THE HIGH COURT

[2023] IEHC 486

[2023 88 COS]

IN THE MATTER OF GTLK EUROPE DAC

AND

IN THE MATTER OF GTLK EUROPE CAPITAL DAC

AND

IN THE MATTER OF THE COMPANIES ACT 2014

AND

THE CENTRAL BANK OF IRELAND

NOTICE PARTY

Judgment of Mr. Justice Michael Quinn delivered on the 31st day of July 2023

1. Of all the principles and rules governing the winding up of insolvent companies, two of the most fundamental are easily and simply stated, as follows:

1. On the occurrence of a winding up and the appointment of a liquidator the shareholders lose such control as they previously enjoyed over the assets and affairs of the company.

2. From the moment when the company becomes insolvent, it is no longer the beneficial owner of its assets, and holds them on trust for its creditors.

These two are statements of trite law. But when they attract the significance which attaches to them in this case, it is appropriate to examine their basis and effect.

2. The Joint Liquidators of GTLK Europe DAC (In Liquidation), and GTLK Europe Capital DAC (In Liquidation) (together referred to as "the Companies") have applied pursuant to s. 631 of the Companies Act 2014 ("the Act") for certain directions and declarations relating to the exercise of their powers in respect of the assets of the Companies.

3. The application was necessitated by the fact that the ultimate owner of the Companies is Joint Stock Company GTLK ("GTLK"), which is incorporated in the Russian Federation and is an entity now listed in Annex 1 to EU Regulation 269 / 2014 of 17 March 2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine ("the Asset Freeze Regulation"). Relevant also are provisions of EU Regulation 833 / 2014, referred to as the Sectoral Regulation. The Joint Liquidators have identified a number of issues arising from these regulations which affect or have the potential to affect, the manner in which they exercise their powers and discharge their duties in respect of the assets of the Companies.

The Companies

4. GTLK Europe DAC was incorporated in the State on 9 May 2012. It has its registered office at 2 Hume Street, Dublin 2. The authorised share capital of GTLK Europe is €10,000 divided into 10,000 ordinary shares of €1 each. The issued share capital is €100 and the shareholders are: -

(i) GTLK holds one (1) ordinary share.

(ii) LLC GTLK Finance, a company also incorporated in the Russian Federation, holds 99 shares.

5. GTLK Europe Capital DAC was incorporated in the State on 17 January 2018 and also has its registered office at 2 Hume Street, Dublin 2. It is a subsidiary of GTLK Europe.

6. The Companies are part of a group of companies which operate an international transport leasing business owned and controlled by the Russian Federation (the GTLK Europe Group). The GTLK Europe Group is one division of a wider group of companies that are ultimately owned and controlled by GTLK.

7. GTLK is wholly owned by the Russian Federation, represented by the Ministry of Transport of the Russian Federation. Its principal activity is the operation of Russian state programmes for the development of the Russian transport industry. The group describes itself as Russia's largest leasing business. It has a portfolio of passenger and freight aircraft and sea vessels which it leases to customers throughout the world.

8. GTLK Europe DAC is headquartered in Dublin and is the top level company for GTLK Europe Group's operations in Europe and the Middle East. Its activities include aviation and maritime leasing, trading in transport assets, marketing, asset management and consulting on commercial aircraft and shipping transactions. The latest available financial statements relate to the period to 31 December 2020 and record GTLK Europe as having total assets valued at USD$4.5 billion.

9. GTLK Europe Capital DAC is a special purpose vehicle incorporated to facilitate the raising of finance by the group through bond issuances which are used to finance the group's operations. As of the end of 2020, GTLK Europe Capital had issued loan notes with a total cumulative notional value of approximately USD$2.75 billion.

10. GTLK Europe DAC had issued loan notes with a notional value of approximately USD$500 million and is the guarantor of the loan notes issued by GTLK Capital.

11. The liquidation of the Companies will be a complex and large task. GTLK Europe held, through a complex corporate structure of subsidiary companies owning individual assets, 70 aircraft and 19 sea vessels with 21 lessees in 13 countries. Customers included airlines such as Aeroflot, Emirates and EasyJet.

12. The subsidiaries are incorporated and registered variously in Ireland, Bermuda, Lithuania, Malta, Switzerland, Liberia and United Arab Emirates. The majority of the valuable assets are held through these special purpose entities.

13. The last published financial statements for GTLK Europe presented that company as having total assets of USD$4.5 billion, comprising aircraft and vessels held through subsidiaries, together with loans to shareholders and related parties, "finance receivables", "trade and other receivables" and cash.

14. The companies were largely funded by the issue of loan notes in an amount of USD$2.75 billion issued by GTLK Capital, all guaranteed by GTLK Europe. A further USD$500 million worth of notes were issued by GTLK Europe itself.

Sanctions

15. After the Russian Federation invaded Crimea in 2014, the European Union, the United Kingdom, the United States and others imposed sanctions on Russian individuals and Russian state and private entities. When Russia escalated its invasion of Ukraine in February 2022, the European Union and others imposed further sanctions on Russian related entities and the Russian Federation itself. As an emanation of the Russian Federation, being controlled by the Ministry of Transport of the Russian Federation, the GTLK Group was specifically targeted by EU and other international sanctions. I shall return to the precise terms of those sanction measures later. The effect of these measures on the GTLK Group has been to freeze funds and impose restrictions on its transactions internationally which rendered it virtually impossible for the group to carry on its business and for the Companies to service interest or other payments due under notes issued by them.

Acceleration of notes and petitions for winding up

16. On 17 April 2023, a group of noteholders, comprising Trinity Investments DAC, Attestor European Multi – Asset One Portfolio, Ben Oldman Special Situations Fund LP, and

Sona Credit Masterfund Limited (referred to as "the Petitioners"), served an Acceleration Notice declaring amounts due under certain 2029 Notes immediately due and payable and demanding payment of an amount of USD$175,384,581.75. The notice warned that if payment was not received the Petitioners reserved the right to present petitions for the winding up of the Companies without further notice. Payment was not made and on 19 April 2023, the Petitioners served demands for payment in writing pursuant to s. 570 of the Companies Act 2014.

