THE HIGH COURT

[2023] IEHC 674
[2023/88 COS]

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

AND IN THE MATTER OF AN APPLICATION BY SWAN HELLENIC CRUISES LIMITED, CATSTANS HOLDING LIMITED, VALBRIDGE LIMITED AND DIAMANT SA, FASTLEAD LIMITED AND MARACOL LIMITED

JUDGMENT of Mr. Justice Michael Quinn delivered on the 1st day of December, 2023

1. The SH Minerva is a cruise ship intended primarily for extreme polar expedition cruises. It is capable of travelling to the Arctic and Antarctic regions at most times of the year without icebreaker assistance. It was built in 2021 at a cost of US $116 million.

2. The Minerva was purchased from Helsinki Shipyard OY by STLC Europe Nine Leasing Limited, a company incorporated in the State ("**STLC**"). STLC chartered it to Swan Hellenic Cruises Limited ("**Swan Hellenic**"), a cruise operating company incorporated in Cyprus, which took delivery of the vessel on 3 December, 2021.

3. The charter terms included a hire purchase arrangement whereby Swan Hellenic would acquire ownership of the vessel at the expiry of the charter term of fifteen years, or earlier on certain conditions.

4. STLC is a subsidiary of GTLK Europe DAC ("**GTLK Europe**"), a company now in liquidation by order of the High Court. GTLK Europe had its registered office at 2 Hume Street, Dublin 2. Its ultimate parent company is Joint Stock Company GTLK, an entity incorporated in Russia and in which the sole shareholder is the Ministry of Transport of the Russian Federation.

5. GTLK Europe is the top level company for the operations of the GTLK group in Europe and the Middle East. Its activities include aviation and maritime leasing, trading in transport assets, marketing, asset management and consulting on commercial aircraft and shipping transactions.

6. After the invasion of Ukraine by Russia in February 2022 Swan Hellenic found that because the registered owner of the Minerva was an entity controlled by the Russian Federation, service providers, port authorities, suppliers, insurers and customers were unwilling to continue engaging and providing goods and services to and in respect of the vessel. The vessel was at that time at a port in Uruguay for scheduled maintenance. Since that time it has not left Uruguay and is "stranded" there unable to function and generating no revenue. No cruises can be made or planned. As the operator, Swan Hellenic are earning no revenue and are incurring the costs of basic maintenance and such insurance as it can obtain. It is said that the costs incurred in respect of maintenance and security of the vessel by Swan Hellenic are running at a rate of $500,000 per month.

7. On 8 April, 2022 JSC GTLK and entities owned and controlled by it, including GTLK Europe, were designated as sanctioned entities pursuant to the provisions of EU Regulation 269/2014 ("**the Sanctions Regulation**"). That Regulation establishes measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine.

8. On 2 August, 2022 similar designation was made in respect of Joint Stock Company GTLK and GTLK Europe and subsidiaries by the US Department of State pursuant to Executive Order No. 14024.

9. The effect of all of these sanctions is to preclude companies in the GTLK group from utilising assets to obtain funds, goods or services and from normal trading activities. The Minerva remains stranded.

Liquidation of GTLK Europe

10. On 19 April, 2023 creditors of GTLK Europe and of another company in the group GTLK Europe Capital DAC petitioned this court for the winding up of those companies.

11. On 31 May, 2023, the court (Dignam J.) made an order for the winding up of the companies and appointed joint liquidators, Messrs. Damien Murran and Julian Moroney of the firm of Teneo Restructuring (Ireland) Limited.

12. Following their appointment the joint liquidators brought an application to this court pursuant to s.631 of the Act for certain directions regarding the application of the Sanctions Regulation to the companies. In particular they sought directions as to the effect of the liquidation on a presumption of control which applies to subsidiaries of companies designated under the Regulation. This court made orders in respect of these questions on 11 July, 2023 which included *inter alia* the following declarations:

(1) That the presumption of control by JSC GTLK which arises in respect of GTLK Europe under the Sanctions Regulation is rebutted by the appointment of joint liquidators.

(2) That the assets of the companies (which includes the shares of GTLK Europe in STLC) are under the control of the joint liquidators who are the only persons entitled to deal with the assets of the companies.

13. The judgment delivered by this court on 31 July,2023 [2023 IEHC 486] ("**the First Judgment**") contains a detailed description of the background to GTLK Europe and the GTLK Group and to the winding up of GTLK Europe, which it is unnecessary to repeat here.

14. STLC is a special purpose vehicle incorporated to acquire the Minerva and charter her to Swan Hellenic. It is not in liquidation. Following their appointment as joint liquidators of GTLK Europe, the liquidators, exercising their powers and authority in respect of the shares in STLC, replaced the directors of STLC and appointed new directors nominated by them.

For reasons explained in an affidavit of Mr. Moroney sworn on 17th November 2023, that process took some time and the appointments of those new directors took effect on 6 September, 2023.

15. In the proceedings for the winding up of GTLK Europe the applicants have issued a notice of motion "pursuant to s. 627 and/or 631 of the Companies Act, 2014 and/or pursuant to the court's inherent jurisdiction directing and/or determining that":

> *"1. GTLK Europe DAC and its subsidiaries cannot recover damages from a counterpart for unpaid lease payments during a period when the asset the subject matter of the lease could not be used by reason of the sanctions imposed by Council Regulation EU 269/2014.*
>
> *2. GTLK Europe DAC and its subsidiaries should be identified with their ultimate parent, the Russian Federation, for purposes of determining whether GTLK entities are liable for damages for breach of contract where the breach is as a result of the sanctions.*
>
> *3. The joint liquidators of GTLK Europe DAC cannot, in the absence of a prima facia basis for alleging that there has or will be a breach of sanctions, lawfully require counterparties to comply with the so called enhanced due diligence protocol before contracting with them or complying with existing contracts."*

16. For reasons which appear in the chronology below, I refer to this as the applicants' fourth application.

17. This judgment relates only to a preliminary objection to this application made by the joint liquidators.

<u>Locus standi</u>

18. Swan Hellenic claims that it makes this application as a creditor. It claims that STLC and GTLK Europe are liable to it for damages for loss of profit and operational expenses.

