APPROVED **[2023] IEHC 743**

THE HIGH COURT

Record No.: 2023/88 COS

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))

-AND-

JOINT STOCK COMPANY 'STATE TRANSPORT LEASING COMPANY

-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, STLC EUROPE SIXTEEN LEASING LIMITED

NO REDACTION REQUIRED

EX TEMPORE JUDGMENT of Mr Justice Rory Mulcahy delivered on 19 December 2023

Introduction

1. This is an application by Julian Moroney and Damien Murran as joint liquidators ("**the Joint Liquidators**") of two companies, GTLK Europe DAC and GTLK Europe Capital DAC (together "**the Companies**"), pursuant to Section 631 of the Companies Act 2014.

2. The Joint Liquidators seek various reliefs concerning pledge agreements ("**the Pledge Agreements**") entered into by the Companies on 29 March 2022 regarding 37 aircraft then owned by the Companies. The insured value of these aircraft is in excess of US$2 billion.

3. The Companies are part of a group of companies operating an international transport leasing business known as the GTLK Europe Group. GTLK Europe Group is a division of a wider group of GTLK companies that are ultimately owned and controlled by the respondent JSC GTLK ("**JSC**"), owned by the Russian Federation. GTLK Europe DAC ("**GTLKE**") is the registered owner of nine of the aircraft which are the subject matter of this application.

4. The notice parties to the application are a series of companies known as the relevant group entities, which are either wholly owned by GTLKE or owned by other relevant group entities which are, in turn, owned by GTLKE. The notice parties own the other 28 aircraft, which are the subject matter of this application.

5. The Joint Liquidators appointed the nominee directors of each relevant group entity on 26 September 2023.

6. In addition to ownership of the relevant group entities, GTLKE is named as the insured on the insurance policies for the fleet of aircraft owned by each group entity. GTLKE and/or the relevant group entities are noted as parties interested in the reinsurance certificates put in place by the lessees of each aircraft.

7. The Companies were placed in liquidation by order of the High Court (Dignam J) on 31 May 2023 in unusual circumstances. The petition was presented on 19 April 2023 by four creditors who were holders of certain of the Companies' loan notes with a significant value. The Companies contested the petition, and disputed that they were insolvent. Following an exchange of affidavits, the matter was listed for hearing on 31 May 2023.

8. However, just prior to the hearing of the petition, on 26 May 2023, GTLKE presented an examinership petition seeking to have an examiner appointed to the Companies. In this petition, the Companies contended that they were or were likely to be insolvent, i.e. unable to pay their debts as they fell due. When the conflict between the position in the two petitions was highlighted, the Companies' legal team withdrew. The winding up petition and examinership petition were then heard together, and the court made the order winding up the Companies on foot of the examinership petition.

9. Some months after the appointment of the Joint Liquidators, they received a letter from Mr AK Sarkov on behalf of JSC dated 29 September 2023. The letter contended that JSC was the owner of the 37 aircraft, the subject of this application, pursuant to its out-of-court enforcement of ten Pledge Agreements entered on 29 March 2022. These are the Pledge Agreements in respect of which the Joint Liquidators seek orders.

10. The Joint Liquidators had been unaware of the existence of these Pledge Agreements prior to receiving this correspondence and proceeded to investigate the matter. In light of their review of the books and records of the Companies, they formed the view that the Pledge Agreements were void or voidable on a number of grounds. To understand how they came to this view, it is necessary to go back in time and consider the position of GTLKE prior to and on the date the Pledge Agreements were purportedly executed.

11. GTLKE had historically secured loans from JSC pursuant to standard form loan agreements. Several of these loans are exhibited in this application, each in a similar form. Of particular significance is that before March 2022, all of the loans from JSC to the companies were unsecured.

12. On 24 February 2022, Russia invaded Ukraine. Consequently, the EU and others imposed financial and economic sanctions on persons and companies connected with the Russian Federation.

