



**THE GRAND COURT OF THE CAYMAN ISLANDS**

**FINANCIAL SERVICES DIVISION**

**CAUSE NUMBER: FSD 51 OF 2021 (NSJ)**

**IN THE MATTER OF THE COMPANIES ACT (2021 REVISION)**

**AND IN THE MATTER OF MIDWAY RESOURCES INTERNATIONAL**

**ON THE PAPERS**

**Before:** The Hon. Justice Segal

**Further evidence/submissions:** 17, 23 and 24 March, 2021

**Draft Judgment Circulated:** 25 March, 2021

**Judgment Delivered:** 30 March, 2021

**HEADNOTE**

*Application for the appointment of provisional liquidators under section 104(3) of the Companies Act (2021 Revision) on a light touch basis – the evidence that the Company needs to file concerning the proposed compromise or arrangement – the need to provide evidence of the views of creditors – the impact of challenges by creditors to the credibility of the proposed compromise or arrangement and of foreign proceedings which might interfere with the ability of the Company’s subsidiary to have its restructuring approved by creditors.*

**JUDGMENT**

**Introduction**

1. This is my judgment on the application (the **Application**) of Midway Resources International (the **Company**), a Cayman Islands company, for the appointment of provisional liquidators (**JPLs**). The principal evidence in support of the Application was given by Mr Peter Worthington, a director and CEO of the Company.



2. The application was initially heard on 15 March 2021 (the **Hearing**). Ms Shelley White of Walkers appeared on behalf of the Company. For the reasons given below, the hearing was adjourned to enable the Company to provide further evidence and to give further notices to creditors. Those notices were given on 15 March and that further evidence was filed on 17 March.
3. One creditor, Sakson Drilling & Oil Services DMCC (**Sakson**), whose claims were disputed by the Company but who is potentially owed a substantial sum, in response to the notice that I directed be given, indicated that it wished to make representations to and may wish to appear before the Court on any further hearing and another creditor, in a similar position, indicated that it was considering making representations to the Court. I therefore directed that a further hearing of the Application be listed for 25 March at 9am and that any notice of an intention to appear and any written submissions or representations to the Court (together with any evidence) must be filed with the Court and served on Walkers (by email) by 4pm Cayman time on 23 March. I also said that in the event that no such notices and submissions or representations were filed, I would be prepared to deal with the Application on the papers (unless there were issues that required discussion at the hearing with respect to the form of the order) and in that event the new hearing date would be vacated.
4. On 23 March 2021, Sakson sent to Walkers a document headed “*Written Submissions of [Sakson]*” (the **Sakson Written Submissions**) which was signed by a director of Sakson (which appears to be a corporation incorporated in Dubai), Chaher Sakkal (who I assume to be Mr Sakkal). On 24 March, Walkers filed a further letter setting out the Company’s response and submissions in reply to the Sakson Written Submissions and containing an update on recent developments in Kenya and in relation to the Mauritian insolvency proceedings relating to the Company’s principal (sub) subsidiary, Zarara Oil & Gas Limited (**Zarara**). On 24 March, shortly after having received that letter and late that evening, I informed (via an email sent by my PA) Walkers and Sakson (and the Cayman attorneys for the other possible creditor mentioned in paragraph 2 above), that I had concluded that the Application could be dealt with without the need for a further hearing, that the hearing listed for 25 March was vacated and that I would circulate an email the following morning explaining my decision on the Application. On the morning of 25 March (today), my PA circulated the following email to Walkers and Sakson:

*“Following receipt yesterday pm of Walkers’ reply submissions, I indicated that I had concluded that the Company’s application could be dealt with without the need for a further hearing and had vacated today’s hearing. I said that I would circulate an email this morning explaining my decision on the application. This is that email.*”



*Having reviewed and carefully considered the submissions made by Sakson in its letter dated 23 March in opposition to the Company's application together with the submissions in reply made and the update on further recent developments provided by the Company in its letter dated 24 March, I have concluded as follows:*

1. *I am satisfied that the requirements of section 104(3)(a) and (b) are met in this case so that Court has jurisdiction to appoint JPLs.*
2. *I am also satisfied that it is appropriate to exercise my discretion to appoint the JPLs in the present circumstances. I shall therefore grant the application.*
3. *The draft order filed after the hearing by Walkers is approved subject to the amendments made in the attached draft (which is marked-up to show the changes from Walkers' post-hearing draft). I believe that the amendments are self-explanatory. If Walkers wish to raise any issues on the amendments, they may do so in writing.*
4. *I shall hand down later today or tomorrow a written judgment setting out the reasons for my decision. At this stage I shall just note that the recent developments in the Mauritian administration and the order made by the High Court of Kenya give rise to serious concerns as to whether it will be possible to proceed with the proposed restructuring of Zarara at all or within the period previously envisaged (and therefore as to whether Emerald's funding will be sufficient and remain available to fund the actions required to facilitate such a restructuring). I am satisfied that these developments do not provide a sufficient reason for dismissing the Company's application (and accept that, as the Company submitted, the appointment of the JPLs may well be helpful by allowing them to use their experience and expertise in restructurings to encourage and facilitate further negotiations and the avoidance of damaging hostile action by creditors) but consider that, in view of their significance, it is important that the JPLs provide an initial report to the Court immediately after the expiry of the 31 March deadline (the revised order provides for the initial report to be filed on 1 April). I would also add that I do not wish any order made by this Court to be considered as interfering with or cutting across the orders made or the exercise of their proper jurisdiction by the courts of Mauritius or Kenya and that, if appropriate, I would be prepared to consider suitable court to court communications with those courts, to the extent that the JPLs consider that this would be helpful and appropriate."*
5. This is my judgment setting out the reasons for my decision and explaining the procedural history of the Application.

### **The Application**

6. At a meeting of the Company's board on 1 March, 2021, the board reviewed a draft creditor proposal (the **Restructuring Proposals**) to be presented to the creditors of its principal operating subsidiary, Zarara. Zarara is a company incorporated in Mauritius. Zarara had been placed into voluntary administration in Mauritius on 2 November 2020 pursuant to a



resolution of its board. The shares in Zarara are held by another Cayman company, MRI Kenya Limited (*MRI Kenya*) which is a wholly owned subsidiary of the Company. At the meeting, the board confirmed that in its view the Company was or was likely to become unable to pay its debts within the meaning of section 93 of the Companies Act (2021 Revision) (the *Act*), and that it intended that a compromise or arrangement be presented to the Company's creditors and the creditors of Zarara. The board also resolved to issue a unanimous recommendation to its shareholders that they should pass a resolution approving the filing of an application in this Court for appointment of provisional liquidators (*PLs*) and authorising the directors to make the application and take such other steps as may be necessary to appoint PLs for the purpose of seeking to implement a restructuring of the Company and Zarara by way of compromise or arrangement with all of the Company's creditors and those of Zarara (and take all steps necessary to achieve a restructuring of the Company consistent with the Restructuring Proposals).

7. On 3 March 2021, shareholders holding 85.424% of the Company's shares signed written resolutions in the following terms:

*“Resolution 1*

*IT WAS RESOLVED that the members of the Company hereby require the Company to be wound up by the Grand Court of the Cayman Islands (the Court) under section 92(a) of the Companies Law (2020 Revision) .... (the Law) and authorise [the] board of directors of the Company to present a winding up petition (the Petition) to the Court seeking a winding up order in respect of the Company under section 94(1) of the Law.*

*Resolution 2*

*IT WAS RESOLVED that concurrently with the presentation of the Petition, the board of directors of the Company be directed to issue an application with the Court for the appointment of joint provisional liquidators (the Provisional Liquidators) in respect of the Company under section 104(3) of the Law for the purpose of seeking to implement a restructuring of the Company by way of compromise or arrangement with its creditors*

*Resolution 3*

*IT WAS RESOLVED that, in the event that the compromises or restructuring arrangements proposed by the Provisional Liquidators are rejected by the Court or the Company's stakeholders or are otherwise incapable of being implemented the Shareholders hereby confirm that they revoke their requirement that the Company be wound up by the Court under section 92(a) of the Law and authorise the directors of the Company to take such steps as then deem appropriate to procure the withdrawal of the Petition.”*