This claim was first notified in a Default Notice served on STLC only on 17 June, 2022 in an amount of $16.262 million. More recently it was said to be quantified at a figure of $32 million. The joint liquidators say that the claim for damages is disputed.

19. The joint liquidators do not for the purpose of the decision I have to make at this stage dispute the standing of Swan Hellenic to apply for directions. They reserve their position as to the standing of the applicants as creditors but that is not an issue on which I am required to make a decision at this stage.

20. It emerges very clearly from the affidavits and submissions, and is openly stated by the applicants, that their objective in this matter is to acquire the vessel, either directly or by acquiring the shares in STLC, so that they can resume their business having invested heavily in the vessel and incurred expenses already. There is nothing wrong with that commercial objective. It is a valid commercial objective to resolve the position in relation to the vessel and get it back into operation. It does however call into question whether in truth this application is being moved by the applicants qua creditor, or pursuant to their commercial interests as a counterparty to STLC.

21. In the very different context of applications for directions in examinerships, in *Re Ladbrokes (Ireland) Limited and Cos. Act* [2015] IEHC 381 and *Re Eircom* Kelly J., 17 May 2012, the court was in each case willing to recognise the locus standi of the applicants even though the applications related not to their status as creditors, but to their interest as putative investors. I propose to follow the same approach, particularly in light of the indication by the joint liquidators that they take no issue on this point.

Preliminary objection

22. The joint liquidators submit that the questions raised in the notice of motion are not appropriate for determination by an application pursuant to s. 631. They say that if the

applicants wish to pursue these questions, they should do so when they arise in a plenary action which they commenced against GTLK Europe and STLC on 19 August 2022.

23. The parties agree that if the determination of these questions were to proceed by way of an application for directions pursuant to s.631 it would be necessary to exchange pleadings and submissions and possibly even evidence before a substantive hearing of the application could take place. It was therefore agreed that the court should first determine the objection raised by the joint liquidators on the very question of whether s. 631 is an appropriate mode of determining these questions. I heard submissions on this preliminary question and this is my judgment on the objection.

24. I have concluded that the objection of the joint liquidators is valid and that I should uphold it. Because I am required only to rule on that objection nothing contained in this judgment can bind the court at the substantive hearing of the plenary action. Nonetheless, in the context of this judgment on the objection it is necessary to refer in more detail below to the events preceding this application.

The Charter

25. The charter was effected by a document described as a Standard Bareboat Charterparty made on 30 December, 2019 between STLC and Swan Hellenic (under its previous name of Mavilor Shipping Limited). These are the only two parties to the Charter.

26. Amendments were made by addenda dated 5 March, 2021, 17 May, 2021 and 3 December, 2021. The vessel was delivered to Swan Hellenic on 3 December, 2021.

27. The Charter effects a fifteen year "charter by demise" similar to a lease. The total charter hire payments provided for under the initial charter amount to €134.5 million, payable by quarterly amounts of €2.67 million.

28. Clause 4 is the operative clause granting a "charter by way of demise" for the charter term of fifteen years.

29. Clause 7 contains the obligation of the owner, STLC to grant quiet use possession and enjoyment of the vessel throughout the charter term.

30. Clause 19 contains the obligation on the part of Swan Hellenic to purchase the vessel at the expiry of the charter term. Clause 19 contains also an option, the "Purchase Option" to purchase the vessel early, at any time after two years of the term, subject to compliance with certain conditions and payment of a Purchase Option Price.

31. The obligations of Swan Hellenic to STLC are secured by certain Account Pledges granted by Swan Hellenic itself over earnings generated from the vessel. Other entities in the Swan Hellenic Group, including the second to sixth named applicants, granted to STLC certain Share Pledges.

Exercise of Purchase Option

32. After the events of February 2022 and when Swan Hellenic found itself unable to operate the vessel, it made a request to STLC for its agreement to an early exercise of the option to purchase, notwithstanding that two years had not expired. This request was made by letter dated 16 March, 2022. It also stated that until completion of a sale or purchase, in order to minimise its costs and damages the vessel would continue to be laid up and payments pursuant to the charter would be suspended.

33. By letter dated 6 April, 2022 STLC consented to the early exercise of the purchase option, subject to compliance with the Sanctions Regulation and the receipt of authorisation from relevant competent authorities.

34. STLC consented also to the deferral for a limited period to 9 October, 2022 of payments due under the Charter.

35. At the time of this exchange of letters the Purchase Option Price was calculated in accordance with the Charter, including a Termination Amount, a Prepayment Fee, the March charter hire payments, and interest at €142 million.

36. Efforts to secure the required derogation from the effect of the Sanctions Regulation to enable the transaction to proceed were unsuccessful.

The plenary summons

37. On 19th August, 2022, the applicants issued a plenary summons against GTLK Europe and STLC. The action was for specific performance of the Purchase Option.

38. In the General Indorsement of Claim the plaintiffs sought the following reliefs:

1. *A declaration that the first plaintiff, Swan Hellenic, is entitled to exercise the Purchase Option.*
2. *A declaration that the first plaintiff has exercised the Purchase Option in accordance with Clause 19 of the Charter and having regard to the consent of the second defendant dated 26 April, 2022 to the early exercise of that Purchase Option.*
3. *An order for specific performance of the Purchase Option.*
4. *A declaration that the second defendant is required to transfer to the first plaintiff the title free and clear of any security or incumbrance of the Vessel.*
5. *An order requiring the second defendant to transfer to the first plaintiff the title, free and clear of any security or incumbrance, of the Vessel.*

6/7. Declarations for the release on completion of the sale of the Account Pledges and the Shares Pledges.

8. *An order requiring the first and second defendants to release any other securities already granted.*
9. *An order restraining the defendants from disposing of the Vessel other than to the plaintiff.*
10. *A declaration that the first plaintiff was entitled to terminate the Charter and/or that the Charter is frustrated and/or can be treated as being at an end.*

11. A declaration that the arbitration clause at Clause 21 of the Charter does not have effect with respect to these proceedings.