17. On 19 April 2023, the Petitioners presented petitions for the winding up of the Companies pursuant to s. 569 (1) (d) and/or s. 569 (1) (e) of the Act by way of main proceedings in accordance with Article 3.1 of Regulation EU 2015 / 848 of 20 May 2015 on insolvency proceedings (recast).

18. The petitions were grounded firstly on the inability of the Companies to pay their debts (s. 569.1 (d), of the Act). The period of 21 days after demand for payment referred to in Section 570 (a) of the Act had not passed when the petitions were presented, but in support of the petitions, the petitioners presented a report by Interpath Advisory (Ireland) Limited which analysed the most recently available information as to the assets, liabilities and affairs of the Companies, and stated its opinion that the Companies were insolvent both on a balance sheet basis and on a cash flow basis.

19. The petition was grounded also on the just and equitable ground (s. 569.1 (e)) having regard to the following: -

(a) that the Companies had ceased carrying on business;

(b) the Companies lacked effective management, thereby placing at risk the security of the assets which, according to the Petitioners ought to be available for the benefit of their creditors;

(c) an alleged failure of the Companies to respond to recent legal proceedings, again placing at risk the assets of the Companies;

(d) the failure and/or inability of the Companies to comply with international sanctions applicable to them;

(e) concerns arising from the resignation of the Companies' auditors, and certain directors.

20. The petitions were opposed by the Companies partly on the grounds that the companies were not insolvent. Affidavits were exchanged, and the petitions were listed for hearing before the Court on Monday, 29 May 2023.

Examinership petition

21. On Friday, 26 May 2023, petitions were presented for the appointment of an examiner to each of the Companies pursuant to Section 509 of the Act.

22. The petitions for examinership were accompanied, as required by s. 511, by an independent expert report of Mr. Aidan Garcia Diaz.

23. Mr. Garcia Diaz stated in his report that he had read the report produced by Interpath and confirmed that he was in agreement with the conclusion of Interpath that the Companies are insolvent on a cashflow basis.

24. Mr. Garcia Diaz also reported that the balance sheet of GTLK Europe DAC as at March 2023 shows a net deficit position of USD$1.598 million, and that this deficit was projected to become €2.160 million "in a liquidation scenario".

25. Section 522 (5) of the Act provides that: -

"Where a petition is presented [for the appointment of an examiner] in respect of a company at a date subsequent to the presentation of a petition for the winding up of that company, but before a provisional liquidator has been appointed or an order made for its winding up, both petitions shall be heard together".

26. The matter came before the court on 29 May 2023. The petition for winding up was adjourned to the next day, before Dignam J together with the examinership petition.

27. When the matter came before Dignam J., the court was informed that the solicitors retained by the Companies wished to be discharged from the record in the proceedings, but that they had no instructions to withdraw the examinership petition. Dignam J. heard the examinership petition first.

28. Dignam J. dismissed the examinership petition, on two grounds: -

(a) failure on the part of the Companies to exercise utmost good faith;

(b) the petitioner had failed to discharge the burden of proving that there is a reasonable prospect of the survival of the Companies and the whole or any part of their undertaking as a going concern.

29. Dignam J. noted that in an affidavit sworn by a director of the Companies, Mr. Lyadov, in opposition to the winding up petitions, Mr. Lyadov had sworn that "GTLK Europe is solvent and continues to function appropriately".

30. By contrast, in the examinership proceedings, Mr. Lyadov had exhibited and relied on the report of the Independent Expert which stated the opinion that the Companies were insolvent.

31. In his *ex tempore* judgment delivered on 31 May 2023, Dignam J. analysed of the contents of the examinership petition and the report of the Independent Expert. He concluded that the petition was "fatally deficient and the court could not safely conclude that the companies had a reasonable prospect of survival as a going concern".

32. Finally, Dignam J. stated that: -

"It also seems to me that in circumstances where the very basis for the companies application for examiner was their insolvency, it would be appropriate to make an order winding up the company within the examinership".

33. He therefore made an order pursuant to s. 512 (5) of the Act refusing the examinership petition and ordering that the Companies be wound up by the court under the provisions of the Act and in main insolvency proceedings in accordance with Article 3.1 of the Insolvency Regulation.

34. Dignam J. appointed Damien Murran and Julian Moroney of Teneo, 20 Lower Hatch Street Dublin 2 Joint Liquidators of the Companies.

35. Dignam J. made an order that the winding up petitions be struck out.

36. The findings of Dignam J. are significant not only in terms of the refusal to appoint an examiner and the making of an order for the winding up of the Company, but insofar as he noted that the Companies had, in verifying and presenting the report of the independent expert, adopted the position that the Companies were insolvent. Similarly, the report of Interpath Advisory has been exhibited on this application and clearly demonstrates that the Companies are insolvent both on a balance sheet basis and on a cash flow basis.

37. The evidence and finding of insolvency are fundamental to the making of the declarations sought on this application, as considered below.

38. Immediately following the appointment of the Joint Liquidators, the court granted liberty to the Joint Liquidators to issue this application.

39. This application was issued by the Joint Liquidators arising from their concerns as to the effect of the Sanctions Regulations on the exercise of their powers as liquidators of the Companies.

The Assets Freeze Regulation : 269/2014

40. Article 1 contains important definitions as follows.

> *"(d) 'economic resources' means assets of every kind, whether tangible or intangible, movable or immovable, which are not funds but may be used to obtain funds, goods or services;*

(e)'freezing of economic resources' means preventing the use of economic resources to obtain funds, goods or services in any way, including, but not limited to, by selling, hiring or mortgaging them;

(f)'freezing of funds' means preventing any move, transfer, alteration, use of, access to, or dealing with funds in any way that would result in any change in their volume, amount, location, ownership, possession, character, destination or any other change that would enable the funds to be used, including portfolio management;

(g)'funds' means financial assets and benefits of every kind, including, but not limited to:

(i) cash, cheques, claims on money, drafts, money orders and other payment instruments;

(ii) deposits with financial institutions or other entities, balances on accounts, debts and debt obligations;

(iii) publicly- and privately-traded securities and debt instruments, including stocks and shares, certificates representing securities, bonds, notes, warrants, debentures and derivatives contracts." (emphasis added)

41. Article 2 provides as follows:

"2.1. All funds and economic resources belonging to, owned, held or controlled by any natural persons or natural or legal persons, entities or bodies associated with them as listed in Annex I shall be frozen.