8. On 4 March, 2021 the Company presented a winding up petition seeking a winding up order on three grounds: that the Company had passed a special resolution requiring the Company to be wound up by the Court, in reliance on section 92(a) of the Companies Act (2021 Revision) (the *Act*); that the Company is unable to pay its debts, in reliance on section 92(d) of the Act and that it is just and equitable that the Company should be wound up, in reliance on section 92(e) of the Act. On the same day, the Company issued an *ex parte* summons (the *Summons*) seeking the appointment of PLs pursuant to section 104(3) of the Act on the basis that the Company is or is likely to become unable to pay its debts within the meaning of section 93 of the Act and intended to present a compromise or arrangements to its creditors. In its evidence in support of the Application filed before the Hearing, the Company referred to the Restructuring Proposals which had been prepared by the Company's board and were shortly, it was hoped, to be presented to the creditors of Zarara by Zarara's Mauritian administrator Mr Thacoor (the *Administrator*). While the Restructuring Proposals only related to the creditors of Zarara, the Company submitted that they would significantly impact on the Company and its creditors both because it was hoped that they would result in the guarantees given by the Company to certain creditors of Zarara (the *Guarantee Creditors*) being released and because the economic interest in the shares in Zarara was held by the Company (since MRI Kenya, the registered member of Zarara, had no external creditors and was a substantial debtor of the Company) so that the preservation of the value of Zarara would also benefit the Company. Furthermore, the Company anticipated that if the restructuring of Zarara was successful, and the Restructuring Proposals were accepted and implemented, it would also be possible to effect a restructuring of the balance of the Company's debt.
9. Even though the application for the appointment of PLs was made *ex parte*, the Company nonetheless on 5 March gave notice of the Application (but not the hearing date which had at that time not been fixed) to the Guarantee Creditors. Then on Friday 12 March, one working day before the hearing of the Application, the Company notified all its creditors (including the Guarantee Creditors) of the date and time of the hearing of the Application.

### **The Company's business, subsidiaries, operations and shareholders**

10. The Company is the parent company of a group of companies (the *Group*). As I have explained, the Company holds the shares in MRI Kenya, which holds the shares in Zarara. Zarara has a branch office in Kenya. The Company also owns the shares in (a) MRI Nigeria Limited, another Cayman Islands company, which holds shares in another Nigerian company, and (b) MRI Exploration (SL) Limited, a company incorporated in Sierra Leone. However, Mr Worthington stated in his evidence that the Company currently had no assets or property



and conducted no material activities in either Nigeria or Sierra Leone. In addition, management services are provided to the Company by its management contractor, MRI Management Company LLP (*MRI Management*).

11. The directors of the Company, in addition to Mr Worthington, are Dr Bristow (Chairman), Dr Nyanteki-Owusu (Deputy Chairman), Willem Jacobs, Mukesh Valabhji and John Barr. Mr Worthington and Dr Bristow and Dr Nyanteki-Owusu are also directors of Zarara.
12. The Company's majority shareholders are Golden Phoenix Investments Limited (holding around 29.4% of the Company issued shares), Emerald Holdings Limited (holding around 28.5% of the Company issued shares) (*Emerald*), and Logistics Tradecorp Limited (holding around 12.8% of the Company issued shares) while minority shareholders hold the other 29.3%.
13. The principal activity of the Group is the evaluation, exploration and development of opportunities in the oil and gas sector. The Company is a pan-Africa focused upstream oil and gas venture with an existing project in Kenya (including onshore/transition zone gas discoveries) (together Mr Worthington said with some business development in pursuit of opportunities in Nigeria). The Kenyan project had been the Company's principal focus and area of Group expenditure and commitments for the past few years. The Company's strategy was to create value through the development of upstream exploration and production opportunities in Africa with a focus on discovered oil and gas resources with early cash-flow and upside potential.
14. In Kenya, Zarara holds a 75% working interest and operatorship in two production sharing contracts (the *PSCs*). The PSCs are dated 3 September 2008 but only became effective as of 3 December 2008. The PSCs relate to two sizeable exploration blocks, Blocks L4 and L13, which are located onshore in the Lamu basin in Kenya. The PSCs provide for the exploration, development and production of hydrocarbons in the area specified in each PSC. Originally, 90% of the rights and obligations of the contractor in and under the PSCs was held by SOHI-Gas Lamu Limited and SOHI-Gas Dodori Limited (collectively *SGD*) while 10% was held by the Kenyan Government. On 4 April 2011, SGD entered into two Farmout Agreements (the *Farmout Agreements*) with Zarara, which were given effect by deeds of assignment (approved by the Kenyan Government). Under the terms of the Farmout Agreements, SGD assigned and transferred a 75% participating interest in the PSCs for each of Block L13 and Block L4 to Zarara. SGD retained a 15% interest. Thereafter, all subsequent exploration was





to be carried out solely at the cost of Zarara, up until a final investment decision was made to develop any appraised and commercial discovery of oil or gas.

### **The Group's financial difficulties and the Company's financial position**

15. The Company's total subscribed capital is approximately US\$79 million. It has invested substantial sums in the Kenya project, amounting to approximately US\$60 million since 2012. The funding by the Company of the Kenya project was injected by making loans to MRI Kenya which on-lent the funds to Zarara. MRI Kenya has advanced to Zarara by way of loan all of the funds it required for drilling at the exploration blocks. The loan was interest free and repayable on demand.
16. The Company's financial position came under stress during the third quarter of 2018 and has continued to deteriorate since then. The financial stress was caused by the cost and schedule overruns experienced in the drilling of a technically and operationally challenging deep well on Pate Island, Kenya within Block L4. The drilling ran catastrophically over time and budget. During 2018 – 2020 the Company and Zarara entered into various creditor agreements with creditors of Zarara (which had been referred to as the phase 1 and phase 2 creditor agreements) in order to manage and deal with Zarara's financial difficulties. During this period, Emerald made significant loans to the Company and Zarara and injected further capital into the Company on an interest free basis.
17. However, the discussions with creditors and efforts to find a financial solution were ultimately unsuccessful. There were disputes with some creditors which resulted in proceedings in Kenya and these difficulties ultimately resulted in a decision by the board of Zarara to place Zarara into voluntary administration in Mauritius on 2 November 2020 and the appointment of the Administrator on 3 November 2020.
18. On 25 February 2021 the Company received a demand letter from Emerald demanding the immediate repayment of US\$2,556,201 previously advanced by Emerald and on 2 March 2021, the Company received a demand letter from MRI Management demanding the immediate repayment of US\$433,922 and £78,542. Mr Worthington says that the Company has no funds and is unable to repay these amounts.
19. It appears that the Company has three categories of creditor. First, trade and other unrelated creditors totalling US\$1,257,401 of which at least US\$466,130 is due and payable (including sums owed to MRI Management). Secondly, loans totalling US\$3,218,305 made by Emerald



and other connected parties. Thirdly, the Guarantee Creditors. There are three Guarantee Creditors. They are each parties to contracts with and involved in the drilling activities of Zarara. They are Sakson, the drilling contractor; Baker Hughes EHO Ltd. (*Baker Hughes*) the principal cement and logging contractor, and Zarara's drilling project management company, North Sea Well Engineering Ltd. (*Norwell*). The Guarantee Creditors have claims totalling US\$12.6 million, consisting of claims by Norwell of approximately US\$1.1 million; by Sakson of approximately US\$6.4 million and by Baker Hughes of approximately US\$5.1 million. Each of the Guarantee Creditors has made demand for payment under the guarantees on the Company but the Company denies that any payment is due and owing and that, in the case of Baker Hughes and Norwell, that the guarantees are valid or enforceable. On 28 January 2021, Baker Hughes issued a request for a LCIA arbitration in London in respect of the sums which it claims under the Company's guarantee.

20. As regards the Company's assets, Mr Worthington exhibited a report prepared by Borrelli Walsh (Cayman) Limited (*Borrelli Walsh*), the prospective PLs, which was based on information provided by the Company. This included a statement of the financial position and solvency of the Company (at [23]). The Company's assets include a very small sum in cash together with a debt owed by MRI Kenya in the sum of US\$65.116 million, a debt owed by MRI Nigeria Limited in the sum of just over US\$7 million and a small debt owed by one of the Company's subsidiaries in Nigeria.
21. Since 3 November 2011, funding for the Company (including funding for the Application and the administration in Mauritius) had generally been provided by Emerald by way of further unsecured loans which were interest free and repayable on demand.

**The administration in Mauritius, the watershed meeting to consider the Restructuring Proposals and proceedings in Kenya**

22. Mr Worthington has provided certain details of the law and procedure in Mauritius based I presume on the advice of the Zarara's Mauritian counsel or of the Administrator's counsel (in Walkers' most recent letter to the Court, dated 24 March, they stated that certain information had been provided by the Administrator's Mauritian counsel). No expert evidence has been filed for the purpose of the Application.
23. The Administrator is a chartered accountant and an insolvency practitioner registered under the laws of the Republic of Mauritius (and was formerly the managing partner of Grant Thornton, Mauritius).