12. A declaration that the jurisdiction clause at Clause 21 of the Charter (conferring jurisdiction on the courts of England) does not have effect with respect of these proceedings.

13. Damages for breach of contract.

14. Damages for loss of profit.

15. Interest.

16. Other relief and costs.

The first application

39. On 26 August, 2022, the plaintiffs issued a notice of motion, returnable before the court on 30 August, 2022, for summary judgment in terms of certain of the reliefs identified in the plenary summons. The application was focussed on securing a declaration that the first plaintiff Swan Hellenic was entitled to exercise the Purchase Option.

40. The application was heard and determined by Stack J. on 31 August, 2022.

41. The transcript of her judgment records that Stack J. observed that the applicants fairly disclosed that they were not in a position at the time of that application to pay the purchase price then stated at a sum of €142 million. The plaintiffs had said that it was hoped that if an order were granted in the terms sought Swan Hellenic would find it easier to secure funding, as its efforts to do so up to that point had been "hampered by the chilling effect of the sanctions regime".

42. Stack J. declined the relief sought, principally on the ground that a declaration for specific performance would not be appropriate in circumstances where the plaintiff was not at that time in a position to pay for the vessel. The court noted that, for understandable commercial reasons at the time the plaintiff was "hoping to get funding, no more than that at present".

43. After 31 August, 2022, the applicants continued their efforts to resolve the matter with STLC. They say that they got so far as to reach an agreement with GTLK Europe to acquire the shares in STLC. A price of €76.5 million was referred to. That agreement was never documented or completed. Application was made to secure the necessary derogation from the Central Bank of Ireland to enable this transaction to proceed, but such derogation was not achieved.

The second application

44. The petition for the winding up of GTLK Europe and GTLK Europe Finance DAC was presented on 19 April, 2023 and heard on 31 May, 2023. On 15 May, 2023, the plaintiffs issued a second motion in the plenary action, this time seeking a declaration that it was entitled to exercise the Purchase Option, "at a price to be determined but in any event not exceeding €75 million."

45. That application did not proceed to hearing and was overtaken by the winding up proceedings and the order for winding up of the company ultimately made on 31May, 2023.

The third application

46. On 21 June, 2023, the applicants issued a notice of motion in the winding up proceedings seeking the following orders.

> *"1. An order pursuant to s. 678 of the Companies Act, 2014 granting leave to the plaintiffs in Swan Hellenic Cruises Limited and Ors. v. GTLK Europe DAC and Anor Record No. 2022/4352 (the plenary action) to proceed with those proceedings as against GTLK Europe DAC and, insofar as may be necessary, as against STLC Europe Nine Leasing Limited.*
>
> *2. Orders pursuant to s. 614 and/or 627 and/or s. 631 of the Companies Act, 2014 and/or pursuant to the court's inherent jurisdiction directing or determining that the*

joint liquidators of GTLK Europe DAC should deal with certain assets of GTLK Europe DAC as follows.

i. *That the liquidators should exercise their rights in respect of intercompany loans between GTLK Europe DAC and STLC Nine so as to enable the liquidators to enforce any judgment obtained by them against STLC Nine's interest in the SS Minerva (whether by appointing a receiver by way of equitable execution or otherwise); and*

ii. *That the liquidators apply to the Central Bank of Ireland for derogation pursuant to Article 5 of Regulation 269/2014 enabling the immediate performance of any order obtained by the liquidators pursuant to the actions directed at 2(i) above including (if necessary and appropriate) an order pursuant to s. 614 and/or 627(9) and/or (10) vesting STLC Nine's interest in the SS Minerva in the liquidators; and*

iii. *That the liquidators sell the SH Minerva to Swan Hellenic Cruises Limited for such consideration as may by agreed and approved by this Honourable Court or in the alternative directed by this Honourable Court."*

47. This application was initially made returnable before the court on 23 June, 2023 and adjourned from time to time. As regards the first relief, namely leave pursuant to s. 678 of the Act to continue the plenary action as against GTLK Europe DAC, the joint liquidators stated that they made no objection. This motion remains extant and was listed before me at the same time as the fourth application. On 23 November 2023 I made an order granting leave pursuant to s. 678 to continue the action against GTLK Europe DAC. No such leave is necessary to continue the action against STLC.

48. Affidavits were exchanged in relation to the third application. Ultimately the court was informed that following engagement between the parties the applicants did not intend to pursue any of the reliefs contained in para. 2 of the notice of motion. Instead it was agreed that a new motion would be issued returnable before this court on 21 November, 2023. That in turn led to the agreement between the parties that I would consider and determine as a preliminary matter the joint liquidators objection to the disposal of the questions raised in the notice of motion now before the court by an application pursuant to s. 631.

Background to this application

49. After the appointment of the joint liquidators the applicants confirmed to the joint liquidators their preference to purchase the vessel outright. They invited the joint liquidators to progress a transaction for the sale of the vessel. They stated also that if the joint liquidators were unable or unwilling to engage with a view to concluding such transaction quickly their client would consider other options including

1. The exercise of contractual rights to continue to lease the vessel under the Charter.
2. Accept what is characterised as STLC's repudiatory breach of the Charter, abandoning the vessel and proceeding with a claim for damages.

50. It is stated that in the course of these engagements the liquidators have adopted the positions that (i) Swan Hellenic is liable for charter hire payments under the Charter during the period, which continues, for which the vessel could not be used because of the sanctions and (ii) that GTLK Europe and STLC are not liable for damage caused to Swan Hellenic as a result of the sanctions.

51. The joint liquidators have engaged also with the Central Bank of Ireland as the national competent authority for matters relating to the observance of the Sanctions Regulation. Whilst the order of this court made on 11 July, 2023 declares the control presumption rebutted and declares the joint liquidators to be the persons in control of the

assets of GTLK, which of course includes that company's shares in STLC, the joint liquidators say that they have been advised to adopt what they describe as a risk based approach to the conduct of the liquidation. They therefore agreed with the Central Bank a framework for the due diligence procedures to be applied in respect of their dealings with all parties in the course of the liquidation of the company.