2.2. No funds or economic resources shall be made available, directly or indirectly, to or for the benefit of natural persons or natural or legal persons, entities or bodies associated with them listed in Annex I."

42. Neither of the Companies are listed in Annex 1. However on 8 April 2022 the ultimate parent Joint Stock Company GTLK was added to the entities listed in the Annex.

43. The Commission has published a number of documents which aim to assist national competent authorities and others in the implementation of the Sanction Regulations. These include a Commission Opinion of 19 June, 2020 on Article 2 of the Asset Freeze Regulation, an Opinion of 8 June, 2021 on Article 2 of the Asset Freeze Regulation and a Frequently Asked Questions document, the latter most recently updated on 10 May 2023.

44. The Commission's FAQs concerning the Regulation updated on 10 May 2023 address the question of parties controlled by entities listed in the Annex, where it says

"

1. *Do the sanctions in Article 2 of Council Regulation EU No. 269/2014 apply to companies owned, controlled, managed by or otherwise associated with the listed persons.*

A. *"Only the persons and entities listed in Annex 1 to the Regulation are directly targeted by sanctions.*

However if the listed person is deemed to own or control a non-listed entity, it can be presumed that the control also extends to the assets of that entity and that any funds or economic resources made available to that entity would reach or benefit the listed person.

This presumption can be rebutted on a case by case basis by the entity concerned, if it can be demonstrated that some or all of its assets are outside the control of the listed person, and/or that funds or economic resources made available to it would in fact not reach or benefit the listed person."

Commission Opinion 19 June, 2020 on Article 2 of the Asset Freeze Regulation

45. The Commission made the following observations.

"The National Competent Authority is competent to determine, in light of the above clarifications, taking into account all the elements at its disposal and the specific circumstances of the case, whether the designated person has control over the Entity.

….

In the Commission's view, if the designated person is determined to have control over the Entity, it can be presumed that the control extends to all assets nominally owned by the latter. Such assets must be frozen pursuant to Article 2(1) of the Regulation. Otherwise, designated persons could circumvent the asset freeze imposed on them by continuing to have access to funds or economic resources through the non-designated third parties that they control.

The Entity may obtain the lifting of the freeze on some or all of its assets by demonstrating that these are in fact not 'controlled' by the designated person, for instance because safeguards are put in place preventing the designated person from having access to them. The details of the administrative procedure by which the Entity may do so are to be decided in accordance with national rules."

46. The Commission states that

"(1) It is the competence of the NCA to determine, taking into account all the elements at their disposal and the specific circumstances of the case, whether the designated person has control over the Entity.

(2) The assets of the Entity must be frozen. The Entity may obtain the lifting of the freeze on some or all of its assets by showing that they are in fact not 'controlled' by the designated person. The way to do so depends on national rules."

(emphasis added)

Commission Opinion 8 June, 2021 on Article 2.2 of the Regulation

47. In this Opinion the Commission referred to the criteria to be taken into account to determine whether a legal entity is controlled by another person or entity as follows:

"a. the power to appoint or remove a majority of the members of the administrative, management or supervisory body of such legal person or entity;

b. using all or part of the assets of a legal person or entity;

c. sharing jointly and severally the financial liabilities of a legal person or entity, or guaranteeing them;

d. having influence as regards corporate strategy, operational policy, business plans, investment, capacity, provision of finance, human resources and legal matters;

e. putting in place or maintaining mechanisms to monitor the commercial conduct of the legal person or entity;

f. other indicia such as sharing a business address or using the same name which could cause third parties to have the impression that the two entities are in fact part of the same undertaking."

48. In relation to the competence to determine these matters the Opinion continues

"The NCA is competent to factually determine whether the elements that it has identified as linking the designated person to Entity A amount to meeting any of these criteria or others which may prove that the designated person has control over Entity A. This determination should be made in light of the above clarifications, taking into account all the elements at the NCA's disposal and the specific circumstances of the case. The Commission is not empowered to make this factual determination on behalf of the NCAs."

49. Finally in this Opinion the Commission stated the following:

"As generally parent companies exercise control and direction over the activities of their subsidiaries, in the Commission's view, once control by a designated person over a non-designated entity is determined, it can be presumed that the control also extends to the subsidiaries and the assets of the non-designated entity. <u>This presumption can be rebutted on a case-by-case basis by the EU Subsidiary</u>, if it can

demonstrate that some or all of its assets are outside the control of the parent entity, or that the latter is, in fact, not controlled by the designated person.

It follows that making funds or economic resources available to such a subsidiary would amount to making them indirectly available to the designated person, unless it can be reasonably determined, on a case-by-case basis using a risk-based approach, taking into account all the relevant circumstances, that the funds or economic resources concerned will not be used by or be for the benefit of that designated person." (emphasis added)

50. In summary, the effect of the Regulation, the guidance in the FAQs and the Commission Opinions is:

(a) A presumption of control arises in respect of a wholly owned subsidiary, such that the subsidiary will be subjected to the sanctions if the parent company is a designated entity.

(b) This presumption of control can be rebutted if

(i) It can be reasonably determined, on a case by case basis using a risk based approach, taking into account all of the relevant circumstances, that the funds or economic resources concerned will not be used by or for the benefit of the designated person or entity or

(ii) The EU subsidiary can demonstrate that some or all of its assets are outside the control of the parent entity.

51. There is no doubt that before the making of the winding up order the Companies were properly presumed to be under the control of the ultimate parent. The question for determination on this application, and easily answered in the affirmative, is whether that presumption is rebutted in the events which have occurred, namely the making of orders for the winding up of the Companies on the grounds of insolvency.

Derogations and authorisations

52. Article 4 of the Regulation permits authorisations by national competent authorities in certain circumstances as follows.

> *4.1. By way of derogation from Article 2 the competent authorities of the Member States may authorise the release of certain frozen funds or economic resources, or the making available of certain funds or economic resources, under such conditions as they deem appropriate, after having determined that the funds or economic resources concerned are* [necessary or intended exclusively for certain designated needs or payments identified in the Article.]