Sanctions

13. The relevant sanctions included EU Regulation 269/2014 ("**Regulation 269**") which provides for the freezing of funds and economic resources of certain persons and entities responsible for actions that undermine Ukraine's independence. JSC was added to the list of such entities on 8 April 2022. To similar effect, in the United Kingdom, the UK Sanctions and Anti-Money Laundering Act 2018 and the Russia (Sanctions) (EU Exit) Regulations 2019 were amended on 21 April 2022, and JSC was identified as a designated entity. In the Unites States, on 2 August 2022, the Office of Foreign Assets Control of the US Department of the Treasury added JSC to the list of specially designated nationals whose assets were subject to sanction. The sanctions led to the termination of GTLK Europe Group's leases and the freezing of its assets, and it was prevented from continuing its business.

14. To address the application of Regulation 269 to the companies, the Joint Liquidators brought an application to the High Court seeking, *inter alia*, an order granting a direction that the presumption of control by JSC over the companies was rebutted in circumstances where the Joint Liquidators had been appointed. That order was granted on 11 July 2023 (Quinn J). Consequently, the control of the Companies' assets, including its subsidiaries, is no longer presumed to be subject to the EU asset freeze.

15. The UK and US authorities have also granted licences to the Joint Liquidators, which enable them to deal with the Companies' assets and discharge their duties as liquidators, notwithstanding the sanctions.

16. In addition to the asset freeze sanctions, the EU introduced further trade sanctions. EU Council Regulation 833/2014 ("**Regulation 833**") has been amended on several occasions since Russia's invasion of Ukraine, including on 25 February 2022. Of

particular note, Article 3(C)(1) of Regulation 833 provides that it is prohibited to sell supply transfer or export directly or indirectly goods and technology suited for use in aviation or the space industry listed in Annex 11 and jet fuel and fuel additives as listed in Annex 20, whether or not originating in the Union, to any natural or legal person entity or body in Russia for use in Russia as of the 25 February 2022. Annex 11 has been amended to include aircraft.

17. Article 3(C)(2) also states that it shall be prohibited to provide insurance and reinsurance directly or indirectly concerning goods and technology listed in Annex 11 to any person or entity or body in Russia for use in Russia.

18. Both Regulations prohibit circumvention of their main terms.

Minutes

19. In this application, the Joint Liquidators have exhibited minutes of a series of Board meetings held by GTLKE from just prior to the introduction of the revised trade sanctions up to 24 March 2022. These minutes illustrate that the company directors were aware of their duties as directors and the necessity to act in accordance with law. It is also clear that they were aware that the company was in dire financial straits at that time. The directors had been actively considering both liquidation and examinership and received advice that the appropriate thing to do was to sell the company's assets and pay off its creditors.

20. The minutes disclose repeated discussions between the directors concerning the possibility of obtaining support from the company's parent, JSC. Mr Roman Lyadov, was the director communicating with JSC regarding such support. Despite this detailed discussion of support from JSC, there is no evidence from the minutes of any discussion regarding the Pledge Agreements.

21. It is also clear from the minutes that the directors were at all times aware of the significant impacts that the sanctions would have on the company's business and the necessity to act in accordance with the sanctions. On 15 March 2022, a Board meeting

was held. The minutes record that Mr Lyadov was appointed chairperson of GTLKE in circumstances where the other Board members and the firm of solicitors providing company secretarial services had each resigned.

22. A further meeting was held on 24 March 2022. Mr Lyadov was present as chairperson, and Mr Mikhail Kadochnikov as a director. Mr Kadochnikov is also a director of JSC. The minutes noted that the company expected to receive a large loan from GTLK Moscow in the coming days. Mr Lyadov noted that the company, an Irish legal entity as borrower and JSC, a company existing under the laws of the Russian Federation as lender, would enter into a loan agreement whereby the lender would provide the company with a loan in the amount of US$324 million. The purpose was to refinance existing company debt. The minutes note the interest rate on the loan and the repayment terms, and the minutes record that the company resolved that the loan be approved and authorised the directors to sign the loan agreement for and on behalf of the company.

23. In this application, the Joint Liquidators emphasise that in none of these minutes is there any reference to the Pledge Agreements. In particular, the minutes of 24 March 2022, which set out in detail the terms of the refinancing loan apparently to be made by JSC, there is no reference whatsoever to the Pledge Agreements which would be entered into on behalf of GTLKE by Mr Lyadov less than a week later.

