THE COURT OF APPEAL

UNAPPROVED

Record Number: 2024/41
High Court Record Number: 2023/88 COS
Neutral Citation Number [2024] IECA 165

Noonan J.

Binchy J.

Butler J.

IN THE MATTER OF GTLK EUROPE DAC (IN LIQUIDATION)

AND IN THE MATTER OF THE COMPANIES ACT 2014

AND IN THE MATTER OF AN APPLICATION PURSUANT TO SECTION 631 OF THE COMPANIES ACT 2014

BETWEEN/

JULIAN MORONEY AND DAMIEN MURRAN (AS JOINT LIQUIDATORS OF GTLK EUROPE DAC (IN LIQUIDATION))

APPLICANTS/RESPONDENTS

-AND-

JOINT STOCK COMPANY "STATE TRANSPORT LEASING COMPANY"

RESPONDENT/APPELLANT

-AND-

STLC EUROPE TWENTY EIGHT LEASING LIMITED, STLC EUROPE ELEVEN LEASING LIMITED, STLC EUROPE TWENTY SEVEN LEASING LIMITED, STLC EUROPE TWENTY TWO LEASING LIMITED, STLC EUROPE FOUR LEASING LIMITED, STLC EUROPE TWO LEASING

LIMITED, STLC EUROPE ONE LEASING LIMITED, STLC EUROPE FOURTEEN LEASING LIMITED AND STLC EUROPE SIXTEEN LEASING LIMITED

NOTICE PARTIES

JUDGMENT of Mr. Justice Noonan delivered on the 26th day of June, 2024

1. The fundamental issue arising in this application is whether, or to what extent, a defendant/respondent who does not appear before the High Court in the matter in issue is entitled to pursue an appeal to this Court. Relevant to that issue is the question of whether the appellant's failure to appear was deliberate, inadvertent, or due to circumstances beyond its control.

2. The appellant ("JSC") is a corporate entity wholly owned by the Russian Federation and was described during the course of this appeal as in effect part of the Russian transport ministry. Its core business concerns the leasing of aircraft and ships to commercial operators.

3. These proceedings involve two subsidiaries of JSC, GTLK Europe DAC and GTLK Europe Capital DAC (collectively "GTLK"), both of which are companies incorporated under the laws of Ireland. These companies were put into liquidation by order of the High Court made on the 31st May, 2023 and the respondents were appointed joint liquidators of those companies ("the Liquidators").

4. By virtue of certain measures implemented by the European Union, the United States and the United Kingdom following the invasion of Ukraine by the Russian Federation, JSC is a sanctioned entity. The primary assets of GTLK comprise 37 commercial aircraft collectively valued for insurance purposes at in excess of $2bn. These aircraft are currently

in the Russian Federation and apparently under the control of JSC. The Liquidators consider that the prospect of recovering any of these aircraft is remote and have made a claim against the insurers of the aircraft before the courts, both in Ireland and in England and Wales.

5. On the 29th March, 2022, GTLK entered into certain agreements described as pledge agreements with JSC, the purported effect of which was to grant JSC security in the form of charges over the aircraft on foot of certain advances allegedly made by JSC to GTLK.

6. The Liquidators appear to have been unaware of these pledges until they received correspondence from JSC on the 29th September, 2023 claiming that JSC was the owner of the 37 aircraft pursuant to these agreements. Having examined the matter, the Liquidators formed the view that the pledge agreements were void or voidable and, accordingly, they brought an application before the High Court pursuant to s. 631 of the Companies Act 2014 seeking declarations.

7. Ultimately, a hearing took place before the High Court (Mulcahy J.), in which JSC did not participate, and resulted in certain declarations being granted by the court declaring the pledge agreements to be void. It is against that judgment and order that this appeal is now brought.

8. The timeline to the application made to the High Court by the Liquidators is central to certain preliminary issues that are the subject of this judgment and accordingly I propose to set out the relevant chronology:

6th November 2023 - The Liquidators wrote to JSC in response to the latter's correspondence disclosing the existence of the pledges contesting their validity. As noted in the judgment of the High Court, no substantive response was ever received to this correspondence.

21st November 2023 - The Liquidators applied to the High Court for an order for substituted service of their application by way of email on JSC, which order was granted.

22nd November 2023 - The Liquidators issued a motion seeking declaratory relief which was served by email in accordance with the order for substituted service. The motion was made returnable before the High Court on the 28th November, 2023.

28th November 2023 - The matter came before the High Court (Sanfey J.) in the Chancery list for the first time, for the purpose of directions. There was no appearance by JSC. The court adjourned the matter until the 5th December, 2023 and directed the Liquidators to provide JSC with a link to facilitate remote attendance at the hearing. The court also made a direction allowing JSC until the 4th December, 2023 to confirm whether it intended to participate in the High Court application and giving the parties liberty to apply to vary the directions in the event that the appellant elected to participate.

Also on this date, an important letter was sent on behalf of JSC. The author of the letter was Mr. Artur Zurabyan, described as advocate, partner, head of dispute resolution and arbitration practice at ART DE LEX Law Firm in Moscow. This law firm represented JSC throughout. The addressees of the letter include *"Mr. Justice Mark Sanfey, the High Court (Ireland)"* and the Liquidators. The letter is captioned:

> *"Ref: Lack of jurisdiction and inability to initiate disputes in respect of GTLK in the High Court (Ireland)"*

In this letter, Mr. Zurabyan confirms that JSC had received the proceedings on the 22nd November, 2023 claiming the relevant declarations concerning the pledge agreements. By the terms of the letter, JSC notified the High Court, the Liquidators and GTLK of a number of matters. First, the letter sets out in detail the claim that the Irish High Court lacks any

jurisdiction to consider any claims concerning the validity of the pledge agreements which fall exclusively within the jurisdiction of the Russian courts. The letter goes on to note:

> *"3. The lack of jurisdiction of the High Court (Ireland) and other judicial authorities other than competent Russian courts obviously follows from the application of unilateral sanctions against [JSC] by the European Union, the United Kingdom and the United States. This circumstance in itself is a sufficient ground for substantial doubts that an impartial trial and access to justice are ever possible in the sanctioning country."*

The letter goes on to make the point that both the law of the Russian Federation and the terms of the pledge agreement themselves confer exclusive jurisdiction on the Russian courts. The letter continued that JSC would apply to the *"Arbitrazh Court of the Yamalo - Nenets Autonomous Okrug (the Russian Federation) for an anti-suit injunction in respect of any disputes relating to the pledge agreements and [JSC's] legal title to the aircraft"*.

