APPROVED **[2025] IEHC 105**

THE HIGH COURT

Record No.: 2023/88 COS

IN THE MATTER OF GTLK EUROPE DESIGNATED ACTIVITY COMPANY (IN LIQUIDATION)

-AND-

IN THE MATTER OF THE COMPANIES ACT 2014

JUDGMENT of Mr Justice Rory Mulcahy delivered on 21 February 2025

Introduction

1. GTLK Europe DAC and GTLK Capital Europe DAC (together "**the Companies**") are Irish registered companies and were part of a group of companies owned and controlled by the Russian Federation. The group operated an international transport leasing business and its assets principally consisted of ships and aircraft. The Companies had issued loan notes with a notional cumulative value of $3.25 billion ("**the Notes**"). The Notes were traded internationally, including on exchanges in Dublin and Vienna. There was also some so-called "over the counter" trading.

2. As a result of the imposition of international sanctions following Russia's invasion of Ukraine, the Companies' assets were frozen and, ultimately, trading in the Notes ceased. The Companies defaulted on significant payments due under the Notes.

3. On the application of a group of creditors who held the Companies' Notes, the Companies were placed in liquidation on 31 May 2023 by order of the High Court (Dignam J). Pursuant to section 666 of the Companies Act 2014, four creditors were appointed to a

committee of inspection ("**the Committee**") in the liquidation. This judgment concerns an application by two of those creditors, Trinity Investments DAC and Attestor ICAV (together "**the Applicants**"), who had been part of the group of creditors who had applied to wind up the Companies.

4. The Applicants hold approximately $378 million in Notes representing debt owed by the Companies. At all times since the liquidation, trading in the Notes has been prohibited by reason of, *inter alia*, US sanctions which were imposed following Russia's invasion of Ukraine. The joint liquidators of the Companies ("**the Joint Liquidators**") have applied for the Companies to be de-listed from the scope of those sanctions. If that application is successful, and the Joint Liquidators can obtain a general licence from the relevant US authorities, it is anticipated that trading in the Notes will resume. The Applicants anticipate that there may be some delay between any such de-listing and trading in the Notes while the relevant clearing houses satisfy themselves that it is appropriate to trade in Notes which had hitherto been subject to sanctions. If and when trading begins, the Applicants wish to be in a position to participate in that trade.

5. However, the Applicants are concerned to ensure that trading in the Notes does not conflict with their duties as members of the Committee. In those circumstances, they made an application to court seeking either the court's confirmation that trading in the Notes does not conflict with their duties as Committee members or, in the alternative, the court's *imprimatur* to them trading in the Notes subject to compliance with certain conditions, in particular, compliance with a proposed information control protocol ("**the Protocol**").

6. The application is supported by the other members of the Committee and by the Joint Liquidators. In an affidavit filed in support of the application, the Joint Liquidators explain that the presence of the Applicants on the Committee has been "*of critical importance to the Joint Liquidators in the context of seeking to discharge their statutory duties and work towards achieving the highest return possible to all creditors in an efficient manner.*" The Joint Liquidators make clear that, given the overlay of international sanctions, this has been a complex liquidation and persuading creditors to serve on the Committee was not straightforward. The Joint Liquidators stress the importance of retaining the Applicants as members of the Committee and express their apprehension that the Applicants, or the other

members of the Committee, will elect to leave the Committee if prevented from trading in the Notes due to their status as Committee members.

Relevant principles

7. In their extremely helpful legal submissions, the Applicants identify various functions of a committee of inspection under the Companies Act 2014, as amended ("**the 2014 Act**"). In addition, they identify various restrictions which are imposed on committee members under three headings – pursuant to statute, in equity, and by market abuse regulations – each of which may have potential relevance in this case.

i. Statutory restrictions

8. The Applicants identify two potentially relevant statutory restrictions. The first is contained in section 629(6) of the 2014 Act. It provides:

> *Subject to subsection (9), the liquidator or any member of the committee of inspection of a company shall not, while acting as liquidator or member of such committee, either directly or indirectly, by himself or herself or any employer, partner, agent or employee, become purchaser of any part of the company's property.*

9. The Applicants describe the provision as the statutory self-dealing rule, which prohibits dealing in a company in liquidation's property. However, they argue that as the Notes are debt obligations of the Companies and not their property, this provision has no application in this case.

