100%	0	0%
Senior Lenders	18	15	83.33%	91.70%	14	77.89%	1	22.11%
2021 NM Lenders	2	2	100%	100%	2	100%	0	0%
Recovery Financing Lenders	10	7	70%	88.38%	6	67.65%	1	32.35%

52. As shown in this breakdown, among the Senior Lenders and the Recovery Financing Lenders there were: (i) three Plan Creditors (African Development Bank, Shinhan Bank and Woori Bank) which did not vote; and (ii) one Plan Creditor (KEXIM) which voted against the Plan. The 14 Senior Lenders and six Recovery Financing Lenders (being the same persons) that signed the RSA voted in favour.

53. KEXIM's position is an unusual feature of this restructuring. KEXIM is, like KOMIR, owned by the State of Korea. The upshot therefore is that the Plan is being supported and funded by an organisation owned by the State of Korea, while another organisation owned by the State of Korea is the only Plan Creditor to have voted against the Plan.

54. In formal terms, the requisite statutory majority was achieved in three classes (the Super Senior Lenders, the Senior Lenders and the 2021 NM Lenders) but was not achieved within the remaining class (the Recovery Financing Lenders) of the Plan Creditors. It is in respect of this remaining class that the Plan Companies seek the exercise of the Court's cross-class cram down power under section 901G(1) CA 2006.

55. I turn to the matters to be considered in determining whether to sanction the Plan and the cross-class cram down it involves.

Jurisdictional requirements and preconditions for the application of Part 26A

56. Having now set out in more detail the salient facts and circumstances, I return first to the statutorily prescribed pre-conditions to the assumption and exercise of jurisdiction under Part 26A. These were referred to in Mr Bayfield's skeleton argument as *"primary jurisdictional conditions"*. Unless these pre-conditions are satisfied, the provisions of Part 26A have no application.

Are the Plan Companies entities subject to the Part 26A jurisdiction?

57. It is necessary for the Court to be satisfied that (1) the Plan Companies are entities over which it has jurisdiction for the purposes of a plan such as the Plans proposed for sanction, and (2) there is a sufficient connection between the subject-matter of the proposed Plans and this jurisdiction to justify the exercise of that jurisdiction. As Lawrence Collins J (as he then was) explained at [29] in *Re Drax Holdings Ltd* [2003] EWHC 2743 (Ch), [2004] 1 WLR 1049:

> *"That the companies fall within the definition of companies for the purpose of section 425 [of the Companies Act 1985, now section 899 of the Companies Act 2006] does not, of course, mean that there are no limitations to the exercise of jurisdiction under section 425. The court should not come and will not come exercise its jurisdiction and less a sufficient connection with England is shown."*

58. As to (1) in the preceding paragraph, and as held by Richard Smith J at the first convening hearing, although both Plan Companies are foreign entities, both are nevertheless unregistered companies liable to be wound up under the Insolvency Act 1986 ("IA 1986") within the meaning of section 901A(1) and (4) of the CA 2006: see *Re Project Lietzenburger Strasse Holdco* [2023] EWHC 2849 (Ch) at [56] (at the stage of the convening hearing in that case). I have been satisfied that the English court has, for the purposes of the Plans proposed, jurisdiction over both accordingly.

Is there a "sufficient connection" with this jurisdiction?

59. As to (2) in paragraph [57] above, in a number of recent cases a sufficient connection has been found solely or principally in the fact that the rights of the relevant creditors were governed by English law, with the English courts having an exclusive or non-exclusive jurisdiction in respect of disputes: see, for example, *Magyar Telecom B.V. Magyar Telecom B.V.* [2013] EWHC 3800 (Ch), which has been followed in a number and variety of cases since (including, in the specific context of a restructuring plan under Part 26A CA 2006, *Re Project Lietzenburger Strasse Holdco* [2024] EWHC 468 (Ch) when the plan was sanctioned, at [216 – 224]).

60. In this case, as submitted by Mr Bayfield KC (and as noted by Richard Smith J at the convening hearing before him), the Plans concern liabilities under contracts governed by English law and conferring at least non-exclusive jurisdiction on the English Court (save

in one case, where there is an arbitration clause which specifies England as the arbitration seat). I am satisfied that there is a sufficient connection thereby established with the English Court to enable it properly to exercise its jurisdiction under Part 26A (including the 'cram-down' provisions which it contains).

Is it likely that the Plan, if sanctioned, would be given effect in Madagascar?

61. As a closely associated point, which also arises because of the Plan Companies' status as Malagasy entities operating in Madagascar, I must also consider, when determining whether to exercise my discretion, whether the Malagasy court would be likely to recognise the effectiveness of the Plans if sanctioned by this Court. That is often treated as a quasi-jurisdictional hurdle, since it is well established that the Court will not exercise jurisdiction if it would be in vain; but for convenience I deal with it when addressing the issue as to the exercise of discretion later in this judgment, noting for the present that I am satisfied in that regard.

Does the Plan comprise a qualifying "compromise or arrangement"?

62. A further pre-condition of the application of Part 26A is that what is proposed amounts in the case of each plan to a "*compromise or arrangement*". This requires "*some element of "give and take" between a company and the scheme creditors*": *Re E D & F Man Holdings Ltd* [2022] EWHC 433 (Ch), [2023] 1 BCLC 269 at [55]. A confiscation or expropriation of rights without compensating advantage is not a *"compromise or arrangement"*: *Re AGPS BondCo* [2024] EWCA Civ 24 at [265]-[278].

63. I addressed this issue in paragraphs [40] to [43] of my judgment in respect of the second convening hearing. I have not altered my view that the condition is satisfied, nor my reasons for concluding that.

Conditions A and B in section 901(A) CA 2006?

64. Next, and as I have briefly alluded to previously, section 901A sets out two conditions which must be met for Part 26A to apply. These are that:

(A) each of the Plan Companies 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: section 901A(2) CA 2006. This is "Condition A";

(B) the purpose of the compromise or arrangement proposed is to eliminate, reduce or prevent or mitigate the effect of any of the financial difficulties: section 901A(3) of the CA 2006. This is "Condition B".