53. There is no provision for the granting of general authorisations or derogations under the provisions contained in Articles 4, 5 or 6 of the Regulation. Therefore, unless a determination is made that the assets of the Companies are not under the ownership or control of GTLK, individual authorisations pursuant to Articles 4 or 6 of the Regulation would be required to enable the Joint Liquidators to perform each and every transaction necessary to discharge their functions, including the following

- The payment of fees costs and necessary disbursements associated with the performance of the duties of the Joint Liquidators.
- The making of payments or receipt of funds associated with the ascertainment, getting in and realisation of assets of the Companies including the receipt of funds from debtors.
- The exercise of rights in respect of investments and loans granted by the Companies including the exercise of voting and other rights attaching to the Companies' shareholdings in subsidiaries.

54. Similar sanctions have been imposed, and applied to the GTLK Group in the United Kingdom, the United States of America and elsewhere in the western world.

Central Bank of Ireland

55. For the purpose of the Asset Freeze Regulation and the Sectoral Regulation the designated competent authorities in the State are the Central Bank of Ireland, the Department of Foreign Affairs and the Department of Enterprise, Trade and Employment.

56. The Central Bank is the authority responsible for the administration of financial sanctions including the sanctions relating to the obligation to freeze funds and economic resources of designated persons.

57. The role of the Central Bank in respect of the administration of financial sanctions includes monitoring and publishing updates of changes to the sanctions, addressing queries and notifications and participating in meetings of a cross departmental international sanctions committee. Importantly the Central Bank's role includes assessing and where appropriate the issuing of authorisations or derogations for activities which would otherwise be prohibited under the Regulations.

58. The Central Bank of Ireland as the Competent Authority is competent to determine whether the presumption of control has been rebutted taking into account the guidance and the opinions. If the Central Bank of Ireland were to determine that the presumption of control has been rebutted then the Companies would not be subject to the Sanctions Regulations.

59. The Joint Liquidators say that in order to fulfil their statutory duties, they need to act expeditiously to identify and preserve the Companies' assets and to take the necessary steps to preserve as much value as possible for the benefit of the non – Russian creditors and bondholders. They say that in the ordinary course, they would give consideration to the possibility of putting subsidiaries into liquidation in order to gain control of them, or, at a minimum, replacing the directors of the subsidiaries in order to safeguard the assets held by the subsidiaries. This would entail exercising voting and other rights attaching to the shares

held in subsidiaries and they are concerned that any such action is inconsistent with the sanctions.

Pre-liquidation contact

60. On 30 June 2022, Mr. Murran wrote to the sanctions team at the Central Bank of Ireland. He informed them that he had been approached concerning his potential appointment as an insolvency practitioner to Irish companies which were owned or controlled by a Russian entity listed at Annex 1 of the Asset Freeze Regulation. He explained that his role would be to collect and protect the assets of group companies and ultimately realise those assets to discharge contractual debts and other liabilities of the companies. He pointed out that there was nothing contained in the Regulations or in any EU guidance to indicate that the appointment in itself of an insolvency practitioner to an entity owned or controlled by a designated entity would breach EU sanctions. However, he expressed the view that if the sanctions applied to the relevant companies the actions he would need to take in furtherance of his powers and duties under the Companies Act 2014 would breach the Regulations in the absence of appropriate authorisations from the Central Bank of Ireland. He instanced such actions as the following: -

- Getting in assets of the Companies and receiving payments on its behalf;
- Taking steps to maintain the funds and economic resources of the companies.
- Making payments on behalf of the Companies to non – sanctioned creditors under pre – existing contracts.
- Exercising other powers afforded to insolvency practitioners under the Act to progress and conclude the insolvency proceedings.

61. Mr. Murran submitted that given the complexity of the proposed proceedings and the volume of transactions that would need to be undertaken, the requirement to submit detailed applications for authorisations to the Central Bank for each individual transaction would

result in a crippling administrative burden, inordinate delays and an unreasonable amount of legal costs, all to the detriment of non – sanctioned entities such as bondholders and other creditors of the Companies.

62. In reply to this communication, the Central Bank confirmed that there was no prohibition in the Regulation in respect of the appointment of an insolvency practitioner "and the provision of the necessary services that insolvency practitioners would need to engage in to carry out their duties". With reference to individual actions and transactions which the liquidators would need to carry out to fulfil their role, the Bank stated that the liquidators would be required to make individual derogation applications in respect of each proposed transaction and activity. It pointed out that derogation requests may take several weeks and sometimes longer to assess depending on a number of factors including the quality of information and documents submitted by the applicant.

63. After the presentation of the petition, Mr. Murran and Mr. Moroney, then as the nominated Joint Liquidators wrote on 21 April 2023 to the Central Bank identifying the entities in respect of which the petitions had been presented. They noted that there are no general licences available under EU sanctions for matters such as liquidating companies subject to an asset freeze. They noted the effect of the statement quoted in the Commission's FAQ is that the Companies would, unless determined otherwise, be presumed to be subject to control of the listed entity GTLK and therefore that the Liquidators would be obliged to apply for individual authorisation in relation to each and every action that would otherwise be prohibited by the Regulation. They submitted that in their view, having regard to the nature of a liquidation under Irish company law and the relevant provisions of the Companies Acts, the companies should not be presumed to be subject to the Asset Freeze Regulation.

64. The proposed Joint Liquidators submitted the following propositions to the Central Bank: -

(i) that the ultimate parent, namely GTLK, would not exercise any control over assets of the companies following appointment of liquidators;

(ii) no funds or economic resources would be available to listed persons from the proposed liquidation;

(iii) that the presumption of control of the Companies by the listed entity GTLK would on the appointment of liquidators be rebutted because (a) the ultimate parent would not exercise any control over the assets of the companies as a matter of insolvency law, and (b) no funds or economic resources made available to the Companies would be made available to the ultimate parent.

(iv) that once liquidators are appointed the companies should no longer be treated as subject to an asset freeze such that no authorisations would be required from the Central Bank to deal with the assets of the companies in the course of the liquidation, noting that certain EU sanctions may still apply in specific circumstances including those contained in the Sectoral Regulation.

65. This analysis was expanded upon by reference to the provisions of Part 11 of the Companies Act 2014.

66. They submitted that if this proposition were not accepted and determined by the Central Bank as the national Competent Authority, in the absence of a general authorisation or derogation, the requirement to apply for authorisations in respect of every step taken in relation to the Companies' assets would impose an administrative and financial burden which would lead to significant time delays and costs resulting in prejudice to the general creditors of the Companies.