10. Of more relevance, the Applicants suggest, is section 668(9) of the 2014 Act, described as the statutory profits rule. In relevant part, this provides:

> *A member of the committee shall not make a profit from the winding up, except with the leave of the court …*

11. The provision seems to have had no statutory predecessor in this jurisdiction and has not been the subject of any analysis by the courts here. However, the English equivalent of

the statutory profits rule, which has long formed part of the legislative regime there, has been the subject of some consideration by the courts in that jurisdiction, albeit not in the context of a committee member seeking to trade in the debt obligations of the relevant company.

12. In *Re Gallard* [1896] 1 QB 68, the Court of Appeal made clear that *prior* sanction is necessary to avoid breaching the rule. In that case, involving a bankruptcy, a solicitor was on the committee of inspection of the relevant company. The solicitor's firm had also acted for the bankruptcy trustee. It sought to recover its fees from the company for that work, but its claims were disallowed in circumstances where there had been no court sanction to it carrying out the work and thus the work breached the statutory profits rule (at p. 73):

> "*The words are very clear. He is not to derive any profit "except under and with the sanction of the Court." That must mean at the time when the profit is derived or made. How can he be deriving profit "under the sanction of the Court" unless he has that sanction at the time? He must have the sanction of the Court then; and the suggestion that the Court can afterwards, when the thing has been done, say, "We will sanction what has been done although you did not choose to ask the Court for its sanction beforehand," seems to me entirely contrary to both the letter and spirit of the rule. I think the sanction of the Court ought to be obtained before the person who requires it does any work which would, if it were paid for, be profitable to him.*"

13. To similar effect are the more recent decisions in *Re Bulmer* [1937] Ch. 499 *and Re FT Hawkins & Co.* [1952] 1 Ch. 881.

ii. Equitable restrictions

14. In *Re Bulmer*, the English Court of Appeal held that the members of a committee of inspection in a bankruptcy held the same fiduciary duties as a trustee, rejecting the argument that their duties were confined to those expressly provided for in statute. These fiduciary duties impose additional restrictions on committee members.

15. *Lewin on Trusts* (20th ed., Sweet & Maxwell, 2020) identifies two relevant principles (at 45-001):

This Chapter and the next are concerned with the incidence and effects of two closely connected rules which have been established to keep trustees in a straight line of duty. The first is that a trustee, like other fiduciaries, is not in general allowed to retain a benefit acquired or profit made by him from the use of the trust property or in the course of and by virtue of his trusteeship. The second rule is that a trustee, like other fiduciaries is not allowed to place himself in a position where his personal interest, or interest in another fiduciary capacity, conflicts or possibly may conflict with his duty.

16. The Applicants describe these as the 'equitable profits rule' and the 'equitable conflicts rule'. The authors of Lewin seek to explain the scope of a trustees duty (at 45-078):

In order to found liability under the above rule it is necessary to establish that the trustee was enabled to purchase property as a result of an opportunity or special knowledge or information acquired by him by reason of the trusteeship. What counts for this purpose, however, is not altogether clear. It is certainly not all knowledge or information which counts, and in general terms a trustee is allowed to use knowledge or information acquired during the course of the trusteeship for his own purposes or for the purposes of other trusts. There are perhaps two circumstances in which a trustee may be liable. The first is where a trustee obtains knowledge or information which is not available to the general public, but is obtained by him as confidential information in the course of his fiduciary relationship, and has special value in that it enables the trustee to assess the commercial feasibility of a purchase by him and the appropriate terms of a purchase offer, and thereby substantially contributes to the successful purchase by the trustee; liability then attaches whether or not other matters such as the skill of the trustee also contribute to the successful purchase, and even though the purchase involves risk taking by the trustee despite the knowledge and information gained by him. The second is where a trustee obtains confidential information in the course of his fiduciary relationship and then enters into a purchase for his own benefit in circumstances where his personal interest conflicts or may conflict with his fiduciary duties, for example his duty to consider a purchase on behalf of the trust or even an application to the court for authority to purchase an unauthorised investment. It is questionable whether confidential information obtained by a trustee should be regarded as trust property, but whether or not this is so, the trustee becomes

accountable as a constructive trustee because he has obtained a profit by reason of his position as trustee or in circumstances where he has placed himself in a position where his personal interest and duty conflict or may possibly conflict.

