Case No: CR-2025-001156

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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: 07/11/2025

Before :

MR JUSTICE RICHARD SMITH

- -

Between :

IN THE MATTER OF MADAGASCAR OIL LIMITED
- and -
IN THE MATTER OF THE COMPANIES ACT 2006

- -
- -

Matthew Abraham and Rabin Kok (instructed by Shoosmiths LLP**)** for the **Plan Company Outrider Master Fund L.P.** did not appear and was not represented

Hearing date: 7 November 2025
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APPROVED RULING ON COSTS

Mr Justice Richard Smith:

Introduction

1. This afternoon, I oversaw the consequentials hearing following the judgment handed down on 15 August 2025 by which I sanctioned a restructuring plan involving the Mauritius registered Plan company, Madagascar Oil Limited (**MOL**) and its Madagascan operating subsidiary, Madagscar Oil SA (**MOSA**), and its two principal creditors, BMK Resources Limited (**BMK**) which supported the Plan, and Outrider Master Fund LP (**Outrider**) which opposed it.

2. The only question arising on this consequentials hearings is the question of costs and whether the opposing creditor, Outrider, should be responsible for some of the costs incurred in connection with these sanction proceedings, MOL saying that it should be to the extent of nearly 50% for various reasons to which I shall turn shortly.

3. Despite this hearing being arranged for the convenience of Outrider's leading counsel, Outrider does not appear today, nor is it represented. Outrider has indicated that it now seeks to act in person and has sent a letter to the court dated 3 November 2025, indicating its non-attendance for financial reasons but setting out in writing a number of points as to why it should not bear any costs liability. I have considered all the points in that letter and taken them into account in reaching the decisions I have today.

Threshold issue

4. Outrider raises a threshold issue of whether it can be liable for any costs at all given the terms of the restructuring Plan sanctioned and, in particular, clause 23 which provides that:-

> *23.1. The Plan Company shall pay, or procure the payment of, all costs, charges, expenses and disbursements incurred by it in connection with the negotiation, preparation and implementation of this Restructuring Plan as and when they arise, including, but not limited to, any costs incurred by the Plan Administrator in defending any action brought against them in connection with their duties and responsibilities under this Restructuring Plan (save in the case of fraud, gross negligence or wilful misconduct), the holding of the Plan Meetings, the costs of obtaining the sanction of the Court and the costs of placing the notices (if any) required by this Restructuring Plan.*
>
> *23.2. Each Plan Creditor will be responsible for its own costs.*

5. At paragraph 3 of its 3 November Letter, Outrider says that clause 23 precludes MOL from recovering costs from Plan creditors following an unsuccessful challenge. I have no difficulty in rejecting that argument. Clause 23 simply confirms MOL's liability to pay the costs it incurs in connection with the restructuring Plan, including obtaining court sanction. Clause 23 does not seek to limit or remove MOL's ability to *recover* costs from Plan

creditors arising by reason of s.51 of the Senior Courts Act 1981 and CPR, Part 44. I agree that clear language would be required for the restructuring Plan to have that effect, language that is not present here. Being based on a false premise, Outrider's further points as to fairness or the need for Plan amendment do not advance its argument. I am satisfied that there is no impediment to the court making a costs order against Outrider.

Costs order sought

6. MOL quite rightly does not seek to recover all its costs in connection with court sanction. On any view, costs - and on the papers before me – significant costs - would always have had to be incurred in obtaining sanction even if Outrider had not opposed the Plan, it always being incumbent on MOL to persuade the court that it had jurisdiction to approve the Plan and that it was appropriate for the court to exercise its discretion to the end. Moreover, as the authorities make clear, it does not by any means follow that a creditor who unsuccessfully opposes a plan should pay the costs of doing so. To the contrary, as I come on to explain, if that opposing creditor has been of assistance to the court, the court may order the plan company to pay that creditor's costs or make no order for costs.