Communications after winding up order

67. After the appointment of the Joint Liquidators, they submitted to the Central Bank two applications for authorisations. The first is referred to as the "voting rights application"

which related to the necessity on the part of the Joint Liquidators to appoint new directors and replace existing directors of a number of subsidiaries of the Companies.

68. The second was referred to as the "unfreezing application". This was an application for a derogation in respect of certain urgent payments required to be made on 1 June 2023, arising from issues encountered by the Joint Liquidators immediately on their appointment, notably the crashing of the backup server on the Companies' IT system on the evening of 31 May 2023, the date of their appointment.

69. Illustrative of the practical challenges for the Joint Liquidators is that the process of authorisations involves an initial triage stage and a facility for requesting and providing further information. On the voting rights application the Central Bank requires, understandably, such further information as the identities of proposed nominee directors, their status, particulars of the relevant subsidiaries, the forms of resolutions proposed, and further information. This in turn necessitated further due diligence and verification in relation to the identity of proposed directors, some of whom were unable in the initial stages to confirm their willingness to be appointed unless and until appropriate authorisations had been obtained.

70. By letter dated 7 June 2023, the Joint Liquidator's solicitors, Messrs. A&L Goodbody referred the Central Bank's solicitors McCann Fitzgerald to the challenges encountered by the Joint Liquidators on their appointment. They acknowledged that the Central Bank sanctions team was addressing matters as expeditiously and diligently as possible. However, they pointed out that despite the best efforts of all concerned, the process of applying for and obtaining individual authorisations under specific derogations is and would continue to be a complex and time consuming process, "ill suited to the fast moving and high risk environment the joint liquidators were operating in." Measures they intended to take would include such matters as securing control of subsidiaries either through placing them in

liquidation, appointing receivers over secured assets, or changing the constitution of subsidiary's boards. Messrs. Goodbody invited the Central Bank to urgently confirm its agreement with the legal analysis concerning the matter of control and its effect on the presumption of control, namely that the presumption of control could be determined to be rebutted so that the Joint Liquidators could immediately take steps required to protect the Companies' assets.

71. Before and immediately after the Joint Liquidators issued this application the Central Bank stated that it was not in a position to provide general opinions on such requests, on the Joint Liquidators submission or to confirm its agreement to the legal analysis provided in the letter of 21 April 2023.

72. Neither the Joint Liquidators or this court make any criticism of the Central Bank. The Sanctions Regulations must be taken seriously and implemented diligently and vigorously. This explains the requirements for detailed information in the process of applications for authorisations, and the requirement that time be taken in every case to ensure that the Regulations are not circumvented. The difficulty is that in a liquidation where urgent actions are required to protect the legitimate interests of creditors, the inevitable time and cost associated with authorisation applications for every action, presents a risk to the process of getting in and safeguarding assets. It is against that background that the court heard this application, and that I have outlined the challenge facing the Joint Liquidators and the Central Bank, and the positions adopted.

This application

73. With a view to having the fundamental question regarding the presumption of control determined, the Joint Liquidators issued this application. In the grounding affidavit of Mr. Murran, he refers to the background to the liquidations, the Sanctions Regulations, his correspondence with the Central Bank, and the practical challenges for the performance of

the Joint Liquidators' duties in light of the presumption of control which would apply to the Companies unless it is determined to be rebutted. The application is made pursuant to s. 631 of the Act of 2014 for certain directions including the following declarations: -

> *"2. A declaration that the presumption of control which arises in respect of the Companies under Article 2 of Regulation EU 269 /2014, as amended is rebutted in circumstances where Joint Liquidators have been appointed to the Companies by this Honourable Court.*
>
> *3. A declaration that the assets of the Companies are under the control of the Joint Liquidators who are the only persons entitled to deal with the assets of the Companies.*
>
> *4. A declaration that, on the appointment of the Joint Liquidators, the Companies ceased to be the beneficial owner of their assets and hold their assets on trust to apply them in discharge of the Companies' liabilities in accordance with the statutory scheme of distribution.*
>
> *5. A declaration that in the event that there are surplus funds in the liquidation, these are to be placed by the Joint Liquidators in a designated account and are not to be made available to the ultimate parent absent further order of this Honourable Court authorising the release of the funds, which order shall not be made unless and until it is permissible under EU law to do so.*
>
> *6. If necessary, an order pursuant to s. 614 of the Companies Act 2014 directing that the assets of the companies shall vest in the applicant".*

74. At the hearing of the application the direction at 6 above concerning a vesting order was not pursued but the Joint Liquidators sought and were granted liberty to apply should the necessity for such an order arise in the future.

75. Following the issue of this application, the court directed that it be made on notice to the Central Bank of Ireland and to the petitioning creditor bondholders.

76. The Central Bank indicated in a replying affidavit that notwithstanding its status as the National Competent Authority in relation to the Asset Freeze Regulation, it was not its role or function to interpret the Regulation and that this is a matter exclusively within the domain of the court. In its submissions at the hearing of this application, the Central Bank stated that it agrees with the legal analysis presented by the Joint Liquidators on the two fundamental proposition which underpin the declarations I ultimately made, namely that on the occurrence of an insolvent winding up

1. The shareholders of the Company no longer control the assets and affairs of the Companies, and
2. The Companies are not the beneficial owners of the assets, and hold them in trust for their creditors.

77. The application was heard on 10 July 2023. On 11 July 2023, I made orders in the terms set below, and indicated that I would later deliver this judgment stating the reasons for doing so.

78. In light of the submissions of the parties, the orders made on 11 July 2014 were in the following terms : -

> *(i) The presumption of control by joint stock company GTLK having its address at Room 100, BLD 73, Sale Khard, Russian Federation, which arises in respect of the companies under Article 2 of Council Regulation EU no. 269 /2014 of 17 day of March 2014, concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine as amended, and in consideration of the European Commission guidance in its consolidated FAQs on the implementation of Council Regulation EU no. 269 /2014*

and Council Regulation no. 833 / 2014 (last update 6 July 2023, s. B 1) and the Commission Opinions of 19 day of June 2020 and 8 day of June 2021 respectively is rebutted in circumstances where the Joint Liquidators have been appointed to the Companies by this Honourable Court.