9. Mr. Zurabyan says that the effect of such an injunction would be to restrain the Irish proceedings and impose criminal liability for any breach of that restraint. He goes on to say that legal title to the aircraft now vests in JSC by virtue of the pledge agreements and Russian law.

10. The letter concludes in the following terms:

> *"[JSC] reserves the right to disclose the arguments and present the legal basis of its position, when the dispute is considered by a competent court.*
>
> *In view of the above, [JSC] requires joint liquidators not to institute any legal (including arbitration) proceedings involving the pledge agreements and/or [JSC's]*

> *legal title to the aircraft under a threat of application of the liability measures established by the mandatory provisions of Russian law."*

The first sentence above is a clear statement that JSC would present its case only when the dispute is considered by a competent court i.e., a court in Russia. While the letter states that JSC requires the Liquidators not to initiate legal proceedings, the proceedings had already been initiated and served on JSC by that time, as Mr. Zurabyan was aware.

On the same date, the Liquidators' solicitors notified JSC that the High Court had adjourned the matter to the 5th December, 2023 and provided a remote link as directed by the court.

29th November 2023 - It would appear that on this date, JSC instituted anti-suit injunction ("ASI") proceedings in the Russian courts by filing a document equivalent to a statement of claim. The document includes a lengthy statement of the basis for the claim and includes the following:

> *"Although both the mortgage agreements and the entire procedure for enforcement against the aircraft full (sic) comply with Russian law [JSC] believes that the liquidator's claims are likely to be satisfied, at least because [JSC] is in fact deprived of the opportunity to present its position to the High Court of Ireland and will not have access to qualified legal assistance in the jurisdiction of Ireland (this is the case detailed below)."*

The document goes on to refer to the correspondence and proceedings concerning the claim in Ireland and says:

> *"[JSC] has in response sent a message that it does not recognise the jurisdiction of the Irish High Court with respect to the subject matter of the dispute and intends to*

apply to the competent Russian arbitration court with an application to establish the anti-claim injunction …"

1st December 2023 - The Liquidators' solicitors replied to Mr. Zurabyan's letter of the 28th November. The claims in the latter correspondence were refuted in full, with the Liquidators contending that the Irish courts had exclusive jurisdiction in the matter. The letter confirmed that the matter would proceed on the 5th December before the High Court as previously advised.

5th December 2023 - The matter came before Sanfey J. when there was again no appearance by or on behalf of JSC. In the absence of confirmation from JSC that it had intended to participate in the matter, the court listed the substantive hearing of the application for the 14th December, 2023. The Liquidators were directed to deliver legal submissions and any supplemental affidavits by the 11th December, 2023. The Liquidators' solicitors wrote to JSC and Mr. Zurabyan on the same date informing them of the court's directions.

7th December 2023 - The matter appeared in the usual Chancery Call Over List which facilitates remote attendance and again, there was no appearance by JSC.

11th December 2023 - The Liquidators' solicitors served a further affidavit and legal submissions on JSC noting that the matter was listed for hearing for one full day before Mulcahy J. on Thursday the 14th December, 2023.

13th December 2023 - At 4:51pm, Mr. Zurabyan sent an email to GTLK, the Irish Supreme Court and the Liquidators' solicitors. The purpose of this letter was to inform the addressees that the Arbitrazh Court of the Yamalo-Nenets region had granted an interim injunction the previous day prohibiting the Liquidators from continuing the proceedings in Ireland until final order of the Russian court. The addressees were advised that non-compliance may

result in a judicial fine and may entail criminal liability under Russian law. Mr. Zurabyan followed up this email with a further communication less than an hour later reiterating that the High Court lacked jurisdiction to consider the matter and JSC's position was set out in its letter of the 28th November, 2023 which could not be construed as a waiver of its position on jurisdiction. Mr. Zurabyan noted that *"notwithstanding of the obvious absence of competence"* the High Court had scheduled a hearing for the next day, the 14th December and he required a remote link so as to have the *"possibility to receive actual information about these proceedings."* He again reminded the addressees of the legally binding order of the Russian court prohibiting the continuation of the proceedings in Ireland. The Liquidators' solicitors responded saying they are seeking the court's permission to provide such a link.

14th December 2023 - The matter proceeded before Mulcahy J., a remote link having been provided with the court's permission. It would appear that the hearing was joined on the link by a number of unidentified parties but there was no appearance or participation by or on behalf of JSC at the hearing. At the conclusion of the hearing, the court indicated that it would deliver an *ex tempore* judgment on the 19th December, 2023.

19th December 2023 - Mulcahy J. delivered judgment in which he found the pledges to be void and granted declarations accordingly. The order was perfected on the 18th January, 2024. Mr. Zurabyan again wrote in the afternoon of the 19th December seeking a copy of the judgment and complaining that despite being informed of the order of the Russian court, the Liquidators proceeded to violate the ruling by trying *"to push the case forward."*

11th January 2024 - It would appear that on this date, the interim ASI made by the Russian court became a final order.

17th January 2024 - An unconditional appearance was entered by Irish solicitors on behalf of JSC.

14th February 2024 - JSC served a notice of appeal which sets out 63 grounds of appeal.

28th February 2024 - A respondent's notice was served by the Liquidators. In addition to taking issue with the grounds of appeal, the Liquidators raised two preliminary objections in this notice. The first objection is that having failed to participate in the High Court application, it is impermissible for JSC to maintain this appeal or, in the alternative, to advance any of the grounds of appeal in circumstances where none were advanced or considered in the High Court. The second preliminary objection of the Liquidators is that, having regard to its conduct in relation to the High Court application, JSC is now estopped from maintaining this appeal. Further, the Liquidators contend that JSC cannot maintain an objection to the jurisdiction of the Irish courts having entered an unconditional appearance.

20th March 2024 - JSC applied to the High Court for a stay on its order pending appeal.

