THE HIGH COURT

[2021] IEHC 272

2020/366 COS

IN THE MATTER OF ARCTIC AVIATION ASSETS DESIGNATED ACTIVITY COMPANY

AND

IN THE MATTER OF NORWEGIAN AIR INTERNATIONAL LIMITED

AND

IN THE MATTER OF DRAMMENSFJORDEN LEASING LIMITED

AND

IN THE MATTER OF TORSKEFJORDEN LEASING LIMITED

AND

IN THE MATTER OF LYSAKERFJORDEN LEASING LIMITED

AND

IN THE MATTER OF PART 10 OF THE COMPANIES ACT, 2014

AND

IN THE MATTER OF NORWEGIAN AIR SHUTTLE ASA, AS A RELATED COMPANY WITHIN THE MEANING OF SECTION 517 AND SECTION 2 (10) OF THE COMPANIES ACT, 2014, AND IN THE MATTER OF THE COMPANIES ACT, 2014

Judgment of Mr. Justice Quinn delivered on the 22nd day of April, 2021 (Section 541)

1. This judgment relates to an application by the examiner appointed to the five companies named below for an order pursuant to s. 541 of the Companies Act 2014, ("the Act"), confirming his proposals for a scheme of arrangement between each of the companies and their respective members and creditors. The proposals relate to the following companies:-

    - Arctic Aviation Assets DAC ("AAA").
    - Norwegian Air International Limited ("NAI")
    - Drammensfjorden Leasing Limited ("DLL")
    - Lysakerfjorden Leasing Limited ("LLL")
    - Norwegian Air Shuttle ASA ("NAS")

2. I refer to the companies listed above as "the companies". NAS is the parent company of the wider Norwegian Group to which I shall refer as "the Group".

3. On 18 November, 2020, Kieran Wallace of KPMG Dublin was appointed interim examiner of the companies and of Torskefjorden Leasing Limited ("TLL"). By further order made on 7 December 2020, Mr. Wallace was appointed examiner of the companies and Torskefjorden Leasing Limited. The structure of the Group and the background to the appointments is described in my judgment in these proceedings delivered on 16 December, 2020, ([2020] IEHC 664) ("the First Judgment").

Liquidation of TLL

4. TLL was a company which focused on leasing wide-bodied aircraft suitable only for long haul flights. On 14 January, 2021, the companies made an announcement in relation to

their business plan, a significant part of which was a decision that the Group would in the future focus on its core Nordic business, operating a European short-haul network with narrow-bodied aircraft. It had concluded that a long haul operation was no longer viable for the Group and therefore that long haul operations would cease.

5. On 15 January, 2021, the examiner made an application to the court seeking the removal of protection from TLL and an order winding up TLL. He reported that in light of the decision to cease offering long haul flights, he had formed the view that he was unable to formulate proposals for a scheme of arrangement in relation to TLL. Accordingly, this Court made an order on 15 January, 2021, lifting the protection of the court in relation to that company and an order for the winding-up of TLL.

The examiner's report

6. Section 534 of the Act requires that the examiner formulate proposals for a scheme of arrangement, hold meetings of members and creditors to consider the proposals, and report on the outcome of those meetings within 35 days after the date of his appointment, or such longer period as the court may allow. As permitted by s. 534, the court granted a number of extensions to the reporting time limit. A final extension was granted on 19 February, 2021, up to 16 April, 2021. The final extension was granted by reason of exceptional circumstances, as permitted by amendments to s. 534, made by s. 13 of the Companies (Miscellaneous Provisions) (Covid-19) Act 2020, as updated by SI 672/2020.

7. The examiner convened the required meetings of members and creditors for each of the companies to consider and vote on the proposals. The meetings were held initially between 18 March, 2021, and 20 March, 2021, with certain inquorate meetings adjourned to 22 and 23 March, 2021.

8. On 22 March, 2021, the examiner delivered his report on the proposals in accordance with s. 534. The hearing of the application to confirm the proposals took place on 25 and 26 March, 2021. At the conclusion of the hearing, I delivered my ruling and confirmed the proposals pursuant to s. 541 (3). This judgment summarises the reasons for my decision to confirm the proposals.

9. The application to confirm the proposals was grounded on an affidavit sworn by the examiner on 22 March, 2014. To that affidavit there was exhibited the examiner's report pursuant to the provisions of s. 534 of the Act.

10. The examiner delivered a supplemental report on 23 March, 2021, in which he reported on the final outcome of all of the meetings of members and creditors including certain of the meetings which had been adjourned to 23 March, 2021.

11. The proposals were approved by the members of each of the companies.

12. The proposals were also approved by at least one class of creditors of each company.

13. At the confirmation hearing 24 notice parties, in addition to the companies themselves, were represented. The majority of those who were represented stated that they were participating in the hearing only as observers, and a number of those parties stated that they were neutral as regards confirmation of the proposals.

14. No party opposed confirmation of the proposals. Support for confirmation was stated on behalf of four creditors.

15. I shall return to the contents of the proposals as regards each of the companies. I propose to consider first the general evidence given by the examiner as regards the proposals and the investment arrangements intended to underpin the proposals.

Background

16. As described in my First Judgment, the perilous state of the companies' finances was largely attributable to two significant events in 2019 and 2020 respectively. The first of these was the grounding of all 18 of the Group's Boeing 737 Max 800 aircraft at the direction of the European Union Aviation Safety Agency after the Ethiopian Airlines and Lion Air crashes. Those aircraft remain grounded. The second event was the COVID-19 pandemic.

17. In early 2020 the Group embarked on a restructuring entailing significant cost reductions, and the raising of additional external working capital.

18. The 2020 restructuring plan included the conversion of a proportion of the Group's debt and leasing commitments to equity, and renegotiation of terms with lessors and financiers of aircraft. The Group reduced its active fleet to seven Boeing 737 – 800 aircraft operating solely on domestic routes within Norway, and postponed operations outside Norway pending the easing of travel restrictions necessitated by the pandemic.

19. Following the completion of the 2020 restructuring, the Group applied to access the Norwegian state aid package which consisted of a state loan guarantee package of NOK 3 billion (approximately €278 million).

20. On 9 November, 2020, the Norwegian government announced that it had declined to provide this further financial support to the Group. This announcement, combined with increased public health restrictions in the latter half of 2020 as a result of the pandemic placed the Group in a challenging situation both financially and operationally and ultimately led to the presentation of the petition for examinership.

21. The examiner's proposals are largely based on the companies' business plan and proposals to secure investment. These plans were announced by the companies to the Oslo Stock Exchange, the Oslo Børs, on 14 January, 2021. The examiner reports that although he had engaged with a number of potentially interested parties concerning investment, no offer or proposal for any investment was forthcoming from those parties. He formed the view that the form of investment envisaged by the companies' proposals was the only viable basis for proposals for a scheme of arrangement for the companies that would secure their ongoing survival as going concerns.

22. The investment terms proposed by the companies, and which form the basis of the examiner's proposals, envisage the raising of funds through a Rights Offering, a Private Placement and a New Capital Perpetual Bonds Offering. These are described in more detail below.