17. Lewin suggests that the court has jurisdiction, under its inherent jurisdiction to secure the good administration of trusts, to give a trustee permission to enter into a transaction from which it might earn a profit.

iii. Market abuse rules

18. The third area where the Applicants identify a possible conflict between their role as Committee members and as participants in the market trading the Notes relates to the EU Market Abuse Regulations, Regulation (EU) 596/2014, as amended ("**the MAR**").

19. Recital 2 of the MAR identifies that their objective is to ensure confidence in securities markets:

An integrated, efficient and transparent financial market requires market integrity. The smooth functioning of securities markets and public confidence in markets are prerequisites for economic growth and wealth. Market abuse harms the integrity of financial markets and public confidence in securities and derivatives.

20. 'Market abuse' is described in Recital 7:

Market abuse is a concept that encompasses unlawful behaviour in the financial markets and, for the purposes of this Regulation, it should be understood to consist of insider dealing, unlawful disclosure of inside information and market manipulation. Such behaviour prevents full and proper market transparency, which is a prerequisite for trading for all economic actors in integrated financial markets.

21. Chapter 2 of the MAR sets out rules governing insider dealing and inside information. Article 14 prohibits any person engaging in or attempting to engage in "insider dealing". Article 8 defines 'insider dealing'. In relevant part, it occurs where "*a person possesses inside information and uses that information by acquiring or disposing of, for its own*

account or for the account of a third party, directly or indirectly, financial instruments to which that information relates."

22. Article 7 defines 'inside information' as including, *inter alia*, "*information of a precise nature, which has not been made public, relating, directly or indirectly, to one or more issuers or to one or more financial instruments, and which, if it were made public, would be likely to have a significant effect on the prices of those financial instruments or on the price of related derivative financial instruments.*"

Arguments

23. Both the Applicants and the Joint Liquidators agree that there is no question of trading in the Notes giving rise to a potential breach of section 629(6) of the 2014 Act in circumstances where the Notes are not the property of the Company.

24. The Applicants also contend that there is a question mark over whether section 668(9) of the 2014 Act could be engaged. Although that restriction prevents committee members "*mak[ing] a profit from the winding up*", the Applicants contend that trading in the Notes, arguably, would not involve making a profit from the winding up, noting that trading in the Notes will not involve the Companies incurring any new liabilities or expenses. As it was put, trade in the Notes is neutral from the Companies' perspective.

25. The Joint Liquidators suggest a more expansive interpretation of the restriction contained in section 668(9), suggesting that the restriction on making a profit is intended in a fiduciary sense and that the statutory restriction is intended to restrict a committee member making a profit from their special position in the winding up. In this regard, it can be seen as a statutory reflection of the equitable profits rule discussed above.

26. Both parties agree, however, that the court has the power to give prior sanction to the Applicants trading in the Notes and should do so having regard to the safeguards proposed.

27. The parties are also agreed that no issue arises in relation to potential breach of the equitable conflicts rule, subject to compliance with the safeguards, in circumstances where the Companies will not be trading in the Notes. Similarly, they argue, any potential for

breach of market abuse rules will also be addressed by compliance with the safeguards. The safeguards proposed involve putting in place the Protocol.

The Protocol

28. The proposed Protocol is attached as an appendix to the Applicants' notice of motion.

29. As appears therefrom, the expressed purpose of the Protocol is to establish and regulate controls and barriers on the flow of information from the Committee to the persons within the Applicants' organisations who will be involved in trading the Notes in order to avoid breach of the MAR and to otherwise facilitate trading in the Notes. In summary, the intention is that controls will be put in place so that information which is made available to the Applicants in their role as committee members and which is not otherwise available to the public will not be made available to the Applicants' trading team.

30. The information barrier or 'ethical wall' proposed is described in the Protocol and will be put in place from the 'effective date', a date which has not yet been determined. The Applicants are represented on the Committee by two representatives ("**the Representatives**"). It is proposed that from the effective date, the Representatives will only provide information they obtain from their membership of the Committee to the head of compliance in Attestor IM, the delegated investment manager of the Applicants. That information will then be managed in such a way that it is never shared with, or made known to, anyone on the Applicants' trading team.

