Neutral Citation Number: **[2024] EWHC 2598 (Ch)**

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

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

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

Date: **3 September 2024**

Before :

The Honourable Mr Justice Richard Smith

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In the matter of Ambatovy Minerals Société Anonyme
and
In the matter of Dynatec Madagascar Société Anonyme
and
In the matter of the Companies Act 2006

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Daniel Bayfield KC and Jon Colclough (instructed by **Sullivan & Cromwell LLP**) for the **Claimant Plan Companies**
Richard Fisher KC and Henry Phillips (instructed by **Millbank LLP**) for the **Senior Lenders and Recovery Financing Lenders**

Hearing date: **3rd September 2024**

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APRROVED JUDGMENT

The Honourable Mr Justice Richard Smith **Tuesday, 3 September 2024**
(**11:15** am)

Introduction

1. This morning, I heard two applications by two companies registered in Madagascar, respectively, Ambatovy Minerals Société Anonyme and Dynatec Madagascar Société Anonyme (**Plan Companies**). They each seek permission to convene two meetings of certain of their creditors for the purpose of considering two proposed restructuring plans which I will call "**the Plan**", simply because they are both referable to a single plan document. The application is made pursuant to Part 26A of the Companies Act 2006.
2. The Plan Companies operate the Ambatovy nickel and cobalt mine in Madagascar. They are said to be in significant financial distress and have been for some considerable time, with approximately US$2.3bn of debt falling within the scope of the Plan. It is said that the Plan Companies have no prospect of repaying that sum in full or anything approaching it. It was also said in the evidence that US$104m will fall due on 30 September 2024, although it was hoped then, and has been confirmed today, that the relevant maturity date and, therefore, repayment, can be deferred for at least a short period, ideally with a view to allowing the Plan process to proceed. It has also been highlighted in the evidence and argument that, given certain major operational issues affecting the mine, a substantial injection of new money will be required for it and the Plan Companies to survive. The Plan is said to encompass two main features: first, the introduction of such new money to enable those operations to continue; second, 'out-of-the-money' debt being discharged to make the balance sheet a manageable size.
3. In preparation for this hearing, I have read the skeleton argument lodged by the Plan Companies. In addition, I have read the witness statement of M. Luc Nouvian, Deputy CEO and CFO of both Plan Companies, as well as the statement of Ms Katie Lacey of GLAS Specialist Services Limited, the information agent in relation to the Plan. I have also read parts 1-6 of the draft Explanatory

Statement, and, less closely given my focus today at this convening stage, the relevant alternative report prepared by Grant Thornton and the expert report on Madagascan law prepared by M. Olivier Ribot. I have also read the skeleton argument lodged by those lenders described as the "**Senior lenders**" and "**Recovery Financing lenders**", both of which were represented today. They oppose the plan and will apparently vote against it, assuming I allow the creditors' meetings to be convened.

4. Those objecting lenders do not say that there are obvious roadblocks to the Plan such that the court lacks jurisdiction to convene the proposed Plan meetings, but their objections, expressed in, I think it is fair to say, forceful terms, are said to be matters which will have to be determined by the court at the sanction hearing, if any. Accordingly, although they do not seek to stand in the way of convening the Plan meetings, they have sought directions from the Court to achieve what they say will be a fair and effective sanction hearing which allows important issues arising from the Plan, including those foreshadowed in their skeleton argument at least, to be properly ventilated and determined by the court. To that end, I am pleased to see that the parties have managed to agree directions for my approval today, although Mr Fisher did, whilst not asking me to make any further directions, canvass the possibility that it may be necessary to return to the court for that purpose.

The Plan Companies

5. Turning to the background of this matter in more detail, particularly as it pertains to the Plan Companies and their current debt structure, the companies are ultimately owned by the Sumitomo Corporation, a Japanese trading company, as to 54.2%, and Korea Mine Rehabilitation and Mineral Resources Corporation, a Korean state-owned entity and investor in energy and natural resources projects, as to 45.8%.

