Neutral Citation Number: [2025] EWHC 1015 (Ch)

Case No: CR-2025-001156

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

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

Date: 28 April 2025

Before :

THE HON MR JUSTICE MELLOR

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IN THE MATTER OF MADAGASCAR OIL LIMITED
AND
IN THE MATTER OF THE COMPANIES ACT 2006

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

Hearing date: 1 April 2025
Draft to the parties: 24 April 2025

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APPROVED JUDGMENT

This judgment was handed down remotely by circulation to the parties' representatives by email. It will also be released for publication on the National Archives and other websites. The date and time for hand-down is deemed to be Monday 28 April 2025 at 2pm.

THE HON MR JUSTICE MELLOR

Mr Justice Mellor :

Introduction

1. On 1 April 2025 I heard argument on the application by the Plan Company, Madagascar Oil Limited ('MOL') for an order pursuant to section 901C of the Companies Act 2006 convening two meetings of creditors for the purpose of considering and, if thought fit, approving a restructuring plan (the "**Plan**") under Part 26A of the Companies Act 2006 ("**CA 2006**") in respect of MOL. The following morning, I issued the Order resulting from that hearing, convening two meetings, and I now set out my reasons for making that Order.

2. Mr Mark Phillips KC argued the case for MOL, assisted by Mr Matthew Abraham and Mr Rabin Kok. Mr Matthew Weaver KC argued the case for Outrider Master Fund LP ('**Outrider**'). I am grateful to all Counsel and their solicitors for their arguments and the materials provided to me.

3. The issues are somewhat unusual in that there are only two Plan Creditors – Outrider and BMK Resources Ltd ('**BMK**') and MOL's proposal for two meetings means that each of Outrider and BMK will be the only entity at their respective meeting.

4. The Plan's purpose is to restructure the indebtedness of the Plan Company and its subsidiary, Madagascar Oil S.A. ("**MOSA**") under an Amended and Restated Guarantee dated 7 September 2021 (the "**Guarantee**"). Both Outrider and BMK are parties to the Guarantee.

5. BMK is a specialist oil and natural resources investment group based in Singapore. It is the Plan Company's parent and owns all of its shares. Outrider is a Cayman Islands company in voluntary liquidation. It is a vehicle controlled by Outrider Management LLC, its General Partner and a part of a wider Californian distressed debt hedge fund of that name.

6. The purpose of the Plan is to enable MOSA to restart production at a large but difficult to exploit oilfield at Tsimiroro in Madagascar (the "**Oilfield**"). MOSA has the exclusive right to exploit the Oilfield pursuant to a Production Sharing Agreement with the government of Madagascar. The Oilfield is, however, not currently producing oil. Production cannot restart, and revenue generation cannot increase, without a significant infusion of capital into MOSA.

7. That infusion cannot occur as long as the Plan Company and the wider Group are saddled with liabilities under the Guarantee and Intercompany Loans.

8. MOL's case in outline is as follows:

    i) BMK is the only investor willing to provide the necessary capital and which possesses the expertise to extract oil from an oilfield of this nature.

    ii) That fact has been confirmed through three professionally run sale processes seeking equity and debt investment from hundreds of investors, as well as a judgment of the Supreme Court of Bermuda.

iii) But even BMK, which has been funding MOSA's and the Group's operational costs to date, will not do so forever. BMK (via MOL) says it will not invest capital and expertise on a long-term basis unless the Plan is sanctioned to rationalise the Group's capital structure.

9. MOL also says that offers have been made to Outrider over the years to compromise its Guarantee Liabilities. None of those offers have been accepted, even though Outrider must know that it will recover nothing near its paper debt if the Plan Company was liquidated. Instead, MOL contends that Outrider has pursued a 'down to the wire' strategy, threatening to have the Plan Company liquidated in Mauritius in order to hold it to ransom and, so MOL says, extract a substantial payment or payment in full from BMK.

10. With that background in mind, MOL asks the Court to convene two meetings of Plan Creditors. MOL submits that Outrider and BMK should each vote in a separate meeting and says that whilst their 'rights in' are the same in that they both are unsecured creditors and would rank *pari passu* in any Mauritian insolvency of the Plan Company, their 'rights out' under the Plan are different. Both BMK's and Outrider's Guarantee claims are to be compromised but the Plan grants Outrider the benefit of a valuable option – either an upfront cash payment or revenue share, and in either case an anti-embarrassment clause or 'Restructuring Surplus Payment' – while BMK will put new money into the Group and receive only nominal consideration.

11. In effect, MOL says that Outrider is being given an exit from the Group's capital structure that reflects the real economic value of its debt, although it is accepted that is ultimately a matter for sanction.

12. On behalf of Outrider, Mr Weaver KC made three key points:

i) First, that the convening hearing should be adjourned because Outrider had not been given adequate notice.

ii) Without prejudice to that first point and if the Court declined to adjourn, his second point was that threshold condition B was not satisfied as regards BMK. His point was that the Restructuring Plan requires solely 'give' from BMK and no 'take'.

iii) Similarly, his third point was that the Court should convene a single meeting on the basis that Outrider's and BMK's rights are not so different as to make it impossible for them to consult together with a view to their common interest.

13. Overall, Outrider's position was that the Restructuring Plan is plainly an attempt by the Company to (a) entirely avoid both its liability and that of its subsidiary, MOSA, to Outrider of circa US$71.25m and (b) stifle insolvency proceedings already commenced by Outsider against the Company in Mauritius.

14. In exchange for the writing off of US$71.25m owed to Outrider, the Company is proposing to offer Outrider (a) US$200,000; or (b) 1.25% of the Net Revenue of MOSA (capped at US$1.45m) for a period of up to 12 years, such revenue to

be generated pursuant to a business plan for the Company which has only just been disclosed and which, even on the Company's own account, has a significant number of risk factors attached to it which may render it entirely unachievable, plus US$1 for the writing off of the £71.25m owed by MOSA.

15. The offer to Outrider under the Restructuring Plan equates to a dividend of 0.3% of Outrider's debt from the Company or an entirely speculative return of a maximum of 2% of Outrider's debt, payable over a period of up to 12 years. As regards MOSA, Outrider is being offered US$1 for the release of its US$71.25m claim.

16. In addition, Outrider is being offered the Restructuring Surplus Payment. This is a payment representing 19% of the Relevant Value (the amount of cash or cash equivalent received by, and freely available for distribution by, any of MOSA, the Company or BMK) upon the occurrence of a Relevant Event (namely, the Listing, Disposal, or change of control in the 3 years after sanction but not thereafter). Mr Weaver raised a number of points as to how this would work and suggested that, in reality, it was unlikely to result in any tangible benefit to Outrider.

17. Overall, Outrider characterise the Restructuring Plan as, to all intents and purposes little more than a wiping clean of both the Company's and MOSA's debt to Outrider.

18. Accordingly, as matters stand, Outrider opposes the Restructuring Plan. Naturally, if a sanction hearing takes place, Outrider is likely to make a number of points against sanction.

19. Some of the points I have already summarised go to sanction. It was agreed that at this convening hearing the points I have to resolve are:

    i) Adequacy of notice of the convening hearing;

    ii) Jurisdictional requirements;

    iii) Class composition;

    iv) Any other issues not going to merits or fairness which might lead to a refusal of sanction;

    v) Practical issues regarding notice, documentation and the form of the meetings: Gategroup Guarantee Ltd at [42].

20. Before I set out the relevant background, I will deal with Outrider's application to adjourn this convening hearing. I can deal with this relatively briefly. Although the application to adjourn was heard first, it seemed to me it could not be considered in isolation and without hearing much of the argument on the convening issues, so I proceeded to hear argument on all the issues for the convening hearing. Having done so, I was and I remain satisfied that Mr Weaver KC and his clients were not under any disability in dealing with the convening issues. I acknowledge that Mr Weaver and his team had to work

hard over the weekend to prepare for their attendance at this hearing and I am grateful for their efforts. I should also say that it was unwise of MOL to push matters so close to the wire, serving a large amount of material only just before the convening hearing: in future the Court may not be sympathetic. Where more time was needed was for Outrider to prepare their case for the sanction hearing and I was satisfied that they would have ample time to do so before the sanction hearing which I have directed for 21 May 2025.