(ii) The assets of the Companies are under the control of the Joint Liquidators who are the only persons entitled to deal with the assets of the Companies.

(iii) On the appointment of the Joint Liquidators, the Companies cease to be the beneficial owner of their assets and hold their assets on trust to apply them in accordance with the statutory scheme of distribution provided that no distribution shall be made to the ultimate parent company of the Companies pursuant to s. 618 (1) (b) of the Companies Act 2014 or otherwise absent further order of the court authorising such distribution which order shall not be made unless and until it is permissible under EU law to do so.

(iv) An order that in the event that there are surplus funds in the liquidation, such funds shall be placed by the Joint Liquidators in a designated account held with a credit institution established in Ireland and licenced pursuant to s. 9 of the Central Bank Act 1971, and shall not be made available to the ultimate parent company of the companies in liquidation absent further order of this Honourable Court authorising the release of the funds on the application of the joint liquidators, such application to be made on notice to the Central Bank of Ireland which order shall not be made unless and until it is permissible under EU law to do so".

79. I also granted liberty to the Joint Liquidators to apply in respect of any of the remaining reliefs sought on the notices of motion, which would include any potential application for a vesting order. An order was also made allowing the Joint Liquidators, the Central Bank and the petitioning creditors their costs as costs in the winding up.

Section 631

80. Section 631 of the Act provides as follows: -

"631. (1) Each of the following:

(a) the liquidator or the provisional liquidator;

(b) any contributory or creditor of the company;

(c) the Corporate Enforcement Authority

. . . .

may apply to the court to determine any question arising in the winding up of a company (including any question in relation to any exercise or proposed exercise of any of the powers of the liquidator).

(2) The court, if satisfied that the determination of the question will be <u>just and beneficial</u>, may accede wholly or partially to such an application on such terms and conditions as it thinks fit or may make such other order on the application as it thinks just". (emphasis added)

81. A similar, but not identical, provision which enables a receiver to apply for directions is in s. 438 of the Act. The predecessor of s. 438, s. 316 of the Act of 1963, was considered by McCracken J. in *Re: Salthill Properties Limited (In receivership)* [2006] IESC 35. In that case, the court was invited to consider substantive questions regarding the validity and effectiveness of leases created by the company in contravention of negative pledge clauses in mortgages granted by the company. The High Court declared that the leases contravened the relevant clauses in the mortgages and this decision was upheld on appeal. In the course of the appeal, the question of the correctness of the procedure invoked under s. 316 for such a substantive matter was raised and McCracken J. said: -

"The purpose of the procedures set out in section 316, <u>and indeed the equivalent procedures relating to applications by liquidators</u>, is to permit a person who has been effectively put in control of a company either on behalf of a specific creditor, in the

case of a receiver, or on behalf of creditors in general as in the case of a liquidator, to control the affairs of the company and obtain the advices of the court in as efficient and speedy a manner as possible". (emphasis added)

82. McCracken J. was satisfied that substantive directions regarding the validity of the relevant leases came clearly within the provisions of s. 316.

83. There is a difference in text between the provision in s. 438 (and s. 316 as considered by McCracken J.) and s. 631. S. 438 expressly empowers the court to make an order "declaring the rights of persons before the court or otherwise". Those words are absent from s. 631, which refers to an application "to determine any question arising in the winding up" and confers power to determine such question or "make such other order on the application as it thinks fit". The same difference in text arose between s. 316 of the Act of 1963, considered by McCracken J, and s. 280 of that Act, the predecessor of s.631 of the Act of 2014. Nonetheless it is clear from the passage I have quoted above that McCracken J. considered that the tool of obtaining the "advices of the court" on substantive issues was appropriate both for receivers and liquidators. This remains the case having regard to the broad wording of s. 631.

84. The core duties of the Joint Liquidators are to ascertain, get in, preserve and realise assets of the Companies for the benefit of their creditors. In this case the task is particularly complex and urgent. The Joint Liquidators have adopted what they themselves describe as a conservative or cautious approach to the application of the Sanctions Regulations to the many tasks they are obliged to undertake. In the unusual circumstances of this case, and taking account of the pressing challenges encountered by the Joint Liquidators, it would be inconsistent with the order of this court appointing the Joint Liquidators and the provisions of the Act generally, if the court were to decline to hear and consider this application and to make appropriate orders and declarations reflecting its opinion on the questions raised, as

envisaged by McCracken J. in "Salthill". I concluded that it was just and beneficial and therefore appropriate to consider the questions and to declare the result of the court's analysis in the order I made.

85. The Central Bank made it clear that because it is in agreement with the fundamental of the Joint Liquidator's submissions, it is not acting as legitimus contradictor. The Petitioners supported the application. Therefore there was no legitimus contradictor. I raised this matter at the hearing, and in particular the absence of any representation of the shareholders of the Companies. Counsel submitted that the overwhelming evidence of insolvency is such that the shareholders could only have a contingent, and they submitted remote, interest in the questions. That is correct for so long as the Companies are insolvent. That would of course change if there were a surplus after the discharge of costs and expenses of the winding up and of all the claims of creditors. Should that ever arise, the shareholders of the Companies will be entitled to be heard on, or at least put on notice of any application concerning the distribution of such a surplus. In the meantime I was satisfied that the questions of law now falling for determination which concern control and ownership only during insolvency, and which urgently affect the conduct of the winding up, could be considered and decided without hearing the shareholders.

EU Insolvency Regulation – applicable law

86. In making his order for the winding up of the company, Dignam J. found that the centre of main interests of the Companies is in Ireland. Therefore Regulation EU no. 848 / 2015, the European Insolvency Regulation Recast, applies to the proceedings.

Article 7 of the Regulation provides that: -

> *". . . the law applicable to insolvency proceedings and their effects shall be that of the Member State within the territory of which such proceedings are opened (the 'State of the opening of proceedings')".*

Article 7.2 provides: -

"The law of the State of the opening of proceedings shall determine the conditions for the opening of those proceedings, their conduct and their closure. In particular, it shall determine the following:

. . . .

(b) the assets which form part of the insolvency estate and the treatment of assets acquired by or devolving on the debtor after the opening of the insolvency proceedings;

(c) the respective powers of the debtor and the insolvency practitioner;

. . . .