21st March 2024 - The High Court delivered an *ex tempore* judgment on the stay application refusing it. In his judgment, Mulcahy J. said that he was prepared for the purposes of the application to assume that there is an arguable case on appeal but the balance of justice would rarely favour affording a stay to a party that did not participate in the hearing before the High Court. He held further that he was not persuaded that JSC had demonstrated any prejudice it might suffer in the absence of a stay being granted, whereas on the other hand, there may be prejudice to the Liquidators by the grant of the stay. However, and probably most fundamentally, the judge found that it was misconceived to seek a stay on declaratory orders and in all the circumstances, he refused the application.

28th March 2024 - JSC brought an application before the Court of Appeal again seeking a stay on the order of the High Court pending the determination of the appeal. That application was grounded upon the affidavit of Mikael Kadochnikof, a director of JSC, which is considered further below.

5th April 2024 - Mr. Kadochnikof's affidavit was replied to by Julian Moroney on behalf of the Liquidators.

19th April 2024 - JSC's application for a stay was heard by the directions judge, Costello J., who delivered an *ex tempore* judgment on the same day refusing the application. This is also considered below. Following that ruling, on the application of JSC, Costello J. directed that there should be a hearing of the preliminary objections raised in the respondent's notice on the 29th May, 2024 and, subject to the outcome of that hearing, fixed the hearing of the full appeal for the 1st and 2nd of July, 2024.

The affidavits

11. Mr. Kadochnikof

Mr. Kadochnikof swore an affidavit on the 28th March, 2024 for the purpose of grounding both an application for a stay and a determination of the preliminary objections. He avers that he has been employed by JSC since 2020 and holds the position of First Deputy General Director since 2022. He is also a director of GTLK since the 15th March, 2022 although his powers in that regard ceased on the appointment of the Liquidators on the 31st May, 2023.

12. Mr. Kadochnikof sets out in detail extracts from the respondent's notice including elements of the chronology above. At paras. 11 - 26 inclusive of his affidavit, Mr. Kadochnikof deals with the non-appearance by JSC in the High Court. He refers to the fact that Russian companies, and in particular sanctioned companies, faced considerable

difficulty engaging legal counsel in Ireland to represent them. He deposes that there was significant difficulty in securing the service of Irish lawyers for the GTLK liquidation proceedings and many lawyers in Ireland were contacted, all of whom refused to represent GTLK, before finally securing the services of a firm for that purpose.

13. Mr. Kadochnikof says that given that the whole of the application in the High Court took less than a month between the issue of the motion and the delivery of judgment, it proved impossible for JSC to obtain representation in Ireland. He goes on to say (in para. 16):

> *"For clarity, in November and December 2023, [JSC] was continuing in its attempts to secure legal representation in Ireland. For that end, [JSC] requested assistance from several reputable Russian law firms with strong international connections. However, despite the efforts of these firms, no representation in Ireland could be secured."*

He then refers to a list of firms contacted who refused to engage in the matter and exhibits three letters from Russian law firms in support of his averment. The first letter is dated the 26th March, 2024 from B.I.R.C.H. Attorneys at Law Offices St. Petersburg. This letter says, *inter alia*:

> *"In April 2023, we were approached by [JSC] with a request to engage an Irish counsel and represent [JSC] in liquidation proceedings of its Irish subsidiary."*

14. Clearly, therefore, this letter relates to the liquidation proceedings concerning GTLK seven months earlier and is of no relevance to this application. Although B.I.R.C.H. was unable to secure representation for JSC in the liquidation matter, clearly somebody else was, given that JSC was ultimately represented in those proceedings. This letter therefore

provides no support for the suggestion that JSC was unable to obtain representation in Ireland in November 2023.

The next letter is from Mr. Zurabyan of ART DE LEX and says, *inter alia*, the following:

> *"Nevertheless, throughout 2023, and particular in November-December, we have made several enquiries in an attempt to engage Irish counsel: …"*

15. Mr. Zurabyan then identifies three firms only who either ignored or rejected his request for representation on behalf of JSC. As in the previous letter, Mr. Kadochnikof does not exhibit any of the letters to the law firms concerned.

The final letter dated the 27th March, 2024 is from the Moscow firm RGD. This letter states that in 2023, RGD was approached by GTLK, not by JSC, with a request to assist in the engagement of legal counsel. It goes on to say that the firm contacted virtually every law firm in Ireland appearing in legal ranking journals and identifies a number of these. However, since these approaches were apparently made on behalf of GTLK, they were clearly related to the liquidation proceedings and not to the period concerning this application, by which time GTLK was under the control of the Liquidators. The letter goes on to say:

> *"In early January 2024 [JSC] asked us to engage an Irish counsel to represent [JSC] in Irish court proceedings initiated by Julian Moroney and Damian Murran as the joint liquidators of GTLK Europe DAC (in Liquidation)."*

16. This letter accordingly demonstrates that the first attempt made by JSC to obtain representation in relation to this application was made in January 2024, after the matter had been already determined by the High Court. As with the previous letters, no correspondence to the Irish law firms concerned is exhibited.

17. It appears to me therefore that this correspondence provides scant, if any, support for the averment at para. 16 of Mr. Kadochnikof's affidavit and if anything, contradicts it. At paragraph 17 of his affidavit, Mr. Kadochnikof says that *"[JSC] was deprived of the opportunity to present its position to the High Court of Ireland and would not have access to qualified legal assistance in the jurisdiction of Ireland."* He avers that this was set out in ART DE LEX's communications to the Liquidators' solicitors in advance of the hearing before the High Court.

18. However, a close reading of the correspondence from ART DE LEX finds no suggestion that it, or its client JSC, was deprived of the opportunity to present its position to the High Court of Ireland. On the contrary, the correspondence to which I have already referred makes clear that JSC would not be presenting its position to the High Court but only to a court of competent jurisdiction, which, as far as JSC's correspondence was concerned, was a Russian court. Accordingly, what is stated in para. 17 of Mr. Kadochnikof's affidavit appears to be at variance with the facts.