65. Albeit in the context of the Plans as then proposed, both these Conditions were discussed by Richard Smith J in paragraphs [33] to [35] of his judgment after the first convening hearing, for which the short reference is [2024] EWHC 2598 (Ch). For convenience, I set out below the relevant parts of his reasons for being satisfied as to both:

> *"[34] I also accept that the Plan Companies have encountered, or are likely to encounter, financial difficulties that are affecting, or will or may affect, their ability to carry on business as a going concern, being condition A under section 901A(2) of the*

> *Companies Act 2006. That is apparent, it seems to me, from the indicative losses already mentioned, the level of support provided by the shareholders to date, the various restructurings that have taken place, the significant debts falling due on 30 September 2024, albeit now deferred, and the operational difficulties to which I have been referred.*
>
> *[35] As for condition B, section 901A(3) requires the purpose of the compromise or arrangement to be the elimination, reduction, prevention or mitigation of the effect of any of the financial difficulties. I accept that this condition is met given that (i) the Plan seeks to bring in new money to enable the Plan Companies to continue operations through the continued production from the mine, including attempts to overcome the operational difficulties described (ii) consideration will flow between the Plan Companies and the creditors such that there is a sufficient element of give and take so as to constitute the Plan a compromise or arrangement and (iii) although this will be challenged by the Senior lenders, on the basis of the evidence presently before the court, the Plan creditors would, under either Plan option, be paid more than in the relevant alternative.*"

66. This analysis holds good in the context of the Plans as now before me, and I adopt it. In my judgment, in the circumstances I have described above, both Conditions are satisfied in the case of each of the Plan Companies.

Class composition

67. The Court must also be satisfied that the classes convened to consider the Plan were properly constituted. This too is a jurisdictional requirement.

68. As recorded above, this has also been considered at some length in two prior applications for such meetings to be convened. It must be addressed again, in case circumstances have changed or a new perspective or argument has been raised. However, "*if a judge has heard full argument at the convening hearing and has decided on the appropriate constitution of classes, it is not ordinarily appropriate for a different judge at the sanction hearing to take a different view of his own motion in the absence of any creditor appearing to contend that the classes were not correctly constituted*": *Re Global Garden Products Italy SpA* [2016] EWHC 1884 (Ch) at [43]. This has been followed in the Part 26A context in *Re E D & F Man Holdings Ltd* [2022] EWHC 687 (Ch) at [22] and *Re Chaptre Finance Plc* [2023] EWHC 2276 (Ch) at [15] and numerous other cases.

69. In any event, I do not consider that there could be any valid objection on this score: the Plan Creditors voted in four classes because each class is being treated differently under the Plan. No creditor has raised such an objection or argument in this case.

Compliance with Convening Order and of the Explanatory Statement

70. Third, the court must address whether, and be satisfied that, there was compliance with the terms of the convening order, including in particular whether the scheme creditors received an adequate explanatory statement: *Re KCA Deutag UK Finance plc* [2020] EWHC 2977 (Ch) at [18] and see also section 901D CA 2006.

71. Mr Bayfield referred me to salient parts of the Explanatory Statement (as amended) which he had also invited me to read in advance. Having done so, and having noted his points, I consider that the Explanatory Statement was compliant, being (i) in a form and style appropriate to the circumstances of the case; (ii) which explains the commercial impact of the Plan clearly and comprehensibly; (iii) is as concise as the circumstances admit; and (iv) provides Plan Creditors with the information they need to enable them to make an informed decision as to whether or not the Plan is in their interests, as evidenced by the high turnout at the Plan meetings.

72. More generally, and having considered a detailed *'Schedule of Compliance with Convening Orders'* annexed to Mr Nouvian's third witness statement, I am satisfied that the convening orders were complied with.

Was there any coercion?

73. <u>Fourth</u>, as explained above, in respect of the <u>assenting</u> classes, the court will apply the principles that are applied in schemes of arrangements: *Re Project Lietzenburger Straße Holdco S.À.R.L.* [2024] EWHC 468 (Ch) at [196]. These were summarised in *Re Virgin Atlantic Airways Ltd* [2020] EWHC 2376 (Ch) at [52] as being

> "*whether the class was fairly represented by the meeting…whether the majority was coercing the minority in order to promote interests which are adverse to the class that they purported to represent…[and] whether the scheme was a fair scheme which a creditor could reasonably approve*":

74. As to these three issues:

(1) As appears from the tables set out in paragraphs [50] to [51] above, the turnout by value of Super Senior Lenders was 100% and the Senior Lender turnout was (in value terms) high at 91.7%, with turnout in number terms being 83.33%. Turnout in value terms of Recovery Financing Lenders was 88.38%; but in number terms it dipped to 70%. Those are high figures; the failure to achieve the statutory hurdle in the case of the Recovery Financing Lenders requires focus in the context of the proposed cross-class cram down; but otherwise I am satisfied as to fair representation of the classes.

(2) There is no evidence of any coercion, nor any suggestion that any Plan Creditor who voted in favour did so other than in their own interests as a member of that class.

(3) Subject again to the issue relating to the fairness of exercising the Court's cross-class cram down power, I consider that as regards the assenting creditor classes, the requirement that the Plans should in each case be such as creditors could reasonably approve it (the rationality test) is met.

Cross-class cram down and the further conditions for the application of section 901G CA 2006

75. Fifth, as there is a dissenting class which the Plan Companies seek to cram down under section 901G(1) CA 2006, the following two further jurisdictional conditions must be satisfied:

(1) That if the Plan were to be sanctioned, none of the members of the dissenting classes would be any worse off than they would be in the event of the "*relevant alternative*": section 901G(3) CA 2006.

(2) The Plan has been agreed by a number representing 75% in value of a class of creditors who would receive a payment, or have a *"genuine economic interest in the Plan Companies, in the event of the relevant alternative"*: section 901G(5) CA 2006.

Further discussion of the "relevant alternative"

76. As to the first of these further jurisdictional conditions applicable if the exercise of the cross-class cram down power is sought, as I have indicated above 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*": section 901G(4) CA 2006.

77. As Snowden J (as he then was) explained in *Re Virgin Active* at [107]:

> "*[107] It is important to appreciate that under the first stage of this approach, 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.*"

78. In this regard, it is well established in this context that the views of the directors as to what is the relevant alternative ought to be afforded proper weight:

(1) As Michael Green J put it in *Re Fitness First* at [63]

> "*In identifying the relevant alternative, the directors of the Company, being advised by their professional advisers, are normally in the best position to identify what will happen if a Scheme or Plan fails. This has been stated on numerous occasions…*":].