23. The business plan envisaged the following key features: -

    (1) That the Group would focus on its core Nordic region business, operating a European short-haul network with narrow-body aircraft. It was envisaged that the Group would initially hold circa 50 Boeing 737 aircraft (reduced from a fleet size at peak of 140 aircraft).

    (2) That the Group would cease operating the long haul network.

    (3) That subject to the restructuring being successful, the Group would: -

        (a) Reduce total debt to around NOK 20 billion (approximately €1.8bn), and emerge from the examinership with a free cash position of approximately NOK 4 to 5 billion.
        (b) Achieve positive EBITDA following the restructuring in 2021, based on certain assumptions as to the length of the COVID-19 pandemic and as to revenue costs and other factors.

    (4) The proposals also envisaged cost savings where possible by procuring competitive terms from suppliers and in certain instances replacing suppliers with in-house resources.

24. The examiner says that having analysed and evaluated the Group's proposals and business plan, the projections underlying them, the level of investment required by the companies, and potential alternative sources of action, he ultimately determined the Group's proposal was an appropriate basis upon which to prepare his proposals in accordance with s. 534 of the Act. He concluded that these were the only proposals capable of securing the survival of the companies as going concerns.

25. The examiner reports that he worked with management at the companies and their financial advisers to assess the level of investment necessary to ensure that the companies could execute a successful restructuring and successfully exit examinership as a viable business. He came to the view that to achieve such an outcome funding in the region of NOK 4.5 billion would be required in the form of new capital. He reports that given the nature of the Group and the large level of capital required investment would need to come from either the public markets or from one or more large investment funds. He concluded that the optimal way to obtain the necessary investment was through a combined equity and hybrid capital raise by NAS as the parent company of the Group. This capital raise was to be reflected in the Rights Offering, the Private Placement and the New Capital Perpetual Bond Offering detailed in the proposals.

26. The examiner stated that the nature and scale of the investment being sought was such that it would have been extremely difficult, if not impossible, to undertake the type of public offering envisaged in the proposals while uncertainty remained about the restructuring of the Group and whether the restructuring would be approved by creditors and ultimately confirmed by the Irish court and as appropriate by the Norwegian court. He says that the inherent uncertainty associated with the examinership process, including legal risks associated with the matter of confirmation of the proposals or the possibility of appeals was such as would have undermined the prospects of a successful capital raise. He did not believe that investors would have been willing to commit funds until after the proposals had been confirmed and the appeal period had expired. For this reason, the examiner states that, unusually, his proposals have been presented to the creditors and to the court before there is in place binding commitments of investment. He says that the capital raising processes would have to be completed following the confirmation of the proposals. The proposals would not take effect unless and until the minimum gross proceeds of NOK 4.5 billion in aggregate had been raised.

27. The companies engaged DNB Markets, part of DNB Bank ASA, the largest investment bank in Norway, to assess and advise on the recapitalisation and funding requirements of the companies. The examiner says that their input has been central to his determination of the optimal approach to securing the investment necessary for the examinership.

28. The examiner referred also to discussions had with a number of prominent investors and which, as at the date of his report, were said to be at an advanced stage.

29. Finally, the examiner said that there had been positive engagement with the Norwegian government in relation to the provision of funding as part of the New Capital Perpetual Bond Offering. The Norwegian government have proposed and the parliament of Norway has approved the Norwegian government's intention to participate in that offering up to an amount not exceeding NOK 1.5 billion. The examiner was of the view that the participation of the Norwegian government would provide credibility to the capital raising process and is likely to instil confidence among other potential investors.

30. In presenting his report the examiner stated that based on the progress to date, the advice provided by DNB Markets, the evidence presented to him of engagement with prominent investors, the decision of the Norwegian government and of the parliament of Norway he formed the view that there is a strong likelihood of the minimum gross proceeds threshold being raised within the required timeframe.

New Capital Structure

31. The terms of the new capital raise are closely interwoven with the proposals being made to members and creditors and are described in more detail in relation to the proposals for NAS. It is useful however to refer to the summary of the proposed new capital structure as described in the examiner's report.

32. It is envisaged that after the restructuring of NAS, a minimum of 70% of the fully diluted capital of that company will be held by investors who have subscribed for new equity

and/or hybrid capital through the proposed Rights Offering, Private Placement and New Capital Perpetual Bond. It is projected, based on certain assumptions about the size of the investment in new shares, that 25.4% of the shareholding will be allocated to creditors whose claims are converted to equity pursuant to "dividend claims" terms, described in the proposals. 4.6% of the shares will be held by the current shareholders in NAS.

33. This structure is based on the assumption that an aggregate of NOK 4.5 billion will be raised and that all creditors of NAS permit the conversion of their dividend claims into equity.

34. Under the Rights Offering each holder of ordinary shares in NAS will be granted preferential rights to subscribe for and be allocated new ordinary shares in NAS at a subscription price stipulated in proportion to its shareholding in NAS. It is intended that this would raise gross proceeds in an amount of up to NOK 400 million.

35. Under the Private Placement, certain new investors, and certain examinership creditors are invited to apply for new ordinary shares in NAS, which will be listed on the Oslo stock exchange.

36. The allocation of ordinary shares pursuant to the Private Placements is to be determined by NAS, with the support of DNB Markets and will follow customary practice for institutional placements.

37. Under the New Capital Perpetual Bonds Offering, certain groups of creditors will be entitled to apply for bonds in amounts to be determined by the company in parallel with determining the amount of the Rights Offering and the Private Placement. The capital raise under this bond is anticipated to be in the order of NOK 1.875 billion, including the subscription of the Norwegian government.

38. Creditors who elect to participate in the Private Placement and New Capital Perpetual Bonds will be issued with what are described as "Retained Claims Bonds". The Retained Claims Bonds form part of the contribution to the settlement of debts due to creditors and are described in more detail in the proposals for NAS.

NAS Proposals

39. NAS is the holding company of the Group. It is the immediate parent company of NAI and AAA. Group management and corporate functions are carried out by NAS and it provides to other airline companies in the Group shared services including ticket sales. All income generated in ticket sales by companies in the Group is collected and held by NAS which operates a cash pooling arrangement for all entities in the Group.

40. NAS is also the holder of an air operator's certificate and itself operates flights, leasing its fleet of aircraft from other companies in the Group, usually subsidiaries of AAA.

41. Although the examiner was appointed to NAS on the basis that it was a related company for the purpose of s. 517, the proposals in relation to NAS are the "lead" proposals. All of

the intended investment for the companies will be secured through the restructuring of NAS.

42. NAS is also a guarantor, or co-guarantor in some instances with AAA, of leasing and other obligations of other companies in the Group, both the companies in examinership and other subsidiaries to which no examiner was appointed (the "excluded subsidiaries"). The NAS proposals contain provisions for the claims of a number of the guaranteed creditors and counterparties and those claims are settled through the NAS proposals. Importantly, therefore, the NAS proposals contain certain releases of the claims of those counterparties against the relevant other companies.