52. In August 2023, the joint liquidators concluded a Protocol with the Central Bank of Ireland. The purpose of the Protocol is to ensure that in all things they do the joint liquidators remain compliant with the Sanctions Regulation. The Protocol requires that a due diligence be applied to ensure that no assets are sold or utilised in a manner which would circumvent the effect of sanctions. The joint liquidators say that because the companies to which they stand appointed had links to the Russian Federation and had various international counterparties which may have links to the Russian Federation there are serious risks of sanction breaches and therefore a need for heightened scrutiny and due diligence on all counterparties with whom they as joint liquidators transact.

53. The Protocol between the joint liquidators and the Central Bank of Ireland is not exhibited, and one of the applicants' criticisms made on this application is that they have not seen the Protocol and yet are being subjected to a due diligence pursuant to it.

54. Engagement between the joint liquidators and the applicants has continued, at all times pursuant, it is said, to the applicants' stated desire to acquire the vessel. It is not necessary for the court for the purposes of the decision now being made to adjudicate on the granular detail of that engagement. However the applicants complain that in respect of this engagement

(a) They are being treated unfairly or improperly;

(b) That the rigorous application of a Protocol for enhanced due diligence to them is excessive;

(c) That the application of the enhanced due diligence is an obstacle to the completion of an agreement on the sale of the vessel and

(d) That the application of the Protocol and the enhanced due diligence is unlawfully interfering with the due performance by STLC of its contractual obligations under the Charter to provide peaceful and quite enjoyment of the vessel.

55. It is not suggested that the entry into the Protocol with the Central Bank of Ireland is unlawful or improper.

56. It is against this background that the revised motion for directions has been issued and I am required to determine the liquidator's objection that a s. 631 directions application is not the correct mode for resolving the disputed issues.

<u>Section 631</u>

57. Although reference is made in the notice of motion to s. 627 of the Act (powers of a liquidator) and to the "inherent jurisdiction of the court" the application is clearly brought by reference to the provisions of s.631 which provides as follows:

Section 631:

631. (1) Each of the following:

(a) the liquidator or the provisional liquidator;

(b) any contributory or creditor of the company;

(c) the Authority (meaning the Corporative Enforcement Authority);

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

(2) The court, if satisfied that the determination of the question will be 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."

58. Many of the cases cited in submissions relate to s. 631 and its predecessor 281 of the Companies Act, 1963. I was referred also to cases concerning s. 438, which relates to applications for directions in receivership matters and its predecessor s. 316 of the Companies Act, 1963. There is a difference in the wording of the section relevant to receiverships which is of limited relevance to the decision I am required to make. Section 438 provides as follows:

"438. (1) Where a receiver of the property of a company is appointed under the powers contained in any instrument, any of the following persons may apply to the court for directions in relation to any matter in connection with the performance or otherwise, by the receiver, of his or her functions, that is to say:

(a) (i) the receiver;

(ii) an officer of the company;

(iii) a member of the company;

(iv) employees of the company comprising at least half in number of the persons employed in a permanent capacity by the company;

(v) a creditor of the company;

and

(b) (i) a liquidator;

(ii) a contributory;

and, on any such application, the court may give such directions, or make such order declaring the rights of persons before the court or otherwise, as the court thinks just.

(2) An application to the court under subsection (1), except an application under that subsection by the receiver, shall be supported by such evidence that the applicant is

being unfairly prejudiced by any actual or proposed act or omission of the receiver as the court may require."

59. In *Re Salthill Properties Ltd (in receivership)* [2006] IESC 35, McCracken J. made the following observations in relation to s. 316 of the Act of 1963:

"*The purpose of the procedures set out in section 316, <u>and indeed the equivalent procedures relating to applications by liquidators</u>* (emphasis added)*, is to permit a person who has been effectively put in control of a company either on behalf of a specific creditor, in the case of a receiver, or on behalf of creditors in general as in the case of a liquidator, to control the affairs of the company and obtain the advices of the court in as efficient and speedy a manner as possible. ...*

I am quite satisfied that the directions sought by the receiver in this case clearly come within the provisions of section 316. The primary issue is the priority of charges on the assets of the company. If a receiver is to perform his functions properly, and in particular if he were to wish to sell the relevant assets, it is, of course, essential for him to know and identify such priorities. Furthermore, the section specifically empowers the court to make orders declaring the rights of persons before the court, in this case the rights of Porterridge as a lessee.

It is, of course, always open to the court to direct a hearing on oral evidence rather than on affidavit if the court feels this is necessary to do justice between the parties. This is a power which the court may exercise at its discretion, and will usually do so if there is a clear and direct conflict of evidence on affidavit. In those circumstances the correct procedure is for the court to direct pleadings, as far as they may be necessary, within the motion before it under section 316, rather than to direct the receiver to commence or join in plenary proceedings. In the present case, for reasons

which I will indicate below, I am quite satisfied there was no such clear and direct conflict of evidence.”

60. The approach described by McCracken J. of enabling the office holder to “obtain the advice of the court in as efficient and speedy manner as possible” was particularly apposite to the application which this court heard and determined in July of this year (see the First Judgment).

61. At first reading, s. 631, and the corresponding section for receivers s. 438 and their predecessor sections in the 1963 Act, appear on their face to be intended to relate to very specific, or “process” related questions concerning the manner in which office holders perform their functions or exercise their powers. In fact, on a perusal of the case law concerning these sections and their predecessors it is clear that in a number of cases the section has been utilised to determine substantive issues as between the office holders and third parties.

62. *Re Salthill Properties* itself concerned questions of whether leases created by companies prior to the appointment of the receiver contravened provisions of security granted by the company and if so the validity of such leases. *Re HSS (in receivership)* 2011 IEHC 497 and *Re Jeffel (in receivership)* 2012 IEHC 279 concerned determinations of the rights of a receiver to possession of company property as against third parties. Other cases have been limited to discrete questions, concerned with such matters as construction of documents or purely legal questions concerning the priority of security as against other interests, based on very limited if any disputes as to the facts. In yet more cases the court has taken the view that substantive issues between office holders and third parties are not appropriate for a directions application and ought to be resolved by a plenary hearing. See *Moran v. Hughes & Ors* [2-13] IEHC 522 and *Keelgrove Properties Ltd (in receivership)* [2016] IEHC 65 and [2017] IECA 254.