The Pledge Agreements

24. GTLKE executed ten Pledge Agreements to secure the repayment of six loan agreements from JSC. Agreements in similar terms were executed on 29 March 2022 and amended on 31 March 2022. These were executed on behalf of the company by Mr Lyadov and Mr Kadochnikov.

25. The loans secured include an agreement, Loan No. 45-G, entered into on 28 March 2022 between GTLKE and JSC, executed on behalf of both of them by Mr Lyadov. This appears to be the refinancing loan for $324 million referred to in the minutes of 24 March 2022

26. The loan agreement is similar in many ways to the earlier agreements between GTLKE and JSC and are written in both English and Russian. There is, however, one critical difference, being that Loan Agreement No. 45-G contains the following security provision at 4.1:

> *"As a security for the performance of its obligations under this agreement, the Borrower undertakes to provide or arrange for the provision by third parties in favour of the Lender of security (pledge of property, pledge shares, etc.). The composition of the security is subject to agreement by the parties at the suggestion of the Lender, including and taking into account the need to obtain the consent of third parties."*

27. It is important to note that the loan agreements and Pledge Agreements are expressly made subject to Russian law, and the Joint Liquidators, quite properly, do not ask this court to interpret these agreements or their legal effect. However, it seems clear that this agreement's security provision triggered the Pledge Agreements relied on by JSC. The Pledge Agreements pledge identified aircraft as collateral for the loans, referred to as Master Agreements, secured.

28. Each Pledge Agreements contain the following provision at 4.1.14 requiring that the lender:

> *"Within 180 calendar days from the date of execution of this Agreement, on its own behalf and at its own expense, arrange insurance for the Collateral against risks of loss and damage and Pledgor's third party liability. The Pledgor undertakes to maintain insurance of the Collateral throughout the entire term of the Agreement. The terms of the insurance agreement(s) (insurance policy(s)), the relevant Insurance Rules, and the insurance company (hereinafter referred to as the Insurer) must be agreed with the Pledgee in advance. The list of insurance risks and the list of third party liability risks against which the Pledgor undertakes to arrange insurance of the Collateral is specified in Appendix No. 3 hereto."*

29. It is worth recalling that, given the provisions of Article 3(C)(2) of Regulation 833, a significant question arises as to whether this was an obligation which could ever have been complied with without contravening the sanctions. That is not an issue which I

have to or could decide, but this is a matter about which a company entering the Pledge Agreement should, in the ordinary course, have been rightly concerned.

30. In addition, the Pledge Agreements provide for foreclosure:

> *"5.1. Foreclosure on the Collateral may be applied in the event of non-fulfilment or improper fulfilment by the Debtor of the Secured Obligations, including in the event of non-fulfilment or improper fulfilment of the Pledgee's demand for early discharge of the Secured Obligations, and in other cases provided for by this Agreement and the applicable law.*
>
> *5.2. Foreclosure on the Collateral may be made, among other things, if there is a one-time violation of the payment deadlines under the Master Agreement, even if such delay is minor.*
>
> *5.3. The Pledgee shall have the right to satisfy the demands of the Debtor under the Master Agreement through the Collateral (by foreclosing on the Collateral) judicially by one of the following means:*
>
> - *selling the Collateral from public auctions…*
> - *by retention of the Collateral at a price equal to the market value of the Collateral...*
> - *selling the Collateral to a third party...*
> -

31. The amendment agreements made on 31 March 2022 amended this clause such that retention of the collateral, *i.e.* the aircraft, could be accomplished in an extra-judicial procedure.

32. The Joint Liquidators argue that the agreements could be regarded as circumventing the sanctions insofar as, if triggered and the retention of collateral clause relied on, it could be regarded as a transfer of aircraft from an EU-registered company to a company registered in the Russian Federation, in breach of Article 3(C)(1) of Regulation 833. The fact that a default event – the requirement to retain insurance - was potentially "baked in" to the Pledge Agreements with regard to the terms of Article 3(C)(2) heightens the Joint Liquidator's concern in this respect. The Joint Liquidators have

reported this potential to relevant authorities in accordance with Article 12 of Regulation 833. Again, whether there has been a breach of Article 3C(1) is not an issue I have to decide, but the possibility of circumvention was something to which GTLKE would and should have had to have regard when entering the Pledge Agreements.