43. NAS has formally undertaken to fund the cash dividends under the proposals relating to NAI, AAA, DLL and LLL where appropriate, including any obligations in relation to the issuance of New Capital Perpetual Bonds, the Rights Offering, the Private Placement and the Retained Claims Bonds in favour of any such creditors. That undertaking is recorded in the proposals for each company and was given to the court formally by counsel for NAS at the hearing on 26 March, 2021.

Conditions

44. The proposals recite that they will come into effect only when the following preconditions have been satisfied: -

    (1) That the proposals and the proposals for the related companies have been confirmed by this Court.

    (2) That the Norwegian Restructuring Plan, which is intended to implement the proposals without modification, save for any modification made in accordance with the Act, has been sanctioned by the Norwegian court. (The proposals contain a provision whereby each creditor irrevocably appoints the examiner as its agent and proxy with full power and authority to exercise all rights to vote on the Norwegian Restructuring Plan, such authority to take effect immediately following the making of the confirmation order.)

    (3) That the company has raised investment proceeds of no less than the minimum gross proceeds threshold of NOK 4.5 billion in connection with the Rights Offering, the Private Placement and the New Capital Perpetual Bonds Offering.

45. The proposals contain detailed provisions regarding the structure and operation of the Rights Offering, the Private Placement and the New Capital Perpetual Bonds Offering, and Term Sheets are appended to the proposals. The proposals also include provisions requiring verification of the amount raised by the companies' auditor, PWC, approval by the Norwegian Financial Supervisory Authority, and registration of the issued shares at the Norwegian Register of Business Enterprise. The proposals contain provisions for the investment proceeds to be blocked pending that registration and pending final instruction to be given by the examiner.

46. The proposed Effective Date is 26 May, 2021. The proposals contain provision for the examiner to apply for an extension of the Effective Date should that become necessary, subject to a long-stop date of 30 June, 2021.

47. The amount raised through the investment element of the proposals will be applied to the working capital requirements of the companies. The cash element of the proposed dividends will be sourced from the cash resources of NAS.

Effect on members

48. Shares in NAS are a popular investment in Norway. The examiner reports that the existing shareholder base includes more than 50,000 retail shareholders. 73% of the shareholding is held by the 20 largest creditors, a range of financial institutions and nominees.

49. Under the proposals, the existing shares will be diluted to represent 4.6% of the total issued share capital of the company on a fully diluted basis.

50. Members will be entitled to participate in the Rights Offering and doing so may mitigate the extent to which their total interest in the company's share capital would be diluted by the proposals.

The blended dividend to creditors

51. For many of the classes of creditors of NAS, the proposals provide for a combined or "blended" dividend arrangement comprising two elements: -

    (a) A pro rata cash dividend from a fixed amount of NOK 500 million, referred to as the "*cash pot entitlement*", and;

    (b) An amount representing 5% of their "Net Agreed Debt", after deducting the amount of the cash dividend, being converted into a Dividend Claim.

52. The cash pot entitlement is based on a pro rata participation in the amount of the cash pot based on the proportion that each creditors' net agreed debt bears to the aggregate of the amount of all creditors participating in the cash pot following the end of the expert determination process for unagreed claims.

53. The second element is referred to as a Dividend Claim. This comprises the issue of a debt obligation of NAS, stated as unsecured debt repayable seven years after the Effective Date. The dividend claim carries interest and is assignable subject to certain terms and conditions.

54. Subject to a right to opt out, the dividend claim is deemed to be converted into shares 60 days after the Effective Date. Those shares then form part of a structured sale of all such shareholding to be effected in the market and the proceeds of the sale of shares are to be distributed *pro rata* to those creditors who have participated.

55. Each creditor granted a dividend claim has a right to opt out of the conversion to shares or to opt out of the onward sale of the shares.

Effect on each class of creditors

56. NAS has 17 classes of creditors. The effect of the proposals on those classes may be summarised as follows.

57. Secured cash deposit creditors: There are two creditors in this category, namely DNB Bank and Danske Bank. The security held by each of these parties will be unaffected by these proposals.

58. NAS 09 Secured Bond Creditors and NAS 07/08 Secured Bond Creditors: Existing security for these designated cash bonds will be unaffected, but to the extent that there are unsecured balances due to the holders of these bonds, the blended dividend will be paid on such.

59. Preferential creditors will be paid in full.

60. The blended dividend applies to most of the other classes of creditors, including the "*2019 Convertible Bond Creditor*", Unsecured Creditors, the Norwegian Export Credit Guarantee Agency, and certain banks namely Danske Bank and DNK Bank, (save to the extent of the value of security held by those entities), and the following classes: Retained Guarantee Creditors, Non-Retained Guaranteed Creditors, Terminated Contract Creditors, Retained Lease Creditors, Terminated Lease Creditors, Customer Creditors, The 2020 Convertible Perpetual Bond Creditors, Intercompany and Connected Creditors to the extent that there are any balances due after set off has been applied, and the Contingent Unagreed Creditors.

61. As the class name implies, the creditors in the classes of Terminated Contract Creditors, Terminated Lease Creditors and Non-Retained Guaranteed Creditors, include lessors, guarantee beneficiaries and a range of counterparties whose contracts have been terminated on or after the date of the petition pursuant to formal termination agreement with the company or will be repudiated pursuant to approval orders made by this Court under s. 537 of the Act on 5 March, 2021, (see judgment of this Court delivered on 21 April, 2021 ([2021] IEHC 268) ("the Second Judgment").

62. The proposals provide for the payment of no dividend in respect of the claims of Retained Sub-Lease Creditors and Terminated Guaranteed Sub-Lease Creditors, both of which categories comprise only related companies.

Contingent Unagreed Creditors

63. The only class recorded by the examiner as having "not approved" the proposals were the Contingent Unagreed Creditors. These are defined as meaning parties with claims against NAS which are contingent, including upon the outcome of litigation or other binding dispute resolution procedure and which are not accepted by the Company.

64. The majority of the creditors in this class are related companies. The most significant external parties were the Norwegian Tax Authority, having an estimated claim at NOK 673,288.069, New York State Division of Tax Appeals, having a stated claim of NOK 1.327

million (US$147,125), and two Boeing entities, being the Boeing Company and Boeing Commercial Aviation Services Europe Limited.

65. The proposals provide that in respect of any Contingent Unagreed Creditor which had issued proceedings against the company or has a counterclaim against the company in ongoing proceedings, that claim should be determined by the courts of competent jurisdiction. This is by way of exception to the provision for expert determination of unagreed claims (see para. 67 – 69). In respect of any balance found to be due to such an unagreed creditor, such creditors shall be treated in like manner as an unsecured creditor of the company, which is the "*blended dividend*".

66. This treatment is of significance in relation to Boeing. On 29 June, 2020, NAS and AAA filed proceedings against the Boeing entities in the Circuit Court of Cook County, Illinois. Claims are made for damages for breach of contract, breach of good faith and fair dealing obligations, for fraudulent inducement and rescission of aircraft purchase and maintenance contracts. The claims arise largely from the worldwide grounding of the Boeing 737 Max fleet. Boeing has not participated in the hearing to confirm these proposals.