63. In *Re Dan Morrissey (Ireland) Limited* [2023] IECA 89 the provisions of s. 438 were invoked to address a number of substantive disputes between appointed receivers and a shareholder and director of the company. The matter was considered by the court pursuant to an application pursuant to s.438, albeit that the application was ultimately dismissed following a substantive hearing. That case concerned an application pursuant to s.438 by a shareholder and director of the company for orders directing the receiver to grant to him an agricultural lease of lands then under the control of the receiver. The court considered the substance of the claim on an application pursuant to s. 438, albeit that the application was dismissed.

64. A significant feature of *Moran v. Hughes* is that a number of the issues on which the applicant sought directions were issues in respect of which proceedings were at the time of the application extant before other courts and tribunals. In the Commercial Court proceedings were pending challenging the validity of the appointment of the receiver and issues arose concerning the provision of security for costs of those Commercial Court proceedings). Proceedings were pending before the Circuit Court relating to claims for payments to a security services provider, and proceedings were pending before the Employment Appeals Tribunal arising from the termination of the employment of a person who was also a director of the company.

65. The court took the view that in circumstances where those matters were the subject of pending proceedings in other courts and fora it was not appropriate that they be entertained on the s. 316 application.

66. The applicants submitted that because s. 631 on its face permits an application for directions to be made by a creditor, the bar for entertaining the application is a low bar and that they are entitled as of right to at least issue their application and have it determined. That is an oversimplification of the section. The court has discretion as to the process which is

appropriate and I must have regard to the informative consideration of the section in the cases cited. From those cases the following principles can be gleaned.

(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 a 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 determining 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.

(3) A question concerning the manner in which an office holder performs his functions or exercises his powers is not necessarily the same as determining a question which is in truth a substantive dispute between a third party and an office holder performing his duty to ascertain and realise assets of the company to which he is appointed.

(4) Where a question arises the answer to which will have general application and will 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.

(5) Although a liquidator is not the only party with standing to apply he is the party charged by the Act with the duty of conducting the winding up in the interests of the creditors as a whole. He is therefore the person most likely to know if an application for directions will benefit that process and to bring an application for directions.

(6) If a creditor applies the court must test whether the determination of the question put in his application by way of a s.631 application is beneficial to the winding up as a whole. The mere fact that one creditor applies and the mere fact that the creditor concerned has a singular interest in the resolution of the question does not mean that the best interests of the creditors as a whole would not be served by determining the application or that it would not be just and beneficial for the conduct of the winding up as a whole that the matter be determined on such an application. If however it is clear that the application is grounded principally in a substantive dispute which the applicant wishes to advance as against the companies or the appointed liquidators, whether alone or, as in this case, in conjunction with other parties, it will be more difficult for such a party to persuade the court that the interests of the winding up as a whole are served by having the matter determined on a s. 631 application. Such a party is entitled to pursue such a dispute by a plenary action against the office holders and the companies, subject in the case of a company in liquidation to leave of the court pursuant to s. 678 of the Act.

(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.

(8) If it transpires that the utilisation of further pleadings, evidence and submissions and possibly even discovery of documents is required to ensure a just and fair hearing of the matter the court should be slow to invent a procedure for the case pursuant to s.631 where in truth the issues are more appropriately heard and determined in plenary proceedings where clear and well understood rules for the conduct of such a case are already in place under the Rules of the Superior Courts.

(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. If that case engages disputes of fact and law to be determined then the ordinary process for doing so is the progression and determination of the matter by the plenary action.

The plenary action

67. Before turning to the three questions raised in the notice of motion it is appropriate to say more about the plenary action and its current status.

68. I have quoted earlier from the terms of the Plenary summons (see para. 38)

69. The summons was issued on 19 August, 2022.

70. The principle relief sought is a declaration that Swan Hellenic is entitled to exercise the Purchase Option in the Charter and an order for specific performance of the Purchase Option. Claims are also made for damages for breach of contract and for loss of property. Other reliefs sought relate to the use of the Account Pledges and the Share Pledges. An order

is sought seeking to restrain GTLK Europe and STLC from disposing of the vessel other than to the first plaintiff.

71. A statement of claim was delivered on 29 August, 2022. In the course of this, the fourth application the plaintiffs exhibited a draft Amended Statement of Claim, to which I refer later. The original Statement of Claim pleads the terms of the Charter including, centrally, the provisions relating to the Purchase Option and the right to exercise the Purchase Option early. It recites the agreement by the exchange of letters on 16 March, 2022 and 26 April, 2022 by which it is said that STLC consented to the exercise of the Purchase Option and it contains a calculation of the Purchase Option Price as of 14 July 2022 in an amount of €142 million.

72. Although Clauses 4 and 7 are recited in the original statement of claim and a claim is made for damages for breach of contract, no order is sought for specific performance of those clauses. Specific performance is sought of the Purchase Option only.

73. The court was informed that an appearance had been entered to the proceedings.

74. No defence or other pleading has been delivered. Apart from the unsuccessful application for a summary declaration in August 2022 and the second application for a summary declaration made in May 2023 which was overtaken by the liquidation of GTLK, it appears that no other step has been taken in the plenary action by either party.

75. The applicants say that after the decision of Stack J. on 31 August, 2022 they focussed their efforts on attempting to negotiate a purchase of the vessel from STLC, and thereafter on a possible purchase of the shares in STLC. They say that there was a measure of engagement regarding such a possible transaction, but it never became possible to consummate the transaction because of the sanctions and the inability to obtain an appropriate derogation.

76. In the context of efforts to find an alternative solution, the inactivity in terms of the progression of the action is understandable to a point. But in so far as the applicants rely now on urgency as a reason for moving under s. 631, that reason must be seen against the absence of any step on their part in the proceedings, even so much as a motion to compel delivery of a defence.