33. On 22 March 2023, earlier loans between JSC and the relevant group entities were amended such that default pursuant to Loan Agreement No. 45-G constituted a default event for those earlier loans. As described by counsel, this created, in effect, a default provision in those earlier loans and appeared to have enabled JSC to enforce its security against the relevant group entities. Mr Kadochnikov executed these amendments on behalf of JSC and Mr Lyadov on behalf of GTLKE.

34. On 5 May 2023, JSC served a series of notices ("**Commencement Notices**") on the company's relevant group entities in the following terms:

> *"On commencement of extrajudicial foreclosure on the collateral*
>
> *Loan Agreement No. 45-G dated 28 March 2022 (hereinafter referred to as the Loan Agreement) was concluded between GTLK JSC (as the lender) and GTLK Europe DAC (as the borrower). Pursuant to the Borrower's obligation under clause 4.1. of the Loan Agreement, the Borrower arranged to pledge the following property.*
>
> [Each notice then identifies the aircraft pledged as security by the relevant company and the applicable Pledge Agreement]
>
> *The said pledge agreement provides for the obligation of the pledgor to arrange insurance for the collateral within 180 days from the date of signing the Pledge Agreement provided that the Pledgee (GTLK JSC) is named as the beneficiary on the risks of loss of the collateral (clause 4.1.14 of the Pledge Agreement). To date, the Collateral has not been insured, the deadline for insurance of the Collateral has expired on 25 September 2022*
>
> *To date, the debt under the Loan Agreement has not been paid,; interest has not been paid.*

In connection with GTLK Europe DAC's failure to repay the debt and interest under the loan agreement … GTLK JSC hereby notifies of the commencement of extrajudicial foreclosure proceedings against the said Pledged Property by retention in the manner specified in clause 5.3.2 of the pledge agreements."

35. By this mechanism, JSC claimed an entitlement to retain the aircraft. JSC then issued certificates of taking possession of aircraft dated 19 May 2023 ("**the Transfer Notices**") in respect of each of the 37 aircraft the subject of these proceedings. The aircraft were registered in Russia on 26 May 2023 under the ownership of JSC.

36. It is noteworthy that the sequence of events only came to light following the Joint Liquidator's investigations after receipt of the letter dated 29 September 2023 from JSC and based on documentation supplied with that letter, including the Transfer Notices, the Certificates of Registration and the Commencement Notices. In particular, notwithstanding that this extrajudicial enforcement had commenced in March 2023 and purportedly was completed by May 2023, there was no reference to it in either the affidavits sworn in opposition to the winding up petition or in the affidavit sworn in support of the examinership application.

37. Having carried out investigations, the Joint Liquidators sent a detailed letter dated 6 November 2023 to JSC. The letter stated as follows:

"2.*1 The Joint Liquidators make no admission concerning the purported agreements (including without prejudice to the generality of the preceding, the Pledge Agreements) upon which JSC have seemingly sought to rely in asserting title to the Aircraft, including the occurrence of an alleged event of default.*

2.2 Further, the Joint Liquidators make no admission as to whether the purported entering into and performance of the Loan Agreements and the Pledge Agreements, as well as any enforcement and registration procedure described above, are to any extent and in any aspect valid, binding or compliant with Russian law. The Joint Liquidators reserve all legal rights in this regard.

2.3 However, even on the basis of the documentation provided, the accompanying narrative in the letter dated 29 September 2023 and the objective facts of which the Joint Liquidators are aware, it is clear in any event that the purported Pledge Agreements are void and/or are unenforceable as a matter of Irish law."

38. The letter then set out five separate bases upon which it was alleged that the Pledge Agreements were void and/or unenforceable as a matter of Irish law. The grounds set out in the letter mirror the grounds relied on in this application for seeking the declaration sought under section 631 of the Companies Act 2014, except that one ground was not pursued at the hearing of this application. No substantive response has ever been received to this letter save for an assertion in a letter dated 28 November 2023 from JSC that the Irish courts lack jurisdiction and, in particular, that the issue of the enforceability of the Pledge Agreements is exclusively within the purview of the Russian courts. The letter also raises concerns about getting a fair hearing from the Irish court. It appears, although there is no formal evidence of this, that JSC has obtained an order from a Russian court restraining the Joint Liquidators from taking any further action with respect to the 37 aircraft.