31. Recognising that the Applicants may already be in possession of information which is not known to the market, the Protocol indicates that the Applicants have requested that the Joint Liquidators issue a statement to the public addressing any such information prior to or immediately following the de-listing of the Company. This is referred to as a 'cleansing statement'. As currently framed, the Protocol does not expressly oblige the Joint Liquidators to issue such a statement, although they have stated in their affidavit that they will do so. The contents of any such statement will depend on the information which has already been shared with the Applicants, as committee members, at the time of the de-listing. In effect, any information which has been provided to the Applicants which would be regarded as "*inside information*" within the meaning of the MAR, will be made public. As counsel for

the Joint Liquidators put it, the information will thus cease to be 'inside information' but will become 'public information', the possession of which would confer no advantage in the market on the committee members.

32. In their affidavit in support of the application, the Joint Liquidators give examples of the type of information which might be included in such a statement. They suggest that it may include information regarding potential gross asset realisation value, and estimated total recoveries in relation to insurance claims in the courts of Ireland, and in England and Wales, against insurers of aircraft stranded in Russia. The Applicants identify, in addition, that information regarding asset realisation to date and the costs of litigation might also be included.

33. The Protocol also provides for an inadvertent breach of the ethical wall. If inside information is made available to the Applicants' trading team in breach of the protocol, then trading in the Notes shall immediately cease and shall not resume until the information has been "cleansed", *i.e.*, made public, or otherwise ceases to be inside information.

34. The Protocol requires all affected persons to acknowledge the restrictions imposed.

Debt trading by committee members

35. The parties were unable to identify any authority dealing with an application by a committee member to trade in the debt of the liquidated company over which they had been appointed in this jurisdiction or in England and Wales. However, they did identify that it was a common practice in the United States in Chapter 11 bankruptcies, where official creditors' committees perform a similar role to that of committees of inspection, provided sufficient ethical walls are put in place.

36. The Applicants refer to the earliest decision in which such an application was approved, *Re Federated Department Stores Inc* (1991) WL 79143, a decision of the US Bankruptcy Court, Ohio. Fidelity, a member of the creditors' committee in a Chapter 11 bankruptcy, applied to the bankruptcy court for approval to trade in the securities issued by the bankrupt company. The Bankruptcy Trustee opposed the application, considering that it would involve a breach of the committee member's fiduciary duties. The Securities and Exchange

Commission, however, supported the application, which was approved by the court. The court concluded that there would be no breach of duty provided that the creditor employed an adequate information blocking device to prevent such a breach of duty. The necessary features of the information blocking procedures identified by the court were as follows:

- All Fidelity personnel with access to non-public information, committee members, were required to execute a letter acknowledging the restrictions;
- Committee members were prohibited from sharing non-public information with other employees of Fidelity;
- Committee members were required to maintain non-public information in secure storage, inaccessible to other Fidelity employees;
- Committee personnel were required to receive no information regarding Fidelity trades prior to those trades being made;
- Compliance department personnel were required to review Fidelity's trades to confirm that they were made in accordance with these procedures.

37. In *Re Adelphia Communications Corp* 368 BR 140 (2007), the US Bankruptcy Court, New York, summarised the practice as follows:

> "*It is customary, in chapter 11 cases with publicly traded securities (most significantly, bonds) for debtors to share with creditors' and equity committees, bank lender agents, and other key parties in interest confidential information concerning the debtors' business affairs. Typically this would be inside information, knowledge of which would give the recipient an unfair leg up if the recipient were to trade on the information. "Restricted" parties agree not to trade in debtor securities. "Unrestricted" parties, who do not have access to confidential information, are free to trade. In some instances, entities with individuals with confidential information establish "ethical walls," under which those with confidential information do not disclose it to those on the other side of the wall, and the latter, who do not have access to the confidential information and are unrestricted, remain free to trade.*"

38. The Applicants also refer to a very detailed 2023 practice note published by a US law firm which cites a large number of cases in which courts have issued orders permitting

committee members to trade in debt subject to adequate information blocking procedures being established.