77. Exhibited to the affidavit of Mr. Convery grounding this application and sworn on 24 October, 2023 is the draft of an amended statement of claim.

78. The most significant amendment appearing in this draft is that the reliefs sought no longer include an order for specific performance of the Purchase Option. Instead specific performance is sought of Clauses 4 and 7 (the 15 year charter demise and the quiet enjoyment clauses). Unchanged are claims for "damages for breach of contract" and "damages for loss of property" which remain. There are also added prayers for the following reliefs.

> "4. A declaration that the second named defendant is insolvent and that the no set off provision in Clauses 8.4 and 8.5 of the Charter do not apply.
>
> 5. A declaration that neither of the defendants is entitled to any claim for charter hire or for any other payments from the plaintiffs or any of them."

79. There has been added to the draft amended statement of claim a reference to Article 11 of the Sanctions Regulation. This is relied on by the applicants to assert that they cannot be held liable for the payment of charter party amounts in circumstances where they are unable to use the vessel for the purpose for which it was chartered. Article 11 is important in the context of the proposed motion for directions and provides as follows.

> *"1. No claims in connection with any contract or transaction the performance of which has been affected, directly or indirectly, in whole or in part, by the measures imposed under this Regulation, including claims for indemnity or any other claim of this type, such as a claim for compensation or a claim under a guarantee, particularly*

a claim for extension or payment of a bond, guarantee or indemnity, particularly a financial guarantee or financial indemnity, of whatever form, shall be satisfied, if they are made by:

(a) designated natural or legal persons, entities or bodies listed in Annex I;

(b) any natural or legal person, entity or body acting through or on behalf of one of the persons, entities or bodies referred to in point (a).”

80. In para. 33 of the draft amended statement of claim it is pleaded as follows:

“The SH Minerva has been idle since 16 March, 2022 and is laid up in Uruguay. Initially, this was a result of scheduled maintenance work. However following the designation of GTLK Europe DAC it was not possible to recommence the use of the vessel and all commercial operations involving the vessel ceased. The vessel remains unusable in circumstances where the joint liquidators of GTLK have refused to confirm that Swan Hellenic is permitted to use the vessel and have refused to take certain steps necessary in order to render the vessel usable.”

81. In para. 39 the plaintiffs intend to plead:

“*Swan Hellenic claims damages for breach of contract including loss of profits and operating expenses, as a result of the first and/or second defendants’ failing to ensure Swan Hellenic quiet and peaceful use, possession and enjoyment of the vessel. Swan Hellenic further seeks specific performance of its right to lease and operate the vessel under the Charter.*

40. Swan Hellenic will further particularise the claims it intends to proceed with, and the reliefs it intends to seek, in the within proceedings prior to and/or at the hearing of the action.”

82. In para. 44 of the draft amended statement of claim the following is pleaded:

"Further or in the alternative both the first and second defendants are State Owned Enterprises and are to be identified with the Russian Federation for the purposes of the subject matter of these proceedings.

45. In the premises it would be unconscionable for the first and/or second defendant to deny the claims made by the plaintiffs in these proceedings. The plaintiffs will also, to the extent necessary, rely on the doctrine of illegality and ex turpi causa in response to any defence advanced by the defendants."

83. Para. 47 reads as follows:

"The plaintiffs further say that the second named defendant is insolvent and that the provisions of s. 619 of the Companies Act, 2014 apply and that Swan Hellenic has an automatic right to set off any monies owed by it to the second named defendant (and it is denied that it owes any such monies) against the damages for which the defendants are liable. In the premises the no set off clauses of the Charter, Clauses 8.4 and 8.5 do not apply."

84. The joint liquidators state that they cannot consent to the delivery of the amended statement of claim in the form in which it has been presented. They say this is partly due to the fact that the reliefs sought in the draft amended statement of claim are so different to the relief sought in the plenary summons that if the applicants intend to pursue these amendments it is necessary also to apply to amend the summons.

85. I am conscious of the fact that there is before the court no more than a draft of the amended statement of claim and the applicants' statement of their intention to apply for leave to deliver the amended statement of claim. However, it has been stated that this is the amended statement of claim which the plaintiffs seek leave to deliver and therefore it is appropriate to examine that document to understand the issues which the applicants seek to have determined in the plenary action.

86. In the course of submissions I was referred also to issues which have been identified in correspondence between the parties which the joint liquidators say would also fall for determination in the plenary action. Taking all of these together, it is clear that the issues which arise in the plenary action include at least the following:

(1) The plaintiffs' claim for specific performance now of Clauses 4 and 7 (charter for the hire term and quiet enjoyment)

(2) the plaintiffs' claim for damages for loss of profit and direct expenditure incurred.

(3) The plaintiffs' claim for a declaration that neither of the defendants are entitled to pursue claims for charter hire or other payments in circumstances where the vessel is not available for commercial exploitation. Until such time as a defence is delivered, it is not known whether the defendants will make a counterclaim for these amounts. However, it is said that in correspondence the liquidators, who are liquidators only of the first named defendant GTLK Europe, do not accept that these amounts are not payable and that they are seeking payments of the charter hire amounts. In any event it is clear from the draft amended statement of claim that the plaintiffs are seeking a declaration that the amounts are not so payable and are seeking to put this matter in issue in the action.

(4) The claims made in the statement of claim that the plaintiffs cannot be held liable for charter hire payments at a time when the vessel is stranded are rooted in an alleged breach of Clauses 4 and 7. Article 11 of the Sanctions Regulation is cited as a "further" plea that the defendants are not entitled to pursue claims for charter hire and therefore Article 11 is not the only basis upon which that claim is made.

(5) A claim is made that the defendants ought to be identified with the Russian Federation for the purpose of these proceedings.

87. I now turn to the reliefs sought in the notice of motion

First Relief: an order determining that GTLK Europe DAC and its subsidiaries cannot recover damages from a counterparty for unpaid lease payments during a period when the asset the subject matter of the lease could not be used by reason of the sanction imposed by Council Regulation EU 269/2014

88. The applicants say that the joint liquidators have taken the position that Swan Hellenic is liable for charter hire payments after the date on which the vessel was stranded, notwithstanding that the vessel was not capable of being used.