Relevant Background

21. It is unnecessary to set out in full the background in the degree of detail which was presented to me in the evidence and in MOL's Skeleton Argument. However, it remains necessary to explain a considerable amount of the background. Much of what follows is based on MOL's evidence in, principally, the witness statement of Duncan Reynolds who is the Manager of Strategy and Corporate Finance at the Plan Company and also the Managing Director of Oil & Gas at BMK. I also make reference to the Expert Report of Mr Andrew Ian Charters on the relevant alternative (referred to as the "**AC RA Report"**) and to the short witness statement of Mr Al Njoo Kok Kiong, the Group CEO of BMK. The proposed Restructuring Plan is explained in the First and Second Witness statements of Mr Neil John Mitchell, a director of MOL. I will also make reference to the content of the Explanatory Statement ("**Explan"**)

22. Naturally, Outrider will have the opportunity at the sanction hearing to put forward any disputes in response to the evidence presented by MOL.

23. The Plan Company is a company incorporated in Mauritius, with its head office in the UK. It is the intermediate holding company within the "**Group**". The Group consists of:

    i) Madagascar Oil SA ("**MOSA**"), a company registered and headquartered in Madagascar, in which the Plan Company owns 99.8% of the shares; BMK Resources Ltd ("**BMK**") holds the remaining 0.2% of the shares;

    ii) The Plan Company, which is 100% owned by BMK; and

    iii) BMK, a specialist oil and natural resources investment company which is incorporated in the Cayman Islands and headquartered in Singapore.

24. MOSA is the Group's operational company and its only trading entity. In 2004, MOSA entered into a Production Sharing Agreement ("**PSA**") with *l'Office des Mines Nationales et des Industries Stratégiques* ("**OMNIS**"), the Malagasy government's natural resources agency, to enable MOSA to explore and develop an oilfield at Block 3104, Tsimororo, Madagascar ("**Oilfield**"). The Oilfield is effectively the Plan Company's and MOSA's only asset of any significant value.

25. To explain the Plan Company's current financial position, it is necessary to explain the former group structure of the Company ("**Former Group**"):

i) Prior to being owned by BMK, 100% of the shares in the Plan Company were owned by US Holdings Ltd ("USH" or "Former Parent"), a company incorporated in Bermuda.

ii) In the Former Group, the Plan Company owned 99.8% of the shares in MOSA as it does now, and USH owned the remaining 0.2%.

iii) The Former Group therefore consisted of USH, the Plan Company and MOSA – effectively, the same structure as the present Group but with BMK at its head instead of USH, following BMK's purchase of the Plan Company's shares.

26. As mentioned, the Group's and Former Group's only asset of value is the right to exploit the Oilfield. Pursuant to the PSA with OMNIS:

i) MOSA holds the exclusive right to carry out oil and gas operations in the contract area known as Block 3104 for a period of 25 years from 2015 (the time of approval by OMNIS of the plan of development) until May 2040.

ii) After 2040, the PSA can then be extended on five separate occasions for a period of five years each occasion (i.e. until a longstop date of May 2065), subject to there still being oil production from the Oilfield.

iii) Pursuant to various provisions of the PSA, MOSA must be able to meet all of its financial commitments. If it does not, OMNIS is entitled to terminate the PSA.

27. MOL say that the Oilfield is a 'thermal heavy' Oilfield that can only be exploited by a very specialist investor who is willing to commit resources to develop it over a span of many years. The evidence of Mr Reynolds is that the features of the Oilfield make it very challenging to exploit successfully and the reasons for this include the following:

i) Unlike conventional oilfields, oil can only be extracted from the Oilfield by 'thermal recovery', which involves the pumping of steam into the oilfield to extract oil. This requires the construction of special processing and handling facilities. This type of infrastructure (i) requires significant capital investment and (ii) does not result in as high a daily production rate as conventional oilfields, meaning that more wells need to be drilled and a longer period of time is needed to recover a significant volume of oil.

ii) The oil reservoir spans a large area and contains a significant amount of oil but is pockmarked by geological faults that impede the efficiency of oil extraction.

iii) An onshore heavy oil project like the Oilfield requires many oilfield services and equipment suppliers. Madagascar lacks most of these basic support services as well as basic infrastructure such as pipelines.

iv) To sell the oil, it must be transported from Tsimiroro, where the Oilfield is located, to a city called Tsiroanomandidy for onward distribution. The road to Tsiroanomandidy is very difficult to pass during the cyclone or monsoon season, especially for large trucks.

28. To add to these challenges, Mr Reynolds says that international investors are wary of investing in Madagascar because it is a jurisdiction which can be considered politically challenging. He states that very few oil companies and investors have the experience and appetite either to develop or invest in thermal heavy oilfields like the Oilfield, and that only specialist investors such as BMK are willing and able to commit the necessary capital. MOL submit that these statements are borne out by the Former Group's numerous unsuccessful attempts to solicit investment for the Oilfield.

29. MOSA has only ever succeeded in producing 260,000 barrels of oil from the Oilfield, during a test production and development phase from 2013-2016. 111,000 barrels have already been consumed by the Oilfield's extraction operations, leaving 150,000 barrels presently in storage and available for sale. Nothing further has been produced.

30. The Oilfield is therefore producing no oil. While MOSA is selling the remaining barrels in storage, these sales and the cash from them are insufficient to cover even its operating costs. 71,769 barrels have now been sold between 2022-2024, realising US$8.5m in total. This has been insufficient to cover MOSA's overheads, which is why the Former Parent, and now BMK, have had to fund MOSA through the Intercompany Loans. At the time of the hearing, the evidence was that the inventory will only sustain sales until November 2025 at the present rate. However, I should record that, in response to the draft of this Judgment, I was sent an erratum (dated 22 April 2025) to the AC RA Report, in which Mr Charters explained that MOSA's inventory levels would be depleted to below the production capacity level required to make inventory sales viable by April 2027. After April 2027 therefore, MOSA will be fully reliant on BMK's funding to cover even operational costs. The significance of this change in date can be considered at the sanction hearing, but it did not change Mr Charters' opinion as to the Relevant Alternative, nor does it change the fact that MOSA has very low cashflow generation which is insufficient to repay its debts.

31. MOSA's very low cashflow generation is directly correlated to the lack of any ongoing production at the Oilfield, and this combination is the source of its difficulties. MOL say they cannot be solved without the Plan: in order to repay its debts, MOSA must increase production to a much higher level. It cannot do that without significant capital expenditure to increase production. Some of the capital items MOSA needs to expend funds on are explained by Mr Reynolds and include:

i) Repairs and re-commissioning of existing production facilities and improvements of these facilities, with the aim of increasing capacity to at least 500 barrels of oil a day.

ii) Testing, repairing and re-commissioning the 16 existing production wells and converting the 9 steam injection wells so that they can produce

oil as well as inject steam under Cyclic Steam Stimulation; drilling 12 additional production wells and installing the associated flow lines for steam and produced fluids.

iii) Recruiting and deploying a new team of oilfield engineers.

iv) Repairing MOSA's fleet of vehicles to transport oil to market for sale, particularly along the dangerous and difficult road from Tsimiroro to Tsiroanomandidy.

32. However, MOL say that MOSA's current levels of debt, and the expense that any investor would need to spend on infrastructure, mean that it is essentially uninvestible to all but the most specialised and committed of investors. Without such investment, it cannot invest in the necessary capital expenditure to repay its investors.

33. BMK has proved to be – after three rounds of capital raising run by professionals – the only investor who is willing to plough further capital into developing the Oilfield via MOSA. But BMK is a commercial enterprise, not a charity. It has confirmed that its present funding of MOSA's operational expenses is temporary, and it will cease all funding of the Group in its present form if the restructuring plan is not sanctioned, because in that scenario the Group's debt capital structure will remain unsustainable for the reasons set out above.

The Financing of the Former Group

34. MOL's case is that the Former Group, and the Group, have found it extremely difficult to raise capital in either the public or private markets. The Former Parent underwent a series of name changes and had a difficult equity capital structure throughout its existence. It was listed on the AiM Market until 2016 but its shares were mostly held only by just 4 investors: BMK, Outrider, the John Paul Dejoria Family Trust ("**JPD Trust**"), and SEP African Ventures Trust ("**SEP**").