Expert determination of unagreed claims

67. The proposals provide for the determination of the quantum of unagreed claims by an expert.

68. Where an unagreed claim arises from contracts relating to the leasing, financing, acquisition, manufacture or maintenance of aircraft or any part thereof, the expert is to be one of two named persons, at the election of the claimant. Two aviation experts are nominated in the proposals for this purpose, namely Mr. Richard G. Spaulding, or Mr. Robert Palmer.

69. In respect of the other claims of unagreed creditors, disputes are to be referred to a "general" expert, namely Mr. Damien Murran of RSM Ireland.

Comparison with winding up

70. The examiner compares the outcome of these proposals for each class of creditors with the outcome on a winding-up basis.

71. In respect of preferential and secured creditors, it is said that the relevant creditor would on a liquidation secure recovery of 100% of its claim. A similar recovery is proposed under the examiner's proposals.

72. In respect of each of the other categories, with the exception of the 2020 Convertible Perpetual Bond Creditors, the projected liquidation dividend is estimated at 1.53%. The intended examinership dividend is described as 5% although it has to be recognised that that dividend is a blend of a cash and dividend claim.

73. In respect of two categories, namely the Terminated and Retained Sub-Lease Creditors, the examiner's proposals provide for a dividend of 0%, against a theoretical recovery on

liquidation of 1.53%. The counterparties to those subleases in each case are Group companies and they have not voted against the proposals or objected to their confirmation.

Norwegian Air International Limited ("NAI")

74. NAS and NAI are the only two companies in examinership which are aircraft operating companies ("AOC"). NAI was the Group's first EU licenced airline. It operated intercontinental routes out of bases in Denmark, Finland, Spain, Ireland and the United Kingdom.

75. NAI is a wholly-owned subsidiary of NAS and no change to its shareholding structure is effected by the proposals.

76. Insofar as there are cash dividends to be paid under these proposals, they are being funded out of the cash pooling arrangement with NAS, which has recorded its undertaking to fund cash dividends under the proposals for NAI.

Effect of proposals on creditors

77. The preferential creditor is Fingal County Council and will be paid a 100% cash dividend.

78. There is a category of Disputed Tax Creditors, being the Revenue Commissioners of Ireland. The claim is for two separate amounts, namely €731,078.68 and €29,797,179.66. The claim is the subject of a tax appeal before the Tax Appeal Commissioners of Ireland. Under the proposals, any portion of the claim which is upheld and which would on a liquidation of the Company be afforded preferential status under ss. 621 and 622 of the Companies Act 2014 will be paid a cash dividend of 100%. In respect of any determined liability in excess of the preferential claim, the company will pay a cash dividend of 1%.

79. The Revenue Commissioners abstained from voting on the proposals and at the hearing of this application, confirmed that they were making no objection to confirmation of the proposals.

80. Unsecured creditors will be paid a cash dividend of 1% of their net agreed debt.

81. There were 255 unsecured trade creditors listed in the appendix to the proposals. Of those creditors, three creditors representing US$33,548 voted in favour of the proposals, and four creditors representing claims amounting to US$4,325,543 voted against the proposals. Four creditors representing claims valued at US$151,752 abstained. Therefore, this class of creditors did not approve the proposals. However, no such creditor opposed confirmation of the proposals by this Court.

82. The Terminated Sub-Lease Creditors, Customer Creditors, Retained Sub-Lease Creditors and a so-called Counter Indemnity Creditor will each receive 0% in respect of the amount of their claims. Insofar as any of these claims relate to unconnected parties, their claims are provided for in the proposals relating to NAS. No dividend is provided for Counter Claims because they are provided for in the NAS proposals.

83. In the class of Co-Obligor Liability Creditors, the proposals were not approved, the only vote being that of Terminal 1 Group Association, which claimed to be owed US$40.6 million. That party did not participate in the hearing to oppose confirmation of the proposals.

84. The class referred to as The Contingent Unagreed Creditor has one member, namely the Environmental Protection Agency, Ireland (the "EPA). The proposals provide for the payment of a cash dividend of 1% on any amount which may be established. The amount, if any due, is to be determined under the Expert Determination Process.

85. I have discussed later in this judgment the particular issues which were drawn to the court's attention in relation to the status of the EPA (see paras. 194 et seq.).

Comparison with winding up

86. The proposed dividend of 100% on preferential claims corresponds to the outcome which would be achieved on a liquidation. In respect of secured creditors, the examiner estimates that the proposal to pay 100% exceeds the amount of 63% which would otherwise be payable to that creditor on a liquidation.

87. In respect of all other categories of creditors, the estimated liquidation dividend is 0%, and dividends are proposed for a number of those categories at either 0% or 0.5% in the case of connected and inter-company creditors or 1% in the case of Unsecured Creditors, the unsecured balance, if any, due to the Disputed Tax Creditor and the Contingent Unagreed Creditors.

Arctic Aviation Assets Limited ("AAA")

88. AAA is the Irish holding company for the Group's aircraft management, trading, leasing and licencing platform. Through AAA, and its subsidiaries, the Group finances and leases its entire fleet of aircraft. This company was incorporated to act as an asset management company for the Group and to centralise the aircraft leases and financing arrangements in a dedicated corporate structure. It has 36 Irish incorporated subsidiary companies, including DLL and LLL.

89. These companies lease or sublease aircraft to operating companies in the Group, including NAS and NAI. AAA is the assignee by novation of aircraft purchase contracts with Boeing and Airbus, and its obligations under those contracts are guaranteed by NAS. Together with NAS, AAA is the guarantor of multiple lease and financing obligations extant between its subsidiaries and third parties. A number of those guarantee contracts have been subject to orders approving repudiation by the Company pursuant to s. 537 of the Act.

90. No change is proposed to the shareholding of AAA.

Effect of proposals on classes of creditors

91. The proposals provide for the payment of a cash dividend of 1% of Net Agreed Debt in respect of the claims of unsecured creditors. One unsecured creditor, Lufthansa Technik, owed US$155,106, voted against the proposals.

92. The proposals provide for a payment of 0% on connected and inter-company debt, such debt being calculated after any set off from mutual claims as between the company and connected companies.

93. In respect of a class of creditors referred to as the Co-Obligor Liability Creditors, the proposals provide for a nil dividend, because the claims of those creditors are discharged pursuant to the proposals for NAS. Importantly, this class includes the beneficiaries of certain guarantees, the repudiation of which has been approved by this Court pursuant to s. 537.

94. The claims of Terminated Contract Creditors are treated in like manner as unsecured claims, namely a cash dividend of 1%.

95. The class of "Contingent Litigation Creditors" comprises only the Boeing Company and Boeing Commercial Aviation Services Europe Limited. Together with NAS, AAA is party to the proceedings against the Boeing entities in Illinois. The proposals provide that to the extent that any liability to those creditors is established in these proceedings it will receive a dividend of 1% from AAA to the extent that the liability is not also a liability of NAS and provided for in the NAS proposals.