(2) Trower J had made the same point earlier in *Re E D & F Man Holdings Ltd* [2022] EWHC 687 (sanction) where he made the point also, at [39] that

> *"Where the evidence appears on its face to reflect a rational and considered view of the company's board, the court will require sufficient reason for doubting that evidence…*"

79. In this case, as in *Re E D & F Mann Holdings Ltd,* there was ultimately no challenge before the Court to the relevant alternative being an insolvent liquidation of the Plan Companies, and no basis for doubting the view of the Directors. At an earlier stage, the Senior Lenders and the Recovery Financing Lenders claimed that "*[t]here are a number of alternative outcomes which (either individually or collectively) are more likely to occur in the event that the restructuring plans fail*". However: (i) it was not entirely clear what it was said the alternative to insolvent liquidation might be, given the perilous financial state of the Plan Companies; and (ii) the majority of the Senior Lenders and the Recovery Financing Lenders have now agreed to support a restructuring plan under which they will receive 5.45% of the outstanding value of the Senior Debt and 0.05% of the outstanding value of the Recovery Financing Debt. That does suggest that these (very sophisticated) Plan Creditors ascribe very little value to their current contractual rights against the Plan Companies, and that in turn suggests that their point of reference is the likelihood of insolvent liquidation if the Plan is not implemented.

80. Furthermore, there is a variety of reasons for my acceptance that, as submitted by the Plan Companies, liquidation should be accepted as the relevant alternative:

    (1) As explained above, the Plan Companies are currently experiencing acute financial difficulties. They are heavily loss-making and suffered indicative losses before tax of US$98.2m in 2022 and US$180.5m in 2023 and are forecast to lose US$376.6m in 2024.

    (2) On 15 December 2024, the Plan Companies are required to pay c.US$122m to the Super Senior Lenders and the Senior Lenders. They cannot do so and it has never been suggested that they have any ability to do so.

    (3) The Plan Companies plainly have an urgent need for the injection of new money. The amounts involved are very significant – US$140m simply to get through an anticipated further 12 months of trading (this sum also involves providing the Plan Companies with the c.US$46m they need to pay the Senior Lenders and the Recovery Financing Lenders under the Plan).

        (a) The evidence is that the only source of new money is the Shareholders. The court has before it the evidence of Mr Kwon, the deputy Director of KOMIR. Mr Kwon explains that KOMIR will not provide its share of the new money (and neither will Sumitomo given what is called the "Marching Together" policy) other than on the terms of the Plan. This is what he says:

        > "*[6.6] KOMIR has considered the consequences of the liquidation relevant alternative extremely carefully, and I should stress that KOMIR has not taken this decision lightly. KOMIR has duties to its own stakeholders and its own financial position to consider. KOMIR has supported the Project for many years and incurred substantial losses. If the Project cannot be deleveraged on the terms of the Revised Plans, KOMIR is prepared for the liquidation of the Project…*
        >
        > …

> *[6.17] This deal, now provided for under the Revised Plans, reflects the absolute limit of the support that KOMIR is prepared to provide the Plan Companies. If the Revised Plans were to fail and not be sanctioned, KOMIR is not prepared to provide any further support to the Project and the inevitable consequence is that the Project would then enter into a Malagasy insolvency process. The deal reflected in the Revised Plans is extremely generous and the extended nature of the negotiations that have led to the terms now proposed under the Revised Plans clearly demonstrates that if these Revised Plans were to fail then a restructuring of the Project is simply not feasible.*"

(b) In those circumstances, I consider I should, and I do, accept the evidence that the only source of new money available within any realistic time-table is the Shareholders.

(c) I accept also, in those circumstances, that if the Plan fails the directors will be left with no choice but to make a declaration of a situation of "cessation of payments" to the commercial court in Madagascar. The evidence is that if they were to fail to do so they would face potential civil and criminal liability. The declaration would trigger a liquidation process. I accept that evidence.

81. It is for these reasons that I have accepted that the relevant alternative is indeed insolvent liquidation.

The "no worse off" test

82. As to the *"no worse off"* test, which is the second part of the first condition which must be satisfied in the case of a 'cross-class cram down' (see paragraph [75(1)] above), the returns to creditors in the relevant alternative have been modelled by Grant Thornton. That analysis, which was not disputed, shows that each class of creditor (and each creditor within each class) is better off under the Plan.

83. Again at an earlier stage, it was suggested that "*the Senior Lenders would in fact be "worse off" under the restructuring plans than in the PC RA. The recovery figure asserted in the PC RA report for returns to the Senior Lenders in the PC RA is disputed*". However, ultimately, no Plan Creditor has sought to adduce any relevant evidence, or indeed any evidence, challenging Grant Thornton's analysis and, as regards the Recovery Financing Lenders, they are so far out of the money in the relevant alternative that any return to them is a bonus.

84. In my judgment, the *"no worse off"* test, and thus the second part of the first additional condition applicable in the case of a cross-class cram down, was satisfied also.

Approval by the requisite majority of classes of creditors with a "genuine economic interest"

85. Turning to the second of the additional conditions (see paragraph [75(2) above), which is whether a creditor has a *"genuine economic interest"*, it is important to note that this is to be measured by reference to the interest that creditor would have in the relevant alternative (once again demonstrating the centrality of that concept in the context of Part 26A).

86. As Snowden J emphasised in *Re Virgin Active* at [247]-[249], the expression "*genuine economic interest*" means a creditor who would be "in the money" in the relevant alternative. He drew attention in this regard to the fact that although section 901C(3) provides that every creditor whose rights are affected by a plan must be permitted to participate in a class meeting, section 901C(4) provides that this does not apply to a class of creditors if the court is satisfied that no member of that class *"has a genuine economic interest in the company."*

87. He went on to say this (at [25]) :

> *"It is, I consider, tolerably clear that this test of a "genuine economic interest" reflects the observations of Mann J in Bluebrook*[14] *that what the court must ascertain is whether a purported class "actually has an economic interest in a real, as opposed to a theoretical or merely fanciful, sense", and that it is to be applied to the plan company by reference the relevant alternative for the company if the plan is not sanctioned"*
>
> *"That conclusion is, to my mind, put beyond doubt by paragraph 188 of the Explanatory Notes to Part 26A that explains that as a default under section 901C(3) all creditors whose rights are to be affected by the compromise or arrangement must be permitted to participate in the class meetings, but then states,*
>
> > *"However, if the court is satisfied that a class of creditors or members has <u>no genuine economic interest in the company (an 'out of the money' class)</u>, the court may order for that class of creditors or members to be excluded from the meeting summoned in subsection (1)."* [Snowden J's emphasis.)