19. At paragraph 18, Mr. Kadochnikof avers:

> *"I say and I am advised that [JSC's] position and understanding was that [JSC] could not attend and appear before the Irish courts without representation through legal counsel recognised by the courts of Ireland. I would however further say that [JSC] and/or its Russian counsel were not in a position to attend at the 14 December 2023 High Court hearing by virtual attendance using a hyperlink in light of our concerns that by doing so, [JSC] would prejudice its position that the Irish courts had no jurisdiction to hear the application. This was a position in respect of which [JSC] did not have the benefit of advice from Irish counsel..."*

20. In the same vein, Mr. Kadochnikof says at paragraph 21:

> *"For clarity, your deponent confirms on behalf of [JSC] that even though [JSC] never accepted jurisdiction of Irish courts, it was always [JSC's] intention to oppose the application which has given rise to the order of 19 December 2023 and the only reason [JSC] did not appear at the hearing was due to it being unable to retain Irish counsel to advise it with regard to its position in dealing with the proceedings."*

21. If that was in fact JSC's position in November and December 2023, it is in my view wholly remarkable that this was never articulated in the detailed and assertive correspondence sent by ART DE LEX. No mention is made in that correspondence of any intention to instruct Irish lawyers nor is there any suggestion that further time might be needed for that purpose. It will be recalled that the High Court expressly directed that JSC be asked whether it wished to participate in the matter before it proceeded, and it resolutely declined to do so, despite being afforded every opportunity by the High Court.

22. On the contrary, and again despite seeking remote access to the hearing, and it being availed of, no communication was made to the court or the Liquidators, either orally or in writing, to the effect that JSC wished to participate, wished to retain lawyers and wanted more time to do so. It is in my view inconceivable that had such a desire been communicated to the High Court, it would not have afforded such additional time as it required to JSC to enable it to instruct lawyers and participate fully. Instead, JSC through its Russian lawyers made clear that not only would it not participate in the proceedings, but it was going to, and did in fact, seek an injunction before the Russian courts restraining the pursuit of those proceedings on pain of criminal liability on the part of the Liquidators.

23. The assertions of Mr. Kadochnikof in this regard become all the more difficult to credit when one has regard to an earlier judgment of the High Court drawn to this Court's attention by counsel for the Liquidators at the hearing of the preliminary objections application.

24. In *Compagnie de Bauxite et D'Alumine de Dian-Dian S.A. v GTLK Europe Designated Activity Company* [2023] IEHC 324, GTLK were sued by the plaintiff for US$20m for breach of the terms of a guarantee entered into by GTLK on the 18th May, 2021. This matter appears to have come before the High Court (Twomey J.) during the period when it will be recalled that Mr. Kadochnikof was one of two directors of GTLK. The proceedings were issued on the 17th October, 2022 and after no appearance was entered by GTLK, the plaintiff's solicitors wrote to GTLK on the 27th October, 2022 informing it that failing the filing of an appearance within 21 days, it would seek judgment in default. As noted at para. 20 of the judgment, GTLK replied on the 4th November, 2022 stating:

> *"Please be advised that to date we have been unable to obtain legal representation to adequately defend the within proceedings despite continued efforts to do so.*
>
> *We hope to be in a position to enter an appearance in advance of the expiry of 28 days from the date of your letter of the 27 October 2022".*

The judgment continued (at paras. 23 - 24):

> *"On the 9th December, 2022 GTLK entered a conditional appearance (i.e., solely to contest the jurisdiction of the Irish courts to deal with the proceedings). However, this appearance was not entered by solicitors on behalf of GTLK, rather it was entered by GTLK on its own behalf.*
>
> *24. The reason why [GTLK] entered a conditional appearance in this matter, rather than having solicitors do so on its behalf, is explained by GTLK in its letter dated 8th December, 2022 … where it states, inter alia, that:*
>
> > *'Unfortunately, despite desperate attempts, we have been unable to obtain counsel to defend the proceedings on our behalf. This is mainly due to the*

fact that all our funds are frozen and any payment to legal advisors would have to be approved by the Central Bank of Ireland (post the work being carried out) and paid after the fact, which in reality would not be for another three months - too much risk and uncertainty exists given the volume of work involved.

However, we believe it is highly appropriate for your client to be joined to the proceedings in the interests of justice. With a view to being extra prudent, we have attempted to file a conditional appearance in our own capacity. We attach a copy of same for your attention. The appearance is conditional due to the jurisdictional point which we say is quite clear. Additionally, in the interests of justice and in an exception to the rule in Battle (Allied Irish Banks v Aqua Fresh Fish Limited; 2018), it is clearly appropriate that the company can enter an appearance on its own behalf. The entering of an appearance is being carried out to avoid judgment in default - unfortunately, due to our inability to obtain counsel, we will be reliant upon your client to articulate any legal arguments.'"

25. The judgment does not disclose the identity of the author of this letter but if it was not Mr. Kadochnikof himself, it is difficult to conceive that he would have been other than fully conversant with its contents. It is also significant to note that it is apparent that GTLK were fully legally represented when the matter came on for hearing before Twomey J. However, apparently before lawyers were even instructed, it is noteworthy that the letter from GTLK referenced above appears to display a significant knowledge of Irish jurisprudence, not just in the context of entering a conditional appearance to contest jurisdiction, but also the legal principles relevant to the appearance of a corporate entity before the courts in this jurisdiction

by virtue of the rule in *Battle v Irish Art Promotion Centre* [1968] I.R 252, as discussed in *Allied Irish Banks plc v Aqua Fresh Fish Limited* [2019] 1 I.R. 517.

26. These facts sit very uneasily with Mr. Kadochnikof's averment that if JSC sought to participate in any way in the matter before the High Court without the benefit of Irish lawyers, it would prejudice its position that the Irish courts had no jurisdiction to hear the matter. It is plain that Mr. Kadochnikof was, in late 2023, already well aware that the mechanism of a conditional appearance could be availed of for the purpose of contesting jurisdiction and GTLK entered just such an appearance on its own behalf in those proceedings.

27. Mr. Moroney

Mr. Kadochnikof's affidavit was replied to in an affidavit sworn by Mr. Moroney on the 5th April, 2024. Mr. Moroney points to some of the inconsistencies in Mr. Kadochnikof's affidavit which I have already highlighted. He avers, *inter alia*, at para. 38:

> *"... No suggestion was ever advanced on behalf of the appellant that it wished to participate in the directions application but required additional time to obtain appropriate legal representation in Ireland."*

He also questions the fact that JSC apparently was able to obtain legal representation within one month of the High Court order being handed down but could not do so at any time before that. At para. 47, he also refers to the RGD letter which I have alluded to above to the effect that JSC only sought legal representation in Ireland as of January 2024.