6. The nickel and cobalt mine is located in Madagascar, it is operated by the Plan Companies and it is said to represent a key part of that country's economy. According to the Plan Companies, the operation of the mine has been beset with financial difficulties throughout, including, it is said, on

account of volatility in cobalt and nickel prices and, relatedly, technically superior competitors operating in the market, making it even more difficult to trade.

7. As a result, there have been three prior restructurings in 2016, 2019 and 2021. Despite those restructurings, indicative losses are said to have been suffered amounting to US$98.2m in 2022 and US$180.5m in 2023, with a forecast loss of US$376.6m in 2024.

8. The Plan Companies say that the shareholders have invested $7bn since 2005 and have only received a *de minimis* return of less than $1m. In addition, the mine is said to face significant operational difficulties, not least the need to replace a lengthy system for the transportation of ore.

9. Further funding was sought in 2024 by what is described as the 'Super Senior' debt raise, the capital injection from which is said to have been the only thing which has allowed the Plan Companies to trade to this point. It is fair to say that the objecting lenders have been heavily critical as to the circumstances in which priority was obtained for the Super Senior debt and its current use in the Plan as a potential 'cramming' class, a matter which will be apparently explored at any sanction hearing that might be directed today.

10. In any event, the Plan Companies say that more money is now required. The shareholders are said to be willing to provide the new money required but only on terms that discharge the 'out-of-money' debt, to which the Senior lenders and Recovery Financing lenders are not prepared to agree.

The debt position of the Plan Companies

11. Turning to the debt position of the Plan Companies, this is indicated in the skeleton argument as $71m of Super Senior debt, $842m of Senior debt, $565m of '2021 NM debt' and $818m of Recovery Financing debt. Those debts are subject to an intercreditor agreement called the Restructuring Creditors' Agreement, in relation to which, the pre-enforcement 'waterfall' is first, the Super Senior debt, second, the Senior debt and 2021 NM debt on a *pari passu* basis, and third, the Recovery Financing debt. The post-enforcement 'waterfall' is slightly different, and that is now

said to be relevant, given the financial position of the Plan Companies: first, the Super Senior debt, second, the Senior debt, third the 2021 NM debt, and last, the Recovery Financing debt.

12. The Super Senior debt was provided under an agreement dated 22 April 2024 to meet the Plan Companies' urgent liquidity needs. Although open to all Plan creditors, only the shareholders of the Plan Companies provided financing in that way. The debt matures on 30 September this year, those lenders enjoying payment in kind interest of 21.3% per annum, direct security over most of the Plan Companies' offshore assets and the right to become beneficiary of the Plan Companies' security over their onshore assets as well as turnover rights in respect of the proceeds of the onshore security. It is said that there is no prospect of the Plan Companies being able to repay the Super Senior debt on 30 September 2024 but, as has been indicated to me today, deferral has now been agreed, temporarily at least. Significantly, the Super Senior lenders are said by the Plan Companies to be the only 'in-the-money' creditors in the relevant alternative. However, it is again fair to say that the objecting lenders take strong exception to the notion that liquidation is, in fact, the relevant alternative to the Plan or, even if it were, that they would be no worse off under the Plan.
13. As for the Senior debt, this was originally advanced in 2007 in the sum of US$2.1bn but has since been partially repaid and restructured down to US$842m. There are apparently 14 Senior lenders. The Senior debt matures on 15 December 2033. Interest is payable at a particular reference rate plus margin, with interest of $33m due on 30 September 2024, again it is said, with no prospect of it being repaid by that date, but again confirmed today that the deferral previously under discussion has been agreed, at least for a temporary period. In terms of security, the Senior debt ranks behind the Super Senior debt but ahead of the 2021 NM debt and the Recovery Financing debt.
14. As for the 2021 NM debt, this was provided by the shareholders pursuant to an agreement dated 15 June 2021 to meet the Plan Companies' then liquidity needs. That has no fixed maturity date, albeit repayment is said to be closely aligned to full satisfaction of the Senior debt or enforcement action being taken. The payment in kind interest rate is 21.3%. The debt is unsecured but it does rank

above the Recovery Financing debt because of the turnover provisions in the Restructuring Creditors Agreement.