39. Before turning to the question of jurisdiction, one further matter should be highlighted by way of background. At paragraph 168 of Mr Moroney's grounding affidavit, he acknowledges that he believes and is advised that the prospect of recovery of the aircraft is remote. The affidavit refers to the proceedings that the Joint Liquidators have taken in England and Wales seeking recovery of losses sustained pursuant to insurance policies held regarding the aircraft. The Joint Liquidators very properly acknowledge that the orders they seek in this application will be relied on in the context of those claims.

40. For instance, at paragraph 176 of his affidavit, Mr Moroney avers that any uncertainty as to whether GTLKE and/or the relevant group entities had the capacity to enter into the purported Pledge Agreements or otherwise deal with the aircraft in late March 2022 could create significant challenges for the Joint Liquidators in the insurance claims. In particular, it could be suggested that any potential issue bearing on the title of GTLKE

and other relevant group entities to the relevant aircraft must be determined prior to determining the insurance claims.

41. It appears, therefore, that the orders sought are for the purpose of facilitating the Joint Liquidators in pursuing their insurance claims rather than in any expectation that they might lead to the recovery of the aircraft. I will return to this issue below when considering the question of the appropriateness of relying on section 631 for the orders sought.

42. Before addressing the issues raised by the Joint Liquidators regarding the enforceability of the Pledge Agreements, I should say that I reject in the strongest terms the suggestion that the Respondent could not obtain a fair hearing before this court. The Respondent has been given every opportunity to participate and to make its case and has elected not to do so. As to whether this court has jurisdiction, it seems to me that that is the first issue that should be addressed.

Jurisdiction

43. In my view, it is self-evident that the Irish courts have jurisdiction to determine whether the agreements entered into by an Irish company, placed in liquidation in Ireland pursuant to a High Court order, are enforceable as a matter of Irish law. This follows as a matter of both Irish and EU law. Article 7(1) of the Recast Insolvency Directive (EU 2015/848) provides as follows:

> *Save as otherwise provided in this Regulation, 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').*

44. In this case, that State was clearly Ireland. Article 7(2) provides that:

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:

(a) the debtors against which insolvency proceedings may be brought on account of their capacity;

(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;

(m) the rules relating to the voidness, voidability or unenforceability of legal acts detrimental to the general body of creditors.

45. The decision to wind up the Companies necessarily involved a determination that the centre of the Companies' main interests was Ireland. Neither that decision nor the subsequent decision of Quinn J that the appointment of Joint Liquidators had rebutted the presumption of control by JSC has been appealed.

46. As noted in the decision of Quinn J, pursuant to sanctions, the presumption of control was extended to wholly owned subsidiaries. Therefore, the Joint Liquidators were prevented from dealing with the subsidiaries or the relevant group entities. The rebutting of the presumption of control applies to those subsidiaries or the relevant group entities, and the Joint Liquidators now have control of those entities. They can exercise control over those subsidiaries – as evidenced by their appointment of directors of those companies – even though they are not themselves in liquidation.

47. I am satisfied, therefore, that in accordance with EU law, the Irish courts have jurisdiction to determine the issues raised in this application. Moreover, since the Companies are Irish registered companies, wound up in accordance with the provisions of the Companies Act 2014, and a number of the issues raised are questions of the interpretation of Irish law and of the compliance by the Companies with Irish law requirements, it is manifestly the case that these are matters falling within the jurisdiction of the Irish courts. That remains the position notwithstanding the apparent granting of an injunction against the Joint Liquidators in a Russian court. That *in*

personam order does not displace the jurisdiction of this court conferred by the opening of the winding up proceedings here pursuant to the Directive and by Irish law.