28. It is to my mind significant that the many criticisms made by Mr. Moroney of JSC's position as outlined in the affidavit of Mr. Kadochnikof were not further replied to, despite the fact that a further affidavit responding to Mr. Moroney's affidavit was sworn by JSC's

Irish solicitor. The assertion by JSC that it wished to appear before the High Court but was unable to do so because it could not obtain legal representation is therefore, in my judgment, entirely lacking in credibility. I am satisfied that a consideration of all the evidence demonstrates clearly that JSC made a deliberate choice to eschew participation in the proceedings and instead, to pursue ASI proceedings before the Russian court. For unexplained reasons, JSC now appears to have changed its mind.

The stay application in this Court

29. The application for a stay on the order of the High Court was grounded upon the same affidavits as concern this preliminary objections application. On the jurisdiction question, Costello J. noted that despite the entry of an unconditional appearance, JSC is still contesting the issue of the jurisdiction of the Irish courts. The Court found as follows on this issue: -

> *"In my judgment it is not open to the appellant to seek an injunction or a stay from the court while still maintaining that the party has not submitted to the jurisdiction. In this sense the application could be described as an abuse of the process of the courts and should be refused in the sense that one cannot both approbate and reprobate the jurisdiction of the court.*
>
> *It is not the case that there was no remedy ever available to the appellant. It always would have been possible for the appellant to have followed the appropriate procedure which was to file a conditional appearance and bring a motion seeking to contest the jurisdiction of the court before proceeding further."*

30. Costello J. also considered the issue of the *bona fides* of the appeal as this was, in her view, relevant to the grant of a stay. She said in this regard: -

"In addition I canvassed the issue whether the appeal was bona fide or tactical because, if this is so and if this court is of that view, then it should refuse the stay based on the decisions in Lobar and Danske Bank. The problem, as I see it, arises from the basis upon which the 'stay on execution' was sought.

In correspondence in November 2023 the Russian lawyers acting for the appellant contested the jurisdiction of the Irish courts and said that it could not get a fair hearing in Ireland. Under cover of an email of the 29th November 2023 the Russian lawyers acting for the appellant sent a copy of the statement of claim where the appellant sued the joint liquidators in anti-suit proceedings in Russia…

Counsel on behalf of the appellant referred me to page 6 of the statement of claim in the Russian proceedings to support the contention that the difficulty of representation had been raised by the appellant prior to the decision of the High Court. I quote from paragraph 6 of the statement of claim and the translation furnished by the appellant:

> *'Although both the mortgage agreements and the entire procedure for enforcement against the aircraft full (sic) complies Russian law, [JSC] believes that the liquidator's claims are likely to be satisfied at least because [JSC] is in fact deprived of the opportunity to present its position to the High Court of Ireland and will not have access to qualified legal assistance in the jurisdiction of Ireland. This is the case detailed below.'*

… In my judgment a pleading to that effect on 28th November cannot be true. Firstly, the hearing had not yet taken place and didn't take place until 14th December 2023, therefore it had not yet exhausted their efforts to obtain counsel to act on their behalf.

Secondly, the appellant had not asked for any accommodation such as an adjournment of the application to afford them further opportunity to obtain legal representation.

And, thirdly, they were not as a matter of law or fact unable to get representation as they were able to do so by the 17th January, 2024. So the question really was when did they look, how long did they look and how long did they need to obtain representation. The pleading in the Russian statement of claim was not correct."

31. The same argument has been advanced in the application before this panel i.e., to the effect that the Liquidators were on notice of the fact that prior to the hearing of the matter in the High Court, JSC was unable to procure legal representation. However, in that context, Costello J. analysed the correspondence that I have already referred to and came to the same conclusion, namely that it did not bear out the suggestion that JSC was unable to obtain legal representation before the High Court. Costello J. also placed particular emphasis on the absence of any suggestion that JSC needed more time to obtain legal representation in the High Court.

32. With regard to Mr. Moroney's averment in his replying affidavit that the issue of difficulty in obtaining representation was never raised by JSC in the High Court at any stage, Costello J. found, as have I, that it was *"quite remarkable that this averment is not replied to in the replying affidavit of [JSC's] solicitor…"*. The judge expressed herself satisfied that the appellant had not established on the balance of probabilities that the only reason it did not attend the hearing before the High Court on the 14th December, 2023 was because of its inability to obtain lawyers to act on its behalf at the time.

33. She went on to observe:

"That in turn causes a difficulty with accepting that the appeal is being pursued bona fide and that it is not simply a tactical appeal. The fact that significant sums of money are at stake or that there may be arguable grounds of appeal is not an answer to the concern raised. Here, for its own reasons, the appellant

(a) did not contest jurisdiction in the normal way by simultaneously contesting that Ireland lacked jurisdiction;

(b) pursued anti-suit orders in Russia at a time when these proceedings were before the High Court;

(c) I am not at all satisfied that it was ever intended to appear before the High Court because, if it had wished to do so, it would have been very possible to do so, it did not have to prejudice its position by writing and seeking further time to obtain counsel and I think that failure is very telling.

But critically even now, despite entering appearance and seeking relief from the court, it is still contesting the jurisdiction of the courts. This suffices me to allow in my judgment for the purposes of this application to conclude that the appeal is tactical and not bona fide and on this basis also I refuse the relief sought."

Costello J. went on to identify other reasons for refusing the application which are not directly material to the matter presently before the Court.

32. It is true to say that this panel of the Court is not bound by the views of Costello J. on the stay application and is free to reach its own conclusion on these issues. However, in my view no particular ground has been advanced by JSC to show why Costello J.'s reasoning was wrong or why this Court should not adopt it insofar as material now.

The non-appearance before the High Court

34. I have already come to the conclusion that JSC has failed to establish that its non-appearance before the High Court was either due to inadvertence or circumstances beyond its control. On the contrary, I am quite satisfied that the non-appearance was the product of a deliberate decision, taken for tactical reasons to pursue proceedings before the Russian courts to enjoin the Liquidators from proceeding in the Irish courts. Having elected to make that tactical decision, the question arises as to whether JSC can now pursue an appeal before this Court, not just on the merits, but also on the question of jurisdiction.