35. By the time the Former Parent was delisted from AiM in 2016, these 4 investors held around 90.5% of the Former Parent's shares. MOL suggest that is strongly indicative of an illiquid market in its shares and lack of interest from the public markets.

36. After delisting in April 2016, SEP exited its equity position in the Former Group, leaving BMK holding 82.6% of the Former Parent's Shares while the JPD Trust held the remaining 17.4%.

37. Shortly before the delisting, BMK, SEP the JPD Trust and Outrider entered into the Facility Agreement with the Former Group, which remained a principal avenue of debt financing for the Group and Former Group from 2015 to the present, alongside ad hoc intercompany funding from BMK. Matters relating to the Facility Agreement are explained further below. However, MOL submit it is significant that (i) Outrider aside, only the Former Group's existing shareholders were willing to become debt investors in it and (ii) by 2017, SEP had existed the Facility Agreement and (iii) by 2021, the JPD Trust had also exited the capital structure.

38. Aside from the Facility and the AiM listing, the Former Group tried, and failed, to secure external investment through professionally run capital raising exercises at least three times from 2015 to 2021:

    i) In 2015, Jefferies was appointed to raise capital for the development of the oilfield. While some interested parties expressed interest and conducted due diligence, no executable offers of investment were made.

    ii) In September 2021, the Former Group appointed Stellar Energy Advisers ("**Stellar**") with a mandate to secure further equity or debt investment in the Group ("**Stellar Process**"). Stellar approached 16 different parties. All of them either did not engage or stated that they were uninterested in investing in the Oilfield. Some of the potential investors that did engage expressed the view that the Oilfield faced significant technical challenges, rendering it difficult to invest in.

    iii) In late 2021, the Former Parent attempted to find a new advisor to lead a round of equity and debt investment into the Former Group. Even finding an advisor proved very difficult – 13 banks and finance houses declined to accept the mandate.

    iv) Ultimately, Carlingford accepted this mandate in December 2021. Carlingford approached as many as 142 debt and 142 equity investors in April and May of 2022, but only nine even took the transaction further by entering an NDA to gain access to the data room. By July 2022, only one potential investor remained – an international oil company who wished not to invest in debt or equity, but only to buy some of MOSA's oil and invest in a part of its distribution infrastructure. Even that failed; by March 2023 Carlingford had failed to secure any investment in the Oilfield. It advised the Former Group that investors were wary of investing in a 'niche' oilfield in Madagascar.

39. BMK itself reached out to numerous investors between 2017 and 2022, but its efforts were no more successful than those of Jeffries, Carlingford and Stellar.

The Facility Agreement

40. Outrider first provided a small working capital facility to the Former Parent of US$5m in 2015 pursuant to the Facility Agreement. In short order, it was amended in 2015 to include BMK, the JPD Trust and SEP as parties, with total commitments of US$21.89m.

41. The Facility Agreement was amended and restated 12 times between 2015 and 2021: the changes in parties and participants upon each restatement and amendment are set out in fuller detail by Mr Reynolds.

42. SEP exited the Facility Agreement and Company's capital structure by way of the 11th amendment and restatement in 2017 by selling their participations to Outrider at a steep 50% discount. JPD exited by the 12th amendment and restatement in September 2021 after converting its debt to equity.

43. The only remaining debt investors in the Former Group were, by this time, Outrider and BMK. They remain the only debt investors in the Group.

The Guarantee

44. The Facility Agreement was supported by the Guarantee, being a first demand guarantee originally dated 29 September 2015 and last restated on 7 September 2021. The parties to the Guarantee are the Plan Company, MOSA, and BMK and Outrider. The maximum sum guaranteed is US$80m, pursuant to clause 2.3.

The Intercompany Loans

45. A number of intercompany debts exist between the Group companies; these can be summarised as follows:

    i) The "**BMK / Plan Company Intercompany Facility**", previously the "**Former Parent / Plan Company Intercompany Facility**". The drawn commitments under this facility are c. US$63.41m, and represent money lent by the Former Parent to the Plan Company over its existence. This Facility was assigned to BMK on 9 May 2024 alongside BMK's purchase of the Plan Company's shares from the Former Parent.

    ii) The "**MOL / MOSA** Intercompany Facility". MOSA's liabilities to the Plan Company under this facility are c. US$203m.

    iii) The "Former Parent / MOSA Intercompany Facility"). Pursuant to this facility, MOSA's liabilities to BMK are c. US$600m. This Facility was assigned to BMK on 9 May 2024 alongside BMK's purchase of the Plan Company's shares from the Former Parent, and the amounts that BMK has continued to lend MOSA since that time are included in the calculation of sums due and owing under the Facility.

    (together, these three facilities are the "**Intercompany Loans**")

46. BMK has paid (by way of unconditional payments) some overheads for the Plan Company and MOSA from the period 2022-2024, totalling c. US$2.43m. Outrider has not funded the Group in this way, though it did pay c. US$1.03m to fund the costs of the Provisional Liquidators whilst they were in office.

BMK's Purchase of the MOL Shares and Intercompany Loans

47. On 20 August 2021, Outrider presented a winding up petition against the Former Parent in Bermuda, where it was incorporated, but this petition was ultimately withdrawn following negotiations which led to the 12th amendment to the Facility Agreement.

48. However, Outrider served a statutory demand and subsequently presented a winding up petition on 29 September 2022. The petition debt being the unpaid sum of US$45m under the Facility Agreement.

49. On 6 September 2022, Outrider also issued letters of demand against the Plan Company and MOSA seeking payment under the Guarantee, but no statutory demand or petition was presented at that time.

50. On 27 March 2023, the Former Parent was placed into provisional liquidation in Bermuda and Joint Provisional Liquidators from Teneo ("**JPLs**" or "**Provisional Liquidators**") were appointed. The provisional liquidation was a 'soft touch' provisional liquidation (a restructuring mechanism well-known to Bermudian law) in that the hearing of a final order was postponed to enable the Former Parent to propose a restructuring that had a realistic prospect of success.

51. Once appointed, the JPLs began approaching potential investors to realise the Company's assets, namely, its shares in MOSA, its shares in the Plan Company, and the Former Parent / Plan Company Intercompany Facility and Former Parent / MOSA Intercompany Facility. In other words, the JPLs' aim was effectively to market and sell the Group as a whole.

52. To that end, the JPLs carried out a marketing process from 2 May 2023 to 12 May 2023. In summary:

    i) Eight potential investors, including BMK, took part in the open bidding process.

    ii) Out of those eight investors, five made bids for the Group assets.

53. At the start of the sales process, the JPLs' fees and costs as well as MOSA's operational costs were funded by Outrider. Outrider provided only a base level of funding, forcing the JPLs to place MOSA's employees on no-pay leave and apply funds from the liquidation estate to MOSA's operational costs in priority to the JPL's fees.

54. Upon the withdrawal of a lead bidder from the sales process on 7 September 2023, Outrider withdrew all funding to the JPLs. BMK took over funding, and provided US$500,000 from 2 October 2023 onwards.

55. The JPLs ultimately rejected all bids except that of BMK, on the basis that the other bidders were not sufficiently credible, lacked proof of funds, and demonstrable experience in running the Group's business: see AC RA Report, [4.42]. Accordingly, the JPLs agreed to sell the Former Parent's remaining shares in the Plan Company and MOSA, and the Intercompany Loans, to BMK.

56. The price for the sale was c. US$2.04m. As recorded in the Bermuda Sanction Judgment at [24], this was made up of (i) the JPL's fees of c. US$1.81m; (ii) US$230k in costs and expenses and (iii) US$300,000 being the Petitioner's costs of the petition.

57. The JPLs and BMK exchanged an Asset Purchase Agreement ("**APA**") to document the sale on 21 December 2023. The APA was conditional on, among other things, an order of the Supreme Court of Bermuda sanctioning the sale, it being considered a 'momentous' decision for which the JPLs wished to have the comfort of sanction.