24. Following his appointment, the first meeting of Zarara's creditors was held on 12 November 2020 (the *First Creditors' Meeting*). At this meeting the Administrator explained the circumstances surrounding his appointment and that creditors should submit nominations for appointment to a creditors committee. He also explained that it was open to creditors at the meeting to propose and vote on the appointment of a different administrator. However, none of the creditors wished to make such a proposal and accordingly it was confirmed that the Administrator continued in office.
25. On 6 January 2021, the Supreme Court of Mauritius made an order extending until 31 March 2021 the deadline by which time the Administrator was required to hold a further meeting of creditors. The further meeting is called a watershed meeting and its purpose is to allow the creditors to vote on the future of Zarara. It appears that in the event that the watershed meeting is not held on or before that date, the Administrator's appointment and the administration will end (unless the Supreme Court of Mauritius grants a further extension).
26. After the Administrator's appointment an investor (the *Investor*) had made a confidential approach to the Zarara board and the Administrator. The interest of the Investor had been known to the board (and I assume the Administrator) at the time of the First Creditors' Meeting. On 25 January 2021, a confidential and non-binding expression of interest was provided by the Investor to the Administrator. The Investor has expressed interest in negotiating a restructuring of Zarara based on the Restructuring Proposals. The identity of the investor has not been disclosed in the evidence filed in support of the Application because, for understandable commercial reasons, the Investor does not at this stage wish to have its identity made public pending further progress in discussions with the Administrator and the Company and the further development of the Restructuring Proposals. However, details of the Restructuring Proposals and some of the discussions with the Investor have been disclosed and are discussed below. The Company, as I have noted, prepared the Restructuring Proposals and is closely involved in the discussions with the Investor as part of the Company's overall plans for a restructuring and the survival of the Group.
27. The Administrator is, as I have noted, required to convene the watershed meeting of Zarara's creditors before 31 March, 2021 (unless the court in Mauritius grants an extension of time). At the watershed meeting the Restructuring Proposals will be considered by the creditors who will be invited to vote on whether to approve them.



28. On 16 March 2021, the Administrator wrote to Zarara’s creditors inviting them to attend the watershed meeting on 30 March 2021 (this was initially scheduled for 26 March) and attach a report (the *Administrator’s Report*) in which he explained Zarara’s financial position, the work he had done, his findings and recommendations.

29. His findings included the following statements (underlining added):

“(vii) Zarara is considered to have value only if further exploration can build upon the Pate-2 ST2 discovery and related regional discoveries at Pate-1 and Dodori-1 wells. However additional funding would be required to solve the present shortage of cash flow and complete the exploration process. Hence new or additional investors will have to be approached to fund in some way the continuing exploration work in and under the PSCs.

(viii). *Since my administration began, one potential investor was identified, and a non-disclosure agreement was signed with them. They have in a letter of intent addressed to the administrator expressed interest to invest in Zarara subject to the following conditions:*

a. *all the creditors of Zarara, including MRI Kenya Limited, Emerald Holdings Limited, should release, waive, and discharge all Zarara’s debts and liabilities and in return the creditors of Zarara, save and except MRI Kenya Limited, and Emerald Holdings Limited, would become entitled to an unencumbered free carried 15% direct interest in the two PSC with respect to Blocks L4 & L13. Such free carried interest to continue unless and until a development is agreed as commercial by the Government of Kenya pursuant to the terms of the two PSC.*

b. *The Government of Kenya should grant an extension of an additional 3-year term for the two PSCs subject to any other conditions as maybe imposed by the Government of Kenya and acceptable to the investor.*

c. *the shareholders of Zarara should cede/transfer to the potential Investor a majority stake and controlling interest in Zarara, subject to any approval which may be required from the Government of Kenya, no payment would be made to the shareholders of Zarara.*

d. *The potential Investor would then invest approximately US\$15.0million which would be required to fund the future work program for the PSCs as agreed by the Government of Kenya.*

(ix) *The Directors of Zarara have confirmed to me that the prospective investor has no interest in Zarara or any related company or party and was unknown to them prior to commencement of the administration.*”

30. The Administrator’s recommendations were as follows (underlining added):

“Deed of Company Arrangement (DOCA)



A. Bearing in mind the insolvency of Zarara and in order to avoid Zarara being placed in liquidation, I am of the view that it would be in the Creditors interests for Zarara to secure fresh/additional investment/funding and to execute a Deed of Company Arrangement based on the proposal made by the potential Investor in order to safeguard the rights of the Zarara unsecured creditors so that the latter may be ensured of a realistic prospect of payment of their respective claims.

B. I therefore propose that at the watershed meeting, the Creditors considers and approve the hereunder resolution:

“The Creditors having cognizance of the report of the Administrator and more especially of the fact that Zarara is insolvent, resolve that Zarara enters into a Deed of Company Arrangement (DOCA) under the following terms and conditions:

- a. All the creditors of Zarara, including MRI Kenya Limited, Emerald Holdings Limited, agree to release, waive and discharge all Zarara’s debts, liabilities and obligations, including any claimed parent company guarantee, and immediately stay and then terminate/withdraw all pending suits/cases lodged against Zarara, its staff, officers or directors and/or any third parties before the Kenyan or any other Courts and in return the unsecured creditors of Zarara, save and except MRI Kenya Limited and Emerald Holdings Limited, be issued shares in SOHI-Gas Lamu Limited and SOHI Gas Dodori Limited (or their common parent company, SOHI Oil and Gas Limited) such that they become entitled to an unencumbered free carried 15% direct interest in the two PSCs with respect to Blocks L4 & L13. Such free carried interest to continue unless and until a development is agreed as commercial by the Government of Kenya pursuant to the terms of the two PSCs.
- b. The aforesaid waiver/discharge/withdrawal by the Creditors, the issuing of shares in SOHI-Gas Lamu Limited and SOHI-Gas Dodori Limited (or its common parent company) to the Zarara Creditors, excluding MRI Kenya Limited, Emerald Holdings Limited, and the transfer of a majority stake and controlling interest in Zarara to the potential Investor shall become effective and be concluded simultaneously within seven days (7) of Zarara obtaining an extension of an additional 3-year term for the two PSCs subject to any other conditions as may be imposed by the Government of Kenya and acceptable to the investor.
- c. As a result of the above, the Zarara Creditors, excluding MRI Kenya Limited and Emerald Holdings Limited, through SOHI-Gas Lamu Limited and SOHI-Gas Dodori Limited (or their common parent company) would eventually hold and benefit from the 15% Carried Interest (until commerciality as set out above, like the Government of Kenya) in the two PSCs. It is anticipated that the accruing increase in value of the 15% Carried Interest from the PSCs related to Blocks L4 & L13 could be crystallized by creditors, over time as they decide.
- d. The Deed of Company Arrangement to be signed by Zarara and other parties within twenty-one (21) days completed from the date of the present resolution being passed and then completed or closed in



*terms of the above within a period of three (3) months as from the passing of the present resolution.*

- C. *Alternatively, if the above resolution is not approved by the Creditors at the Watershed Meeting, then it is my recommendation that Zarara be placed in liquidation being given that it is insolvent and have no funds to proceed any further with its business activities. Consequently, the Creditors shall be called upon to approve the following resolution:*

*‘Being given that the Resolution for the execution of a Deed under Company Arrangement, as recommended by the Administrator, has not been voted/approved, the Creditors resolve that it would be in their interests that Zarara be placed in Liquidation and the Administrator be and is hereby appointed as Liquidator.’*

- D. *Finally, I would hasten to add that if neither the resolution for the execution of the DOCA as proposed above nor the resolution for Zarara being placed in liquidation is approved by the Creditors, the administration shall come to an end and the mandate of the Administrator shall lapse ipso facto. Consequently, the Administrator shall hand over the management and control of Zarara to its Directors and the latter may petition the Bankruptcy Division of the Supreme Court of Mauritius for an Order to wind up Zarara and appoint a Liquidator on the ground that Zarara is insolvent and is unable to pay its debts.”*

31. The Administrator has taken steps to have his appointment recognised in Kenya, where the assets, property and business of Zarara are located. Recognition had been contested by some local creditors of Zarara and various applications to the High Court of Kenya have been required. On 12 March 2021, Kenyan court granted interim recognition of the Administrator’s appointment, conditional upon the Attorney-General of Kenya being notified and publication of an advertisement in a national newspaper both of which conditions have been fulfilled (and on the further condition that the Administrator file a weekly report to the Kenyan court). The final hearing of the Kenyan recognition application is scheduled to take place on 19 May 2021.