Scope of Application

48. This is an application pursuant to Section 631 of the Companies Act 2014, and the court must consider the scope of that provision. Section 631 provides that certain parties, including the liquidator, may apply to the Court to determine any question arising in the winding-up of a company influencing any questions in relation to any exercise or proposed exercise of any of the powers of the liquidator. Subsection 2 provides that:

> *The court, if satisfied that the determination of the question will be just and beneficial, 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.*

49. In **Re Doonbeg Investments [2021] IEHC 382**, Butler J stated (at paragraph 17):

> *"The legislature has provided in s. 631 a very flexible mechanism through which questions arising in the course of the winding up can be brought before the High Court for determination. The flexibility of the mechanism is enhanced by the absence of any procedural strictures applying to its invocation, save that the category of person entitled to make an application is defined by s. 631(1). However, it does not follow from the absence of stipulated procedures that s. 631 can be invoked in a manner which has the potential to be unfair to any person whose interests are likely to be affected by any determination a court is asked to make under its provisions."*

50. Quinn J, in an earlier application regarding the companies, **([2023] IEHC 674**), also discussed the scope of section 631, and in paragraph 66, he summarised a number of applicable principles. Of particular relevance are the following numbered principles:

> "(*1) Section 631 is a tool to facilitate the determination of "any question arising in the winding up of a company." This is extremely broad, and the court has the discretion to hear and determine applications brought under the section.*

(2) The reference in s. 631 to any question "including any question in relation to any exercise or proposed exercise of any of the powers of the liquidator" shows two things. Firstly, the section is particularly suitable for any question regarding the manner in which a liquidator exercises his powers, including the powers conferred on him by s.627 of the act. Secondly, the section is not limited to questions relating to the exercise of the powers of the office holder.

(4) Where a question arises, the answer to which will have general application and inform the conduct of the liquidation as a whole or the outcome of the liquidation for its creditors as a whole, the procedure is likely to be appropriate.

(7) There may be cases where the hearing and determination of a s. 631 application would require the court to direct exchanges of pleadings such as points of claim, points of defence, further submissions and evidence, and potentially direct a hearing on oral evidence and/or direct cross-examination on affidavits. In exceptional cases, discovery of documents may be required in advance of such a hearing. The use of these procedures was expressly contemplated by Denham J. In Bula Ltd v. Crowley (No. 4) *[2003] 2 IR 430 and by McCracken J. In* Re Salthill Properties Ltd *(op cit). However, no case was cited to this court of a directions hearing held pursuant to any of these sections, which entailed the use of all such procedures.*

(9) it follows from the foregoing that if there is already in being a plenary action in which the questions concerned are capable of being determined, the court should be slow to deviate from the conduct of that action or create a separate and new process for resolving issues which at a very minimum overlap with that action. Suppose that case engages disputes of fact and law to be determined. In that case, the ordinary process for doing so is the progression and determination of the matter by the plenary action."

51. In circumstances where, as I have noted, any orders made in this court may be relied on in the UK proceedings, I did raise the question with counsel for the Joint Liquidators whether these are issues which should be determined in the existing plenary action in the UK. As counsel pointed out, correctly in my view, since these are matters within the jurisdiction of this court, they could not be resolved in the UK proceedings. Moreover, since any dispute about the validity of the Pledge Agreements is a dispute

between the Companies and JSC, then JSC is the proper respondent to those applications. The fact that it has chosen not to participate in this application does not alter that.

52. Notwithstanding my view that the Court can continue to determine or consider the application pursuant to section 631, it is necessary to remain mindful, when considering the issues raised, of the caution advised by both Butler J and Quinn J in the aforementioned judgments, and in particular, the court should pay particular attention to the question of whether the questions regarding the status of agreements entered into by the relevant group entities or the Companies in liquidation are question arising in the winding up within the meaning of section 631.

Registration of Charge

53. Turning then to the grounds upon which the Joint Liquidators seek the orders sought under Section 631. The first of them is that the Companies and the relevant group entities have failed to register the charges – the charges being the Pledge Agreements – contrary to section 409 of the Companies Act 2014. Section 408 of the Companies Act 2014 ("**the 2014 Act**") defines a charge in relation to a company as meaning a mortgage or a charge in an agreement, written or oral, that is created over an interest in any property of the company. The Pledge Agreements were very clearly charges over the assets of the Companies and of the relevant group entities. Section 409 of the 2014 Act provides that where a charge is not registered by a company in accordance with the requirements of the Act, the charge is void as against the liquidator or the creditors of the company.