35. Where an order is obtained in the High Court in the absence of one of the parties, the Rules of the Superior Courts provide for certain remedies, depending on the circumstances of the non-attendance. Where an order is made after a trial, O. 36, r. 33 provides that:

> *"Any verdict or judgment obtained where one party does not appear at the trial may be set aside by the court, upon such terms as may seem fit, upon an application made within six days after trial."*

36. This rule was considered by the Court of Appeal in *Danske Bank v Macken* [2017] IECA 117. In those proceedings, the bank was seeking an order for possession of the defendant's family home. The defendant couple represented themselves throughout and the first defendant, Mr. Macken, appeared on numerous occasions before the High Court prior to the final hearing when judgment was given. The bank's application for possession was listed for hearing before the High Court on the 2nd November, 2015 when Mr. Macken failed to appear. He had previously appeared on some 16 occasions and filed a number of affidavits challenging the claim. When he did not appear on first or second calling, the court (Cross J.) granted an order for possession.

37. Subsequently, Mr. Macken claimed that he had been unable to attend court on the 2nd of November due to what appears to have been some medical issue, albeit that the evidence in this regard was far from satisfactory. Shortly after the order was made, Mr. Macken brought the matter back before Cross J. and made an application pursuant to O. 36, R. 33 to vacate the judgment and re-hear the matter. Cross J. declined on the basis that he was *functus officio*. This Court set aside that order and remitted the matter for re-hearing by the High Court.

38. The judgment of the Court of Appeal was delivered by Hogan J. Speaking of the general rule that once final judgment has been pronounced, the court is *functus officio,* Hogan J. said:

> *"14. Such is clearly the general rule. But O. 36, r. 33 may, however, be regarded as a minor derogation from that rule, designed as it is to deal with the special contingency of where a litigant, whether by reason of oversight or what amounts to force majeure, is prevented from actually attending court on the day in question. Every legal practitioner has had experience of where - whether through oversight, listing difficulties, transport failures, sudden indisposition or a medical or family emergency - a litigant went unrepresented and judgment was entered against them in their absence. Order 36, r. 33 is designed to deal with these types of difficulties and to ensure that justice is fairly done as between the parties where events of this kind occur. In particular, it allows the trial judge to set aside the judgment (on terms, if needs be) and proceed to determine the matter where both sides are represented without the necessity for an actual appeal.*
>
> *15. It is, of course, important to stress that a party who deliberately elects not to participate at a particular hearing may not invoke r. 33, at least in the absence of*

quite particular extenuating circumstances. If it were otherwise, then as Leggatt L.J. observed in Shocked v Goldschmidt [1988] 1 All E.R. 372, 382:

> *'... A party who chose not to be present at trial could afterwards change his mind and provided that he was prepared to pay the costs thrown away could always procure a rehearing of the matter, however much time of the court has been wasted by his decision, whatever the inconvenience to his opponent and however little his own conduct merited indulgence. That is not the law.'*

16. In Shocked, Leggatt L.J. also observed ([1998] 1 All E.R. 372, 381):

> *'Where judgment has been given after a trial it is the explanation for the absence of the absent party that is most important: unless the absence was not deliberate but was due to accident or mistake, the court would be unlikely to allow a rehearing.'"*

39. Hogan J. also referred with approval to the judgment of Dunne J. in *Nolan v Carrick* [2013] IEHC 523 where the defendant had deliberately absented himself from his trial. Having so held, Dunne J. went on to say:

> *"... It seems to me O. 36, r. 33 of the Rules of the Superior Courts, is not applicable to the facts of this case. Order 36, r. 33 is there to avail those parties who by accident or mistake or for some similar reason were not aware of the trial date and consequently suffered a judgment being given in their absence."*

Hogan J. went on to allow the appeal and remit the matter back to the High Court for hearing.

40. An analogous provision of the RSC was considered by this Court in *P.C. v The Minister for Health and Ors.* [2020] IECA 28, being O. 52, r. 12. Unlike O. 36, r. 33, which

is concerned with trials, O. 52, r. 12 is concerned with motions where one of the parties fails to attend:

> *"Where any of the parties to a motion on notice fails to attend, the Court may proceed in the absence of such party. Where the Court has so proceeded, such proceeding shall not in any manner be reheard unless the Court shall be satisfied that the party failing to attend was not guilty of wilful delay or negligence…"*

41. In that case, the plaintiff instituted proceedings by plenary summons against a number of defendants seeking certain reliefs in relation to the alleged mistreatment of a ward of court, his mother. After issuing the plenary summons, the plaintiff served a notice of motion seeking interlocutory injunctions and other reliefs. The matter came before the High Court sitting during the long vacation when the presiding judge took the view that the matter should be dealt with before the President of the High Court in the Wardship List.

42. The case was accordingly adjourned to the first Wardship List sitting of the President in the following Michaelmas term. The plaintiff did not appear before the President at either first or second calling on the return date and accordingly, the President dismissed the application and made further orders in effect restraining the plaintiff from proceeding further with those or any other proceedings in relation to his mother, the ward, other than in the Wardship List of the High Court.

43. Mr. C. then served notice of appeal to this Court in which he sought to agitate a large number of grounds concerning the manner in which the case had been conducted in the High Court by the President. Giving the judgment of the Court, with which the other members agreed, I referred to the provisions of O. 52, r. 12, going on to say:

"28. Where a genuine mistake has been made therefore, the court is entitled to rehear the matter, absent wilful delay or negligence. Had Mr. C. made a bona fide mistake, it would have been open to him to apply to the President to have the matter reheard. Courts can and frequently do strike matters out when the moving party does not attend, but it is commonplace where genuine oversight has occurred to reinstate the case. Because Mr. C. did not follow the proper course under the Rules and apply to the High Court to have the matter reheard but instead appealed, it is necessary on the unusual facts of this case for this court to make a determination concerning whether Mr. C.'s failure to attend was due to wilful default or negligence."

44. I went on to hold that it appeared probable that Mr. C. had decided not to attend the hearing but at a minimum, he was negligent in failing to do so. Having made that finding, I went on to say:

"30. Further, this court should be slow to permit the bringing of appeals against orders made in the absence of the appellant where the Rules provide a remedy before the trial court. Order 52 is but one instance and there are, for example, other provisions for the setting aside of judgments obtained by surprise or mistake. It is, however, not open to appellants to this court to decide that they will not participate in a hearing at first instance and then seek to have their case heard de novo on appeal. In general, the function of this court is to correct error in the determination of the trial court, not to hear argument for the first time from a party who deliberately absented him or herself from that court.