32. However, as Walkers informed the Court in their letter dated 24 March, it appears that three Kenyan creditors of Zarara (the **Kenyan Creditors**) recently (on 19 March) sought, and obtained, from a judge of the Kenyan court a direction that the Administrator should not proceed with the watershed meeting (although apparently no formal order to that effect has yet been drawn up or made). In that letter, Walkers explained the position as follows:

“26. .... *the Company has been informed by the Administrator’s Kenyan legal counsel that:*



- (a). *the recognition matter was mentioned in the Kenyan Court for Friday 19 March, 2021 and at such mention the Three Kenyan Creditors intervened and secured the Direction (which is still yet to be issued by the Kenyan Court);*
  - (b). *the basis of such creditors' intervention was that they believe their position as Zarara's creditors may be 'prejudiced' at the Watershed Meeting, although no grounds or evidence of this prejudice was advanced to the Kenyan Court (see paragraph (c) below for further details); and*
  - (c). *at the time the Kenyan Court made the Direction, the Kenyan Court (along with the Administrator's Kenyan Counsel) had not seen, and still have not seen, the application (or any evidence thereto) that had been made by the Three Kenyan Creditors and on which such creditors rely upon.*
27. *The Administrator is continuing to take legal advice with regard to the Direction, including how best to seek to set it aside. However, unfortunately any such possible action has been delayed because the Kenyan Judge who made the Direction is now on holiday and unavailable, and by the fact that the formal Order is yet to be issued."*
33. On 23 March, in response to the direction given by the Kenyan court, the Administrator wrote to all Zarara's creditors and said as follows:

*"For avoidance of doubt, let it be clear that:*

- a. *if the Resolution set out at paragraph 5(B) of my report is approved by the Creditors, the release and/or waiver of the Creditors' Claims will not be effective until and unless (i) an extension is obtained from the Government of Kenya, (ii) the newly already identified investor (the "Investor") takes over the majority/controlling interest in the Company, and (iii) shares are attributed to the creditors in SOHI Gas Lamu Limited and SOHI Gas Dodori Limited (or their common parent company, SOHI Oil and Gas Limited) ("SOHI") as explained in my report; or*
- b. *If this process is not completed within 3 months of the execution of the Deed of Company Arrangement (the "DOCA"), i.e., if no extension from the Government of Kenya is obtained or the Investor does not take over a majority/controlling interest in the Company and the shares in SOHI not transferred within 3 months as stated above, then the Company's Creditors shall not have to waive and/or release their respective claims.*
- c. *I have spoken to the identified Investor and he has agreed that this process should be completed within 3 months of the execution of the DOCA, failing which the creditors shall neither have to waive nor release their claims against the Company.*





*However, in the meantime, there have been some significant further developments that I deem it my duty to bring to your attention, namely:*

- a. Creditor, “Sakson Drilling & Oil Services DMCC”, has requested a deferral of the Watershed Meeting, to which I agreed. The meeting was to be deferred to Tuesday 30th March 2021 at 1:00 pm (Mauritius time).*
- b. Unfortunately, before I could provide notification of this deferral, I have been informed that on Friday 19th March 2021, three Kenyan Creditors of the Company, namely Oilfield Movers Ltd, Alterrain Services Kenya Ltd and the Kenya Revenue Authority, have sought and obtained an Order from the High Court of Kenya directing me not to proceed with the Watershed Meeting, on the basis that they would allegedly be ‘prejudiced’ on some unspecified basis.*
- c. I am given to understand that no written Order has yet been issued by the Court but have been advised by the Kenyan legal counsel that, at the sitting of the 19th March 2021, the Honourable Judge orally stated that if I were to proceed with the Watershed Meeting as proposed, the recognition of the Company’s Administration proceedings in Kenya would be revoked and that I would be in contempt of the Kenyan Court. This has placed me in an untenable position.*

*As stated in my report, the Company’s Administration process automatically terminates on 31st March 2021, and in the absence of the Watershed Meeting being held by such date, the Company will be returned to its directors. Furthermore, the directors of the Company have informed me that if the Administration of the Company were to come to an end on 31st March 2021 by reason of the Watershed Meeting not being held, the Company will be placed in liquidation and in parallel Midway Resources international (“MRI”), the Company’s ultimate owner and parent company, will also be placed in liquidation.*

*In fact, I have been informed that, currently, the directors of MRI have also already applied to the Grand Court of Cayman Islands (MRI’s incorporation jurisdiction) for the appointment of provisional liquidators with a view to appointing insolvency professionals to undertake a restructuring of the debts of MRI and the Group, subject to the Company, ZARARA OIL & GAS LIMITED, being salvaged.*

*In the light of the above, unless the Creditors’ Watershed Meeting proceeds on the rescheduled date of 30<sup>th</sup> March 2021 or no later than 31st March 2021 (subject to the Creditors agreeing to any necessary waiver of notice because of the delays experienced), then the Company will be placed in liquidation and inevitably, so will MRI, as communicated to me by the directors.*

*My recommendations, as set out in my report, will remain applicable if the Creditors of the Company, acting together, agree to the Watershed Meeting be held on 30th March 2021 or 31st March 2021. In which case, at the Watershed Meeting, the Company’s Creditors will have the opportunity, in their wisdom, to resolve that either (i) the Company executes the proposed DOCA, or (ii) the Administration ends and the Company be returned to the directors, or (iii) the Company be placed in liquidation and a liquidator be appointed.*





*I am available to try and assist the Company's Creditors to see if there is an agreement to proceed with the holding of the Watershed Meeting as suggested. Otherwise, I shall have to comply with the Order of the Kenyan Court issued at the request of the three abovementioned Creditors and thus the Administration will slip towards termination as described."*

34. Accordingly, it appears that, pending a possible application to the Kenyan court to set aside the direction, in order to avoid the revocation of the Kenyan's court's order granting the Administrator interim recognition, to avoid being in contempt of the Kenyan court and to avoid a failure to hold the watershed meeting before the 31 March deadline, the Administrator is hoping that Zarara's creditors will meet to or otherwise approve the Restructuring Proposals without his involvement and without him attending or chairing the (and possibly without there being a) the watershed meeting. This is obviously a highly unsatisfactory position for the Administrator to find himself in and it will be necessary to see what further developments occur during the period leading up to 30/31 March.

#### **The Restructuring Proposals – Zarara's creditors**

35. As can be seen from the Administrator's Report, the Administrator had concluded that Zarara's creditors should be given an opportunity to consider the Restructuring Proposals and that it was in their best interests to accept and approve the Restructuring Proposals by entering into a deed of company arrangement (*DOCA*).
36. The Restructuring Proposals referred to by the Administrator follow, but elaborate on and provide more detail concerning the mechanics of implementation than, those set out in the document considered by the Company's board at its meeting on 1 March 2021. Essentially they involve the Investor injecting sufficient further funds into Zarara to allow (or at least to provide a reasonable prospect of) Blocks L4 and L13 being further explored and developed so as to result in the extraction and sale of natural gas. In return, the Investor will receive a majority of the shares in Zarara (which will retain its 75% interest in the PSCs) and all Zarara's creditors, including MRI Kenya and Emerald, will release their claims against Zarara. Zarara's external creditors (that is excluding MRI Kenya and Emerald) will then be issued shares (whether that will give them all or only some of the shares is unclear in SGD, which will retain its 15% interest in the PSCs. The Kenyan Government will also retain its 10% interest in the PSCs. Zarara will be debt free and having sufficient funding to allow it to generate value and an income stream (for the benefit of itself, thereby benefitting the Investor and the Company as its shareholders, its former creditors and the Kenyan Government) from Blocks L4 and L13.



37. Mr Worthington in his evidence said that the Company had devised the Restructuring Proposals in order to ensure the survival of Zarara and consequently the Group and to provide a better outcome for the creditors of Zarara and the Group than would otherwise be available if the entities within the Group were to be put into liquidation. He pointed out that natural gas had been discovered in three wells drilled in Blocks L4 and L13 and that the presence of natural gas in these wells, together with some other regional gas discoveries, had considerably reduced the exploration risk associated with Blocks L4 and L13. This gave rise to the possibility of value being realised from the blocks. But this could only be done if there was further exploration work on Blocks L4 and L13 and this required further capital and investment. Hence the need but also the prospects of there being a return for a new investor.
38. Borrelli Walsh reviewed the Restructuring Proposals in their report. They did not undertake an independent review or assessment of the proposals but simply reported what they were told by the Company's directors. They noted that a restructuring of the Group had the potential for unlocking significant future cash-flows that would materially benefit all creditors and investors in the Group but that, absent a restructuring of Zarara and of the Company, both companies were likely to be put into insolvent liquidation. In that event they "*did not anticipate any recoveries from [the loans made by MRI Kenya to Zarara and by the Company to MRI Kenya] and [that] absent any other source of recovery (which [were] presently unknown, recoveries [were] unlikely to cover the costs and expenses of [the Company's] liquidation.*"
39. If the creditors approve the Restructuring Proposals, either at the watershed meeting if held on 30 March or at a subsequently held watershed meeting or otherwise, Zarara and the other parties will need to agree and sign a DOCA within twenty-one days. If and once that has been signed, there will be a further period of over two months during which the conditions to the DOCA can be satisfied and the further documentation required to give effect to the Restructuring Proposals can be negotiated and completed (it appears that the arrangements contemplated by the DOCA must be completed within three months of the passing of the creditors' resolution at the watershed meeting).