96. These proposals were approved by three of the classes of creditors.

97. The examiner's report describes and compares the estimated examinership dividend with that which would be provided to the creditors on a winding up basis. His estimate is that there would be no dividend whatsoever payable to any of the creditors of AAA on a winding-up. By contrast, provision is made for a dividend of 1% to Unsecured Creditors, to Terminated Contract Creditors, and to Contingent Litigation Creditors and 0.5% to Connected and Inter-Company Creditors.

DLL and LLL

98. DLL and LLL are wholly-owned subsidiaries of AAA. At the date of the petition, DLL was the head lessee in respect of 20 Boeing 737 – 800 aircraft. LLL was the head lessee in respect of 24 Boeing 737 – 800 aircraft, and 4 Boeing 737 – 8 Max aircraft.

99. Each of the aircraft leased by DLL and LLL were at the time of the petition subleased to operating companies within the Group, including in certain cases to NAI and NAS.

100. The proposals provide a dividend of 0.5% for Connected and Inter-Company Creditors. They do not provide for any payments to other classes of creditors. This is because provision is made in the NAS proposals for the claims of those counterparties, whether by way of direct liabilities pursuant to leases and other contracts, or pursuant to guarantees. By these proposals, each of DLL and LLL is released from such joint obligations.

101. Each class of creditors of these companies approved the proposals.

102. The examiner's comparison of the proposals against the estimated outcome on a winding-up shows that on liquidation the dividend for all classes of creditors would be nil. Although

only the Connected and Intercompany Creditors receive a dividend, of 0.5% on any net balance due, the other classes of creditors are provided for by dividends in the NAS proposals.

Overview of proposals

103. Section 534 requires that the examiner, as he has done, formulate proposals for a scheme of arrangement in relation to each of the companies to which he has been appointed. Part 10 of the Act contains no provision for the "pooling" of the affairs of the companies for this purpose. (See *Re Camden Street Investments Limited* [2014] IEHC 86).

104. Having regard to the manner in which the companies were structured, legally, financially and commercially, and the multiplicity of agreements with external parties which affect each individual asset, it is appropriate in this case to view the proposals for the schemes together. Clearly, the "lead" proposals are those related to NAS for the following reasons:-

    (a) It is the parent company.

    (b) It is the company through which all of the investment is to be received which will fund the payments made under the proposals for schemes in relation to the subsidiary companies.

    (c) The Group operates on the basis of cash pooling and NAS facilitates this cash pooling to fund payments made from time to time by subsidiary companies.

    (d) The proposals for the scheme in relation to NAS provide for participation in its "blended dividend" by parties who are creditors directly of NAS and by parties who are counterparties of the asset holding subsidiaries and in many cases, beneficiaries of guarantees granted by NAS.

    (e) The "blended dividend", provided for across the proposals, relies on the issuance of shares in NAS.

105. Taking these matters into account, it is appropriate to assess the fairness of the proposals for schemes of arrangement by reference to their combined effect on members and creditors as a whole.

106. Creditors which hold security will have the value of their claims written down to the amount of the value of their security, with their security rights in most cases remaining intact in respect of the reduced amount. They will be paid a dividend on the unsecured balance of their debt corresponding to the level of dividend proposed for unsecured creditors.

107. Preferential creditors will be paid in full.

108. Connected and Inter-Company Creditors' claims will be set off against mutual claims and, in the case of NAS, balances will be written down in full.

109. The dividend proposed for unsecured creditors and certain other categories is a "blended" dividend comprising: -

(1) A cash dividend from the cash pot of NOK 500 million (which equates to approximately €45.6 million) on 1% of their claims and,

(2) 5% of their net agreed debt (less the amount of the cash dividend) in the form of the "Dividend Claims". The effect of the dividend claims is to recognise a debt due to the creditors which will be converted into shares and sold in the immediate aftermath of the proposals coming into effect, with the net proceeds shared among the participating creditors. Such creditors have the right to opt out of that sales process or even out of conversion, in which case they will hold the balance of their dividend claim as a debt obligation over a seven-year term bearing interest.

110. Where creditors have related or "overlapping" claims against NAS and other scheme companies (for example where a creditor has granted a lease or credit to another examinership company which NAS has guaranteed) the related claim will in general terms be treated in the following manner: -

(a) The creditor will be paid a dividend under the NAS proposals in respect of NAS's obligations, for example, pursuant to the guarantee.

(b) The NAS scheme provides for the release of both its own obligations and those of the related companies in respect of the relevant lease or guarantee. This applies where the related leases, guarantees or other contracts have been terminated either by agreement or by repudiation approved pursuant to s. 537 of the Act.

(c) The schemes of the related companies propose no dividend in respect of a related or "duplicated" liability that has been provided for and released under the NAS scheme.

(d) Counterindemnity obligations between co-obliging companies are also released.

111. Eligible creditors, as defined under the proposals, will be invited and afforded the opportunity to participate in the Private Placement and the New Capital Perpetual Bonds Offering. Those who choose to so subscribe will be issued with what is referred to as a "Retained Claims Bond", which is described as a potential enhancement to the basic dividend under the schemes.

112. The estimated outcome on a winding up for each company exhibited by the examiner shows that if the proposals are confirmed and implemented the outcome for creditors will be substantially more favourable than the expected outcome if the companies were wound up.

113. In particular, the estimated outcome on a liquidation shows that in NAS unsecured creditors would receive a dividend of c. 1.53%. It is also said that even this amount would

not be paid for approximately three or four years after the commencement of a winding-up, a frequent and generally unavoidable feature of complex liquidations.

114. The rights to participate in the Private Placement or the New Capital Perpetual Bonds, are preferential and considered favourable and, it is said, afford creditors the opportunity to share in the benefit of any future improvement in the value of the Group.

115. Similarly, the Retained Claims Bonds although unsecured debt obligations of NAS, are said to offer a value which over the long term is significantly in excess of their initial face value.

116. Debt to equity conversion is not an unusual feature of complex restructurings. However, the "*blended*" dividend in this case which entails the conversion of debt to equity, coupled with the opportunity for members and creditors to subscribe for additional equity at their election, is unusual in the context of Part 10 of the Act. This complexity does not detract from its inherent fairness to all stakeholders.