The Bermuda Sanction Judgment

58. The JPLs applied to the Supreme Court for sanction on 22 December 2023, and it was heard on 12 and 22 February 2024. Outrider actively opposed it before Subair Williams J. Judgment was handed down judgment on 2 April 2024: Re US Holdings Ltd [2024] SC (Bda) 11 Civ ("**Bermuda Sanction Judgment**").

    i) Outrider's key ground of opposition was that the sale was "*anything but lucrative and yields no return for which payment could be secured to satisfy the debts of any class of unsecured creditor*". The Bermudian Court acknowledged that the sale price payable by BMK was essentially the costs, fees and expenses of the provisional liquidation, with no premium and also acknowledged that Outrider was (then) a larger creditor than BMK: [56]. Despite these matters, the Court sanctioned the sale to BMK, holding that:

> '64. In this case, the JPLs have not come before this Court tainted by uncertainty as to the next step forward. They fervently wish to proceed with the APA on their professional view that this is the only commercially viable option available to preserve all that could be rescued of the Company's assets. It is not to be forgotten that the APA follows various unsuccessful attempts for a restructuring. Equally, it is not to be overlooked that the Company's access to funding is finite and flails month to month. This is all evidence which underpins the logic in the decision to sell the Company's business.
>
> 65. I have no reason to conclude that an obviously better decision is open to the JPLs to make. The alternative proposals put forth by the Petitioner are broad ideas as to an approach for possible solutions, much of which has already been explored through previous restructuring efforts. This is not a case where the JPLs have ignored more advantageous offers on the table. So, this Court is in no position to find that the JPLs have acted unreasonably in wanting to proceed with the only sale offer which is available to the Company having been exposed to the open market within a timeframe commensurate to the Company's survival period. For that reason, the JPLs have reasonably accepted the only finalized bid. To withhold this Court's sanction would be tantamount to accelerating the Company's journey to what would be an inevitable commercial dead-end. I see no reason why the JPLs should be compelled to gamble and conjure the expense of a second bidding process without any real prospect for a more optimal result. I accept that the APA is the only rescue vessel in sight.'

59. MOL's submission is that the judge's decision is powerful evidence that BMK was and is the only realistic investor in the Oilfield with the capital and expertise to rescue the Group's business.

60. The Former Parent was dissolved and the JPLs released from office following the Bermuda Sanction Judgment.

The present situation of the Group

61. The Group's present financing arrangements are similar in structure to the Former Group's, as described above. The Facility Agreement remains in place, although the Former Parent has been dissolved. Pursuant to the Guarantees, MOSA and the Plan Company remain liable for the Former Parent's debts under the Facility Agreement.

62. The current outstanding sums owed to BMK and Outrider across the Group are:

    i) BMK Guarantee Claim: c. US$13.35m

    ii) Outrider Guarantee Claim: c. US$71.25m

    iii) BMK / Plan Company Intercompany Loan: c. US$63.79m

    iv) BMK / MOSA Intercompany Loan: c. US$604.33m

63. Against this backdrop, MOL submit that the Group is in clear financial distress. MOSA, which is the Group's operational company and revenue-generating engine, is not generating enough oil and therefore enough revenue. It has insufficient revenue to even cover its operational costs, let alone to invest in the necessary capital expenditure to increase production to levels needed to repay the debt in full or at all. As Mr Reynolds explains:

    i) No oil has been produced by MOSA since the test production phase described at paragraph 29 above.

    ii) 71,769 barrels have now been sold between 2022-2024, realising US$8.5m in total. This has been insufficient to cover MOSA's overheads, which is why the Former Parent, and now BMK, have had to fund MOSA through the Intercompany Loans.

    iii) As a result, there is insufficient cash flow being generated for capital expenditure necessary to increase production, let alone pay a dividend to the Plan Company and/or repay the debt. There are numerous items of capital expenditure which are necessary, as explained at paragraph 30 above.

64. As the AC RA Report explains MOSA, and the Plan Company, are likely to run out of liquidity in the near term:

    i) Mr Charters' erratum report explains that, by April 2027, the crude oil inventory of MOSA is forecast to go below the minimum level of 6,000 barrels of oil necessary to make inventory sales economically viable. As the Oilfield is producing no oil, this stockpile will not be replenished.

    ii) The Company will have closing cash at bank of c. US$0.2m in the week commencing 19 May 2025 – that is, the week of the Sanction Hearing.

iii) Consequently, by April 2027, or potentially sooner, the Group will no longer have any means of generating revenue and will run out of liquidity, save to the extent that BMK continues to fund it.

65. As explained at paragraph 33 above, the Group is even now surviving and making good its shortfall in revenues to pay operational costs, through funding from BMK, which, as it is drawn on an ad hoc basis, increases the amounts owed under the BMK Plan Company and BMK MOSA Intercompany Loans.

66. But, as also explained at paragraph 33, that cannot go on forever. BMK has confirmed that because the Group's current debt structure is unsustainable, it will cease funding the Group in its present form if the Restructuring Plan is not sanctioned, meaning that MOSA will have no money to pay its ongoing operating expenses: see the witness statement of Mr Al Njoo.

67. MOL submits that is not an irrational or incredible position, because BMK is an investment firm. At some point, it will have to cut its losses. As Mr Charters of Grant Thornton puts it in his report on the Relevant Alternative:

> '3.10 BMK has confirmed to the Plan Company that it is no longer prepared to provide unconditional funding to the Plan Company or MOSA if the Plan is not sanctioned. BMK has also confirmed that it only intends to fund the costs associated with an eventual liquidation of MOL which may arise if it ceases to provide any funding to MOL.
>
> 3.11 Whilst I am conscious that BMK may perhaps be motivated to make this statement simply to assist the Plan Company in furthering its objectives under the Plan, I have no evidence to suggest it is untrue, and in my professional judgment it is not an unreasonable position for BMK to adopt given the financial position of the Plan Company and MOSA and the Guarantee Liabilities owed to Outrider by the Plan Company and MOSA.'

The Mauritian Proceedings and Outrider's position

68. MOL/BMK's position is that BMK has made numerous offers to Outrider over the years with a view to compromising the Guarantee Liabilities and facilitating Outrider's exit from the Group's capital structure on reasonable terms. The latest offer, which was incorporated into the APA dated 21 December 2023, was a cash payment of US$2.315m. Outrider rejected this offer: as recorded in the Explan, 13.20.

69. They further contend that, instead of negotiating on an economically realistic basis, Outrider's strategy has been to hold the Plan Company to ransom by initiating insolvency proceedings in Mauritius. On 14 March 2024, Outrider issued a statutory demand in Mauritius pursuant to section 180 of the Insolvency Act 2009 for US$61m ("**Statutory Demand**"), being the then-outstanding sum under the Guarantee. No such demand has been made against MOSA.

70. It was explained to me that Mauritian corporate insolvency law is different from English insolvency law in that a statutory demand is a necessary precursor to a winding up petition – akin to the procedure for individual bankruptcy in England. If the statutory demand is set aside, no petition can be presented.

71. On 27 March 2024, the Plan Company's Mauritian counsel, ENSAfrica (Mauritius) Ltd ("**ENS**") applied to the Supreme Court of Mauritius to set aside the Statutory Demand ("**Set Aside Application**") on various grounds, which are detailed by Mr Mitchell in his second witness statement.

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

73. The Set-Aside Application and the Plan Company Injunction (the "**Mauritian Proceedings"**) are being heard alongside each other.

74. On 21 February 2025, ENS wrote to the Judge in the Mauritian Proceedings, the Honourable Judge Lau Yuk Poon, to notify the court that the Plan Company had lodged a Part 8 claim seeking the sanction of this Restructuring Plan, but Mr Mitchell reported that the Judge has not yet accepted the supplementary affidavit setting out the position.

75. The Plan Company Statutory Demand and the Set-Aside Application were heard by the Supreme Court of Mauritius on 24 February 2025, but judgment in respect of the final hearing has been reserved. As at the date of Mr Mitchell second witness statement (27 March 2025), the date of judgment remains unknown.

76. No enforcement action has been taken in Madagascar.

77. MOL therefore submits it is clear that Outrider's strategy appears to be not to negotiate a realistic exit from the Plan Company, having regard to the fact that it would recover almost nothing on a liquidation, but instead use its position to seek to extract ransom value from BMK via the Plan Company.