### **The Restructuring Proposals – the Company's creditors**

40. As I have noted, the Restructuring Proposals operate at the Zarara level. If successfully approved and implemented in their current form they will result in the substantial claims of the Guarantee Creditors being released and the Company retaining the shares in MRI Kenya. MRI Kenya will own a minority interest in the shares of the restructured and solvent Zarara.



But the balance sheets and debt owed by the Company (and MRI Kenya) will still need to be dealt with.

41. In paragraph 74 of his Second Affidavit, Mr Worthington stated as follows:

*“The Proposed Restructuring could allow the Company to attract further investment which will return the Company to solvency and allow it to fulfil its purpose of providing funding to the subsidiaries. From any such investment in the Company, the Company intends to reach compromises or agreements with certain of its third party creditors in order for them to be paid as quickly as possible to ensure the Company's continuation as a going concern. Moreover, as part of the Proposed Restructuring, Emerald Holdings Limited and MRI Management LLP, will be asked to compromise their debts in exchange for equity in the Group. Emerald Holdings Limited and MRI Management LLP have indicated that they would be receptive to such a proposal on the condition that the Proposed Restructuring is successfully implemented.”*

42. Borrelli Walsh in their report (at [34]) stated that:

*“34. We understand that the Company and its investors are supportive of initiatives to facilitate the Group's survival. To this end, [the Company's] management has advised that the proposed restructuring [of the Company] would include the following:*

*34.1 debt-to equity conversion of certain connected party claims (we understand that connected party creditors with claims approximating US\$3 million are amendable to this proposal):*

*34.2 introduction of new capital to fund the Group's projects; and*

*34.3 a compromise of the remaining creditor claims against [the Company].”*

43. If and once the claims of the Guarantee Creditors and the claims of Emerald are released, there will be a relatively modest balance of claims to be dealt with. While at this stage the detail of what would be offered to such creditors and the willingness of the external creditors to support the Restructuring Proposals and a Company (MRI Kenya) restructuring is unclear, the commercial logic and benefits of agreeing a Company (and MRI Kenya) restructuring once the Restructuring Proposals at the Zarara level have been agreed, are self-evident.

### **The need for and role of the PLs**

44. Mr Worthington said that he and the Company's board believed that it was in the best interests of the Company that PLs were appointed as independent professional advisors and as officers of the Court to support the board in progressing and concluding the negotiations with



creditors at both the Zarara and Company level and in the implementation of the Restructuring Proposals.

45. The Restructuring Proposals were being put forward by the Administrator with the support of the Company's board and management. Mr Worthington considered that the PLs would be able to assist the board in and supervise this process. Furthermore, restructuring proposals, as I have noted, for the Company would need to be further developed and negotiated and the relevant documentation to give effect thereto would need to be prepared. Mr Worthington considered that once again the PLs would be able to assist the board in and supervise this process. Mr Worthington stated that in view of the directors' expertise, detailed knowledge of the Company's and Zarara's business, and their professional relationships with and understanding of the position of the key stakeholders, it was important to allow the board to continue to lead the restructuring process and manage the Company's operations on a day-to-day basis while the restructuring negotiations and the revisions to be made to the Company's and Zarara's activities in light of the restructuring were developed. Mr Worthington said that in his view the support of independent restructuring professionals to act alongside the board when implementing the proposed restructuring would be crucial to its success and that the appointment of "soft touch" JPLs would best achieve this objective, and promote the interests of the Company's creditors and other stakeholders.
46. The Company submitted, in addition, following the action taken by the Kenyan Creditors and the direction given by the Kenyan judge, that there was an even greater need for the appointment of PLs. The PLs, as independent professionals with their experience and expertise in restructurings and in structuring and conducting negotiations with creditors, across different group companies and jurisdictions, could be expected to play a constructive and useful role in facilitating further discussions and negotiations with the Kenyan Creditors and other creditors of Zarara, including the Guarantee Creditors.

### **The applicable law**

47. Section 104(3) of the Act provides that the Court may appoint PLs after the presentation of a winding up petition on the application of the Company where two requirements are satisfied: (a) that the Company is or is likely to become unable to pay its debts within the meaning of section 93 of the Act and (b) that the Company intends to present a compromise or arrangement to its creditors.



48. If PLs are appointed under section 104(3) of the Act with a view to a restructuring, it will be necessary to adjourn the hearing of the winding up petition. The Court's power to adjourn a winding up petition in order to facilitate such a restructuring is derived from section 95(3) of the Act which enables the Court upon hearing the winding up petition to adjourn the hearing conditionally or unconditionally.
49. The two sub-paragraphs of section 104(3) establish what must be shown to give the Court the statutory power to appoint JPLs on an application by the Company. They go to jurisdiction. If satisfied, the Court has a wide discretion as to whether to appoint JPLs having regard to the purpose of section 104(3) of the Act and the circumstances of the case.
50. The relevant case law relating to section 104(3) of the Act was recently reviewed by the Chief Justice in *Sun Cheong Creative Development Holdings Limited* (unreported, 20 October, 2020) (*Sun Cheong*). The Chief Justice noted that under sections 104(3) and 95(3) of the Act, the Court has a broad and flexible discretion. The breadth and flexibility of the Court's power to appoint PLs to facilitate a restructuring was first described, prior to the enactment of section 104(3), in *In the Matter of the Fruit of the Loom* (unreported, 26 September 2000 but noted at 2000 CILR Note 7) (*Fruit of the Loom*) and the scope of the Court's discretion under section 104(3) had been affirmed by Parker J in *CW Group Holdings Limited* (unreported, 3 August 2018) at [36] (*CW Group Holdings*) and by Kawaley J in *ACL Asean Towers Holdco Limited* (unreported, 8 March 2019) ... at [11]. The Chief Justice summarised the matters to which the Court may have regard when exercising this discretion as follows (underlining added):

“..... *the matters to which the Court may have regard include:*

- a. *The express wishes of creditors (though the Court should be cautious not to "count up the claims of supporting and opposing creditors" per Segal J in Grand T G Gold Holdings Limited (Unreported 21 August 2016) .... at [6(f)iv]);*
- b. *Whether the refinancing is likely to be more beneficial than a winding up order; (Fruit of the Loom at p 9-10)*
- c. *That there is a real prospect of refinancing and/or a sale as a going concern being effected for the benefit of the general body of the creditors;* (Re Fruit of the Loom (ibid)); and
- d. *The considered views of the board as to the best way forward. (CW Group Holdings at [72].”*

51. In *Fruit of the Loom*, the Chief Justice had said that (underlining added):



*“[There] is a three-stage test....: (i) that the [PLs] should be satisfied that a refinancing and/or sale of the [company’s business] as a going concern is likely to be more beneficial to the creditors than a liquidation realisation of the [company’s] assets; (ii) that there is a real prospect of a refinancing and/or a sale as a going concern being effected for the benefit of the general body of the creditors; and (iii) that in the circumstances it is in the best interest of creditors to try to achieve such a refinancing and/or sale as a going concern.”*

52. The Chief Justice noted the following as regards the requirements of section 104(3)(b) (underlining added):

“47. Importantly, in that respect, the language of section 104(3) does not impose a requirement on the Company to already have a pre-formulated restructuring plan. Nor does it require the Company to provide evidence of the viability of its restructuring plan.

48. *The requirements of this limb of the test were considered by Parker J in CW Group Holdings where he specifically considered the language that the Company "intends" to present a compromise or arrangement to its creditors. Parker J accepted (at [70]) that "it is not necessary for there to be a formulated plan at this stage for the appointment of provisional liquidators on behalf of the Company." The rationale for this approach was described by him as follows in terms which must now be regarded as settled principle in Cayman Islands law (at [36]):*

*"The rationale for that language is to give effect to the practice which has developed of appointing provisional liquidators to provide companies with some 'breathing space' before the actions of creditors, acting in their own interests, might interfere with attempts to reach a consensual restructuring or if that should prove not to be possible, a scheme of arrangement – see Esal (Commodities) Ltd [1985] BCLC 450 at page 460 Harman J."*

49. Where the Court is in any doubt as to the viability of such a restructuring plan, it is also well accepted that it can appoint JPLs for the purpose of preparing a report on the prospects of success of a restructuring plan.”

53. The Company submitted that:

- (a). the Company was demonstrably unable to pay its debts within the meaning of section 93 of the Act. The evidence demonstrated that demands had been made by two substantial creditors in February and earlier this month, that the demands were not disputed and had not been met and that the Company did not have sufficient funds to enable these demands to be met.