89. The appellants submit that Article 11 of the Sanctions Regulation precludes such a claim and say that Article 11 is intended to protect the interests of innocent counterparties such as it.

90. The applicants submit the following:

(1) That the ability or otherwise of GTLK Europe and its subsidiaries to recover damages from a counterparty in the particular circumstances described in the notice of motion is a question of law capable of being determined on a directions application.

(2) That the question is bound to arise on many of the other transactions to which GTLK Europe is a party. Reference is made to a number of other cases which have already come before this court and the courts of England and it is submitted that there are likely to be a multiplicity of situations governed by the determination of this issue. Therefore that the determination of this question will be necessary and beneficial for the winding up of GTLK Europe.

91. The joint liquidators submit that Article 11 does not have the effect contended for by the applicants but acknowledge that this is a question for a substantive adjudication.

92. The joint liquidators submit the following. Firstly, that questions of whether STLC, being the registered owner of the vessel and one of the defendants in the plenary action and not in liquidation, can recover these payments is not only a question of the application of Article 11 but is also a question of other laws including questions of English law, and will require determinations of fact and of contractual interpretation.

93. Each of the parties have obtained opinions of English counsel as to matters of English law, having regard to the fact that the Charter is expressed to be subject to the laws of England.

94. Secondly, the joint liquidators submit that after the defendants deliver an amendment of statement of claim, should they be granted leave to do so, they will deliver their defence, and if they deem it appropriate, a counterclaim. They say that even based on the exhibited draft amended statement of claim the question of whether charter hire payments are recoverable in all the events which have arisen will fall to be determined as a substantive question of law, fact and contractual interpretation.

95. Thirdly, the joint liquidators submit that even the discrete and apparently only legal question of whether the applicants can invoke Article 11 to escape liability for charter hire payments is integral to all the matters which will be in issue in the plenary proceedings and therefore is not suitable for determination in isolation.

96. Fourthly, that the court should not embark on a separate consideration of this question by way of directions in circumstances where the question clearly falls for determination in a pending plenary action.

97. I am not persuaded that it is appropriate to determine the first question by way of an application pursuant to s.631 for the following reasons.

98. Firstly it is clear from the affidavits, including the exhibited opinions as to matters of English law, that the question will fall for determination by reference not only to a net point of law concerning the application of the Sanctions Regulations but will require a full examination of the contracts between STLC and Swan Hellenic, to which GTLK Europe is not a party, and of the facts as they have transpired, and will therefore require plenary hearing.

99. Secondly, it is arguable that a discrete question as to whether STLC can recover charter hire payments at a time when the vessel cannot be used by Swan Hellenic could form the basis for a trial of a preliminary issue or even by a first module in the case. I do not say that this question is suitable for a preliminary issue or for a discrete module. The time for considering such a course is after the proceedings have closed and all the issues in the action are joined. Such processes are not always the most expedient way to reach a final resolution of a case. But the applicants have elected to pursue the dispute in a plenary action and it is not now appropriate to direct that this, or any question which will fall for determination in that case, now be determined by a separate directions application in the winding up proceedings. It would not be an appropriate use of s. 631 to permit it to be deployed, independently of the plenary action, to request the "opinion of the court", as it was put by McCracken J. in Salthill, on particular questions selected by the applicants for such a process.

100. Thirdly, I am not persuaded that the determination of this question by this mode will assist the liquidation any more than having the question determined in the course of the plenary action. If the case comes to trial and is so determined the result may or may not inform other situations. The joint liquidators say that there is not a multitude of situations which would be governed by the determination of this question. Neither party has put any clear evidence before the court on this question but the statement by the joint liquidators that there is not such a multitude of situations has not been gainsaid.

101. Fourthly, STLC is not in liquidation. Therefore s.631 does not apply to it. Its new directors are of course nominees of the joint liquidators the exercise of whose powers can in certain cases be subject to scrutiny by reference to s. 631. However, the directors of STLC are obliged in the performance of their duties as directors to protect any asset of that company and in doing so adopt such position in the defence of the plenary action as they are advised, untrammelled by a parallel process in the winding up proceedings.

Second Relief: Whether GTLK and its subsidiaries should be identified with their ultimate parent, the Russian Federation, for purposes of determining whether GTLK entities are liable for damages for breach of contract where the breach is as a result of the sanctions.

102. The reasons stated in relation to the First Relief apply with equal force to the Second Relief, and I add the following.

103. Firstly, the applicants state that the joint liquidators adopt a position that the GTLK entities are not liable for breaches of contract which result from the sanctions on the basis that the cause of the breach is the lawful act of a third party, i.e. the EU and the US State Department. The applicants contend that this position is flawed because it ignores the fact that GTLK Europe is a wholly owned subsidiary of JSC/GTLK which, in turn, is a wholly owned subsidiary of the Russian Federation and that the sanctions have been applied and these entities designated because they are entities ultimately owned by the Russian Federation. It is on this basis that it is argued that, for assessing liability for breaches of contract, GTLK should be identified with the Russian Federation. Having identified this substantive question, the applicants submit that it is a question which is likely to rise in multiple contexts in the course of the liquidation and a matter of general importance which should be determined on a directions motion.

104. Secondly, the decision of this Court in the First Judgment and the order made on 11 July 2023 has the effect of declaring rebutted the presumption of control which applies under the Sanctions Regulation which means that assets of GTLK Europe and its subsidiaries are no longer, at least since the appointment of the joint liquidators on 31 May 2023, subject to the sanctions. This can only apply to the post-winding up position. Therefore, it will be necessary at a trial of the action to apply a different analysis to the position before and after the winding up of the company as far as the damages claim is concerned.

105. Thirdly, the proposition that STLC and GTLK Europe should be *"identified"* with the Russian Federation in the context of a claim for damages for breach of contract deriving from the sanctions is by any measure a substantial and far reaching one. At the risk of venturing into the substance of the question, it seems to me that to sustain such a proposition is likely to require more than simply stating the chain of ownership and pre-liquidation control, and would require a full examination of facts and some potentially novel legal questions, all of which I would be reluctant to direct in a process outside of the plenary action.