The Restructuring Plan

78. The Restructuring Plan is proposed to compromise the claims of both BMK and Outrider, while providing for (i) BMK to provide new money into the Group and (ii) provide Outrider an exit from the Group in the form of an upfront cash payment or a long-term revenue share, plus the protection of an anti-embarrassment clause. It is said that BMK, on the other hand, derives no economic benefit from the Plan beyond keeping the present value of its equity.

79. In effect, the Plan is aimed at restoring the financial position of the Group to an investible state and preventing Outrider from continuing to hold the Group to ransom, whilst giving Outrider an exit from the Group's capital structure on terms which are rational and fair.

80. The terms of the Plan can be summarised as follows:

Treatment of BMK:

i) The BMK Plan Company Guarantee Claim will be compromised and released in full in return for US$1.

ii) The BMK Plan Company Intercompany Loan will be compromised in full in return for one ordinary share of US$1 in the Plan Company. As BMK already owns all of the shares in the Plan Company, this gives BMK no new or additional rights as shareholder.

iii) The BMK MOSA Guarantee Claim will be released via a third-party release under the Plan for US$1.

iv) BMK will enter the BMK New Loan Agreement with the Plan Company and will provide the BMK Committed New Loan Facility to the Plan Company in the sum of US$7.5m, and the BMK Uncommitted New Loan Facility of US$12.5m subject to certain discretionary conditions.

Treatment of Outrider:

v) The Outrider Plan Company Guarantee Claim will be compromised and released in full in return for a valuable option. Outrider will be allowed to elect either:

vi) An upfront cash payment of US$200,000 (the Outrider Cash Payment), this being the default option reversible by election; or

vii) A right to enter into an agreement for payment to Outrider of 1.25% per annum of the Net Revenue of MOSA for the period of up to 12 years following completion of the agreement (subject to a revenue cap of US$1.45m) (the "**Revenue Share Agreement"**)

viii) The Outrider MOSA Guarantee Claim will be released by way of a third-party release for US$1.

ix) Outrider will also be given the protection of an anti-embarrassment clause (regardless of which option it elects) which will see it receive 19% of the cash or cash equivalent received by the Group following any change of control (such as a sale or listing).

81. **The calculations underpinning the plan consideration.** The amounts that Outrider would receive under the Plan have been calculated by reference to Outrider's existing economic interest in MOSA via its debt:

i) Outrider's Guarantee Claim of c. US$71.25m represents c. 48.01% of the debt of the Plan Company. As against MOSA, Outrider holds only c. 8.02% of the debt in legal terms.

ii) However, Paragraphs 13.4-13.5 of the Explan explain that the Plan Company has 'aggregated' the debts owed to Outrider by the Plan

Company and MOSA to come up with a figure for the 'economic' percentage of MOSA's debt owed by Outrider, including 'through' Outrider's interest at MOL level.

iii) Applying this figure, the Plan Company has calculated that Outrider is entitled to the economic benefit of 19.01% of MOSA's indebtedness. This is the basis for the allocation of 19% of the benefit of any sale or disposal of the Group to Outrider.

iv) The revenue cap of US$1.4m under the Revenue Share Agreement similarly represents 25% of the future cashflows of MOSA over the next 12 years, i.e. 19% plus a 6% uplift.

v) Finally, the Outrider Cash Payment of US$200,000 is simply the net present value of the revenue cap of US$1.4m in the present, having regard to the time value of money and the risk factors referred to in the Business Plan: AC RA Report, [3.23].

82. Clause 2.3 of the Guarantee caps the total Guaranteed sum at US$80m. Outrider's present claims amount to c. US$71.3m whilst BMK's present claims under the Guarantee are US$13.4m respectively, therefore exceeding the US$80m cap. Thus, the true value of Outrider's claim against the Plan Company is likely less than US$71.3m. However, MOL says the calculations of the Plan consideration at paragraphs 13.4-13.5 of the Explan ignore the effect of the clause 2.3, meaning that the Plan calculates Outrider's interest on a more favourable basis than the general law. See AC RA Report, [2.7].

83. **The Business Plan.** With the assistance of FRP, its financial advisor, the Plan Company has prepared a Business Plan in support of the restructuring Plan. Its purpose is to outline the challenges now facing the Oilfield and MOSA, as well as outline how the new money injected by the Restructuring Plan will be spent so that the Court can have confidence at sanction that the Restructuring Plan will not be sanctioned in vain. The principal points of the Business Plan were set out in Mr Reynolds' witness statement.

84. The new money. Under the Plan, BMK will enter the BMK New Loan Agreement with the Plan Company, which consists of two facilities:

i) The BMK Committed New Loan Facility, in the sum of US$7.5m. As explained at Explan, [13.13], this Facility is not conditional on the Plan Company's financial performance and will enable the Plan Company to (i) fund the costs of the Restructuring Plan, (ii) fund any payments to Outrider and (iii) advance sufficient funding to MOSA to enable it to continue to operate and carry out capex to restart production, as well as drill wells to increase output to 500 barrels per day.

ii) The BMK Uncommitted New Loan Facility. This facility is available at BMK's discretion and drawdown takes into account a number of factors including (i) the basic assumptions in the Business Plan being met (ii) agreements and improvements relating to infrastructure of the Oilfield and (iii) increased production and (iv) there being no material adverse

changes to the PSA. As set out at Explan, [13.16], these conditions do not strictly bind BMK, which will provide the Uncommitted Facility at its discretion based on the overall financial performance of the Group.

Releases of MOSA's Guarantee Liabilities to Outrider and BMK

85. Both Outrider and BMK hold claims against MOSA under the Guarantee, as well as the Plan Company. MOSA is, of course, not a party to the Plan. The Plan provides for the release of the MOSA Guarantee Liabilities, both 'directly' and through a power of attorney enabling the Plan Company to sign deeds of release on behalf of both Outrider and BMK. See Explan, [10.2].

86. As explained there, it is said to be necessary to release the Outrider and BMK Guarantee Claims at MOSA as well as Plan Company level because:

    i) If those claims were not released, Outrider and/or BMK would enforce their guarantee claims against MOSA, creating a ricochet claim against the Plan Company arising from a right of contribution between co-sureties under the general law, resulting in the very liabilities being released by the Plan effectively being enforced against the Plan Company.

    ii) Further, a separate right of contribution has been created by a deed of contribution, through which the Plan Company has undertaken to contribute to any payment MOSA is called upon to make under the Guarantee. As a result of the deed of contribution should any payment be made by MOSA to Outrider, MOSA would have a further ricochet claim against the Plan Company.

    iii) Finally, and in any event, MOSA is the operational company of the Group and its only source of revenue. Leaving the Outrider and BMK Guarantee Claims in place at MOSA level is likely to deter BMK from investing, jeopardise the Group's ability to generate revenue going forward and therefore jeopardise the wider restructuring.

87. I accept that it is now well-established that there is jurisdiction to release claims against third parties who are not party to a plan where "*necessary"* to do so: Re Lehman [2010] Bus LR 489 (CA).

88. It is equally well-established that (i) such necessity may arise where a 'ricochet' claim arising by contribution or subrogation exists (though this is not a prerequisite) and (ii) a ricochet claim can be created by a deed of contribution to facilitate the releases of a third party where this is in the interests of achieving the best possible outcome for creditors: See e.g. Re Swissport Fuelling Ltd [2020] EWHC 3413 (Ch), [62]-[73]; Re E D & F Man Holdings Limited [2022] EWHC 687 (Ch) at [67]-[68] and Re Lamo Holding BV [2023] EWHC 1558 (Ch) at [46]; Re Gategroup Guarantee Ltd [2021] EWHC 775 (Ch).

89. The issue will be considered further at sanction, but for present purposes I accept that these releases create no roadblock.

Releases of directors, advisers and other similar persons

90. The other principal set of releases are the releases of directors, advisors and other similarly situated persons under the Plan from claims by *Plan Creditors* (though not claims by the Plan Company itself) relating to the preparation and implementation of the Plan: see Explan, [24.3].

91. This type of release is designed to prevent Plan Creditors from undermining the Plan by suing the officers and advisers responsible for implementing it. I was referred to the explanation by Snowden J. in Re Noble Group Ltd [2019] B.C.C. 349 at [24]-[27] and Re Ignition Midco BV [2024] EWHC 1063 (Ch) at [17] (Zacaroli J). Again, I agree that no roadblock is created by these releases.