- (b). the evidence also demonstrated that the Company, in conjunction with and through Zarara, intended to proceed with the Restructuring Proposals; indeed, the Restructuring Proposals had now been presented and provided to Zarara’s creditors by the Administrator. The Restructuring Proposals involved or contemplated a restructuring of the whole Group and the evidence showed that a restructuring of the Company’s balance sheet was necessary and contemplated once Zarara’s creditors had given their approval to the Restructuring Proposals. The Restructuring Proposals involved some of the debt owed by the Company, to the extent that the claims of the Guarantee Creditors were valid. A proposal to deal with the balance of the Company’s liabilities and its equity had been outlined and would be further developed as part of the process for implementing or as a consequence of the approval of the Restructuring Proposals.
- (c). the Court should, in the circumstances, exercise its discretion to appoint PLs. The Company was in the process of making *bona fide* proposals for a restructuring to the Group’s creditors and while the process of consulting and obtaining the support of creditors was still at a relatively early stage, and while there had recently been challenges by and potential difficulties resulting from the action of the Kenyan Creditors, there was a real prospect that the requisite creditor support would be obtained and that the Restructuring Proposals and a restructuring of MRI Kenya and the Company would be successful. In view of the position of the Investor, the attitude and actions of the Administrator, the further time available within the Mauritian administration to allow the DOCA to be documented and implemented, the interim recognition of the Administrator’s appointment by the Kenyan court (until 15 May) and the funding provided by Emerald, there were sufficient grounds for concluding that the Restructuring Proposals, and an arrangement with the Company’s creditors and shareholders, were capable of being implemented. In addition, it was clear that the Restructuring Proposals were in the interests of Zarara’s and the Company’s creditors since the alternative was an insolvent liquidation of Zarara and the Company which was likely to result in creditors receiving nothing. As Mr Worthington had said in his Third Affidavit:

*“... the Company's board (and that of Zarara) strongly believes that a successful Proposed Restructuring of Zarara combined with the provisional liquidation of the Company should provide a stable platform for the Company's group to continue as a going concern and have the best possible chance of repaying creditors and returning to profit, pending the future work program for the PSCs for Blocks 1.4 & L 13, Kenya.”*



(d). the appointment of the PLs would assist in and promote the chances of a successful outcome to the restructuring negotiations (particularly, for the reasons I have already mentioned, in light of the recent developments in Kenya). As I have already noted, the Company considered that it was important and appropriate that the PLs be appointed on a soft touch basis to allow the Company's directors to retain a lead role in the negotiations in view of their knowledge and expertise. Mr Worthington's evidence made this clear. In his Second Affidavit he said as follows:

“77. *I believe it is in the best interests of the Company that JPLs are appointed as independent professional advisors and as officers of this Honourable Court to support the Board through this period and the implementation of the Proposed Restructuring*

78. *The purpose of this application is to allow the Board to continue to manage the Company on a day-to-day basis while its operations are mapped out. I believe the appointment will assist in preserving value for the Group's stakeholders while the details of the Proposed Restructuring are refined. I believe the support of independent restructuring professionals to act alongside the Board when implementing the Proposed Restructuring will be crucial to its success.*

79. *I believe it is in the best interests of the Company that "soft touch" JPLs are appointed as I understand their appointment (subject to the terms of the order) will allow them to work alongside the Board and management who have significant industry experience and detailed first-hand knowledge of the Company's business (a belief which is shared with the Board). The continued involvement of the Board and the Company's management also allows the JPLs to leverage the benefit of their existing professional relationships with key stakeholders which will be invaluable if discussions regarding the Proposed Restructuring are to continue successfully.”*

### **The position at the Hearing**

54. At the Hearing, the Court was only presented with limited information concerning the proposed restructuring of Zarara, the status of discussions with the Investor, the attitude of the Administrator, the law and procedure governing the Mauritian administration and the process by and timetable within which the Restructuring Proposals would be considered by creditors and, if approved, implemented. It was unclear whether the Administrator supported the Restructuring Proposals, whether they had any prospect of being approved by creditors (on one reading of the Restructuring Proposals, Zarara's creditors were being asked to agree to release their claims against Zarara in return for a direct interest in the PSC's *before* the Investor had even agreed to invest) and whether there was sufficient time within which to document and implement the Restructuring Proposals, even if agreed (it was suggested that the administration in Mauritius had to be completed and therefore that the detailed terms of



the Restructuring Proposals had to be finalised and documented by 31 March, 2021, that is within just over two weeks after the Hearing). There was also no information as to how the PLs would be funded (the Company was on the evidence completely without funds) and whether they could perform a useful role. In these circumstances, I was not satisfied that it could be said that there was, to use the Chief Justice's phrase, "*a real prospect of*" the Restructuring Proposals being put to Zarara's creditors or of being approved. I therefore directed that the hearing of the petition be adjourned and that the Company file further evidence before 4pm Cayman time on 17 March 2021 to address the deficiencies in the evidence filed prior to the Hearing.

55. Of course, for the purpose of section 104(3), it is the Company's, not Zarara's creditors, that are relevant. The requirement of section 104(3)(b) is that the company intends to present a compromise or arrangement to *its* creditors. As I have noted above, the evidence in support of what type of restructuring was envisaged at the Company level was sketchy (see [74] of Mr Worthington's Second Affidavit, quoted above). However, based on that evidence, it was clear at the Hearing that a restructuring of the Company's debt and equity was dependent on the Restructuring Proposals being first promoted and successfully implemented and on further discussions, in light of the restructuring done at the Zarara level, with creditors and shareholders of the Company. While no precise terms had yet been formulated or discussed with the Company's creditors and shareholders, and there was no timetable established, the evidence showed that the Company intended to present a compromise or arrangement to its creditors once there had been progress in obtaining the requisite support for and approval of the Restructuring Proposals. Furthermore, according to Mr Worthington, the two key creditors, namely Emerald and MRI Management, had been approached and had indicated that they would be receptive to debt for equity swap if Zarara's Restructuring Proposals were successfully implemented. While the Company's ability to achieve a successful restructuring would also depend, *inter alia*, on the willingness of the Guarantee Creditors to release their claims, or on the Company demonstrating that it was not liable under the guarantees, there appeared to be a basis for restructuring negotiations at the Company level and a real (or realistic) prospect of a restructuring being agreed.
56. I also had a further concern. As I have noted, one of the Guarantee Creditors, Baker Hughes, had commenced an arbitration in London and they and the other Guarantee Creditors including Sakson had only been given very short notice of the Hearing. They had been told on 5 March that the Application had been filed but were only told of the date and time of the Hearing on the Friday before the Monday hearing. Other creditors had not been told of the Application until that Friday. While it is permissible for an application under section 104(3)



of the Act to be made *ex parte*, it is in my view important where possible for the views of creditors to be ascertained and for creditors to have a proper opportunity to file representations and submissions to the Court if they wish to do so. Creditors' views are relevant and important for determining the prospects of the proposed compromise or arrangement (are key creditors supportive or likely to support the proposed compromise or arrangement?) and as the Chief Justice said in *Sun Cheong* the wishes of creditors are one of the matters to be taken into account when the Court is exercising its discretion under section 104(3) and deciding whether to appoint PLs. If there is real urgency and a genuine and substantiated reason why creditors have not been consulted or cannot be given reasonable notice of the hearing, the Court can nonetheless proceed to appoint PLs but on this occasion I was not satisfied that the creditors including the Guarantee Creditors had been given adequate notice of the Hearing or that there was a good reason for the short notice or for appointing PLs immediately rather than adjourning the hearing for a short period to give the creditors proper notice of the adjourned hearing and an opportunity to appear at the adjourned hearing or file submissions, should they wish to do so. The evidence available at the Hearing did not indicate that the PLs needed to be appointed before the Administrator sent out the Restructuring Proposals or before the anticipated meeting of Zarara's creditors, or that there was any action which the PLs needed to take urgently before an adjourned hearing could be listed. I therefore directed that creditors be notified that the Hearing had been to provide the Company with an opportunity to file further evidence, that such further evidence had to be filed by 4pm Cayman Islands time on 17 March and that if creditors intended to appear at any adjourned hearing or to make representations or submissions to the Court they must give notice of an intention to appear to the Company's Cayman Islands attorneys and file such representations and submissions before that time.