The requirements of the Act

117. Section 541 subs. 4 provides as follows: -

> *"The court shall not confirm any proposals unless—*
>
> *(a) at least one class of creditors whose interests or claims would be impaired by implementation of the proposals has accepted the proposals, and*
>
> *(b) the court is satisfied that—*
>
> *(i) the proposals are fair and equitable in relation to any class of members or creditors that has not accepted the proposals and whose interests or claims would be impaired by implementation, and*
>
> *(ii) the proposals are not unfairly prejudicial to the interests of any interested party,*
>
> *and in any case shall not confirm any proposals if the sole or primary purpose of them is the avoidance of payment of tax due".*

118. Subsection 5 of s. 541 of the Act provides as follows: -

> *"Without prejudice to subsection (4), the court shall not confirm any proposals in respect of a company to which an examiner has been appointed under section 517 [as a related company, namely in this case NAS] if the proposals would have the effect of impairing the interests of the creditors of the company in such a manner as to unfairly favour the interests of the creditors or members of any company to which it is related, being a company to which that examiner has been appointed examiner under section 509 or, as the case may be, 517".*

119. S. 543 (1) provides that any member or creditor whose interest or claim is impaired by the proposals may object to confirmation of the proposals on any of the following grounds: -

"(a) that there was some material irregularity at or in relation to a meeting to which section 540 applies;

(b) that acceptance of the proposals by the meeting was obtained by improper means;

(c) that the proposals were put forward for an improper purpose;

(d) that the proposals unfairly prejudice the interests of the objector".

120. No member or creditor has objected to the confirmation of the proposals for any of the companies.

121. At least one class of creditors of each of the companies has approved the proposals.

122. There has been no suggestion by any party that the sole or primary purpose of the proposals is the avoidance of payment of tax due.

123. Although no party has objected to confirmation, the court must be satisfied that they are "*fair and equitable*" and "*not unfairly prejudicial*".

124. The breadth of the discretion and range of factors to be taken into account has been identified in numerous judgments of the Superior Courts including; *Re Antigen Holdings Limited* [2001] 4 IR 600, *Re Traffic Group Limited* [2008] 3 IR 253, *Re McInerney Homes Limited* [2011] IESC 31, [2011] IEHC 4, *Re SIAC Construction Limited [*2014] IESC 25.

125. A number of principles emerge from those judgments. Firstly, the examiner bears the onus of showing that the proposals are fair and equitable and not unfairly prejudicial (*Re McInerney Homes Limited*).

126. Secondly, the test is inherently flexible and is a fact-specific exercise in which the court must consider all of the relevant facts and circumstances presented in relation to the companies the subject of the proposals (*Re McInerney Homes Limited*).

127. In *Re McInerney Homes Limited*, O'Donnell J. said the following: -

> *"The essential flexibility of the test appears deliberate. It is very unlikely that a comprehensive definition of the circumstances of when a proposal would be unfair could be attempted, or indeed would be wise. The fact that any proposed scheme must receive the approval of the Court means that there will be a hearing. The Act of 1990 appears to invite a court to exercise its general sense of whether, in the round, any particular proposal is unfair or unfairly prejudicial to any interested party, subject to the significant qualification that the test is posed in the negative: The Court cannot confirm the scheme unless it is satisfied the proposals are not unfairly prejudicial to any interested party.*

128. Thirdly, an important assessment of the question of unfair prejudice is the examination of the outcome for creditors under the proposed scheme of arrangement by comparison with the likely outcome on a liquidation of the relevant companies.

129. In *Re McInerney Homes Limited,* Clarke J. in the High Court said the following: -

> *"Given that the backdrop to an examinership is that a company is insolvent, it seems to me that very significant weight indeed needs to be attached to what would be likely to be the outcome of the alternative to examinership, whether it be liquidation, receivership or a simple withering of the company without any formal insolvency process. While it is clear from Re Antigen Holdings [2001] 4 I.R. 600, that the court retains a discretion to approve a scheme of arrangement even though it may be that a party might do better under (say) liquidation than under the proposed scheme, it nonetheless remains the case that, as I pointed out at para. 6.10 of Re Traffic Group Ltd [2007] IEHC 445, a disproportionate disparity between the position of a creditor on winding up and under the scheme proposed compared with the position of other creditors under both alternatives might be a factor to be properly taken into account in ruling against confirmation of the scheme".*

130. The uncontested evidence of the examiner in this case is that the outcome for creditors on a winding up of the companies would be clearly less favourable than the outcome if the proposals are confirmed and implemented.

131. Fourthly, the court must consider the outcome for creditors *inter se*.

132. Within the proposals for each of the companies concerned, recognition has been given to the priority which would be enjoyed by secured and preferential creditors. As between classes of unsecured creditors, the same level of dividend is proposed, howsoever the claims arise. Nor has any party objected to the classification of creditors.

133. When assessing the combined effect of the proposals, and the treatment of parties who are creditors of more than one company, it is to be noted that a lower level of dividend is proposed for unsecured creditors of NAI, AAA, DLL and LLL than for unsecured creditors of NAS. This reflects the fact that NAS has the greater level of unencumbered assets and the fact that provision is made for duplicated claims principally in the proposals for NAS itself. In particular, the source for all cash dividends is existing cash, which is held by NAS as part of the Group's cash pooling structure.

Shareholders

134. It is well-established that Part 10 is not intended to serve the interests of shareholders.

135. In *Re Traffic Group Limited*, Clarke J. emphasised that the legislation *"is not designed to help shareholders whose investment has proved to be unsuccessful".*

136. In many examinerships, the outcome for shareholders is that the party investing acquires the entire shareholding or a controlling interest unless new funding is being provided also by the existing shareholders. However, the fact that proposals allow existing shareholders to retain some or part of the shareholding in the company does not deprive the scheme of being found to be fair and equitable.

137. In *Re Tony Gray & Sons Limited* [2009] IEHC 557, the court confirmed a scheme of arrangement in which unsecured creditors were receiving a dividend of 5% yet the shareholders were retaining their ownership of the company without providing new investment. The court considered in the circumstances of that case that the value of the interest being retained by the shareholders under the examinership process was limited and Clarke J, confirming the proposals, stated at para. 31 as follows: -

> *"That seems to me to lead to the view that the shareholder value to be obtained by the current shareholders if the scheme is approved is limited, on the particular facts of this case, and is not such as would render it unfairly prejudicial to allow those shareholders to continue to have the benefit of that shareholding without any injection of new capital".*

138. The proposals provide that the outgoing shareholders will retain 4.6% of the equity of NAS. The examiner in his report has identified reasons why he believes it is appropriate that the interests of shareholders should be retained, albeit much diluted when he says the following: -

    (a) "The retention of a small portion of the equity by existing shareholders is considered important to preserving the value and liquidity in the shares that will ultimately form the principal basis of the dividend to creditors of NAS."

    (b) Existing shareholders include a very substantial number of shareholders who have had their interests substantially diluted by share issuances arising from debt conversion and public offerings during 2020, or they are shareholders arising from the conversion of their interests as creditors as part of the 2020 debt restructuring.

    (c) The share price has already fallen by 98 to 99% compared with values in 2009 and early 2020.

    (d) It is envisaged that a significant part of the new investment required by the companies will be raised from existing shareholders who are being given rights to subscribe for new shares as part of the Rights Offering.

    (e) The existing shareholding base includes more than 68,000 shareholders, of which it is said that some 50,000 are "retail" shareholders. The examiner says that preserving their loyalty to the brand will contribute to the potential customer base of the Group going forward.

139. At the meeting of shareholders of NAS, one shareholder voted against the proposals and five abstained. None of those parties have objected to confirmation of the proposals.