Deed of Subordination

92. Separately from the Restructuring Plan but parallel to it, BMK, the Plan Company and MOSA will enter into a deed of subordination, which will subordinate the existing Plan Company MOSA Intercompany Loan and BMK MOSA Intercompany Loan to Outrider's rights under the Plan. As explained in Mr Mitchell's second statement, until the Plan Company's obligations to Outrider under the Revenue Share Agreement or the Plan are fully performed or have ended, MOSA will not be able to upstream payments to the Plan Company or to BMK under the existing indebtedness, save to fund the obligations to Outrider or the Plan Company's miscellaneous costs (such as the directors fees, legal fees, secretarial and regulatory fees) which become due for payment after the BMK Committed New Loan Facility has been drawn down and on-lent to MOSA.

The Relevant Alternative

93. As I have already mentioned, the Plan Company instructed Andrew Charters of Grant Thornton (UK) LLP to produce the AC RA Report. Mr Charters summarises the relevant alternative in Section 3 of his report. In short, he concludes that the RA is "*A liquidation of MOL in Mauritius, with MOSA's shares and the inter-company loans between MOL and MOSA being purchased by BMK (the Parent Company) from the liquidator of MOL, for a sum consisting of the Mauritian liquidator's costs and a premium of $10,000*."

94. Mr Charters reaches this conclusion for reasons set out in his Section 3 which I have considered. In a Mauritian liquidation, Mr Charters concludes that BMK would purchase the shares of MOSA and the existing Plan Company MOSA Intercompany Loan for a sum equivalent to the Mauritian liquidators' costs plus US$10,000. That would generate a non-zero return of US$4,802 and US$5,198 for Outrider and BMK respectively in the RA.

95. Mr Charters summarises the returns to creditors in the RA as compared to the RP as follows:

Plan Creditor	**RP - Scenario 1** (revenue share agreement)	**RP - Scenario 2** (lump sum cash payment)	**RA** (after costs of realisation)
Outrider	1.25% of net revenue for up to 12 financial years, capped at c.$1.4 million in return for a full release of the MOL Guarantee claim of c.$71.3 million.	$200,000 in return for a full release of the MOL Guarantee claim of c.$71.3 million.	c.$4,802
BMK	1. The issue of one ordinary share of $1 to BMK in the Plan Company in return for a full release of the BMK/MOL intercompany loan of c.$63.8 million. 2. $1 in return for a full release of the MOL Guarantee claim of c.$13.4 million.		c.$5,198

96. Mr Charters' conclusion that BMK will purchase the shares of MOSA and the Plan Company MOSA Intercompany Loan out of the liquidation is based on BMK's confirmation of its intention to do so. That confirmation has also been provided in evidence by Mr Al Njoo, BMK's CEO.

97. Mr Charters has considered BMK's offer and gives his opinion that it is rational and reasonable for BMK to do so for the reasons set out in AC RA Report at [3.19]-[3.20].

98. As for Outrider, it is in voluntary liquidation in the Cayman Islands and would therefore seem to be unable to be likely to demonstrate that it has the funds to purchase the shares in MOSA. The bidding process run by the JPLs was open, including to Outrider.

99. The Relevant Alternative is, therefore, a liquidation of the Plan Company in Mauritius in which BMK purchases the shares in MOSA and the Intercompany Loan for a sum amounting to the Liquidator's costs plus US$10,000.

100. Following that overlong background section, I can turn to consider the issues for this convening hearing. I will resolve the points raised on behalf of Outrider as I go through.

Jurisdictional requirements

A "company" liable to be wound up under the IA 1986

101. Section 901A of the Act is available to a "company". A "*company*" is any company liable to be wound up under the Insolvency Act 1986: section 901A(4)(b). That includes a foreign company, which is an unregistered company for the purposes of IA 1986: section 220. That jurisdiction, however, will not normally be exercised whether to wind up companies or sanction a plan unless there is a "*sufficient connection*" between the company and England.

102. My task at this convening hearing is only to consider whether there is an insuperable jurisdictional obstacle. Detailed consideration of discretion are left to the sanction hearing. Such issues include the existence of a sufficient connection between England & Wales and the scheme companies, as well as the effectiveness of the scheme abroad: Re ColourOz Investment 2 LLC [2020] BCC 926 at [57].

103. MOL submits that the fact that the plan debt is governed by English law will normally be enough to create a sufficient connection to England & Wales on its own, *even if the plan companies' COMI is elsewhere*: Re Primacom Holdings GmbH [2013] BCC 201 (COMI in Germany); Re Rodenstock GmbH [2012] BCC 459, [64]-[68]; Re Vietnam Shipbuilding Industry Group [2014] BCC 433, [8]. The connection is stronger where (as here) English law governs a framework agreement or a single suite of debt documents binding all of the plan creditors, which has been actively negotiated: Rodenstock at [68]-[69].

104. In the present case, the Plan Company is incorporated and registered in Mauritius. But all of the relevant debt, including the Facility Agreement, Guarantee and Intercompany Liabilities are governed by English law, as explained in Mr Mitchell's statements. The Facility Agreement and Guarantee are also a suite of agreements to which both BMK and Outrider acceded. I agree that these facts create the necessary connection to this jurisdiction.

The Plan Creditors are "creditors" for the purposes of the CA 2006

105. BMK and Outrider are creditors of the Plan Company under the Guarantee.

Conditions A and B in section 901A

106. MOL referred to the following caselaw, suggesting that these conditions are not difficult to satisfy: see Re Hurricane Energy Plc [2021] EWHC 1418 (Ch) at [22] per Zacaroli J (where it was said that the threshold for satisfying Condition A is "*relatively low*") and Re Virgin Atlantic [2020] BCC 997 at [39] per Trower J (Condition B was said to contain "*broad language which was intended to be expansively construed*").

107. Condition A (section 901A(2)) requires the following:

    i) It must be shown that the applicant company has encountered or is likely to encounter financial difficulties that are affecting or will or may affect its ability to carry on business as a going concern.

ii) Trower J in Re Deep Ocean 1 UK Limited [2020] EWHC 3549 (Ch) said at [39] that this condition is "concerned with a plan company's existing or anticipated financial condition [and] is a qualitative description of the nature of the financial difficulties which must be established before Part 26A of the 2006 Act can apply in relation to a company. In other words, the actual or likely financial difficulties *must be sufficiently serious to give rise to a possibility that the company will become unable to carry on business as a going concern*" (emphasis added).

108. I agree that this requirement is met in the present case. The Plan Company cannot pay its debts to either Outrider or BMK under the Guarantee, and winding up proceedings have also been commenced by Outrider in Mauritius. Condition A is satisfied.

109. **Condition B (section 901A(3))** has two limbs: **(i)** the company must be proposing a compromise or arrangement with its creditors or any class of them; and **(ii)** the purpose of the compromise or arrangement must be to eliminate, reduce or prevent, or mitigate the effect of, any of the company's financial difficulties under Condition A. As to this:

i) **Limb (i)** requires a "*compromise or arrangement*". MOL submitted this means a sufficient element of "*give and take between a company and its scheme creditors* [although] *a definition is neither necessary nor desirable*", referring to Virgin Atlantic (Convening) at [38]; Adler [2024] EWCA Civ 24. BMK receives US$1 and a share in the Plan Company in exchange for the compromise of its debt and the new money, and Outrider receives the benefit of the option to elect either the revenue share agreement or the upfront cash payment in exchange for the compromise of its Guarantee claim against the Plan Company, and receives US$1 for the release of its claim against MOSA. See paragraph 80 above.

ii) **Limb (ii)** requires the purpose of the compromise and arrangement to be the elimination, reduction, prevention or mitigation of the financial difficulties under Condition A.

110. It is clear that the RP meets limb (ii). However, as mentioned above, Outrider suggest that limb (i) is not satisfied. Mr Weaver emphasised the requirement for both give *and* take. He referred me to the judgment of Trower J. in The Great Annual Savings Company [2023] EWHC 1026 (Ch) at [6] and the point made there that a nominal £1 payment to contingent creditors in exchange for the release of all claims against the Company could give rise to a potential point on jurisdiction, because, as he explained, it is well established that, for the purposes of a Part 26 scheme of arrangement, a surrender or expropriation of the rights of some creditors or members without compensating advantage will not involve a sufficient element of give and take to amount to a compromise or arrangement within the meaning of s.895. Trower J. considered it quite possible that the same principle might apply to a restructuring plan.