54. There is no evidence of any attempt by GTLKE to register the charges. The CRO documentation exhibited is evidence that they have not been registered. Nor is there any evidence of any attempt to effect late registration of the charge, still less is there any evidence of the exceptional circumstances which might justify late registration where the Companies were already in liquidation. The case law is clear, as is Section 409; the charge is void in the absence of registration. The clear consequence is that the charges entered into by the Companies are void as against the Joint Liquidator. That

this is so is clearly an appropriate question, in my view, to be determined in a section 631 application, and I am satisfied to make a declaration pursuant to section 631 to that effect.

55. Section 409 also provides that a charge is void against any creditor of the company in the absence of registration. The Joint Liquidators seek to rely on that provision in relation to the charges entered into by the relevant group entities in circumstances where they are not liquidators over those companies.

56. I am satisfied that the question of whether the relevant group entities have registered the charges is a question which arises in the course of the liquidation and is a question, to borrow the language of Quinn J from the GTLK judgment quoted above, the answer to which will inform the conduct of the litigation as a whole or the outcome of the liquidation for the creditors as a whole and, therefore, is appropriate to be determined in the context of a section 631 application. In this regard, I bear in mind that the Joint Liquidators, as identified in **Re Salthill Properties [2006] IESC 35**, are acting in the interests of the creditors as a whole.

57. In circumstances where the evidence is unequivocal in relation to the non-registration of the charges, I am also satisfied, therefore, to make declarations pursuant to section 631 that the charges entered into by the relevant group entities are void as against the creditors of the company.

Corporate Authorisation

58. The next ground sought to be relied on relates to the question of corporate authorisation. The Joint Liquidators contend, having exhaustively examined the books and records of the Companies as described in their affidavits, that there is no evidence of the Companies' authorisation of decisions to enter the loan agreements containing the requirement to provide security or, more importantly perhaps, the Pledge Agreements. In this regard, it is noteworthy that Loan Agreement No. 45-G differs from the previous loan agreements not just in form, but also in the manner in which it has been agreed and executed. Minutes of relevant Board minutes show express authorisation for prior loans and the main terms of the loan which the company was being authorised by the

Board to enter. The minutes of 24 March 2022 do give authorisation to enter a loan on certain terms but without any reference to the critical terms regarding the giving of security or entering the Pledge Agreements.

59. There is no indication in any of the minutes of the Board meetings of any authorisation to either the companies or the relevant group entities to give security over the Companies' assets or to enter into the Pledge Agreements – there is no reference to the Pledge Agreements or to security at all in the minutes exhibited. There *are* certificates of incumbency pursuant to which Mr Lyadov was authorised to sign on behalf of the Companies, but nothing showing the agreement of the companies to this effect or that the Companies had authorised him to sign Pledge Agreements.

60. In addition, there is no evidence of compliance with the terms of the Shareholder Agreement. The Shareholder Agreement provides that:

> *"The Board has responsibility for management, control and supervision of the Company and its Business and shall be responsible for and authorised to make decisions relating to all aspects of the Company and the Business provided however that the Board shall only take decisions in relation to any of the Reserved Matters set out in Schedule 2 subject to the approval of the Shareholder (which is to be explicitly mentioned in the relevant minutes of the meeting of the Board) unless the matter is already subject to the Shareholders' approval in a manner required by applicable law. Such approval should be sought from Ireland and received in Ireland and the result of the approval being granted or withheld, as the case may be, should be effected or confirmed by the Board in Ireland. Any GTLK Group Company shall carry out any of the Reserved Matters only if both the Board's and the Shareholder approvals are received in accordance with the terms of this agreement."*

Schedule 2 includes at item 14:

> *"Creating any fixed or floating charge, lien (other than a lien or other form of security arising by operation of law) or other Encumbrance of the whole or any part of the Business undertaking, property or other assets of any GTLK Group Company save to*

secure borrowings from banks borrowed in the ordinary and usual course of business."

61. There is no evidence of any authorisation in accordance with the terms of the shareholder agreement. As per the shareholder's agreement, if there were such authorisation, it was required to be mentioned in the minutes of the Companies unless it was an agreement to borrow from banks in the ordinary course of its business. On its face, Loan Agreement No. 45-G was plainly not an agreement to borrow from banks or an agreement in the ordinary course of business. It involved the giving of security to a connected company where no security previously existed, merely in order to refinance loans from that connected company at a time when the Companies were in dire financial straits and considering either liquidation or examinership. That is to leave aside entirely the issue that the Companies were subject, or potentially subject, to sanctions at that time.