31. That is all the more so when the appellant was the moving party before the High Court. All parties, particularly those initiating litigation, have a duty to the

court to engage with the court's process and prosecute the litigation in a bona fide manner. A conscious decision to abstain from appearing in a matter, perhaps in anticipation of an unsuccessful outcome, and then seeking to appeal when that anticipation is realised, is a manipulation of litigation and an abuse of process."

45. In my view, that proposition applies with equal force to the facts of this case. As I have already found that the non-participation by JSC in the proceedings before the High Court was a deliberate tactical decision, it must follow that the pursuit of this appeal is an abuse of process. It would be an extraordinary state of affairs if a litigant, who could not bring themselves within the provisions of the RSC concerning the setting aside of orders made in the absence of that party, could nonetheless pursue an appeal before this Court where all issues could be agitated and decided *de novo* for the first time. For the same reasons as those identified in *P.C.*, I am accordingly satisfied that this appeal is a manifest abuse of process.

The nature of this appeal

46. JSC's notice of appeal herein runs to 63 grounds, the first 28 of which concern objections to jurisdiction. The remaining grounds concern the merits of the appeal. Since JSC elected to enter an unconditional appearance, the effect of that decision requires to be considered. Costello J. held that it was an unequivocal submission to the jurisdiction of the Irish courts. There is a well-established procedure for a defendant to contest jurisdiction. Even though, strictly speaking, the Rules of the Superior Courts only provide for the entry of a conditional appearance in cases where jurisdiction is being contested under the Brussels or Lugano Conventions (which do not apply here), the usual procedure adopted where a defendant wishes to contest jurisdiction is either to enter an appearance marked *"conditional for the purposes of contesting jurisdiction"* or to bring a motion contesting jurisdiction

before the entry of an appearance. References to the entry of a conditional appearance should therefore be construed accordingly.

47. In *Rubin v Eurofinance SA* [2013] 1 A.C. 236, the United Kingdom Supreme Court considered the rule concerning submission to jurisdiction in these terms:

> *"The general rule in the ordinary case in England is that the party alleged to have submitted to the jurisdiction of the English court must have 'taken some step which is only necessary or only useful if' an objection to jurisdiction 'has been actually waived, or if the objection has never been entertained at all'..."*

48. That is also clearly the position under Irish law - see *Transportstyrelsen v Ryanair Limited* [2012] IEHC 226.

49. The position is well summarised in Briggs, *Civil Jurisdiction and Judgments* (7th edn. Routledge 2021) at pp. 776 - 777 as follows:

> *"As a matter of elementary theory, one may see the issue of the summons as an offer by the claimant to accept the jurisdiction and adjudication of the foreign court. If by his words or conduct the defendant accepts it, the common law considers that he makes himself liable to abide by the foreign judgment when it is handed down. It is really that simple ...*
>
> *The court may sometimes be guided by the principle that actions speak louder than words. A defendant whose participation in the process of the foreign court is sufficient to show that he has submitted to or agreed to the court's jurisdiction cannot alter the situation by claiming that what he does is without prejudice to his right to challenge the jurisdiction, or that he 'reserves his rights' to object to the jurisdiction, for if he has submitted to the jurisdiction he has no such rights to reserve. What the*

defendant does may therefore, and entirely properly, be assessed as a submission to foreign court even as he claims that he is not doing so."

50. I therefore find myself in full agreement with the views expressed by Costello J. on the stay application that the entry of an unconditional appearance by JSC in this case amounts to a clear and unequivocal submission to jurisdiction, which of necessity precludes JSC from thereafter purporting to challenge that jurisdiction. Once a conditional appearance is entered or a challenge to jurisdiction is brought prior to the entry of an unconditional appearance, the defendant is thereby enabled to advance argument before the Irish court as to why it does not enjoy jurisdiction.

51. If the defendant is unsuccessful in that endeavour, then the next step is to enter an unconditional appearance and contest the case on its merits. What's more, it is clear from the judgment in *Compagnie de Bauxite v GTLK* that GTLK and its director Mr. Kadochnikof were at all times well aware of this procedure and that it was available to JSC if it wished to use it.

52. Indeed, JSC's very first ground of appeal demonstrates the paradox in which it finds itself:

"1. [The trial judge] erred in fact and in law in determining that the High Court had jurisdiction to hear the application notwithstanding the granting of an injunction against the respondents/applicants by a Russian court;"

53. This is on its face an extraordinary ground of appeal. The notice of appeal is an invocation of the jurisdiction of the Court of Appeal to hear and determine the issues raised in it. In order to invoke that jurisdiction, JSC appointed solicitors to enter an unconditional appearance on its behalf, in itself a submission to the jurisdiction of the Irish courts as I have

found. Yet in its very first ground, JSC purports to suggest that the grant of an injunction by a Russian court deprives the Irish courts of the very jurisdiction upon which JSC relies to bring this appeal. Such a contradictory position is self-evidently untenable.

54. It is a classic case of approbating and reprobating, a concept clearly explained by the Supreme Court in *Corrigan v Irish Land Commission* [1977] I.R. 317. There, Henchy J. said (at 326):

> *"The rule that a litigant will be held estopped from raising a complaint as to bias when, with knowledge of all the relevant circumstances, he expressly or impliedly abandoned it at the hearing, is founded, I believe, on public policy. It would be obviously inconsistent with the due administration of justice if a litigant were to be allowed to conceal a complaint of that nature in the hope that the tribunal will decide in his favour, while reserving to himself the right, if the tribunal gives an adverse decision, to raise the complaint of disqualification. That is something the law will not and should not allow. The complainant cannot blow hot and blow cold; he cannot approbate and then reprobate; he cannot have it both ways."*

In his judgment, Griffin J. observed (at 328):

> *"A party to proceedings before a judicial or quasi-judicial body may so act as to waive any question of disqualification which might otherwise arise. In the course of the conduct of litigation, it frequently happens that one party is confronted with the necessity of making a choice between two possible courses of action which are mutually exclusive. When this occurs, the rule of estoppel by election (or waiver) comes into play, i.e., if by words, conduct, or inaction a party represents to his adversary his intention to adopt one of two alternative and inconsistent positions, he*

will be estopped as against his adversary from subsequently resorting to the course which he has waived."