88. In the present case, the only creditors who would be "in the money" in the relevant alternative and who thus have a genuine economic interest in the relevant sense are the Super Senior Lenders; and they have approved the Plan by the requisite majority of 75% of their class.

89. In my judgment, the second additional jurisdictional condition is thus satisfied, though I shall return to a question which was at one time raised by Mr Phillip's then group of clients that the manner in which the position of a "cramming class" had been secured by the Super Senior Lenders was unfair and contrived: see paragraph [103] below.

Is there any "blot" on the Plan?

90. Before turning to the issue of fairness and the exercise of my discretion, I must consider (a) whether there is a "blot" or potential blot in respect of the Plans such as to prevent their sanction and (b) whether the Court should refrain from exercising its jurisdiction on the ground that it would be in vain to do so: as further elaborated below, that would be the case if the Malagasy courts would not give effect to the English Court's Order.

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[14] *Re Bluebrook Ltd* [2010] BCLC 209. Mann J also relied on the reasoning in *Re MyTravelGroup plc* [2005] 2 BCLC at first instance, where it was stated that the mere fact of a negotiating position and a real prospect of establishing a benefit from the deal is not the same as having any real economic interest.

91. The term "blot" is a reference to some technical or legal defect in a scheme or plan, for example, that it does not work according to its own terms or that it would infringe some mandatory provision of law (and see *Re TDG plc* [2009] 1 BCLC 445 *per* Morgan J).[15]

92. It has not been suggested to me that there is, and I have not detected, any such "blot", although it has occurred to me that if the cramming class had obtained that position by some artifice or contrivance, that might fall within its meaning. I need not decide this, because, in this case, I consider and then reject the suggestion once made of artificiality when addressing the overall fairness of the Plan.

Further as to the issue whether the Plan would be recognised and given effect in Madagascar

93. The last jurisdictional or quasi-jurisdictional point that it is necessary for me to discuss further is whether, even though I have held that I can exercise jurisdiction over the Plan Companies in respect of the Plan, I should decline to do so on the ground that it would be idle or in vain because the Plan would not be likely to be recognised or have substantive effect in Madagascar. I have already touched on this in paragraph [61] above. This is a feature or aspect of the more general principle that "*the court will not generally make any order which has no substantial effect and, before the court will sanction a scheme, it will need to be satisfied that the scheme will achieve its purpose*": *Re Magyar Telecom BV* at [16].

94. The now commonly accepted test is whether there is a "*reasonable prospect*" of the Plan having substantial effect: *Re DTEK Energy BV* [2021] EWHC 1551 (Ch) at [27] and *Re AGPS Bondco* (at first instance) [2023] EWHC 916 (Ch) at [331].

95. The Plan Companies have obtained an expert report from Mr Ribot, a French lawyer who practised law in Madagascar from 2001 to 2017. Mr Ribot has very properly filed a second report in which he explains that, through a Malagasy firm called Lexel Juridique et Fiscal ("Lexel"), he had previously provided legal advice to the Plan Companies. Although Mr Ribot left Madagascar in 2017, he maintains a 25% shareholding in Lexel – and Lexel continues to provide legal advice to the Plan Companies. Mr Ribot recognises that his interest ought to have been disclosed in his first report. He explains, however, that his omission came about because the Plan Companies' English solicitors inadvertently failed to provide him with copies of CPR 35 and PD 35: paragraph 7 of Mr Ribot's second report. Mr Ribot has explained that: (i) his prior relationship and current interest in Lexel did not influence his opinions; and (ii) he would have given the same opinions on Malagasy law whoever had instructed him. I am prepared to accept his evidence as expert evidence in those circumstances.

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[15] In his judgment in that case, Morgan J drew together four matters which required attention when the court was considering whether to sanction any proposed scheme of arrangement. Those matters were as follows: (a) the court must be satisfied that the provisions of the statute have been complied with; (b) the court must be satisfied that the class of shareholders, the subject of the court meeting, was fairly represented by those who attended the meeting, and the statutory majority are acting bona fide and not coercing the minority in order to promote interests adverse to those of the class they purport to represent; (c) an intelligent and honest person, a member of the class concerned and acting in respect of his own interest, might reasonably approve the scheme; and (d) there must be no blot on the scheme.

96. In his expert evidence, Mr Ribot explains that, in his view, it is "*more likely than not that the Malagasy courts would recognise the legal effects of the Plan as a matter of English law, upholding and recognising the effects of the Plan*": paragraph 31 of his first report.

97. No contrary evidence was submitted. In the circumstances, I consider that I should accept Mr Ribot's evidence and proceed on the basis that it is more likely than not that if the Plan is sanctioned it will be recognised and given effect in Madagascar, and so its international dimension does not prevent the court from sanctioning it.

Overall fairness and exercise of my discretion

98. I turn to the issues of fairness and the exercise of my judicial discretion. The fact that the conditions stipulated by Part 26A (including section 901G(5) CA 2006) have, in my judgment, been satisfied opens the gateway to the cross-class cram down jurisdiction but is not a sufficient basis for its exercise. Even though satisfied that the applicable jurisdictional requirements have been met, the Court must, in every case where the exercise of cross-class cram down power is sought, stand back to consider the fairness of the Plan, both in its application to those who have voted against it and overall. Further, in the particular context of cross-class cram downs, it is important to stress that the satisfaction of Conditions A and B in section 901G gives rise to no presumption in favour of sanction, and the Court must still go on to consider whether to exercise its discretion in the light of all the relevant factors and circumstances.

99. The Court must be satisfied in particular that it would be justified in overriding the objections of opposing creditors, in the interests of the approving majority of the relevant class, and that the Plan is, in the round, fair.