106. Fourthly, the assertion of identification is squarely pleaded in the draft amended statement of claim at paragraph 44 (see paragraph 82 above).

107. At first pass, there is some merit in the proposition that the future conduct and progress of the winding up would benefit from determination of a general question whether GTLK Europe should be identified with the Russian Federation, being the party whose actions it is said gave rise to the necessity for the imposition of sanctions. But whilst the question as phrased in The Second Relief as headed has the appearance of a such net point of law, it is no such thing and ought to be determined in a full plenary manner and not in isolation from other issues in the case.

Third Relief: Whether the joint liquidators cannot, in the absence of a *prima facie* basis for alleging that there has been or will be a breach of sanctions, lawfully require

counterparties to comply with the so called enhanced due diligence protocol before contracting with them or complying with existing contracts

108. Again, at first reading, this question has the appearance of one which is confined to the manner in which the joint liquidators exercise their powers and, therefore, clearly within the wording of s. 631. However, on a closer examination, it is inseparable from the first two questions in dispute.

109. Much has been said in the affidavits and submissions about the engagement between the parties around a potential transaction for the sale of the Minerva, or possibly a sale of the shares in STLC. The applicants are dissatisfied with the rate of progress of this engagement, as described at paragraph 54 earlier. The joint liquidators say that it was necessary for them to implement a due diligence framework approved by the Central Bank of Ireland, hence the Protocol agreed in August 2023. It is not suggested that doing so was unlawful or improper. The liquidators acknowledge the cooperation by the applicants with that process and that the applicants have responded at all times in a timely manner to questions and requests for further information. The joint liquidators say that potential counter parties in relation to other assets have been asked to provide information and documents in accordance with the Protocol and have complied without taking issue with the application of due diligence requirements.

110. In an affidavit sworn on 17 November 2023, the joint liquidators state that they have completed their due diligence and that all new information which was provided by the appellants in the course of this exercise is now with an independent team for review before being finally submitted to the Central Bank of Ireland.

111. This question has been formulated, in relation to the application of the due diligence requirements in two separate contexts. Firstly, *"before contracting with the applicants"* and, secondly, *"before complying with existing contracts"*.

112. As to the first part of the question, nowhere in the affidavits or in the submissions is it asserted that the joint liquidators are under any legal obligation enforceable by the applicants to contract with them. If such a claim were made, a good case could be made that the conduct of the joint liquidators under this heading could fall for scrutiny on a directions application pursuant to s. 631. But it is not said that they are obliged to make a new contract with the applicants and that they are in declaration of duty by failing to do so.

113. Clearly, the provisions of s. 631 have no application to the manner in which STLC applies due diligence requirements before it would dispose of an asset.

114. The second element of this relief sought concerns the application of due diligence before the joint liquidators would *"comply with existing contracts"*. Whether they seek specific performance of the Purchase Option under cl. 19 of the Charter or of the quiet enjoyment provisions of clause 4 and 7, as the intended amended statement of claim posits, or damages, the applicants contractual claims are made in the plenary action. At trial they will be required firstly to prove the contract and secondly that in all the circumstances they are entitled to enforce it, all of which will entail questions of law, fact and contractual interpretation. The defendants have yet to deliver a defence in those proceedings. Only then will it be known what, if any, defences are made to the contract claim, and only then would the application of the due diligence requirements arise if a plea is made by reference to those requirements. To direct a determination of the Third Relief sought, in isolation from the plenary action, would be an inappropriate use of s. 631.

<u>Conclusion</u>

115. The plenary action engages substantial questions of law and fact including questions of contractual interpretation and, in some cases, questions of English law. These are complex and important matters which will require determination in a plenary trial with all the

attendant benefits of pleadings, exchanges of submissions and evidence and, if necessary, discovery of documents.

116. The issues to be determined between the parties are not limited to those identified in the questions proposed in the notice of motion. Determination of these three questions will not resolve all the issues between the parties and the applicants have not said that if these questions are determined the plenary action would not still proceed.

117. The applicants have chosen to pursue the plenary action and maintained this position after the appointment of the joint liquidators. Having done so, it is not appropriate that certain questions now selected by them, be subjected to a separate proceeding outside the plenary action and potentially conducted in parallel with the progress of the plenary action.

118. I have a measure of sympathy with the applicants in that they have encountered what from their perspective appears to be a sequence of *"moving targets"*. They took delivery of the vessel in December 2019 and only two months later the incursion of Ukraine occurred which led to the vessel being stranded. In April 2022, they were faced with the designation of GTLK Europe under the EU Sanctions Regulation, followed in August 2022 with the designation of GTLK and its group companies by the US State Department. In April 2022 a petition was presented for the winding up of one of the defendants GTLK Europe and the joint liquidators appointed. The applicants were then faced with having to meet the due diligence requirements of the joint liquidators arising from a Protocol between the joint liquidators and the Central Bank to which the applicants are not a party.

119. Against this background, there were certain good reasons for the applicants to focus on different methods of achieving their commercial objective. But no substantive steps were taken in their plenary proceedings. The fact that one of the defendants in the action is now in liquidation by order of this Court does not warrant diverting from the course upon which the applicants were originally embarked. Invoking s. 631, independently of the plenary action, to

secure a determination of a series of questions selected by them with no assurance either that the determination of the those questions in such a parallel process would determine the issues between the parties or would be just and beneficial for the winding up of GTLK Europe as a whole would be to permit that section to be deployed as a means of progressing in isolation from the plenary action questions which, in any event, will fall for determination in their plenary case, along with other complex questions of law, of fact and of contractual interpretation.

120. For all these reasons, I accept the objection of the joint liquidators that the issues identified in the notice of motion are not in the circumstances of this case appropriate for determination pursuant to s. 631 of the Act.

121. I have already made the order pursuant to s. 678 granting leave to the applicants to continue the plenary action against GTLK Europe DAC in liquidation. No such order is required as far as continuance of the action against STLC is concerned and there is no reason why that action should not now be progressed expeditiously by all parties.