15. Finally, as for the Recovery Financing debt, that is former Senior debt reconstituted during the 2021 consensual restructuring participated in by nine lenders, all of which are also Senior lenders. That matures on 15 December 2045, and is to be repaid on a 'pay-if-you-can' basis. A portion of the debt is apparently convertible into fixed rate bonds in certain circumstances. The debt accrues payment in kind interest of 3% per annum. The debt is secured but ranks below the 2021 NM debt because of the turnover provisions referred to.
16. Certain other debts of the Plan Companies are excluded from the Plan, namely working local capital facilities, local trade creditors and certain arrangements with the shareholders which, I understand, relate to long-term off-take payment arrangements. The reasons for their exclusion are articulated in the evidence and the Plan itself.

The Plan

17. Turning to the Plan itself, the new money requirement envisages the raising of an additional US$100m to fund the mine for 12 months. That is described in the papers as the Senior NM debt which the shareholders have agreed to 'backstop' as to 100%, with an entitlement and commitment of the Super Senior lenders in that capacity to participate in 50% of that debt, with all other lenders entitled, but not required, to participate *pro rata* in the other 50%, with any unsubscribed debt being re-offered to participating creditors.
18. The Plan will also amend and extend the existing Super Senior debt to conform with the terms of the Senior NM debt.
19. For those of the Senior lenders, 2021 NM lenders and Recovery Finance lenders that choose to participate in the Senior NM debt, their existing debt will be reinstated as what is described as a second ranking reinstated junior tranche at a ratio of $3 for every $1 of Senior NM debt up to 100%

of their existing holdings, the balance of a participant's existing debt, if any, being written down to zero.

20. For those of the Senior lenders, 2021 NM lenders and Recovery Financing lenders that choose not to participate, their existing debt will be written down to zero and, in exchange, they will receive on a pro-rated basis a cash payment of $20m less the costs of the Plan Companies in promulgating the Plan, to be paid from what has been termed an 'out-of-the-money' fund to be specially created.

21. The Plan Companies point out the different treatment of the Super Senior lenders by way of amendment and extension of the Super Senior debt rather than its writing down, that different treatment said to reflect their agreement to participate in 50% of the Senior NM debt and the fact that they are said to be the only 'in-the-money' creditors in the relevant alternative.

22. The Senior lenders, the 2021 NM lenders and the Recovery Financing lenders are, it is said, being treated identically as between themselves under the Plan, even though they have different positions in the waterfall. That is because these creditors are all said to be 'out-of-the-money' in the relevant alternatives such that the differences in their existing rights are immaterial or not meaningful and would not lead to a different outcome as between the different groups of lender in that relevant alternative.

23. In this regard, the Plan Companies pointed to the starting point indicated In *Re AGPS Bondco plc* [2024] EWCA Civ 24 as being that the creditors which received the same return in the relevant alternative ought to receive the same return under a restructuring plan unless different treatment can be justified, it being said that there are no good reasons for such different treatment in this case.

24. Turning to the relevant alternative, it is said that a care and maintenance plan for the mine and related operations, an accelerated M&A transaction or a pre-pack insolvency sale or consensual restructuring are not feasible for various different reasons. Accordingly, if the Plan fails, the Plan Companies will not be able to fund the $104m that falls due at the end of this month (as now deferred). They will have no access to substantial new money. There will be a declaration of

cessation of payments required under Madagascan law. The Plan Companies will then enter into insolvent liquidation such that this is said to be the relevant alternative.

25. The Plan Companies say that the Plan has been specifically designed to ensure that creditors are paid more under the Plan than the relevant alternative of insolvent liquidation in the form of at least the 'out-of-the-money' fund already referred to. Grant Thornton has prepared a report on the creditors' likely recoveries in insolvent liquidation and under the Plan which the Plan Companies say shows that all creditors are better off under the Plan. So, in the relevant alternative, it is said that the Super Senior lenders will recover up to 42.4%, with all other creditors receiving nothing. Under the Plan, it is said the Super Senior lenders will receive a 100% return and the return to the other creditors will depend on whether they participate in the Senior NM debt, with those who do not expected to recover 0.7%, representing their share of the 'out-of-the-money' fund, assuming complete non-participation by other lenders, and those who do, a recovery of between 0.1 to 22.5%, the range apparently reflecting different discount rates to the Senior NM debt.