39. In one case, *In re Spiegel*, 292 BR 748 (2003), the Bankruptcy Court refrained from granting an order of a similar type, principally, it appears because inadequate information had been provided by the companies making the application. The judge in question had previously granted a similar order in an earlier case, though he referred to ruing the day he "*opened the Pandora's Box*" in that case. He expressed concern about such orders noting that he intended to "*hold the Committee to full and strict compliance with its fiduciary obligations*", highlighting that there may be an appearance of impropriety if a committee member were permitted to trade in the relevant company's securities from the perspective of those who are unaware that ethical walls are in place. He adjourned the application for a further hearing to be based on fuller information.

40. In the Irish context, the Applicants refer to the Consumer Protection Code 2012, published by the Central Bank of Ireland, and the National Treasury Management Agency's Code of Practice on Confidentiality and Professional Conduct 2016, both of which endorse the use of ethical walls as a means of addressing conflicts of interest.

Discussion

41. The Applicants seek orders, either that trading in the Notes would not involve a breach of section 668(9) of the 2014 Act or any fiduciary duty, or in the alternative, an order granting leave to trade in the Notes, in both cases on condition that they comply with the Protocol.

42. I accept the Applicants' contention that trading in the debt obligations of the Companies could not engage the prohibition in section 629(6) of the 2014 Act. The debt obligations, the Notes, are liabilities of the Companies, not its property, and therefore, are not affected by the restriction in that statutory provision.

43. However, I consider that trading in the Notes does have the potential to involve the Applicants, or any committee members, "*making a profit from the winding up*" within the

meaning of section 668(9) of the 2014 Act. Although I accept that trade in the Notes is, as described, neutral from the Companies' point of view, as a result of the winding up, the Applicants have been appointed to the Committee. They are thus likely to be in possession of information which could be regarded as 'inside information' within the meaning of the MAR. That information could assist the Applicants in making a profit. That would, in my view, involve the Applicants in making a profit "*from the winding up*", which is impermissible without leave of the court.

44. It is also clear that trading in the Notes by Committee members would, in any event and for the same reasons, be regarded as breaching the equitable profits rule. The court has a broad discretion under section 631 of the 2014 Act to make directions in a liquidation (see, for instance, *Re GTLK Europe DAC* [2023] IEHC 486, *Re GTLK Europe DAC (in liquidation)* [2023] IEHC 743). I am satisfied that the court has jurisdiction, whether pursuant to section 631 or to its inherent jurisdiction, to sanction a transaction which might contravene the equitable profits rule. In the circumstances, the question is whether compliance with the Protocol means that there would be no breach or, alternatively, that the court should sanction trade in the Notes so that the Applicant would be free to trade the Notes if that opportunity arises. On balance, in the circumstances of this case, I am satisfied that the Applicants should not be prevented from trading in the Notes, subject to compliance with the Protocol.

45. It is of significance that the Joint Liquidators, and the other committee members support the application, subject to compliance with the Protocol. Both are under a duty to act in the interests of creditors in general and their support for the application, therefore, must be afforded substantial weight. Compliance with the Protocol may require the Joint Liquidators to make public information which it would not otherwise be required to make public, *e.g.*, its estimated total recoveries in the insurance claims it is litigating in Ireland and in England and Wales. The Joint Liquidators have, as they indicated, had regard to this and balanced it against other considerations, in particular, maintaining an effective committee of inspection, and continue to support the application.

46. In this regard, I note that although the Joint Liquidators have expressed their concern that the Applicants or other committee members may elect to leave the Committee if not permitted to trade the Notes, the Applicants have not indicated that that is their intention. It

strikes me that this reflects an entirely appropriate reluctance on the part of the Applicants to, in effect, threaten to take a course of action which would disrupt the liquidation in order to achieve their objective, rather than this not being a possibility. The Applicants are assisting in the liquidation – no doubt because it is in their own ultimate interests – by participating in the Committee, without recompense. They should not be penalised for so doing by placing them at a disadvantage to other Note holders if trading in the Notes resumes.

47. I have also had regard to the fact that trading in the Notes by the Applicants does not seem to carry risks for the Companies or the liquidation and that it is likely to be neutral from the Companies' perspective. No obvious possibility of a conflict arises.