### **The further evidence and developments after the Hearing**

57. Following the Hearing, the Company filed a further affidavit from Mr Worthington (his Third Affidavit). He provided considerably more information and exhibited documents relating to the Mauritian administration; the extent and nature of the Investor's interest, the reasons why the Investor was considered reliable and the steps that had been taken to contact and have discussions with the Investor and the financial position of MRI Kenya. He also clarified the terms of and the anticipated mechanics for implementing the Restructuring Proposals and the manner in which the PLs would be funded (so that their costs and expenses would be paid). In particular, Mr Worthington confirmed that the Administrator had on 16 March sent his report to Zarara's creditors with a letter inviting them to attend the watershed meeting to vote on the restructuring proposal made in the Administrator's report and that the Administrator



supported the Restructuring Proposals; that the Restructuring Proposals had been updated and amended and that if Zarara's creditors voted in favour of the Restructuring Proposals at the watershed meeting, the parties would have a further twenty-one days in which to agree and execute a DOCA. He further confirmed that the Company's board understood that even after the DOCA had been signed Zarara will need further time in which to satisfy the milestones and conditions that will be set out in the DOCA and arrange for the agreement with the Investor to be finalised and executed. It was likely that this would take a further three months. Mr Worthington confirmed that the Company's board believed that provided that Zarara's creditors voted in favour of the proposals at the watershed meeting on 30 March, Zarara would have access to sufficient funding to enable it to complete the restructuring during that further three-month period since Emerald had confirmed that it was willing to provide further limited funding if there was a clear path towards the survival of the Company and the Group (including Zarara) as a going concern and that such survival was a real possibility; that such path had been determined by no later than 31 March 2021, and that the timetable to complete implementation of the restructuring did not exceed the current estimate (of twenty one days plus three months after the approval of the Restructuring Proposals at the watershed meeting). The funding that Emerald had offered to provide would also cover the anticipated remuneration and expenses of the PLs during this period (as I have noted already Emerald has been providing the funding of the Company and the Mauritian administration since November 2020). But, Mr Worthington pointed out, this funding was only available if the creditors supported the Restructuring Proposals at the watershed meeting including the agreement by the Guarantee Creditors to release the Company from its liability under the guarantees. In the event that this did not happen both Zarara and the Company would be forced into insolvent liquidation with the result that the Company's creditors were unlikely to make any recovery.

58. On 23 March 2021, Sakson filed the Sakson Written Submissions in opposition to the Application. These were in the form of a letter from a director of Sakson. The Sakson Written Submissions commented on the Company's evidence and referred to other facts and matters which were relied on by Sakson. Mr Sakkal stated that the matters "*deponed [sic] to herein-above [were] true to the best of [his] knowledge, and belief save as to matters deponed [sic] to on information and advice sources whereof have been disclosed.*" The Sakson Written Submissions did not state that Sakson intended to instruct attorneys or to be represented and appear at any adjourned hearing of the Application and I therefore concluded that Sakson was satisfied that the Application be dealt with by the Court by reference to the Sakson Written Submissions and the submissions and evidence filed by the Company, without the need for a further hearing.



59. The main points made in the Sakson Written Submissions can be summarised as follows:

- (a). the Company had not demonstrated by way of evidence that the funds alleged to have been advanced by Emerald had been actually received and spent. Both Emerald and MRI Management were related parties and their demand letters should not be relied on and did not meet the evidential threshold to make and/or support the Application. The Company should have put in evidence bank statements reflecting receipt of funds and of how the money was spent. *“The Company [had] created fictitious and non-existent loans and expenses with group companies with a view to demonstrating to this Honourable Court that [the Company was] unable to pay [its] debts.”* Furthermore, if the Company had in fact received the funds, it had improperly failed to use the funds to meet its liabilities to Sakson.
- (b). Sakson denied any knowledge of and were not parties to the phase 1 creditor agreements referred to by Mr Worthington.
- (c). the admission by Mr Worthington that the Company had no assets other than its interest in Zarara *“smacks of fraudulent misconduct by the Company and its directors when it purported to issue the [guarantee in favour of Sakson] knowingly and intentionally aware that it would not perform [thereunder].”*
- (d). the Company had never responded to Sakson’s demand dated 6 December 2020 and it could not now dispute the amount demanded or assert and rely on counterclaims.
- (e). the offer to creditors of a 15% free carrying interest in Block 4 and L13 was dependent on the Kenyan Government agreeing to renew or extend the term of the PSCs, which it had not yet done and could not be guaranteed.
- (f). the Application (involving the appointment of PLs on a soft touch basis) was a ploy to shield the Company from creditors while the current board remained in control. It was a ploy to stop Sakson and the Company’s other creditors taking steps to recover their debts. This was the sole purpose of the Application and should not be allowed by the Court.





- (g). it would not be possible for the Mauritian administration to be recognised in Kenya before the 31 March deadline since the application for recognition would only be heard by the Kenyan court on 19 May.
  - (h). the watershed meeting had been cancelled by the High Court in Kenya and all creditors had been given a chance to make representations to the court. Sakson intends to make representations to the High Court in Kenya with respect to the debt owed to it by Zarara and the Company.
  - (i). the Company had not demonstrated that there was a realistic prospect that the Restructuring Proposals would be successful and approved. No details of the Investor had been tabled for consideration and assessment by creditors; Zarara did not have a renewed license from the Kenyan Government and there was no evidence to demonstrate that the Blocks L4 and L13 have commercially marketable gas.
  - (j). it was clear that the Company and Zarara had orchestrated a ploy to “*run away from [their] debts and leave the creditors stranded*”. The Company had been paying its related companies to the detriment of independent service providers and the Application designed to prejudice the external creditors. The purpose of section 104(3) of the Act was to assist genuine attempts to restructure a company’s liabilities, which was not the position in the present case. The Application was an abuse and should be dismissed by the Court.
60. In Walkers’ letter of 24 March setting out the Company’s response to the Sakson Written Submissions, the following main points were made:
- (a). the Company rejected Sakson's allegations that it had been involved in fraudulent conduct and misled the Court in respect of its debts to MRI Management and Emerald. There was no evidence and no basis whatsoever for such allegations.
  - (b). the dismissal of the Application and the failure of the restructuring negotiations would not advantage Sakson and the other creditors of Zarara and the Company since it would only result in an insolvent liquidation of both companies and no return to Sakson and such creditors.



- (c). the Company accepted that number of issues and matters remained to be satisfied and settled before the Restructuring Proposals could be successfully implemented and these were clearly set out in the Administrator's Report. Contrary to the suggestion made by Sakson, the Company was not required as part of the Application to demonstrate to the Court that the Restructuring Proposals were bound to succeed. Rather it was sufficient that they are shown to have, and Mr Worthington had, on behalf of the Company, explained why the Company's board believed that they had, a real prospect of success.
- (d). the Application was not a "ploy" to avoid the repayment of debts which would otherwise be recovered by creditors should the Application be dismissed. On the contrary, the Application was made to give the Company (and the Group) the best possible chance of continuing as a going concern, repaying creditors and returning to profit. The alternative, should the Application be dismissed, will be for the Company (and the Group) to be liquidated with minimal recoveries to creditors.
- (e). in the circumstances, the Sakson Written Submission did not provide grounds on which to dismiss the Application.
- (f). there had been some discussions with Baker Hughes' Cayman attorneys, Kobre & Kim, who had asked for and been provided with the documents filed in these proceedings. On 22 March 2021, Walkers and the Company's onshore solicitors had contacted Kobre & Kim by telephone to confirm that the documents had been received and to ask if Kobre & Kim had any questions. They were told that the documents had been safely received and were being reviewed. They had not heard further from Kobre & Kim.

### **Analysis and decision**

- 61. It is first necessary to consider whether the two requirements of section 104(3) of the Act, which go to the Court's jurisdiction, are satisfied in this case.
- 62. The first requirement, as I have noted, is that the Company is unable to pay its debts. I accept the Company's submissions on this point. I have carefully considered the points made in the Sakson Written Submissions but do not consider that they support or justify a different conclusion. Sakson did not formally file evidence in support of its opposition to the Application. Mr Sakkal did not swear an affidavit. Nonetheless, I consider that it is



appropriate to take into account the submissions and statements made in the Sakson Written Submissions. Mr Sakkal did, as I have noted, in substance include a statement of truth in the Sakson Written Submissions and clearly intended that his statements be relied on by the Court. However, in the absence of properly particularised affidavit evidence, supported by appropriate documentation, I do not consider that I can give much weight to the factual statements made in the Sakson Written Submissions, and cannot accept them where they conflict with the evidence filed by the Company. On the question of whether the Company is unable to pay its debts and whether the requirement of section 104(3)(a) is satisfied, there is no proper basis to reject the Company's evidence as to the existence and status of its liabilities to Emerald and MRI Management or as to its failure and inability to pay the sums demanded. The fact that Emerald and MRI Management are related parties does not undermine or preclude reliance on that evidence.