The Senior lenders' position

26. In their skeleton argument, the Plan Companies foreshadowed the position of the Senior lenders but it is perhaps more useful to take this straight from the horse's mouth, as it were, the Senior lenders explaining in their own skeleton that they object to the plan based on at least the following arguments at this stage: first, that the relevant alternative to the Plan is not liquidation; second, whatever the relevant alternative, the effect of the Plan is, in fact, to leave the Senior lenders worse off than they would be in it; third, the circumstances in which the Plan Companies and shareholders obtained priority for the Super Senior debt are such that the court ought not to sanction the plan; fourth, the terms of the Plan are said to be, for various reasons, unfair. Although I have read the relevant submissions, it is not necessary for me to say anything here about the third and fourth points. They will be matters for argument at any sanction hearing.

Class composition

27. However, it is fairly recognised that the first and second points do have implications for class composition issues which are potentially relevant for me today. Indeed, as noted, the Plan Companies propose two classes comprising (i) the Super Senior lenders and (ii) the Senior lenders, the 2021 NM lenders and the Recovery Financing lenders, on the basis that the Super Senior lenders will make a recovery in the relevant alternative of liquidation and, therefore, receive more under the Plan, such that their existing rights and their rights under the Plan are materially different from the other lenders who will make no recovery under the relevant alternative and are, as between themselves, treated equally under the Plan.

28. As the Plan Companies fairly recognise, were the court to determine that the relevant alternative was something other than an insolvent liquidation, and that in the relevant alternative the Senior lenders would recover something, but the 2021 NM lenders and the Recovery Financing lenders would not, this two-class approach, it is I think fairly accepted, would not be correct: the Senior lenders would need to be in a class of their own.

29. The Plan Companies say in this respect that the difficulty is that a full challenge to the identification of the relevant alternative, and the returns that might be enjoyed in it, would take many weeks to resolve. If the convening hearing were to be adjourned to enable the court to determine the relevant alternative at this convening stage, there is a real risk of the Plan Companies entering liquidation in the meantime.

30. In this case, however, the Plan Companies and the Senior lenders have agreed that the Senior lenders may, if they wish, challenge class composition at the sanction hearing. The Plan Companies say that this is the correct approach given the 'chicken and egg', as it were, of class composition and relevant alternative and the returns which would inure in that relevant alternative. They also say that the agreed approach of deferring arguments on class composition would avoid an unnecessary further costs burden and burden on the court as well as avoiding the risk, as I have indicated, of the Plan Companies entering liquidation. It is also said that there is support in the authorities for such

an approach and I was referred, for example, to *Thomas Cook Group Treasury plc* [2019] EWHC 2494 (Ch) and *Re CB&I UK Limited* [2023] EWHC 2497 (Ch) (at [51]-[53]).

Notice

31. Despite that agreement, the court will obviously, as is recognised by the Plan Companies, still need to be satisfied that it is appropriate to convene the contemplated Plan meetings. As to that, adequate notice must have been given to the Plan creditors, such notice being to enable those creditors to raise class and jurisdictional issues, not to enable them to form a view on, or challenge, the merits of the Plan. In this regard, I was referred to various authorities indicating that, although fact sensitive, depending for example on the urgency, complexity of the plan and creditor sophistication and whether they are legally represented, notice of around 20 days is commonly given. In this case, the Practice Statement letter was sent to the Plan creditors on 25 July 2024, 40 days prior to the convening hearing, both by way of e-mail and access to the Plan portal.
32. I accept that adequate notice was given here, the 40 days being nearly double the 21 days discussed in the authorities but, also importantly, it being clear that the Plan creditors are sophisticated parties, apparently all legally represented, the Plan having been made following negotiation between the parties concerning the indebtedness of the Plan Companies, all parties, it seeming to me, being aware of the financial difficulties of the Plan Companies, there being apparent urgency and the Practice Statement letter appearing to be clear in its terms.