111. Trower J. returned to this point at [25]-[30], referring to *NFU*, *Gategroup* and *Re Smile Telecom* [2022] EWHC 740 (Ch). It is convenient to quote from his judgment as follows:

> 26 The concern I expressed at the first hearing related to the satisfaction of Condition B, in the sense that it was not clear to me that, as against some of the creditors, it was a plan constituting a compromise or arrangement at all. If it is not, Condition B will not be satisfied. The basis of the concern was that if the plan were to be a Part 26 scheme of arrangement, the proposal then put forward for a contingent plan for creditors may well not have amounted to a compromise or arrangement which the court had jurisdiction to sanction. As Brightman J explained in NFU at p.1555:
>
> > "Section 206(2) of the Act is dealing with what is described as a "compromise or arrangement between a company and its creditors or a company and its members." The word "compromise" implies some element of accommodation on each side. It is not apt to describe total surrender. A claimant who abandons his claim is not compromising it. Similarly, I think that the word "arrangement" in this section implies some element of give and take. Confiscation is not my idea of an arrangement. A number whose rights are expropriated without any compensating advantage is not, in my view, having his rights rearranged in any legitimate sense of that expression."
>
> 27 In Re Gategroup Guarantee Ltd [2021] EWHC 304 (Ch) at [142], Zacaroli J agreed with a view that I had discussed in Re Virgin Atlantic Airways Ltd [2020] EWHC 2191 (Ch) at [38], and that Sir Alistair Norris had expressed in Re Pizza Express Financing 2 plc [2020] EWHC 2873 (Ch), to the effect that there was no reason to think that the phrase, "compromise or arrangement" in s.901A was to be construed any differently from its Part 26 meaning to require some element of give and take. However, the context in which the court must consider the ambit of the phrase in Gategroup Guarantee was very different to the present context. It was concerned with the extent to which a restructuring plan could affect creditors' rights against third parties.
>
> 28 In Re Smile Telecom Holdings Ltd [2022] EWHC 740 (Ch), the issue arose in relation to the claims and rights of a particular category of plan participant, which were to be released in return for merely nominal payments, the amounts of which were very small and were described in the explanatory statement as being ex gratia. In the event, Snowden LJ decided that, although described as ex gratia payments, the amount to be received by those plan participants were properly to be characterised as payments in return for the modification or extinction of their rights. It was therefore possible to identify some compensating

> advantage of the character compensated by Brightman J in the NFU.
>
> 29 However Snowden LJ had said at paras 29 and 30 of his judgment in Smile Telecom that, although he did not need to decide, the point, the submission that was made by Mr Smith and recorded in para 29 in the following terms, was one that required consideration. The submission was that:
>
> > "... in contrast to a scheme under Part 26, s.901G permits the court to sanction a restructuring plan which is binding on a class of dissenting creditors under section 901G on the basis that none of the dissenting class would be any worse off than they would be in the event of the relevant alternative. Mr Smith's argument was that if creditors or members in such a case would receive nothing in respect of their existing rights in the event of the relevant alternative, then it must follow that a plan could be sanctioned under section 901G which also provided them with nothing in exchange for the release or cancellation of their existing rights."
>
> 30 I have concluded that I do not have to decide this point in the present case, although I will say that it seems to me that the argument that was made by Mr Smith has real substance. The reason I do not have to decide the point in the present case is that I agree with Mr Weaver's submission that the way in which contingent creditors are now treated under the plan are similar to what occurred in Smile Telecom. It means that the court can be satisfied that there is a sufficient give and take for what is proposed to qualify as a compromise or arrangement. There is to be a £14,000 fund which is to be available for the payment of a dividend, albeit a small one, to each of the contingent creditors. Whether it is appropriate for contingent creditors to be dealt with in that way is a matter for the sanction hearing, but I am satisfied that the jurisdictional issue that otherwise might have arisen in relation to the satisfaction of the conditions is satisfied.'

112. A curiosity here is that it is not Outrider which says there is no give and take in its treatment. Instead, Outrider's point is based on what happens to BMK in the RP. However, in the context where BMK proposes, if the Plan is sanctioned, to provide $7.5m and then $12.5m of funding to enable production at the Oilfield to restart, Mr Weaver's submission that under the Plan, BMK only 'gives' and there is no necessary element of 'take' is counterintuitive. BMK would only be prepared to make these further (and reasonably substantial) investments if it was confident of securing a return on them but perhaps more importantly, in recovering value in its shareholding. In any event, it is clear that the releases which I outlined in [80.i)]-[80.iii)] which BMK secures in the RP represent a significant benefit to BMK. So I find there is ample give and take, and Condition B is satisfied.

Class Composition - General Principles

113. The test for class composition in a scheme or plan was reiterated by Meade J in Re Nostrum Oil & Gas plc [2022] EWHC 1645 (Ch) at [27]:

> The basic principle is that a class must be confined to those persons whose rights are not so dissimilar as to make it impossible for them to consult together with a view to their common interest (see Sovereign Life Assurance v Dodd [1892] 2 QB at [573] and many cases since, including e.g. Re Telewest Communications Plc [2004] BCC 342). In answering the question of whether a separate class is required, the Court must consider the rights that creditors would have if the proposed scheme were not implemented. In carrying out that exercise, the Court is concerned with rights, not interests. Even where there are differences in rights, the differences must be sufficient to make consultation impossible. It is important that the Court should not be too picky, to guard against the risk that that will enable a small group to hold out unfairly against a majority.

114. In Re Gategroup Guarantee Limited, Zacaroli J set out, at [183], the following points:

i) creditors' rights that fall to be considered are both their existing rights against the company and the rights conferred by the scheme/plan;

ii) the existing rights must be assessed in the context of the relevant comparator, described by Hildyard J in Re APCOA Parking (UK) Ltd [2014] EWHC 997 (Ch), at [32] as "*what would be the alternative if the scheme does not proceed*"; and

iii) it is rights, not interests, that fall to be taken into account for the purposes of class composition. Without attempting an exhaustive definition, rights of the creditors against third parties (for example against guarantors for the company's debts) will generally constitute interests as opposed to rights; differences in interests may be relevant to the discretion to sanction the scheme/plan.

Application of these principles

115. In the present case, the Plan Company seeks an order convening two meetings – one of BMK, and one of Outrider.

i) A meeting of one person is still a "*meeting"* within the meaning of section 901C where the class contains only one person: Re Altitude Scaffolding Ltd [2006] B.C.C. 904 at [11]-[12].

ii) If the one person summoned to meet does not show up to vote, that might matter in a scheme but does not matter in a Part 26A Plan, for that class can be crammed down under section 901G even if it is not a strictly a

"meeting": Re Listrac Midco Ltd [2023] Bus. L.R. 920 at [37]-[40]; Re Chaptre Finance plc [2024] EWHC 2908 (Ch) at [90]-[93].

116. The justification for splitting Outrider and BMK into two meetings is set out in the Practice Statement Letter at [18.4] and in greater detail in the Explan at [19].

117. The Relevant Alternative is a Mauritian liquidation of the Plan Company in which BMK and Outrider rank *pari passu*, though each will receive a small distribution. See paragraph 95 above. The 'rights going in' to the Plan are similar.

118. However, the rights afforded to Outrider and BMK under the Plan, sometimes called the 'rights out' of the Plan, are very different:

i) **BMK** will receive (i) a single ordinary share in the Plan Company (which does not alter its overall level of shareholding) in return for the compromise of the BMK Plan Company Intercompany Loan and (ii) cash consideration of US$1 for the compromise of the BMK Guarantee Claim against MOL and (iii) US$1 for the compromise of the BMK Guarantee Claim against MOSA and (iv) will be required to enter into the BMK New Loan Agreement to inject new money into the Plan Company.

ii) **Outrider** will receive (i) an option to elect between two valuable rights – the Outrider Cash Payment and entry into the Revenue Share Agreement and (ii) either way, the protection of the anti-embarrassment clause / Restructuring Surplus Payment and (iii) additional cash consideration of US$1 for the compromise of the Outrider Guarantee Claim against MOSA.