63. The second requirement is that the Company intends to present a compromise or arrangement to its creditors. In my view, this requirement is satisfied on the evidence. As I have noted, what is relevant here is the intention to present a compromise or arrangement to the Company's creditors. A plan to make proposals to the creditors of the Company's subsidiary, such as Zarara, would not be sufficient. But here, some creditors of Zarara are, or at least claim to be, creditors of the Company and a compromise or arrangement with the Company's other creditors is under discussion and contemplated as a necessary consequence of the acceptance of the Restructuring Proposals, since the Company envisages a Group and not just a Zarara restructuring. I am satisfied, following the filing of the Company's further evidence, that the Company has a genuine, *bona fide*, intention to present and negotiate a restructuring both with Zarara's creditors and with its own and that a proper process for conducting those negotiations is now underway. The absence of the identity of the Investor (whose involvement is critical to the credibility and viability of the Restructuring proposals) is a concern but appears to be understandable in view of the commercial sensitivities explained by Mr Worthington. Furthermore, Mr Worthington has confirmed that he considers that the Investor appears to be credible and to have the means to fund the contemplated investment. It also appears that there is no suggestion that the Investor is related to or connected with the Company or its shareholders. I do not consider that Sakson's allegations that the Restructuring Proposals are not being put forward in good faith or properly and that the Application is "*a ploy*" whose purpose is to prejudice and not protect the interests of creditors is made out.



64. Having satisfied myself that the Court has jurisdiction to grant the Application, I must now consider whether I should exercise my discretion to do so. I have concluded, following the filing of the Company's further evidence, that I should do so.
65. As I have noted, I am satisfied that the evidence now shows both that the Company intends to present a compromise or arrangement to its creditors and to promote a restructuring of the Group and that the Restructuring Proposals are coherent and appear to offer Zarara's creditors an apparently attractive alternative to an insolvent liquidation of Zarara (and the Company). There appears to be a rational basis for accepting the Restructuring Proposals, provided that the assumptions on which they were based were validated; in particular, that the Investor proves to be reliable and of substance and prepared to commit the further funds required to allow the necessary further exploration of and work to be done at Blocks L4 and L13 and that the condition and state of those blocks meant (and there was a reasonable expectation) that such exploration and work would result in sufficient revenues and value creation to provide the Investor with a satisfactory return and other creditors with a material recovery. There would also appear to be reasonable basis for putting in place a restructuring of the Company's debt and balance sheet, if the Restructuring Proposals are approved and implemented, to allow the Company's creditors and shareholders to access and have the benefit of the recoveries to be made by MRI Kenya out of its retained minority shareholding in Zarara.
66. As I have noted, the restructuring negotiations are at a relatively early stage. Indeed, in view of the recent developments in Kenya, they are currently at a particularly precarious point. It remains to be seen whether Zarara's creditors (it remains unclear on the evidence whether all or only a particular majority of Zarara's creditors must give their approval) are willing to support the Restructuring Proposals on their current or possibly on revised terms. In particular, it remains to be seen whether the Guarantee Creditors including Sakson, assuming that they can establish that they have valid claims against the Company, will be persuaded and prepared, or can be required by a majority vote, to release their guarantees. They will obviously need to be satisfied that what is on offer is a fair and reasonable deal and a preferable alternative to a liquidation which they may need to fund if they wish to see claims brought against Zarara, the Company and possibly others. I note the allegations made and concerns expressed by Sakson, which for the purpose of the Application have not been proved or established but which will need to be dealt with if Sakson's support for the Restructuring Proposals is to be obtained. I also note that as matters currently stand, there appears to be a serious difficulty in the watershed meeting going ahead before the 31 March deadline (and there is no indication that even in the new and difficult circumstances there is any prospect of the Mauritian court granting and extension of time or of Emerald being prepared to extend its



funding to accommodate such an extension or delay in obtaining creditor approval) and a serious risk that the appointment of the Administrator will terminate. If that were to happen, it is unclear whether the restructuring of Zarara could proceed and whether Zarara's assets in Kenya could and would be protected and preserved. These problems, as I have said, give rise to serious doubts and concerns as to the prospects of success of the Restructuring Proposals. Nonetheless, I am satisfied that all is not yet lost and there remain a number of ways in which the restructuring negotiations could be put back on track. The adverse developments in Kenya occurred only recently and their impact and Zarara's options remain under consideration. It remains possible, and I anticipate that the PLs can play a constructive and useful role in this regard, that there can be discussions with the Kenyan Creditors with a view to alleviating their concerns and for allowing more time in which the restructuring negotiations can progress and proceed (it is unclear whether the Kenyan creditors have a local priority which they are seeking to protect and if they do how that could be accommodated within the Restructuring Proposals).

67. In the circumstances, it seems to be right and appropriate to appoint the PLs in order to assist in and facilitate the restructuring negotiations and to give the Company and them the opportunity to stabilise the position and seek to have constructive discussions with the creditors of Zarara, and with Emerald as the funder whose continued support is critical to the process. It is clear that the time is short but that there may be sufficient time to secure a satisfactory result. Because of the possibility that there may be significant developments, and of the need as matters presently stand for approval of the Restructuring Proposals by Zarara's creditors, before 31 March, I have directed that the PLs provide the Court with an initial report on 1 April.
68. I am satisfied that this is an appropriate case in which the PLs should be appointed on a soft touch basis (although I would reiterate my plea to substitute "light-touch" for "soft touch", since the latter expression has always seemed to me to bring with it associations of someone being duped and defrauded!). The form of order submitted by the Company provides for the Company's directors to retain the power to act with respect to matters within the ordinary course of the Company's business without the prior consent of the PLs but to require that they obtain the prior consent of the PLs for matters outside the ordinary course of business, including the restructuring negotiations. While I question (and indeed raised at the Hearing the issue of) whether in this case it is clear what is covered by the Company's ordinary course of business (where as I understand it, the *Company* has no funds save for what is provided by Emerald for the purpose of the restructuring negotiations and the provisional liquidation and is not therefore conducting business in any meaningful sense), I am prepared to make an order



using that terminology in the form proposed, provided it is made clear that the directors' unrestrained powers only allow them to make payments of limited amounts (I have included a threshold of US\$10,000 in the order). Paragraph 7 of the order now reads as follows:

*“Until further Order, the Directors shall retain all powers of management conferred upon them by the Company immediately prior to the date of this Order, subject to the JPLs' oversight and monitoring of the exercise of such powers pursuant to paragraph 5 hereof. In relation to matters related to the ordinary course of business of the Company, the Directors may exercise these powers without the approval of the JPLs. In relation to matters outside of the ordinary course of business of the Company (to include all matters related to the Company Restructuring and the Group Restructuring and the payment of any creditors save for payments of less than US\$10,000), the Directors may only exercise these powers with the JPLs' prior approval. In the event that the JPLs and the Directors cannot agree upon a proposed action outside the ordinary course of the Company's business, the JPLs and the Directors have liberty to apply to this Court for directions. Specifically, and without limitation but subject to the foregoing, the Directors may continue to exercise the following powers:*

- (a) to continue to conduct the ordinary, day-to-day, business operations of the Company;*
- (b) to continue to operate and maintain the bank accounts of the Company in the ordinary course of the Company's business; and*
- (c) subject to the approval and consent of the JPLs, to open and close bank accounts on behalf of the Company.”*

#### **A footnote point**

69. I should briefly mention one further point. I have referred to above and quoted from the written resolutions signed by the Company's shareholders on 3 March. Resolution 3 was in the following terms (underlining added):

*“Resolution 3*

*IT WAS RESOLVED that, in the event that the compromises or restructuring arrangements proposed by the Provisional Liquidators are rejected by the Court or the Company's stakeholders or are otherwise incapable of being implemented the Shareholders hereby confirm that they revoke their requirement that the Company be wound up by the Court under section 92(a) of the Law and authorise the directors of the Company to take such steps as then deem appropriate to procure the withdrawal of the Petition.”*

70. At the Hearing, I pointed out that this resolution in my view gave rise to a number of questions and issues. It must at least be strongly arguable that it precludes the Company seeking a winding up order in reliance on section 92(a) of the Act (that the Company had



passed a special resolution *requiring the Company to be wound up by the Court*). The decision to wind up appeared to be qualified and conditional. It was also unclear to me whether such a qualified authority to present a petition (or an authority subject to a condition subsequent) tainted or affected the petition more generally. Obviously, the shareholders' intention (and the intention of those who drafted the resolution) was to indicate that the Company was only using the winding up jurisdiction for the purpose of promoting a restructuring and compromise or arrangement with creditors as permitted by section 104(3) of the Act, and it might be said that resolution 3 was unobjectionable since it only gave the directors the authority, as between themselves and the shareholders, to apply to withdraw the petition at a later date if the restructuring negotiations failed. However, I would just note that there may be difficulties with this approach which may need to be considered on another occasion. In the absence of the point being taken by any opposing creditor I do not consider that I need to delve further into the issue, save to note that in this case, resolution 3 appeared to be inconsistent with the Company's evidence that if the restructuring negotiations failed, the Company would be wound up immediately.



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**HON. JUSTICE SEGAL**  
**JUDGE OF THE GRAND COURT**