Jurisdictional conditions

33. As to whether the jurisdictional conditions are satisfied for today's purposes, I accept that the Plan Companies are companies within the meaning of section 901A(1) of the Companies Act 2006 since, as foreign companies, they are liable to be wound up within the meaning of section 901A(4) under the Insolvency Act 1986 as unregistered companies (see *Re Project Lietzenburger Strasse Holdco* [2023] EWHC 2849 (Ch) (at 56)).

34. I also accept that the Plan Companies have encountered, or are likely to encounter, financial difficulties that are affecting, or will or may affect, their ability to carry on business as a going concern, being condition A under section 901A(2) of the Companies Act 2006. That is apparent, it seems to me, from the indicative losses already mentioned, the level of support provided by the shareholders to date, the various restructurings that have taken place, the significant debts falling due on 30 September 2024, albeit now deferred, and the operational difficulties to which I have been referred.

35. As for condition B, section 901A(3) requires the purpose of the compromise or arrangement to be the elimination, reduction, prevention or mitigation of the effect of any of the financial difficulties. I accept that this condition is met given that (i) the Plan seeks to bring in new money to enable the Plan Companies to continue operations through the continued production from the mine, including attempts to overcome the operational difficulties described (ii) consideration will flow between the Plan Companies and the creditors such that there is a sufficient element of give and take so as to constitute the Plan a compromise or arrangement and (iii) although this will be challenged by the Senior lenders, on the basis of the evidence presently before the court, the Plan creditors would, under either Plan option, be paid more than in the relevant alternative.

Class composition re-visited

36. As to whether the proposed class meetings are properly constituted, I was referred to the judgment in *AGPS Bondco* (at [109]-[114]) in which the court explained (at [109]) that the basic principle in relation to class composition under Part 26 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. Second, the application of this test requires an exercise of judgment on the facts of each case. Third, a broad approach is taken. Fourth, differences in rights may be material without leading to separate classes.

37. As to how the dissimilarity of rights test is to be applied, the answer will depend upon analysis of (i) the rights which are to be released or varied under the scheme and (ii) of the new rights (if any) which the scheme gives, by way of compromise or arrangement, to those whose rights are to be released or varied. As to that, where a scheme of arrangement is proposed as an alternative to a formal insolvency procedure, the application of the first limb of the 'similarity of rights' test requires the court to identify the rights that the creditors would have in that insolvency proceeding, rather than the rights that they would have if the company were to carry on its business in the ordinary course.

38. In this case, two Plan meetings are proposed, the proposed class composition being (i) the Super Senior lenders and (ii) the Senior lenders, the 2021 NM lenders and the Recovery Financing lenders. As noted, the Plan Companies say that the Super Senior lenders fall to be placed in a class of their own because of their priority ranking in the payment waterfall, meaning that they are the only creditors who would make any recovery in the relevant alternative, reflected in the Plan through their different treatment. As such, it would not be possible for the Super Senior lenders to consult with the other creditors with a view to their common interest.

39. The senior lenders, 2021 NM lenders and the recovery financing lenders will also form a separate single class. Although they have different existing contractual rights as to their enjoyment or otherwise of security and their places in the waterfall, their existing rights in the relevant alternative are said to be in substance identical because they will have the opportunity to prove in the liquidation of the Plan Companies, and they will receive a zero return. Moreover, since they are given the same rights under the Plan to participate in 50% of the Senior NM debt or to share in the 'out-of-the-money' fund, those creditors can all consult together with a view to their common interest.

40. There is, as I have explained, a potential wrinkle to that in that the challenge indicated by the Senior lenders may, if made good, reveal that the Senior lenders, in fact, fall into a class of their own.

However, I accept that, for the purposes of this hearing, the evidence presently supports a two-class approach and that, for present purposes, such an approach is appropriate, albeit without prejudice to the ability to revisit the question of class composition by the Senior lenders at any sanction hearing in accordance with the pragmatic agreement that has been reached.