140. On no view of the proposals can it be said that the treatment of existing shareholders is unfairly prejudicial to their interests or to the interests of creditors.

The preservation of employment

141. A consistent theme in the reported judgments is the importance the court attaches to the protection of employment and the benefits for the community as a whole deriving from the survival of a company and its undertaking as a going concern. See *Re Atlantic Magnetics Limited* [1993] 2 I.R. 561, *Re Antigen Holdings Limited* [2001] 4 IR 600, *Re Traffic Group Limited* [2008] 3 IR 253, to name but a few.

142. In *Re Traffic Group*, Clarke J. said: -

> *"It is clear that the principal focus of the legislation is to enable, in an appropriate case, an enterprise to continue in existence for the benefit of the economy as a whole and, of equal, or indeed greater, importance to enable as many as possible of the jobs which may be at stake in such enterprise to be maintained for the benefit of the community in which the relevant employment is located. It is important both for the court and, indeed, for examiners, to keep in mind that such is the focus of the legislation. It is not designed to help shareholders whose investment has proved to be unsuccessful. It is to seek to save the enterprise and jobs.*
>
> *It seems to me, therefore, that a court should lean in favour of approving a scheme where the enterprise, or a significant portion of it, and the jobs or a significant portion of them, are likely to be saved".*

143. Prior to the pandemic, the Group employed more than 10,000 persons. The effects of the pandemic were devastating for the companies' operations. In March 2020, the Group made the decision to "furlough" 7,300 employees. That number rose during the summer of 2020, but a number of employees were brought back in the autumn of 2020. Following the resurgence of the pandemic in the Autumn of 2020 and increased travel restrictions, the Group's operations were reduced to only six aircraft.

144. At the date of the petition, excluding employees who were furloughed at the time, the companies the subject of these proceedings employed 515 persons.

145. The examiner reports that it is anticipated that these numbers will rise as and when the companies' activities can return to normal. There can be no certainty as to the timing and pace at which flight numbers will increase. However, the examiner anticipates that the Group, including the companies, will employ approximately 3,330 staff once normal operations have resumed.

146. Even these projected employee numbers are greatly reduced from pre-pandemic levels. Nonetheless, they reflect the Group's revised ambitions, and the examiner's appraisal of the benefits projected for employment levels. There is no evidence as to the employment prospects for any of these persons should the companies be wound up. It is clear therefore that the confirmation and implementation of the proposals will facilitate the retention of existing levels in the Group and a return to work for significant numbers of those currently on furlough. This is a material factor in the exercise of the court's discretion favouring confirmation of the proposals.

Support for the proposals.

147. In the case of NAS nine out of the ten quorate meetings voted in favour of the proposals. These classes included Customer Creditors, Unsecured Creditors, Terminated Lease Creditors, Terminated Contract Creditors and Non-Retained Guarantee Creditors. Significantly, these classes included the counterparties to contracts who, at least initially, resisted applications to this court for approval of repudiations pursuant to s. 537 of the Act. None of these parties opposed confirmation of the proposals now before the court.

148. The only class of creditors of NAS which did not approve the proposals was the Contingent Unagreed Creditors. This was because the three creditors who made up the quorum abstained rather than voting against the proposals.

149. In the case of NAI, six classes of creditors approved the proposals. The proposals were not approved by the unsecured trade creditors. None of the four creditors who voted against the proposals have objected to confirmation. In the other classes of NAI creditors which did not approve the proposals, namely the Co-Obligor Creditors, the Disputed Tax Creditors and the Contingent Unagreed Creditors, the result in three was due to abstentions.

150. In the case of AAA, two classes of creditors approved the proposals and three did not. Of the three which did not approve, one, namely the Terminated Contract Creditors, was a result of an abstention. In the Unsecured Trade Creditors class, one creditor voted against the proposals. In the case of the Co-Obligor Liability Creditors, two voted against the proposals. Again, none of these parties have objected to confirmation of the proposals.

151. Although certain classes of creditors did not approve the proposals, the number of creditors who voted against the proposals was 17, excluding customers.

152. As regards customers, in NAS a total of 746 voted, 453 in favour of the proposals and 293 against. In NAI, a total of 207 customers voted, 134 in favour of the proposals and 73 against. Therefore, these classes approved the proposals. The court was informed that the companies had in excess of 23,000 customer creditors. At an earlier directions hearing, I was satisfied as to the examiner's mode of notification of the creditors' meetings. Having regard to the total numbers of customer creditors, and the geographical diversity thereof, the relatively low proportion of those who participated in the meetings is unsurprising. Insofar as customers have participated they have voted by the required majority in favour of the proposals, and no customer has objected to their confirmation.

153. It is clear from all of this information that the proposals enjoy the support of the overwhelming majority of creditors who have participated in the process. This can only reflect their view that the outcome of confirmation and implementation of the proposals is more favourable than a winding up of the companies.

Releases of liabilities of other examinership companies

154. The nature of the Norwegian Group and the close connection between the companies in examinership have resulted in schemes that are closely interlocking in order to achieve

their objective. This derives largely from the fact that the companies in examinership have many liabilities which overlap with the liabilities of other companies in examinership.

155. The most frequently occurring example is where a leasing entity e.g. LLL has entered into a head lease with an external lessor or other financial arrangements with an external financier in respect of an aircraft. LLL will then have subleased the aircraft to an operating company in the Group, typically NAS or NAI. The external lessor then takes security over the benefit of the sublease and other companies, notably NAS and AAA, have guaranteed to the external lessor both the liabilities of LLL and the sublessee.

156. Arising from the applications and orders made pursuant to s.537 of the Act, and from negotiations between the companies and third parties, many of the external leases and corresponding guarantees have been terminated or will be terminated on the proposed Effective Date. In such cases, the external lessor or financier has residual claims for damages consequent upon the repudiation of the relevant agreement against both its direct counterparty LLL, against NAI as the sublessee (in cases where assignments of subleases were granted) and against NAS or AAA as guarantors. For these scenarios, the proposals for NAS include proposals for payment on foot of the guarantee, with NAS then having counter indemnity claims against LLL or NAI. Whilst these are all distinct claims they are closely interconnected and establish a series of obligations between different parties relating to the same asset The proposals have been formulated on an "interlocking" basis so that these related liabilities are settled by a single dividend paid under the NAS scheme in full and final settlement both of the liabilities of NAS and of the related liabilities of the other companies. This is typically achieved as follows:

    (a) The creditor is to receive a dividend under the NAS scheme in respect of the NAS guarantee obligations.

    (b) The NAS scheme contains a stipulation that the creditor releases the primary obligor LLL under the head lease.

    (c) No dividend is then proposed for that creditor in the proposals either of LLL or under the scheme for the operating company NAI, all of those liabilities having been settled by NAS as guarantor pursuant to its scheme.