Objections: both express and implicit

100. In my assessment of fairness I considered that I should address discernible objections to the Plan, including those advanced before its reformulation, even though, in the event, no one appeared or submitted evidence at the sanction hearing to substantiate and give colour to any objection, nor did KEXIM ever share and elaborate its reasons for voting against the Plan. In doing so, I have been left, albeit with the assistance of Mr Bayfield, to identify what contrary points might have been made, with the risk that further elaboration might have given objections more credence, whilst, on the other hand, there is the opposite risk of tilting at windmills, like Don Quixote.

Whether the express objections to the original Plan might continue to have weight

101. Most easy to discern are the objections formulated by the Senior Lenders and the Recovery Financing Lenders (then substantially allied), who were then all represented by Mr Phillips and intended strenuously to oppose the Plan as then structured. These were set out in a *"List of Objections"* submitted after the convening hearing before Richard Smith J.

102. Of these, the objection I have had most in mind concerned the "*the circumstances in which the Plan Companies and Super Senior Lenders obtained a subordination of the Senior Lenders' claims are such that it would not be fair in all the circumstances for the*

Court to exercise its "cross-class cram down" powers under s.901G of the Act based on votes in favour of the restructuring plans by the Super Senior Lenders".

103. As summarised by Mr Bayfield in his skeleton argument, *"The allegation appeared to be that the Plan Companies and the Shareholders had in early 2024 conspired to artificially create a "cramming" class through the creation of the Super Senior Debt."* It is well established that the Court must be astute to consider whether a cramming class has achieved that position by artifice or objectionable manipulation. As Zacaroli J put it in *Re Houst* [2022] EWHC 1941 (Ch) at [20]:

> *"Clearly, attempts artificially to create an in-the-money class for the purposes of providing an anchor to activate the cross-class cram down power should be resisted, particularly where such a claim is not impaired by the plan."*[16]

104. The Super Senior Debt arrangements, and the super priority thereby conferred on the shareholder creditors, were only put in place in early 2024, when the Plan Companies were already in very deep trouble. I have already noted that it is a feature of the Plan, and to my mind an arresting one, that the Super Senior Lenders are both the only available 'cramming down' class and the persons left, in their capacity as Shareholders, with the equity and the substantial part of any *"restructuring surplus"* at the end of the day. Mr Bayfield, for the Plan Companies, acknowledged that although (as their counsel at the hearing, Mr Phillips confirmed) the Senior Lenders and the other Recovery Financing Lenders no longer maintain that or any objection, it is still appropriate for the Court to have such an objection in mind.

105. To my mind, there are two aspects to this issue. One, which I address first, is whether in point of fact, any contrivance or artificiality is discernible. The other, which is principally a legal point of more general application, is whether there is some fundamental objection to the class relied on as the cramming class being the class which is left with all the equity at the end of the day.

106. As to the first and more factual point, Mr Nouvian emphasised in his second witness statement that the directors and executive management team of the Plan Companies had always been keenly aware of their obligations and duties, had consistently and continuously been monitoring the financial position of the project, as well as soliciting and considering advice on those duties, available options and contingency planning, and believed that all practicable options had been assessed, including insolvency contingency planning. He emphasised that:

(1) *"The Plan Companies incurred the Super Senior Debt due to an urgent need to obtain liquidity. A short term increase in nickel prices over the summer months (and some beneficial nickel price hedging) meant that such liquidity had provided a longer runway than was initially expected. However, the urgent need for liquidity and the absence of any other source of funding at the time necessitated accommodating the requirements of the Sponsors' credit and investment committees to inject further money..."*

16 See also *per* Trower J in *DeepOcean 1 UK Ltd* at [41]

(2) *"The Super Senior Debt was seen by the Plan Companies, based on the discussions that took place with the Sponsors, predominantly as a bridge to a consensual restructuring."*

(3) *"The Super Senior Debt was not borrowed as a means to orchestrate Restructuring Plans. The Plan Companies needed it to continue to operate."*

(4) *"Evaluating the potential to pursue Restructuring Plans and whether or not to do so it was a gradual, considered and iterative process, involving a number of different advisors and stakeholders. The Restructuring Plans have been proposed very much as a secondary option, in light of the failure of consensual negotiations. They have been a sensible contingency plan to avoid a value destructive Malagasy insolvent liquidation in the circumstances in which a consensual deal has not proved possible."*

(5) *"In particular, the final decision to proceed with the Restructuring Plans was not taken until 24 July 2024 …"*

(6) *"Ultimately, the directors of the Plan Companies felt that their options were reduced to the Restructuring Plans as a result of a series of events and factors, including… the historically slow nature of achieving consensus and the internal approvals process of the Senior Lenders and Recovery Financing Lenders, the looming maturity date of the Super Senior Debt… and the position of the directors of the Plan Companies under Malagasy law. "*

107. In assessing this explanation, I bear in mind that the suggestion that there was, by July 2024, no available alternative has to be discounted by reference to the fact that in fact more acceptable proposals were discussed and agreed soon thereafter. The catalyst may have included the fact of the scheme mechanism coming towards its conclusion. However, though subject to the more general issue as to whether it is objectionable that the class relied on to trigger the jurisdiction is left with the entire equity, I do not see any sufficient basis for not accepting this direct rebuttal of the objection; and (for the avoidance of doubt) I do accept it in circumstances where:

(1) It is understandable that the Shareholders/Sponsors demanded Super Senior status when the Super Senior Debt was being negotiated, given the parlous state of the Plan Companies at the time and their own exposure.

(2) The evidence also reveals that the Senior Lenders were given the opportunity to participate: indeed, at one point the Shareholders were demanding that the Senior Lenders should participate, but the Senior Lenders declined to do so (again, understandably and demonstrative of the parlous financial position of the Plan Companies).

(3) I am satisfied and find that (as was submitted) the Plan Companies needed the Super Senior Debt to operate; the Super Senior Lenders alone responded to the need; and the money was not borrowed as a means to orchestrate Restructuring Plans.

(4) At the Hearing before me, no reasoned opposition to the Plan was advanced, notwithstanding that KEXIM (the only dissenting Plan Creditor) have had ample opportunity to oppose and the financial strength to have done so.