Roadblocks

41. The court is also concerned at the convening stage with whether there is any jurisdictional roadblock that would obviously prevent the court from sanctioning the plan (see *Re Noble Group Limited* [2018] EWHC 3092 (Ch) (at [76]). Questions of fairness or merits of the Plan, as foreshadowed by the Senior lenders, are matters for the sanction hearing (see *Re Virgin Atlantic Airways Limited* [2020] EWHC 2191 (Ch) (at [35])).

42. As to whether there is a sufficient connection with England and/ or whether the Plan is likely to be recognised internationally, the point is made that these are not matters for the convening hearing (see *Re Project Lietzenburger Strasse Holdco* (at [56])). Nevertheless, the Plan Companies explain that, for the purpose of sufficient connection, they will contend at any sanction hearing that, with the Plan concerning financial liabilities under contracts governed by English law, conferring at least non-exclusive jurisdiction on the English court, a sufficient connection has been established (see *Re Vietnam Shipbuilding Industry Groups* [2013] EWHC 2476 (Ch) (at [9])).

43. As to international effectiveness, the test is whether there is a reasonable prospect of the Plan having substantial effect (see *Re DTEK Energy BV* [2021] 1 BCLC 260 (at [27]), as to which, the Plan Companies will contend at any sanction hearing that there is at least a reasonable prospect of the Plan having substantial effect in Madagascar. That is based on the independent expert report from M. Ribot, a French lawyer who has practised in Madagascar for 16 years.

44. It is not necessary for me to make any determination on these points at this stage, save to indicate my view that the international aspects of the Plan, and the Plan more generally, do not appear to indicate any obvious roadblocks.

Explanatory Statement

45. Finally, the court will consider the adequacy of the Explanatory Statement at the convening hearing, albeit without actually approving it (see paragraph 15 of the Practice Statement for Companies: Schemes of Arrangement under Part 26 and Part 26A of the Companies Act 2006). What constitutes an adequate Explanatory Statement is explained in paragraph 14 of the Practice Statement.

46. Having considered parts 1 to 6 of the Explanatory Statement, I am satisfied for present purposes that, as already noted under the question of adequacy of notice, the audience to which it is directed is a sophisticated one, that the Explanatory Statement is in a form and a style appropriate to the circumstances of the case, it does explain the commercial impact of the Plan, and in clear terms, and it is as concise as the circumstances allow, providing the creditors with the information they need to enable them to make an informed decision as to whether or not the Plan is in their interests.

47. Given all these matters, I am satisfied that permission should be given to convene the proposed creditor meetings for the purpose of considering the Plan.

Timetable/ directions

48. Turning next to the proposed timetable leading to any sanction hearing, I have considered the proposed timings as they have been agreed by the parties, and I am satisfied that this is a sufficiently significant and urgent case that it should, if possible, be accommodated by the court.

49. As I have told the parties already at this hearing, having spoken to the court listing team, the 11 November 2024 time slot - which I suspect some of the parties at least were hoping for - is no longer available, but the more convenient time slot previously indicated for two weeks thereafter, 25 November, is still available. I am content to direct that the sanction hearing be listed then for five days, including one day's judicial pre-reading. As Mr Bayfield has already canvassed today, any necessary adjustments to the timetable arising from this 14 day difference can be made and I will leave it to the parties to agree these between themselves, it impressing the court that,

notwithstanding their clear differences on the substance, the parties have been able to co-operate well, at least for the purposes of this hearing.

50. Finally, as I indicated earlier, it was canvassed today by Mr Fisher that it may be necessary for the further assistance of the court prior to the sanction hearing. As to that, I will merely say this: the court does expect the parties to continue their reasonable co-operation, which they have certainly shown to me at least to date; the court would also expect the parties to respond to reasonable requests for information made of them in a reasonable timeframe, particularly having regard to the urgency of this matter; finally, I would also indicate that, if there are to be further negotiations between the parties in relation to restructuring, these should not have a disturbing effect on the sanction hearing itself, and the position as between the parties, whether agreed or whether lines have been drawn in the sand, should be known to the court before, not a developing picture during, that hearing.

51. That concludes my ruling.