7. As to those authorities, MOL fairly points out that it is not completely settled whether the approach to costs in a restructuring plan context under Part 26A of the Companies Act 2006 should follow that for schemes under Part 26 indicated in cases such as *In Re Virgin Active Holdings Ltd* [2021] EWHC 911 (Ch). However, both MOL and Outrider draw on the principles and approach to costs indicated in *Virgin* and I consider that approach to be appropriate here, albeit emphasising the need (as indeed did Snowden J (as he then was) in *Virgin* itself) to take into account all the circumstances of the case, including the different types of relief sought from the court under the different regimes. As to the principles indicated, *Virgin* distilled these (at [29]) in the following terms:-

> *29. Instead, on the basis of the authorities to which I have referred, it seems to me that the following principles can be stated in relation to scheme cases under Part 26,*
>
> *i) In all cases the issue of costs is in the discretion of the court.*
>
> *ii) The general rule in relation to costs under CPR 44.2 will ordinarily have no application to an application under Part 8 seeking an order convening scheme meetings or sanctioning a scheme, because the company seeks the approval of the court, not a remedy or relief against another party.*
>
> *iii) That is not necessarily the case (and hence the general rule under the CPR may apply) in respect of individual applications made within scheme proceedings.*
>
> *iv) In determining the appropriate order to make in relation to costs in scheme proceedings, relevant considerations may include,*
>
> *a) that members or creditors should not be deterred from raising genuine*

> *issues relating to a scheme in a timely and appropriate manner by concerns over exposure to adverse costs orders;*
>
> *b) that ordering the company to pay the reasonable costs of members or creditors who appear may enable matters of proper concern to be fully ventilated before the court, thereby assisting the court in its scrutiny of the proposals; and*
>
> *c) that the court should not encourage members or creditors to object in the belief that the costs of objecting will be defrayed by someone else.*
>
> *v) The court does not generally make adverse costs orders against objecting members or creditors when their objections (though unsuccessful) are not frivolous and have been of assistance to the court in its scrutiny of the scheme. But the court may make such an adverse costs order if the circumstances justify that order.*
>
> *vi) There is no principle or presumption that the court will order the scheme company to pay the costs of an opposing member or creditor whose objections to a scheme have been unsuccessful. It may do so if the objections have not been frivolous and have assisted the court; or it may make no order as to costs. The decision in each case will depend on all the circumstances.*

8. The focus of the parties, including in Outrider's letter, is on point (v), namely whether Outrider's opposition has been in the nature of frivolous. As to other potentially relevant matters, MOL also relied upon the distinction drawn by Richards J in *Consort Healthcare (Tameside) plc v Tameside & Glossop NHS Trust* [2025] BCC 46 between a 'classic' plan and a plan which is in substance adversarial litigation as relevant to the exercise of the court's discretion on costs, this case involving only two creditors which ranked *pari passu*, both well-funded (Outrider by third party backer, LVIL), representing the culmination of a long running inter-creditor dispute, with two sides comprising MOL and BMK on the one hand and Outrider on the other. I accept that that too is a relevant consideration in this case.

9. Having considered these principles, I am satisfied that Outrider should bear responsibility for a not insignificant proportion of the costs incurred on this claim. I come to that view for a number of reasons, principally directed to Outrider's approach in this case. This includes the pursuit of a number of grounds of opposition which appeared to be hopeless. A number of metaphors could be used involving 'scatterguns', 'kitchen sinks' or 'mud and walls' but many points, some obviously bad, were taken, some abandoned late, which caused additional costs to be incurred, not just in preparing to address those points even if not ultimately pursued, but also in the more active case management and court intervention necessitated by such an approach. Although parties can and should expect Part 26 and 26A claims to be actively managed, and increasingly rigorously so, I accept that the need in this case was all the greater because of Outrider's approach.