(i) the rules governing the distribution of proceeds from the realisation of assets, the ranking of claims . . .."

87. In light of the Regulation, this court's analysis must be informed by Irish law, which on the questions raised, is governed principally by the Companies Act 2014 and relevant case law.

88. The questions posed by the notice of motion raise two fundamental issues of law. The first issue, which relates to the matter of control of insolvent companies, is largely informed by Part 11 of the Companies Act 2014. Relevant also is case law analysing the legal character and effects of a winding up, the functions and powers of a liquidator and their effects on parties who prior to the winding up, had an interest in or enjoyed control over the assets and affairs of the company including creditors, shareholders, officers, investors and others.

89. The second issue concerns beneficial ownership of the assets of a company. This is largely informed by Section 618 of the Act and a clear line of well known authorities.

Companies Act 2014

90. Section 596: Custody of company's property

"(1) Upon the appointment of a liquidator to a company, the liquidator shall take into his or her custody or under his or her control the seal, books and records of the company, and all the property to which the company is or appears to be entitled.

(2) A person who, without lawful entitlement or authority, has—

(a) at the date of the appointment of a liquidator to a company, possession or control of the books, records or other property of the company, or

(b) subsequent to such date comes into such possession or control,

shall surrender immediately to the liquidator such books, records or other property, as the case may be.

. . .".

91. Section 602: Voidance of dispositions of property, etc. after commencement of winding up: -

"602. (1) This section applies to each of the following acts in any winding up of a company:

(a) any disposition of the property of the company;

(b) any transfer of shares in the company; or

(c) any alteration in the status of the members of the company,

made after the commencement of the winding up.

(2) Without prejudice to subsection (3), (which is a saver for parties not having notice of the winding up) *an act to which this section applies that is done without the sanction of—*

(a) the liquidator of the company, or

(b) a director of the company who has, by virtue of section 677 (3) retained the power to do such act,

shall, unless the court otherwise orders, be void."

92. The significance of s. 602(1) and (2) is to render void any disposition of assets of the Company and any transfer of shares in the Company after commencement of a winding up. Therefore, only the Joint Liquidators can dispose of or transfer assets, and any measure on the part of Joint Stock Company GTLK to transfer or divest itself of shareholding in the Companies, whether direct or indirect, would be void unless this court declared otherwise.

93. Section 614: Vesting of property of company in liquidator

> *"(1) Where a company is being wound up, the court may, on the application of the liquidator, by order, direct that all or any part of the property of whatsoever description belonging to the company or held by trustees on its behalf shall vest in the liquidator by his or her official name".*

94. The Liquidators have not sought a vesting order in this case but have been granted liberty to apply should such an order later become appropriate.

95. Section 617 and 618 govern the priority of costs in a winding up and the distribution of the property of a company. In particular, s. 618 provides as follows: -

> *"Distribution of property of company*
>
> *618. (1) Subject to the provisions of this Act as to preferential payments, the property of a company on its winding up—*
>
> *(a) shall, subject to subsection (2), be applied in satisfaction of its liabilities pari passu, and*
>
> *(b) shall, subject to such application, and unless the constitution of the company otherwise provides, be distributed among the members according to their rights and interests in the company".*

96. This mandate that any distribution to the members is subject firstly to the satisfaction of the liabilities of the company is the core rule of priority which underpins the concept of the "statutory trust" described in case law to which I return later.

97. Section 624: Duty of liquidator to administer and distribute property of company.

"624 (1) . . . it shall be the duty of a liquidator to administer the property of the company to which he or she is appointed.

(2) For the purpose of subsection (1) "administer the property of the company" includes ascertaining the extent of the property of the company and, as appropriate:

(a) the collection and gathering in of the company's property;

(b) the realisation of such property; and

(c) the distribution of such property;

in accordance with law".

98. Section 627 describes in a Table the powers expressly conferred on a liquidator, which include the following:

- the power to bring or defend any action or legal proceedings in the name and on behalf of the company
- recommence and carry on the business of the company so far as may be necessary for the beneficial winding up thereof
- to pay any classes of creditors in full
- make any compromise or arrangement with creditors or persons or to compromise claims against the company
- to ascertain the debts and liabilities of the company
- to sell the property of the company
- to appoint agents
- to take into his or her custody or under his or her control all the property to which the company is or appears to be entitled, and to dispose of goods of the company

- to do all such other things as may be necessary for winding up the affairs of the company and distributing its property.

99. In respect of certain of the powers identified in s. 627 a liquidator must give notice of the exercise of the powers to creditors or a committee of creditors. But it is the liquidator, and no other party, who exercises these powers.

100. Section 677: Effect of winding up on business and status of company

"677. (1) From the commencement of the winding up, the company shall cease to carry on its business, except so far as may be required for the beneficial winding up of it.

. . .

(3) On the appointment of a liquidator, other than a provisional liquidator, all the powers of the directors of the company shall cease, except so far as—

(a) in the case of a winding up by the court or a creditors' voluntary winding up, the committee of inspection or, if there is no such committee, the creditors, sanction (in either case, with the approval of the liquidator) the continuance of those powers, or

(b) in the case of a members' voluntary winding up, the members in general meeting . . . . ". (emphasis added)

(4) The continuance of the directors' powers by virtue of a sanction under subsection (3) shall not, in any case, and notwithstanding anything in section 40, operate to give precedence to any decision or act of the directors made or done during the course of the winding up over that made or done by the liquidator in respect of the matter concerned and, without prejudice to the foregoing, no decision or act made or done by the directors in respect of a matter falling within section 627 shall be valid unless made or done with the prior consent of the liquidator . . .

(5) The court may, on application to it by a person aggrieved, grant such relief as it thinks appropriate from the sanction of invalidity provided under subsection (4) if it is

satisfied that the person (not being an officer of the company) acted in good faith in the matter".

101. On its face, s. 677 contemplates the prospect that from time to time after a liquidator's appointment, sanction may be granted for directors or others to exercise powers associated with the affairs of the company. Such sanction is rarely granted. More importantly, where it is granted it can only have any force or effect with the prior approval of the liquidator (s. 677 (3) (a)) and the exercise of any powers so granted is subject to the prior consent of the liquidator (subsection 4).