(5) On behalf of the Senior Lenders and the other Recovery Financing Lenders, Mr Phillips, as their Counsel, has confirmed that the objection is no longer put forward by them.

108. That leaves the second facet of the question which is a more general issue (see paragraph [105] above). Mr Bayfield fairly clarified that it was indeed the case that the Plan Companies needed to rely on the shareholding Super Senior Lenders class as the assenting class to trigger the cram-down of the only dissenting class (the Recovery Financing Lenders class). He recognised that it would, of course, be preferable if the Senior Lenders, who had also assented, were the 'cramming class'; but that was not possible, because for an assenting class to qualify for cross-class cram-down purposes, the members of the class must be shown to have a *"genuine economic interest"* in the relevant alternative; and according to Grant Thornton's analysis, which I have accepted, they do not.

109. The fact that (in each case) the Super Senior Lenders secured their position as the only in-the-money class so recently, are together acting now as the cramming class, and will not only retain their equity but become the only secured creditors, inevitably excites concern lest the statutory machinery is being abused to enable or excuse oppression and/or abuse of power, and invites sceptical review accordingly.

110. However, on the particular facts of the Plan, its antecedents, urgent purposes and only available alternative, I have reached the conclusion after such review that this should not be regarded as a well-founded objection. There are three principal reasons for my conclusion.

111. First, as explained above, I have concluded that the Super Senior Lenders agreed to lend because the Plan Companies were in such dire circumstances that no one else would; that super senior security and status was an understandable and common-place demand in such circumstances, and did not amount to a contrivance to provide what Zacaroli J described as *"an anchor to activate the cross-class cram down power…."* (see paragraph [103] above).

112. Secondly, once the Court has been satisfied that there was no contrivance of that sort, the mere fact that only the assenting class is in the money and will take the lion's share both as creditors and as shareholders cannot, in my view, have been intended to, and should not, prevent the use of the cram down process.

113. Thirdly, I agree with Mr Bayfield's oral submission that the fact that the Senior Lenders, as a class, do support the Plan does to a large extent (now to quote Mr Bayfield) *"take the sting out of the suggestion that this is a bad plan that was only capable of being done through nefarious borrowing of super senior debt."*

Should any weight be given at this discretion stage to KEXIM's dissent/implicit objections?

114. A related and important question that I must specifically address is what weight (if any) is to be given to the objection implicit in KEXIM's vote against the Plan at the relevant class meeting, in circumstances where I have accepted that the relevant alternative is insolvent liquidation in Madagascar, and where accordingly, KEXIM would have no prospect of any return in a liquidation process, and thus, for the purpose of determining satisfaction of the relevant jurisdictional condition, no *"genuine economic interest"* (measured by reference to the relevant alternative) which it is, or should assumed to be, legitimately seeking to protect.

115. A facet of the discretionary nature of the powers vested in the Court by Part 26A which I have already noted in paragraph [98] above, is that the satisfaction of all the jurisdictional requirements, though necessary, is not sufficient to give rise to a presumption in favour of sanction: and see *per* Snowden LJ in *re AGPS Bondco* at [153]. In particular, before exercising its cross class cram down power, which will alter the rights of a dissenting class for the perceived benefit of the assenting classes, the Court must consider how the value sought to be preserved or generated by the restructuring plan, over and above the relevant alternative, sometimes described as "the restructuring surplus", is to be allocated between those different creditor groups: *ibid.* at [160].

116. However, this gives rise to what appears to me to be something of a conundrum. On the one hand, the views in this regard of the dissentient creditor(s) seem most obviously in point. On the other hand, it is clear that even at this stage, where the dissenting creditors are out of the money in the relevant alternative, their views can logically be given little weight, the only requirement specific to them being that dissenting creditors such as KEXIM should not have their rights extinguished for no consideration, and should receive something qualifying as "give and take" (another matter I consider later). As Snowden J put it in a part of his judgment in *Re Virgin Active* at [249] which he quoted in his judgment (with which the other two members of the Court of Appeal agreed) in *Re AGPS Bondco* at [251], when the dissenting creditor is a member of a dissenting class that is "<u>out of the money</u>" in the relevant alternative, its view about the fairness of the Plan or complaints about the distribution of the benefits of the restructuring "*should not weigh heavily or at all in the decision of the court as to whether to exercise the power to sanction the plan and cram them down*".

117. Further, in this case, and as previously noted, KEXIM has not explained or given any colour to its dissent, and has eschewed the opportunity it was given and had the resources to make use of, to make submissions before me, I consider that negligible weight should be given to any implicit, as it were personal, objection.

118. The resolution of this conundrum appears to me to be that, although what I have described as the "personal" objections of a dissenting creditor which is out of the money are to be given little weight, the general requirement to consider whether there has been a fair distribution of the restructuring surplus is to be treated as overriding and will necessarily take into account, albeit in overall terms, the treatment of the dissenting class. In that regard, at paragraph [160] in *Re AGPS Bondco*, Snowden LJ put it as follows:

> *"In my judgement, 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."*

Other expressed or discernible objections

119. Lastly in relation to any previously expressed or implicit objections, and for comprehensiveness, I confirm that I have also noticed and had explained to me the other objections previously set out in writing on behalf of the Senior Lenders and Recovery Financing Lenders before their agreement to the reformulated Plan.

120. Some of these seem to me no longer to be capable of being pursued, and certainly are not so. These included that (a) there could be other possible alternative outcomes then insolvent liquidation (which I cannot accept); (b) it was arguable that the Senior Lenders would be "worse off" under the plans as then formulated than in the relevant alternative (even assuming that was liquidation), which again I cannot accept; (c) the convening of only two classes was not fair because the Senior Lenders should always have been placed in a separate voting class: and that objection has been overtaken by events, the amendment of the Plan, the direction for four class meetings, and consensus.

Overall fairness

121. In determining whether the Plan provides for a distribution of any restructuring surplus which is fair in all the circumstances, Snowden LJ noted at [161] in *re AGPS Holdco plc* a suggestion made by Professor Sarah Patterson (a highly respected academic in the field), based on a *dictum* of Mann J in a Part 26 scheme case, *Bluebrook Limited* [2009] EWHC 2114 (Ch), that the essential question is whether any class of creditors is " getting too good a deal (too much unfair value)". It is to be noted that the assessment is whether any value disparity is unfair; and that necessarily (to my mind) entails a consideration of the risk also undertaken by the recipients of it, and whether the bargain they are driving is disproportionate and unfair in all the commercial circumstances.