10. Even setting aside the metaphors, and notwithstanding the significant debt due to both creditors and the importance of the matter to the parties, Outrider's approach also lacked a sense of proportion in light of the asset being argued over and its ability to return value to

creditors, namely a complex oil production business mothballed some 8 years earlier. Coupled with that, the approach also lacked a sense of reality in terms of what Outrider said it could itself bring to the table in its suggested Relevant Alternative, an issue which took up significant time and cost, both before and at the hearing, albeit reflecting a moving position and ultimately a departure from Outrider's pleaded case. In the event, the court found Outrider's final landing point on the Relevant Alternative, namely an offer to purchase MOSA's shares, unconvincing and the related evidence highly problematical. This ground should never have been advanced on the basis it was.

11. These observations also give some perspective to Outrider's comments in its 3 November 2025 letter relating to its prior offers to settle not limited to the subject matter of its proposed Relevant Alternative. As I found in my judgment (at [206]):-

> "I am satisfied that BMK and MOL have sought to reach a reasonable compromise with Outrider. That is evident from the significant offer made by BMK to Outrider in the APA. I am also satisfied that Outrider is unreasonably holding out for a better offer. That is evident from Outrider's equivocation as to its own pleaded RA and its inability (as in Bermuda) credibly to back up its suggested investment intentions. With ever more resource diverted towards the rancour previously described, it seems to me that Outrider is seeking to 'kick the can down the road' in the hope of extracting a better offer. However, by taking that course, the prospect of securing such value as might still be capable of generation from a complex business mothballed eight years ago becomes increasingly remote."

12. I should say in this regard that, at para 7(c) of its letter, Outrider quotes favourably to itself paragraph [129] of the sanction judgment as to the genuine nature of the offer made shortly before the sanction hearing. However, it is quite clear that I am stating there Outrider's position in the matter, not the court's.

13. Finally, looking at the distinction drawn by Richards J, it was also quite clear to me that this was, in substance, the continuation of adversarial litigation, the course of these further proceedings showing a number of the hallmarks of the prior proceedings in the Bahamas when the court blessed BMK's acquisition of the MOL and MOSA shares in the face of Outrider opposition and some of the hallmarks of the winding-up proceedings in Mauritius. In this regard, I also noted in my judgment (at [150]) both the eleventh hour provision of the Outrider offer and the issue of the MOL winding-up petition shortly before the sanction hearing which rather smacked of an effort to improve Outrider's position before the court. The way in which these proceedings have fizzled out too, including with this longstanding consequentials hearing fixed for the convenience of counsel now no longer attended by Outrider, bears some of those shared hallmarks.

14. Although, as I say, significant costs will always have been incurred in this matter, although the court is conscious not to make any order which would disincentivise objecting creditors from coming forward to make genuine objections, and although Outrider did, for example,

properly take and explore at the sanction hearing the point about the fairness of the Plan ultimately sanctioned, I am satisfied that the approach and the conduct I have described does merit a significant costs order being made against Outrider.

MOL's approach to costs

15. As to MOL's approach at this hearing, it has analysed in some detail the costs it wishes to recover (i) prior to the sanction hearing, by reference to the stage of the proceedings and (ii) in respect of the sanction hearing and preparation for it, by reference to particular issues which the Court had to decide. Mr Sennett from Shoosmiths has set out in a witness statement MOL's overall approach on costs and brief explanations for the percentage of costs claimed for each relevant stage and issue. That is supported by input from MOL's costs lawyers who have provided supporting costs schedule information in seven separate documents corresponding to the seven categories of costs sought. Each of those schedules is intended to form the basis of the Court's assessment, whether for summary assessment or interim payment purposes. Summary assessment is sought for the disclosure application (where there is already a costs order) and in relation to this consequentials hearing. An interim payment is sought for the other 5 categories. The figures in each schedule represent only the percentage of the costs and fees incurred *that are claimed*. The total costs *incurred* are set out separately, with £2,262,971.65 costs overall having been incurred and only £1,115,569.06 claimed. These figures are said to be *after* a discount of 20% applied by Shoosmiths to some of its own fees. So, MOL claims approximately one half of the costs incurred, albeit at this stage subject to reduction for interim payment purposes and any reduction on summary assessment.