55. Litigation in our system is adversarial and this requires parties to make choices about how they conduct that litigation. Those choices will often be tactical, based on a party's view of how to pursue their case to best advantage. So how to plead, which witnesses to call and what documents to introduce in evidence are all usually matters of choice which require the opposing party to engage with those choices. As McKechnie J. put it in *DPP v Patchell* [2014] IECCA 6, at para. 26:

"... Where an appellant, during the currency of his trial, adopts a certain course of action or engages in a particular course of conduct or otherwise evidences a clear intention of pursuing a definite strategy, and does so, he will not thereafter be permitted to resile from such a position and, for self advantage, to act in a manner entirely inconsistent with his previous actions. Many of the cases describe such activities as constituting - depending on circumstances - an acquiescence or an estoppel, an election or an approbation or a waiver - although a formal categorisation is probably not required."

56. As I think is clear from these authorities, it is simply not permissible for JSC to adopt the course it has. It cannot enter an unconditional appearance and then purport to contest jurisdiction. Doing so is a clear abuse of process, and is so *a fortiori* in circumstances where it deliberately refrained from engaging in any way with the proceedings in the High Court, and now wishes to prosecute an appeal both on jurisdictional grounds and on the merits.

The raising of new issues on appeal

57. There is more than ample authority for the proposition that a party will, in general, on appeal be confined to the issues agitated in the court below. There are many reasons why this should be so, not least the fact that the determination of issues for the first time on appeal deprives the affected party of their right of appeal, which they would have enjoyed had the issue been agitated at first instance. One of the leading authorities in that regard is the well-known judgment of the Supreme Court in *Lough Swilly Shellfish Growers Co-operative Society Limited & Anor. v Bradley and Anor.* [2013] IESC 16.

58. There, O'Donnell J. (as he then was) in considering the raising of new grounds of appeal spoke of a *"sensible flexibility, by the court towards such grounds having regard to 'the interests of justice'".* Counsel for JSC here argues that this *"sensible flexibility"* should operate in favour of JSC in circumstances where, he submits, the grounds of appeal advanced were not dependent on any new evidence that was not already before the High Court. O'Donnell J. said in this regard (at para. 26):

> *"Accordingly a certain sensible flexibility is exercised by the Court depending on the demands of the case, and a similar approach could be considered when a point is sought to be argued which was not advanced in the High Court though closely connected to points which were argued, and which would not have any implication for the evidence adduced in the High Court."*

59. O'Donnell J. considered the *"spectrum of cases"* in which a new issue is sought to be argued, ranging from cases involving new evidence or making arguments diametrically opposed to those advanced in the High Court to, at the other end of the spectrum, a new formulation of an argument in relation to a point already advanced in the High Court or closely connected with it.

60. This does not get JSC very far in circumstances where no argument of any colour was advanced in the High Court on its behalf because it simply was not there. It cannot thus be said that the arguments it now wishes to raise should be permitted simply because they do not require new evidence, if that is so, and I am not necessarily satisfied that it is, but such arguments cannot by definition be closely connected with arguments which were never made previously.

61. *Lough Swilly* is certainly not authority for the proposition that some sort of casual attitude is adopted by the court to new arguments on appeal and this is clear from the subsequent judgment of the Supreme Court in *Allied Irish Banks Plc. v Ennis* [2021] IESC 12, [2021] 3 I.R. 733, where MacMenamin J. said (at para. 15):

> *"I address first, therefore, the approach in appeals from plenary hearings. In K.D. [otherwise C.] v M.C. [1985] 1 I.R. 697, Finlay C.J. observed [at p. 701] that it was a fundamental principle, arising from the exclusively appellate jurisdiction of the Supreme Court, that, save in the most exceptional circumstances, the Court should not hear and determine an issue which 'has not been tried and decided in the High Court'. However, he added that, '[t]o that fundamental rule or principle there may be exceptions, but they must be clearly required in the interests of justice'. This remains the general principle. It emphasises the weight to be given to finality in litigation, subject to rights of appeal as set out in the Constitution and statute law. To this end, litigants are required to advance their full case at first instance. But this passage from K.D. v M.C. also appropriately places the interests of justice arising in exceptional cases as an overarching principle…"*

62. At para. 18, MacMenamin J. went on to comment:

> *"But, although a grant of leave to argue new points, or raise new evidence, may arise in the interests of justice, it must be viewed from another perspective. Exceptions are not to be seen as a licence for lax procedure. There are serious competing considerations which will also concern a court when new arguments are sought to be raised on appeal. A person entitled to win a case should not be faced with the prospect of losing it because a valid and decisive point was not made at the trial at first instance. There are real dangers in allowing a practice which is over-lax in permitting new grounds to be raised on appeal. Parties must be required to make their full cases at trial. An over-generous approach to permitting new grounds to be raised on appeal for the first time could only encourage either sloppiness, imprecision, or lead to attempts to take tactical advantage (per Clarke J. in Ambrose v Shevlin [2015] IESC 10 at paras. 4.11 - 4.13, pp. 9-10)"*

63. I see nothing in these authorities which supports JSC's position. The opposite is the case. But there is in any event a question as to how relevant they are at all to the circumstances that arise in this case, where it is not simply a question of raising a new ground on appeal but of raising a case where none existed before. There is no *"sensible flexibility"* arising in the present circumstances that can be prayed in aid by JSC to, in effect, allow a first instance hearing to take place before this Court. The interests of justice could not be served by such a course.

Conclusion

64. For the reasons explained, I am satisfied that the preliminary objections raised by the Liquidators are valid and determinative of this appeal. Like Costello J., I am entirely satisfied that this appeal is not brought *bona fide* by JSC but is, as she described it, *"tactical"*

and is the clearest abuse of process. I would accordingly dismiss the appeal in its entirety. In that event, the hearing of the appeal previously listed for 1-2 July, 2024 will be vacated.

65. With regard to the question of costs, as the Liquidators have been entirely successful in this application, it would appear that they should be entitled to the costs of the application and of the appeal. If JSC wishes to contend otherwise, it will have liberty to deliver a written submission not exceeding 1,000 words within 14 days of the date of this judgment and the Liquidators will have a similar period to respond likewise. If no submission is received, an order in the terms proposed will be made.

66. As this judgment is delivered electronically, Binchy and Butler JJ. have authorised me to record their agreement with it.