122. On behalf of the Plan Companies it was submitted that whether or not it is right that the court should afford little or no weight to the views of "out of the money" dissenting creditors, there can be no serious complaints about the fairness of the Plan in this case. I take the elaboration of these submissions almost word-for word from Mr Bayfield's skeleton argument.

123. First, it was submitted more particularly that:

    (1) All creditors will be better off under the Plan as compared to the relevant alternative. In particular:

        (a) The Super Senior Lenders are forecast to recover in full under the Plan. In the relevant alternative, they are forecast to recover between 24% (low case) and 42% (high case) of their debt.

(b) Tshe Senior Lenders are forecast to receive nothing in the relevant alternative. Under the Plan, they will share a substantial sum – US$45,740,786.54.

(c) The 2021 NM Lenders are the Shareholders in a different capacity. They support the Plan and are being offered what they want, that is to say, the opportunity to participate in the new money, though their existing debts will be written down to US$0.

(d) The Recovery Financing Lenders (who are also Senior Lenders) are, in their capacity as Recovery Financing Lenders, "out of the money" to a very significant degree for the reasons explained above. They are nevertheless receiving something for nothing: a share of US$406,429.07, which, as I explained in paragraphs [40] to [43] of my previous judgment in respect of the second convening hearing held on 22 October 2024, is in line with sums paid in other recent sanctioned plans.

(2) The c.US$46m that is needed to pay the Senior Lenders and the Recovery Financing Lenders is only available because the Shareholders (in their different capacities) have agreed to provide $140m of new money to the Plan Companies. This is not money that the Plan Companies would have available but for the Plan.

(3) There can be no complaint about the differential treatment of the Super Senior Lenders as compared to the other Plan Creditors. The Super Senior Lenders are the only Plan Creditors that are forecast to make any recovery in the relevant alternative. In addition, they are committing 50% of the Senior NM Debt. Their relatively advantageous position in the relevant alternative necessitates their differential treatment.

(4) Although Grant Thornton forecasts that none of the Senior Lenders, the 2021 NM Lenders or the Recovery Financing Lenders will make any recovery in the relevant alternative, there are good reasons for their differential treatment under the Plan:

(a) First, it is of some significance that the Plan represents the outcome of a hard-fought negotiation process between the Plan Companies, the Shareholders, the Senior Lenders and the Recovery Financing Lenders.

(b) Second, in the relevant alternative of insolvent liquidation, the Senior Lenders rank ahead of the 2021 NM Lenders and the Recovery Financing Lenders. Prior to the RSA, the Senior Lenders contended (although the Plan Companies disputed) that they would make a recovery in the relevant alternative. There was a risk to the Plan Companies that such an argument might succeed and derail the restructuring at the expense of all stakeholders. The favourable treatment of the Senior Lenders, as compared to the 2021 NM Lenders and the Recovery Financing Lenders, simply reflects their contractual position in the waterfall and the potential value of their debt if it could be used to block the restructuring process.

(c) Third, the option to participate in the Senior NM Debt is being given to the 2021 NM Lenders because: (i) they are the Shareholders in a different capacity; and (ii) the Shareholders wish to provide a proportion of the new money in their capacity as 2021 NM Lenders. As set out above, the provision of new money is essential to the Plan Companies but carries considerable commercial risk, which no other Plan Creditor is prepared to bear. As the 2021 NM Lenders have agreed, the Plan Companies will not offer any cash payment to the 2021 NM Lenders, which is beneficial to the Plan Companies.

(d) Fourth, the treatment of the Recovery Financing Lenders simply reflects the fact that, because they are subordinated to all other Plan Creditors, there is no sensible prospect (and no lender has suggested that there is) of them making any recovery in the relevant alternative. Instead, they will receive a modest cash payment in return for the release of the wholly "out of the money" debt owed to them. I accept that in comparison to the face value of their debt, it is very modest indeed; and the prospect of sharing any equity upside arising in the five-year period stipulated under the Deferred Payment Mechanism must be very slim. But even slimmer are their prospects of any recovery in respect of their debt. In circumstances where KEXIM have not articulated their dissent and not appeared before me, which is not an irrelevant consideration, I am persuaded that there is sufficient "give and take", that the sums are not so very different from the modest sums made available primarily to satisfy the "give and take" requirement (and no more) in other cases, that it is reasonably clear that there is no alternative available in a realistic time-frame, that others in the dissentient class have approved it (even if through gritted teeth), that it is the price of the necessary reward for risk that the Super Senior Lenders have insisted upon, and that it is not a factor which should, in the ultimate balance, weigh against the cram down required and the giving of the Court's sanction to the Plan .

124. Nor, it is submitted on behalf of the Plan Companies can there can be any complaint about the exclusion of certain creditors from the Plan:

(1) In respect of local working capital facilities and local trade creditors, it is acceptable (in fact, usually necessary) to afford advantageous treatment to certain creditors where "*the continued supply of goods or services by those creditors is regarded as essential for the beneficial continuation of the company's business under the plan*": *Re AGPS BondCo* at [170]. That is the position here.

(2) In respect of unsecured liabilities owing to the Shareholders, there are good reasons for their exclusion, in that (a) it is the Shareholders who are introducing all the new money (and very substantial amounts of it) into the Plan Companies; and (b) the Shareholders have made it clear (in their evidence) that they will not support the Plan if these liabilities were to be compromised.

125. Finally, in this discussion of the effect of the Plan on each of the groups of stakeholders, it is submitted on behalf of the Plan Companies that, in the circumstances, there can also be no complaints about the Shareholders retaining the equity:

(1) The non-Shareholder Plan Creditors have not suggested that they want to acquire any equity in these loss-making Malagasy companies. However, the Shareholders

have made it clear in their evidence that they will not support any restructuring under which they are to be diluted.

(2) The Plan Companies require very substantial amounts of new money to support the restructuring and their ongoing trading thereafter. That new money is being raised by the Shareholders, being the only entities willing to provide it. If (for example) an unconnected third party was to provide all the new money and, in exchange, was to acquire 100% of the equity, there could be no possible cause for complaint. The same principle applies, or ought to apply, when it is the existing shareholders providing all the funding.