The seven individual claims

16. Taking the seven elements of costs in turn:-

(i) MOL claims 30% of the costs of the convening hearing (ie: £68,726.16) on account of Outrider's unsuccessful adjournment application and two points argued then which later became grounds of objection, ground 3, by which Outrider argued that BMK and Outrider should form a single class, and ground 4(a), by which Outrider argued that the Plan was an expropriation of BMK's – not Outrider's – rights. MOL says that these were frivolous and of no assistance to the court, unnecessarily prolonging the convening hearing and related preparations. I accept that these points were bound to fail, they should not have been taken and, having considered the judgment and the transcript of the convening hearing, that they did unnecessarily prolong the argument and significantly increase the costs. I am satisfied that 25% is the appropriate proportion of those costs for Outrider to bear and, given the evident lack of merit in these points, that this should be on the indemnity basis.

(ii) MOL claims 100% of the costs of the CMC (£128,074.02) on the basis that, having served wide-ranging grounds of opposition, Outrider dropped ground 3 (class composition), ground 4(a) (expropriation of BMK's rights) and ground 7 (that

BMK, not Outrider, could not act rationally in voting for the Plan). Outrider only did so very shortly before the hearing. Moreover, at the CMC itself, Ground 1 (lack of jurisdiction on the basis that the intercompany loans between BMK and MOL were not governed by English law) was struck out on MOL's undertaking to formalise one of the loans in an agreement containing an express English choice of law clause. Grounds 4(b) and (c) (concerning the purpose and effect of the Plan) were pursued by Outrider but only at the hearing did it accept that these were aspects of fairness (ground 8). Moreover, Outrider failed in its application for expert evidence on grounds 5 and 6 (Relevant Alternative), Outrider's request for expert evidence on whether a hypothetical buyer would buy MOSA's business rather than the shares was denied because this was not part of Outrider's pleaded case, Outrider was permitted expert evidence from an oil and gas expert but the scope sought by Outrider was severely curtailed and extensive disclosure of all documents underpinning Outrider's business plan was denied.

MOL says that it was almost entirely successful save for a minor indulgence on expert evidence on the business plan, if grounds 1, 3, 4 and 7 had been dispensed with in good time and the Relevant Alternative expert evidence and business plan disclosure not pursued, the CMC might well have been dispensed with by agreement and grounds 5 and 6 were found at trial to be frivolous such that, if Outrider had pursued ground 8 alone, no CMC would have been necessary.

Although I am persuaded that Outrider unreasonably pursued (frivolous) grounds which were only dropped shortly before the hearing, unreasonably pursued requests for expert evidence and disclosure and unreasonably pursued grounds 5 and 6 on the Relevant Alternative (all the way through to trial), grounds which were, in my view, also frivolous, and that these matters should be marked in a costs order against Outrider on the indemnity basis with respect to the CMC, I am not persuaded that it should bear 100% of the costs but that 75% is more appropriate. I reach that view on the basis that, even if no CMC had been necessary (which I accept it may well not have been if Outrider had not taken these steps), there would still have been not insignificant work to undertake to seek to agree directions for the conduct of the case to the sanction hearing.

(iii) As to the costs of the PTR generally, MOL seeks 100% of these (£67,178.40) on the basis that this related to timetabling, evidential and translation issues principally related to ground 2 which is also said to be frivolous.

(iv) As to the costs of the disclosure application, these have already been ordered to be paid on the standard basis. £26,608 is claimed in the summary assessment schedule.

I return to elements (iii) and (iv) later in my ruling.

(v) As to the costs of the sanction hearing and trial, MOL accepts that Outrider was entitled to raise the pleaded aspects of ground 8 (albeit does not press for costs on the unpleaded aspects of those where Outrider failed, namely unfairness of the new money and 'blot'). However, it does seek some of its costs in relation to certain issues that were pursued, the first being ground 2 concerning international effectiveness on the basis that the Mauritian and Malagasy law ultimately adduced by Outrider was so weak as to show that it had no reasonable basis to resist the Plan on effectiveness grounds. MOL does not seek all its costs because it recognises that it would have had to satisfy the court about this in any event. It therefore seeks £197,029.36 out of a total of £858,233.36 as the work and percentages are explained in the evidence for today.