62. In circumstances where the parties to the agreement on behalf of JSC were at all times directors of GTLKE, it cannot, in my view, rely on the indoor management rule, the Rule in *Turquand's* case or the provisions of section 40 of the 2014 Act to argue that JSC was unaware of the Companies' failure to follow its internal processes. The case law is again clear; in the absence of authorisation to enter the Pledge Agreement, it means that the Pledge Agreements are voidable at the Companies' instance.

63. For the same reason that I consider that the application under Section 409, as regards the relevant group entities, gives rise to a question arising in the liquidation and is a question the answer to which will assist in the carrying out of the liquidation and will enure to the benefit of the creditors of the company, I am satisfied that it is appropriate for the court to give the declaration sought in relation to not just the companies, but the relevant group entities.

Unfair preference

64. The third issue relied on is that the Pledge Agreements and the giving of security amounted to an unfair preference contrary to section 604(4) of the 2014 Act. Section 604(4) provides that:

> *(4) An act to which subsection (2) applies in favour of a connected person which was done within two years before the commencement of the winding up of the company shall, unless the contrary is shown, be deemed in the event of the company being wound up—*
> *(a) to have been done with a view to giving such a person a preference over the other creditors and*
> *(b) to be an unfair preference and be invalid accordingly*

65. Subsection 2 includes the giving of a mortgage to a connected person. JSC is clearly a connected person for the purpose of section 604, and the security was given less than two years prior to liquidation. The consequence, therefore, is that the Pledge Agreements are presumptively invalid, and it is for JSC to prove otherwise. In circumstances where they have not participated in this application, there is no evidence to rebut the presumption. Given the circumstances of the transaction, it is difficult to imagine what evidence there might have been. The minutes of the Board meetings show the parlous financial state of the Companies and the director's awareness of it. It also shows their awareness of the sanctions. The creation of charges in favour of the parent company put the parent in a preferential position compared to other creditors and as compared with the position they were in prior to the Pledge Agreements being entered. In those circumstances, there is no question of the presumption of invalidity being rebutted.

66. Unlike the position in relation to the previous two grounds relied on by the Joint Liquidators for impugning the Pledge Agreements, it does not seem to me that I can make an order regarding the relevant group entities pursuant to section 604. The application of that provision seems to me to be confined to transfers made by a company which is in liquidation. The relevant group entities are not in liquidation.

Fraudulent transfer

67. The final issue raised as a basis for seeking to avoid the Pledge Agreements or question their enforceability is pursuant to Section 74(3) of the Land and Conveyancing Reform Act 2009, which provides that any conveyance of property made with the intention of defrauding a creditor or other person is voidable by any person thereby prejudiced. While the word defraud no doubt carries negative connotations, it is clear that it is not fraud in the criminal sense, and all that is necessary is to show that the necessary and probable consequence of the transfer would be to hinder creditors in the recovery of their debts. That is clear from the *dicta* of Palles CB in **Re Moroney (1887) 21 LR Ir 27** in respect of a similar provision contained in the Conveyancing Act (Ireland) 1634, as approved by the High Court (Twomey J) when analysing section 74(3) in **AIB v Burke [2018] IEHC 767**.

68. It seems to me, for all the reasons that the Pledge Agreements are presumptively invalid pursuant to section 604, they must be regarded as a transfer which can be set aside pursuant to section 74(3). Given the position of the Companies at the time of transfer, the existence of the sanctions, the connectedness between the Companies and their parents with whom the Pledge Agreements were made, it seems to me that the necessary and probable consequence of the transfer is and would be to hinder the Companies' creditors in recovering the sums due to them. In those circumstances and again for the reasons which I have outlined in relation to the first two headings upon which the Joint Liquidators proceed, I'm satisfied to give the declaration sought pursuant to section 74(3) in relation to the Pledge Agreements entered into by the Companies and by the relevant group entities to the effect that those Agreements are voidable.