119. MOL submitted that the compromise being offered to BMK and Outrider is so different that it would be impossible for Outrider and BMK to consult together in a single class. BMK is putting in new money and being locked into the Group's capital structure and the bulk of its debt in the Group is being written off (or subordinated to Outrider's interests in the structure) to support the Group. Outrider is being offered a better exit from the Group's capital structure than it would get if the Plan Company entered a Mauritian liquidation.

120. I agree that it would be impossible for Outrider and BMK to consult together in a single class. Furthermore, the negotiations which have happened to date indicate these two parties are unable to find any common ground. Finally, if I were to order a single meeting, it would kill the RP, since it seems inevitable that the requisite majorities would not be achieved such that the RP could never reach the sanction stage.

No Roadblocks

121. In Re PizzaExpress Financing 2 plc [2020] EWHC 2873 (Ch), Sir Alistair Norris explained at [23] that, at the convening hearing:

> …it is emphatically not my role to consider the merits or fairness of the proposed plan. This will be the subject of the sanction hearing if approved by the relevant statutory majority (see Telewest Communications [2004] BCC 342, paragraph 14, per David Richards J). Matters not going to fairness but which could make it without point to convene the meetings (because they cast a blot on the scheme or present a roadblock in the way of its approval) do however fall for consideration, at least on a provisional basis.

122. I agree with MOL's submission that there are no jurisdictional roadblocks in the present case which could be said to make it "*without point*" to convening a meeting to consider the Plans.

No artificiality in class composition

123. Supposed artificiality issues relating to class composition may give rise to fairness issues at sanction but in and of itself does not create an issue at convening: Re Sino Ocean Group Holding Ltd [2025] EWHC 205 (Ch) at [33].

124. In the present case, BMK is not being included in the Plan simply to facilitate a cross-class cram-across, but because the write off of BMK's debt and the new money to be injected by BMK are critical to the Plan Company's survival. The nature of the Plan Company's business means that it, and the Group, cannot survive without a long-term investor with the expertise and resources to develop the Oilfield. There is no one else, and certainly not Outrider, who has the wherewithal to do so. As Subair Williams J pithily put it in the Bermuda Sanction Judgment, BMK is the only "*rescue vessel in sight*".

125. MOL submit that it is therefore rational, and proper, for a Plan to be proposed on terms which lock BMK into the Group and secure the injection of new money, whilst providing Outrider with a clear exit from the Group's capital structure on terms which fairly reflect Outrider's economic interest in the Group. The Plan Company's case is that the rights conferred on Outrider are, in fact, fair. But that is an issue for sanction.

International effectiveness

126. The international effectiveness of the Plan is a matter for the sanction hearing: in Re ColorOz Investment 2 LLC [2020] BCC 926, Snowden J said at [57] that the question of "*whether the scheme will have international effectiveness do[es] not go to the exercise of jurisdiction;* [it] *goes to the exercise of the Court's discretion whether or not to sanction… and should therefore not be determined at the convening hearing*".

127. The Companies have instructed experts to consider whether the Plan would be recognised and given effect in two key jurisdictions. These are Mauritius and Madagascar. Mr Mitchell says in his evidence that CPR 35 compliant opinions will be adduced at the sanction hearing. As Mr Mitchell explains, the experts have confirmed that the Plan and the third-party releases entered into pursuant to the Plan are reasonably likely to be recognised and enforced under the laws

of Mauritius and Madagascar. The lack of finalised expert reports at the convening stage should not lead the Court to conclude that a roadblock to the Plans exists. Trower J faced a similar situation in Re OQ Chemicals Holding Drei GmbH [2024] EWHC 2036 (Ch). He said, at [33]-[35], that "*the international effectiveness of a scheme is principally a matter for the sanction hearing*".

128. Furthermore, Part 26A plans promoted by Mauritian and Malagasy companies have been held to be capable of recognition in those jurisdictions in previous cases:

i) **Mauritius:** In Re Smile Telecoms Holdings Ltd [2022] BCC 808 at [71]-[90]. Significantly, Snowden LJ concluded that (i) Mauritian law would recognise the effect of a power of attorney granted by the Plan (which this Plan contains) and (ii) a Part 26A Restructuring Plan could be recognised as a foreign proceeding under the Mauritian enactment of the UNCITRAL Model Law. In the present case, the Plan Company's COMI is in England, for the reasons set out at Mitchell-2, [75]. The Plan Company's COMI was moved to England to facilitate the wider restructuring to facilitate the Plan's international effectiveness, and I was reminded that this is permissible: Aggregate [2024] EWHC 468 (Ch) at [228] (involving a COMI shift from Germany to England). It is therefore open to it, in principle, to apply for recognition in Mauritius.

ii) **Madagascar:** In Re Ambatovy Minerals SA [2025] EWHC 279 (Ch) at [93]-[97], Hildyard J concluded that there was a reasonable prospect of the plan there being recognised and enforced in Madagascar.

Practical issues

129. The Plan Company sought directions as to the summoning and conduct of the Plan Meetings as set out in the draft convening order.

Adequacy of the Explanatory Statement

130. The Practice Statement requires the Court to consider the adequacy of the draft Explan and check it is in appropriate form: see [15]. In Virgin Active [2021 EWHC 814 (Ch), Snowden J:

i) Explained at [96] that "an explanatory statement must explain the commercial impact of the scheme or plan and must provide creditors with such information as is reasonably necessary to enable them to make an informed decision".

ii) Cautioned at [98] that paragraph 15 of the Practice Direction does should not "be taken as signifying any intention that the convening hearing should become the forum for a detailed consideration by the court of the accuracy or adequacy of the contents of the explanatory statement. Paragraph 15 makes clear that the role of the court at the convening stage is primarily to consider whether the form of the explanatory statement is appropriate, and the court does not approve the accuracy or adequacy of

the explanatory statement when convening the scheme or plan meetings".

131. In the present case, I agree that the draft Explan will be readily comprehensible to BMK and Outrider who are sophisticated investors represented by solicitors and specialist counsel.

132. The Explan discloses, at [24], the material interests of the Plan Company's directors in the Plan, including the releases granted to them by it, as required by section 901D CA 2006.

133. I also agree that there are no material deficiencies in the Explan that the Court should decline to convene the plan meeting unless such manifest defect is corrected (see Virgin Active (Convening) at [99]).

Timetable

134. The proposed timetable for the approval and sanction of the Plans is set out at p. 5 of the Explan and is, in short, as follows:

i) The Convening Hearing takes place – **1 April 2025**.

ii) The Notice of Meeting and Explan will be disseminated on **3 April 2025.**

iii) The Record Time and Voting Instruction Deadline are on **6 May 2025**.

iv) The Plan Meetings take place on **7 May 2025**: **(i)** the BMK Plan Meeting will be held at 11am, and **(ii)** the Outrider Plan Meeting at 2pm.

v) The Sanction Hearing will be on **21 May 2025**, with a present time estimate of 1 day.

vi) The Plan's Effective Date is on or before **23 May 2025**.

135. This timetable ensures that there is sufficient time (i) for the Plan Creditors to consider the Plan and (ii) following sanction of the Plan, to close the restructuring and ensure that the new injection of capital is in place prior to the liquidity shortfall in November 2025.

Notice and Conduct of Plan Meetings

136. By 5pm on 3 April 2025, the Plan Creditors will have been provided with the Plan documentation, including the Notice of meeting, form of proxy and details of the meeting as well as the Explan. The documentation will have been sent by the Plan Company directly to the Plan Creditors by email and will have been uploaded to the Plan Website.

137. The practical arrangements (including the voting requirements) for the Plan Meetings were set out in Mr Mitchell's first witness statement at [80]-[86]. In the usual way, the Chairperson will be responsible for determining entitlement to vote at the meetings.

138. The meetings will be held on Microsoft Teams. The directions for remote meetings sought by the Company conform to those first approved by Trower J in Re Castle Trust Direct Plc [2021] 2 BCLC 523 at [36]-[44].

139. I agreed that the proposed arrangements were appropriate, and I did not understand Mr Weaver to contend otherwise. They featured in the Convening Order I made on 2 April 2025.