102. The combined effect of all these provisions is to deprive directors or other officers of the company of the control which in the ordinary course is entrusted to them by virtue of their appointment over the affairs of the company. Equally for shareholders the loss of control is absolute. Therefore, should the ultimate parent of the Companies Joint Stock Company GTLK even purport to pass resolutions replacing directors or authorising directors to take any measures in relation to the affairs of the Companies or concerning assets of the Companies, such resolutions or other steps would be wholly ineffective. By virtue of their appointment, the Joint Liquidators are the only persons entitled to deal with the assets of the Companies.

103. I have no hesitation in those circumstances in making a declaration that the presumption of control for the purposes of Article 2 of the Asset Freeze Regulation, and which is identified in the Commission's FAQs last updated on 6 July 2023, is conclusively rebutted by the order for the winding up of the Company and the appointment of the Joint Liquidators.

Beneficial ownership of the assets of the Companies

104. The proposition that on a winding up the company ceases to be the beneficial owner of its assets and that the directors no longer have power to dispose of them was clearly stated by the Supreme Court (Blayney J.) in *Re: Frederick Inns Limited* [1994] 1 ILRM 387. That

case concerned payments made by an insolvent company in respect of tax liabilities of other companies in the relevant group of companies. The High Court (Lardner J.) held that the payments were ultra vires.

105. Blayney J. stated the position as follows: -

> *" . . . as soon as a winding-up order has been made the company ceases to be the beneficial owner of its assets, with the result that the directors no longer have power to dispose of them. Where, as here, a company's situation was such that any creditor could have caused it to be wound up on the ground of insolvency, I consider that it can equally well be said that the company had ceased to be the beneficial owner of its assets with the result that the directors would have had no power to use the company's assets to discharge the liabilities of other companies. Once the company clearly had to be wound up and its assets applied pro tanto in discharge of its liabilities, the directors had a duty to the creditors to preserve the assets to enable this to be done, or at least not to dissipate them".*

106. In *Re: Lance Investments Limited (in liquidation) & Ors.* [2018] IEHC 444, Baker J. considered the position of a company after a winding up has commenced and identified what she described as the "statutory trust" which comes into effect on the commencement of an insolvent winding up: -

> *"20. In Ayerst (Inspector of Taxes) v. C&K Construction Ltd. [1976] AC 167, the House of Lords described the effect of a winding-up as divesting a company of the 'beneficial ownership' of its assets, since it could not thereafter use them for its own benefit.*
>
> *21. It is often said that a 'trust' comes into existence on a winding-up, such that while the company is not divested of its assets and continues to be alive, the assets are fixed with a trust so that the company is no longer entitled to the benefit of the assets or the*

proceeds of sale. In Ayerst v. C&K, Diplock L.J. described the functions of a liquidator as 'similar to those of a trustee' or a personal representative in the estate of a deceased person, subject only to the proviso that, unlike in those examples, the legal title does not vest in the liquidator as it would in a trustee, personal representative, etc. Diplock L.J. was describing the effect of the UK legislation which directed the priority of payments by a liquidator.

22. . . . . The principle has a statutory origin and derives from the fact that, on a winding-up, the beneficial interest in the assets of a company no longer belongs to the company, and a 'trust' is created by the statutory scheme that directs the manner in which the assets of the company are to be distributed by the liquidator".

107. Baker J. cited with approval the judgment of Blayney J. in *Re: Frederick Inns Limited*, quoted above.

108. In *Re: Mouldpro International Limited (in liquidation)* [2018] IECA 88, Whelan J. considered the role of a liquidator as trustee. She said that it was important to draw distinction between the strict concept of a trust as understood in equity and the "statutory trust". She continued: -

"it is important to draw a distinction between the strict concept of a trust as understood in equity and the statutory trust which the liquidator's position to encompass".

109. She quoted Mellish L.J. in in Oriental Inland Steam Co. (1874) 9 Ch. App. 557, stating: -

"...in a winding up the legal estate still remains in the company. But, in my opinion, the beneficial interest is clearly taken out of the company. What the statute says …is that from the time of the winding up order all the powers of the directors of the company…shall be wholly determined and nobody shall have any power to deal with

them except the official liquidator, and he is to deal with them for the purpose of collecting the assets and dividing them amongst the creditors. It appears to me that that does in strictness, constitute a trust for the benefit of all the creditors".

110. Whelan J. identified distinctions between the *"the statutory trusts governing the liquidator's dealings with the assets of a company in a winding up and the rules of equity which govern a trust of assets established voluntarily by deed or will."*

111. She emphasised that "a liquidator does not owe to the members of the company or individual creditors all the obligations that a trustee in equity owes to a *cestui que* trust".

112. She stated: -

"The statutory trust arising in a liquidation is a legal construct which confers no beneficial interest on the creditors.

The trust arising requires the liquidator to exercise relevant statutory powers for the benefit only of parties entitled to share in the realisation of the assets pursuant to the statutory scheme".

113. When regard is had to the priority which Section 618 confers on creditors over shareholders, the logic for all those statements as to beneficial ownership and the use of the term "statutory trust" is clear. The principles may be summarised and applied to this case as follows:

(1) On the appointment of the Joint Liquidators the Companies ceased to be the beneficial owner of their assets;

(2) the assets are held by the Companies, now under the control and authority of the Joint Liquidators, on trust for their creditors;

(3) the duty of the Joint Liquidators is to get in and realise the assets and apply their proceeds in accordance with the scheme of priorities prescribed by the Companies Act 2014;

(4) I have already declared (in paragraph 103) that the presumption of control by the ultimate parent Joint Stock Company GTLK is rebutted.

114. Having regard to the Sanctions Regulations, it is appropriate in this case to declare that no distribution shall be made to the ultimate shareholders pursuant to s. 618 (1)(b) or otherwise absent a further order of the court.

115. In light of submissions made by the Central Bank of Ireland particular to the circumstances of this case it is appropriate to direct that any surplus funds or assets available after discharge of costs, expenses and liabilities of the Companies, be lodged to an account held with a credit institution established in Ireland and licensed pursuant to the Central Bank Act 1971, and not made available to the ultimate parent of the Companies absent further order of this Court. The Central Bank will be a notice party on any application for such order. This direction is included in the order I made on 11 July 2023, which is recited fully at paragraph 78 above.