48. Critically, compliance with the Protocol should ensure that any advantage that the Applicants might have over other market participants by reason of their presence on the Committee will be negated. I have considered the terms of the Protocol, which appear to reflect procedures which have been approved, in equivalent circumstances, by US Bankruptcy Courts. In this regard, I accept the Applicants' submissions that the risks involved in permitting the Applicants to trade in the Companies' Notes are, if anything, less than those that might be involved in a Chapter 11 bankruptcy, where the company the subject of the bankruptcy is restructured rather than wound down. Compliance with the Protocol will ensure that the 'harm' to which section 668(9) of the 2014 Act and the Applicants' equitable obligations are directed is avoided.

49. I note the reservations which were expressed by the US court in *In re Spiegel*, which are understandable. The fiduciary duties of committee members should not be diluted. However, it is clear that in this case, as evidenced by this application, the Applicants are keenly aware of their fiduciary obligations. A combination of compliance with the Protocol and the cleansing statement address, in my view, the concerns identified in the court's judgment in that case. Moreover, in the form of order proposed by the Applicants, the court will retain full capacity to address any breach of duty, including any breach occasioned by non-compliance with the Protocol.

50. There are three aspects of the Protocol, however, which, subject to further submissions from the parties on the final form of orders to be made on this application, might bear some amendment.

51. The first is the uncertainty about the effective date. In circumstances where it is not known when trading might resume, the Applicants have not identified an effective date. They explain that they have already started the process of putting in place the procedures to comply with the Protocol in anticipation of the Companies being de-listed from the sanctions later this year. In particular, the lines of communication between the Representatives and the Attestor IM Head of Compliance have been established. Once the Protocol comes into effect, the Applicants, or at least the trading arm of the Applicants, will no longer have access to inside information. Only information which they obtain prior to that date will need to be addressed in a cleansing statement. In my view, greater certainty about what needs to be included in that cleansing statement, and greater confidence in the Protocol, would be achieved by putting all elements of the Protocol in place sooner rather than later and, in any event, at some definite date. I will hear the parties as to what that date might be.

52. Secondly, I note that in *Re Federated Department Stores*, one of the information blocking measures put in place was that the Fidelity committee members were not provided with any information regarding the trades proposed to be made by other Fidelity employees. In other words, the ethical wall prevented information travelling in either direction, from the committee members to the traders and from the traders to the committee members. No such reciprocal 'block' is proposed in this case. It is difficult to anticipate what advantage could possibly accrue to the Applicants were their Representatives in possession of information regarding the trades that the Applicants proposed to make. However, in circumstances where prior sanction is required from the court, it may be that greater confidence in the Protocol would result if the ethical wall blocked the flow of information in either direction.

53. And third, the Protocol as drafted does not impose an express obligation on the Joint Liquidators to issue a cleansing statement. In the event that the Applicants are, as a result of their position as members of the Committee, in possession of inside information, the issuing of such a statement is essential to ensure that there is no breach of their statutory or equitable obligations. This can be addressed by amending the Protocol and joining the Joint Liquidators as a party to it, or by including obligations in relation to the cleansing statement in any orders made.

54. It bears emphasising that use of inside information would be contrary to the MAR irrespective of any order this court makes and the Applicants will, at all times, have to ensure that there is no breach of the requirements of those regulations. The Applicants have not suggested that the court has any power to give sanction to conduct which contravenes the MAR. The Applicants clearly anticipate that compliance with the Protocol will prevent any potential breach of the MAR. If the Applicants are not, when trading in the Notes, in possession of inside information because of the Protocol and the cleansing statement, it can readily be seen how this would be so, but this is not something which the court could declare in advance. The fact that the Applicants will remain at all times subject to the requirement to comply with the MAR is itself a significant safeguard supporting the making of the orders sought.

Conclusion

55. In light of the foregoing, I propose making orders which will facilitate the Applicants trading in the Notes in the event that the Companies are de-listed from the sanctions and trading resumes, on condition of compliance by the parties with the terms of the Protocol, subject to the potential amendments to the Protocol indicated above.

56. I will hear the parties as to the precise form of order and, as previously indicated, I will list the matter on 28 February 2025 at 10.30 am for the purpose of dealing with same.