I accept that, once expert evidence had been served, and given the significant common ground, but also given the disputed issues, it was or should have been apparent to Outrider that there was a reasonable prospect that the Mauritian courts would recognise the Plan. There were two principal issues: first, there was MOL's COMI, as to which there were competing arguments from both sides but, for the purpose of reasonable prospect of recognition, the position advanced by MOL was more than sufficient; second, the same is true of the role of the Mauritian proceedings in the context of ground 2 once it had been accepted by Outrider, as it was in its expert's report, that the judge's decision to refuse recognition of the convening order did not have any effect on a subsequent recognition of the sanction order. Moreover, given the significant common ground, the question of recognition in Madagascar turned largely on the position in Mauritius.

The continued pursuit of ground 2 in these circumstances was, in my view, frivolous. I therefore agree that Outrider should bear part of the costs of this issue and that the apportionment of the total amount sought by MOL (as explained in the evidence) appropriately reflects the additional costs in addressing this issue which should not have been incurred. I am also satisfied that Outrider's position in pressing the points it did was such that this element of those costs should be awarded on the indemnity basis.

(vi) MOL also seeks a larger portion of the costs of grounds 5 and 6 (£429,066.85 out of £756,761 claimed). It recognises that it would have had to establish the Relevant Alternative to the court's satisfaction in any event but, given what is described as Outrider's abusive approach on this particular issue, the apportionment sought here is larger. I accept that these grounds were frivolous but, much more than that, it was a moving target, only then really settled upon at or shortly before trial and, its primary position then not even reflecting its pleaded case. Having again considered the evidence, I am satisfied that the apportionment of the relevant work claimed for this issue is appropriate. Moreover, for the reasons given in my judgment and upon which I do not need to elaborate here, Outrider's conduct was again so out of the norm as to warrant an indemnity costs order.

(vii) Finally, I agree that having been successful in obtaining costs (if not to the full extent sought today), MOL should have its costs of this hearing. I am also satisfied that the way Outrider has gone about matters, fixing this hearing for the convenience of its counsel at some distance from the hand down of judgment, then indicating at the last minute its non-attendance but submitting a long letter, supposedly on the basis of impecuniosity, again has all the hallmarks of its approach to the case I have already described, such that those costs should be on the indemnity basis. The costs schedule for summary assessment indicates that £198,686.27 are claimed.

17. I should say that, in considering these different elements of the costs claimed, I am satisfied that there is no overlap between them given the items of work or stages of the case by reference to which they have been calculated.

18. In terms of the level of interim payment, the authorities indicate that I am not looking for the irreducible minimum but an estimate of the likely recovery, subject to an appropriate margin for error and the potential effect of other factors impinging on recoverability and/ or risk of overpayment. Having considered these matters, my findings as to the basis of assessment, my view, having conducted the trial, as to the substance of the case and likely costs incurred and recoverable, and the allocation of the work (or percentages of work) to the relevant hearing or issue where the full amount is not claimed, I am satisfied that the appropriate level of payment on account in this case, after applying in Outrider's favour a margin of error avoiding the risk of overpayment, is 75% of the amount stated in the relevant appendices.

19. Finally, returning to items (iii) and (iv), I was not persuaded that Outrider should pay the costs of the PTR. The largest issue by some distance debated at the PTR was the question of disclosure, in relation to which, I have already made a costs order. The other pre-trial elements (although mainly relating to ground 2) were minor by comparison. However, there does appear to be some discrepancy between the amounts claimed for these two elements in the corresponding schedules. Although I am ordinarily happy to undertake the summary assessment of costs, since there will be a detailed assessment anyway, I will vary my prior costs order in relation disclosure to provide that these costs too shall be subject to detailed assessment, with the same (75%) interim payment to be made against the amount claimed in the costs schedule. Given the apparent understatement of costs in that schedule, there will be no risk of overpayment. Although there is not the same issue with the related costs schedule, the same approach is also appropriate with respect to the costs of today's consequentials hearing.