(3) In any event, as a matter of economic substance, it is not correct to say that the equity is not being impaired. As explained above, under the Deferred Payment Mechanism, if the Shareholders sell their shares in the Plan Companies, or raise a sufficient amount of capital, prior to 30 June 2029, the Senior Lenders and the Recovery Financing Lenders will be entitled to share in any upside (subject to various conditions). In other words, the Senior Lenders and the Recovery Financing Lenders will, for a five-year period, be entitled to share any equity upside with the Shareholders. In other restructurings, dissenting creditors have expressed concern about the fact that, if the plan company was to beat its business plan forecasts, the economic upside would inure solely to the benefit of the existing shareholders. That is not this case. In this case, not only are the Shareholders taking all the economic risk of providing the new money, they have also agreed to share (subject to certain conditions) potential upside with the Senior Lenders and the Recovery Financing Lenders.

126. I accept these submissions. Rather than seeking to parrot or summarise them in my own words, I would rather add the following commentary in their further support:

(1) It is in both the challenging and the simplifying nature of the Plan that the <u>only</u> class of creditors which is not out of the money in the relevant alternative is the class of shareholding Super Senior Lenders. Challenging because it is by virtue of this that the Super Senior Lenders thereby are the cramming class for a Plan under which they get the lion's share in both their capacities (creditors and shareholders); simplifying because there would be nothing to distribute in the relevant alternative, and the *pari passu* principle as such is of no application or relevance. The focus is instead on the fairness of any differential treatment, especially as regards any value sought to be preserved or generated by the restructuring plan.

(2) That exercise is often referred to as the "horizontal comparison". Whereas a "vertical comparison" involves a comparison of the position of the particular class of creditors under the restructuring proposal with the position of that class in the relevant alternative, the horizontal comparison compares the position of the class in question with the position of other creditors or classes of creditors (or members) if the restructuring goes ahead.

(3) As to that, it seems to me that there is no basis for me to second-guess the considered and properly informed views of the assenting creditors, as expressed by their approval of the Plan in their separate class meetings, as to the fair distribution between them:

it is not for the Court, having determined that they were properly informed, to second-guess that decision (unless plainly irrational, which I am satisfied it was not).

(4) The question again arises, however, whether material weight is to be given to the views of creditors (such as KEXIM in this case) who are out of the money in the relevant alternative. This is a question on which the views expressed in the cases on Part 26A have differed. For example, in *Re Project Lietzenburger Strasse Holdco SaRL* at the sanction stage, Richards J appears to have considered (see paragraph [210]) that in that case, *"since the Subordinated Creditors would have been out of the money on the relevant alternative, they had no entitlement to share in the benefits of restructuring, with the result that it was none of their concern how the Senior Creditors chose to share those benefits among themselves or with others."* Richards J also relied on paragraph [249] Snowden J's judgment in *Re Virgin Active***.** I have to say that I am not entirely persuaded by this, if it is intended to mean that no weight at all is to be given to the matter by the Court, since that negates the overall obligation to consider fairness in the round. In the context of assessing overall fairness, the Court is entitled and bound to take account of all discernible objections, though (as already noted) it may ascribe little weight to unparticularised objections of differential treatment impliedly advanced by a particular class, if that class is in effect reliant simply on an abstract suggestion of being cut out of something it could never expect to have. In other words, the fact that an objection is made or attributed to a creditor with no realistic prospect of any share in the relevant alternative detracts in this context from its weight but not its relevance: and it may be that this is what is intended to be reflected in paragraph [215] of the Richard J's judgment.

(5) I have considered KEXIM's implicit view, which is in any event a matter which must be considered, that the share it has been offered is far too modest relative to its nominal debt. I have assumed that this might have been expanded into an objection that such was the paucity of the payment that it should be regarded substantively as tantamount to expropriation of its interest for meaningless consideration. For the reasons I have given, I have concluded, taking into account accepted practice in other cases, that it is sufficient to constitute the "give and take" and is not merely expropriatory, and more generally is not unfair, given KEXIM's reduced legitimate expectations, and the fact (which I consider to be established) that there is no other available Plan, and tested against the relevant alternative of liquidation, they will be receiving some (modest) cash payment for the release of a worthless debt.

(6) I should add a few words with regard to the submission (which I have accepted) that in this case there can be no sustainable complaint about the Shareholders retaining all the equity: it is certainly, to my eyes, an arresting feature of the Plan. There was extended discussion on the point in *Re AGPS Bondco* in relation to the submission made by the appellants in that case that it was unfair, where there was any prospect of a solvent surplus emerging in due course (as must be part of the rationale for any plan), for shareholders to retain their equity: it was further submitted that the outstanding shares should be compulsorily cancelled or transferred to money creditors for no consideration: see paragraphs [243] to [245] in the judgment in *Re AGPS Bondco.* It is an interesting argument in a situation where the company is to be enabled, by virtue of a plan of reconstruction, to continue in business, there is more than one class of creditors who would be entitled to share the assets in the relevant alternative and in that sense "own" the company, and yet the shareholders are to retain

their shares and thus ownership and the prospect of future returns. However, not only did Snowden LJ reject the argument on the facts in that case, and furthermore expressed doubt that there was jurisdiction under Part 26A to sanction a compulsory cancellation or transfer of the shares in a debtor company for no consideration, but also in the present case, the argument deployed in *Re AGPS Bondco* that those who would stand to receive something in the relevant alternative should be treated as "owning" the company would result in the Shareholders having the only "ownership" claim to them.

Conclusion

127. In these circumstances, and in light of my overall impression that though their overall effect is arresting, the Plans are fair, I concluded after the Hearing that I had jurisdiction to sanction each Plan and that I should exercise the Court's cross-class cram down power to enable effect to be given to it, and finally, sanction the Plan.

128. After discussion with Counsel as to its terms, and with an eye on the obvious urgency, I made an Order accordingly at the conclusion of the hearing, noting that as the Plan Companies are overseas companies, the requirement is for a copy of the orders to be published in the Gazette rather than delivered to the registrar under section 901F(6) of the CA 2006.