157. Section 548 of the Act provides that the liability of a guarantor shall not be affected by the fact that the principal debt is the subject of a scheme of arrangement. However, the section also provides that this prohibition shall not apply if the guarantor is itself a company to which an examiner has been appointed. Accordingly, there is nothing in the Act to prohibit a scheme of arrangement in one company e.g. NAS, effecting releases of claims against a related company, provided that the related company is also in examinership.

158. Such "third party releases" are unusual in the context of Part 10 of the Act (Examinership). However, on this question the case law regarding schemes of arrangement under Part 9 of the Act is relevant by analogy. It is clear from the judgments

of Barniville J. in *Re Ballantyne* [2019] IEHC 407 and *Re Nordic Aviation Capital DAC* [2020] IEHC 445 that the court has jurisdiction to confirm a scheme of arrangement which provides for the release of third party liabilities.

159. In *Re Ballantyne*, Barniville J. was considering arguments to the effect that Part 9, concerning schemes of arrangement not forming part of an examinership process, did not confer jurisdiction to effect releases of claims against third parties. He concluded:

> *"There was no attempt by the Oireachtas when enacting Part 9 of the 2014 Act to exclude third party releases from schemes of arrangement under that part or to define a compromise or arrangement in such a way as to exclude such releases. I agree that the principles and conclusions that we have seen from the decisions in T & N, Lehman Brothers and Opes Prime reflect the correct and proper interpretation of the relevant provisions of Part 9 of the 2014 Act and I am satisfied that it is appropriate to adopt the pro release interpretation referred to by Mr. Justice Finkelstein in the Opes Prime case and which is seen elsewhere in the authorities to which I have just referred."*

160. This question was considered further by Barniville J. in *Re Nordic Aviation Capital DAC* when he considered the test to apply when the court is invited to sanction a scheme providing for third party releases and he stated as follows:

> *"The court in Pathfinder was satisfied that the 'sufficient nexus test reflected the law in Australia so far as schemes of arrangement were concerned and concluded that that was the appropriate test to be applied in Singapore under the relevant legislation there. It was not satisfied that a necessity test had to be applied. The court further concluded that there were no good reasons for drawing a distinction between a primary and a secondary obligation in the context of a guarantee for the purpose of determining jurisdiction under the relevant provisions of the legislation which was equivalent to Part 9 of the 2014 Act. On the facts, the court concluded that the debt owed by the other members of the corporate group, which included the scheme company in that case, to the relevant creditors was closely related to the creditor debtor relationship between those creditors and the scheme company. While the court found that the 'sufficient nexus test was the appropriate test, it held that even if the test of necessity were to be adopted, it would have been inclined to find that it was satisfied on the facts."*

161. The question which arises is whether it is appropriate to adopt to a Part 10 scheme, the approach to third party releases endorsed by the court in *Re Ballantyne* and in *Re Nordic Aviation* in the context of Part 9. Relevant to that question is a consideration of whether the legislator intended a different approach when it enacted s.548 of the Act.

162. It seems to me that s. 548 is clearly intended to restrict the scope for a scheme of arrangement to limit or even extinguish the liability of guarantors, where those guarantors have not themselves submitted to the process of examinership and all which that entails, including full scrutiny of its solvency and viability and a consideration of the

interests of its members and creditors. Where the guarantor has an examiner appointed to it, the clear effect of s. 548 (3) is to permit releases to be effective in the manner proposed in this case. The combined effect of that subsection and of the caselaw regarding Part 9 leads to the conclusion that there is nothing objectionable in the third party releases effected by the proposals.

163. In this case, there is a "sufficient nexus" between the liability of NAS and AAA under relevant guarantees and the obligations of the companies which are being released under the proposals.

164. If the proposals are to achieve their objective of restructuring the Group as a whole, it is necessary and, for the reasons considered above, appropriate that such releases across be effected.

Can the objectives of the Act be achieved by confirmation of the proposals?

165. Two issues arise as to whether confirmation of the proposals will serve the objectives of Part 10 and the purpose for which the examiner was appointed.

166. Firstly, can the court be satisfied that the companies will survive as a going concern following confirmation of the proposals?

167. Secondly, is there sufficient evidence that the investment necessary to implement the proposals can be secured?

168. Although s. 541 does not identify the prospects of the company surviving as a going concern as a precondition to confirmation of a scheme, in the context of the discretion of the court to confirm proposals for a scheme of arrangement which have far-reaching effects on members and creditors it is appropriate for the court to consider whether the purposes of Part 10 and of the examiner's appointment can be achieved. The prospect of an outcome more favourable than liquidation for creditors in the short term in terms of dividends is not the only factor and the court looks for evidence as to future viability.

169. The examiner has considered this question in Part 16 of his report. He has analysed the company's business plan, its projected trading performance under a number of scenarios and the projected cash flow and cash status of the companies following the completion of the examinership. He expresses the view that the restructuring of the legacy creditor balances will have a very significant cash flow benefit for the companies. He states that the projected level of capital that will be raised and the cost reduction initiatives already taken by the companies mean that the ability to trade profitably going forward has been greatly improved.

170. The examiner states that the "*leaner operating model that companies in examinership can now operate will mean that while the impacts of the COVID-19 pandemic continue in the coming months, the airline will be in a position to operate in a flexible and cost efficient manner".* He refers then to the reduced and restructured aircraft lease arrangements and the flexibility of the arrangements which have been entered into and he states: -

"This will allow them to scale up quickly as the market improves and demand increases and they can do so in a cost efficient manner given that they will have adequate working capital and flexibility to increase the number of aircraft in use which can be deployed on the routes that are required and are generating the greatest financial return for them".

171. The examiner then cites facts supporting his belief that the companies will be likely to survive as going concerns which may be summarised as follows: -

    (1) That the intended investment in NAS will provide it with the working capital (NOK 4.5 billion) needed to finance future operating requirements.

    (2) That by reducing the fleet and the employee base the Group is now "*right sized*" to meet its future requirements as a business focused on short-haul travel in the Nordic region.

    (3) Historic legacy litigation issues have been dealt with under the proposals which provides certainty in relation to the financial impact of such litigation.

    (4) That the proposals bring finality to the obligations of the company under aircraft purchase agreements with Boeing and Airbus which were on commercial terms which were onerous and uncompetitive. He says that the Group will therefore be in a position to source aircraft in the future at market rates and in a competitive manner. The proposals recognise that pending litigation with Boeing remains to be resolved, but limit the companies' exposure to any counterclaims or damages.

    (5) That the long haul business had never generated an annual profit for the Group and the Group can now focus on the more profitable short-haul routes going forward.

    (6) Power by the hour arrangements on aircraft leasing going forward will minimise cash outflows for the Group, at least in the medium term.

    (7) Adjustments have been made to the arrangements with lessors and others which achieve savings in the cost of aircraft and engine.

    (8) Overall monthly aircraft lease rental costs have been reduced significantly against those which were being borne before the companies entered examinership. This will make the airline more competitive and will have a positive impact on its ability to maximise profitability going forward.

    (9) The business plan has factored in the need to protect the companies' liquidity position and conserve cash so that the companies will be in a position to take advantage of the anticipated future recovery of the industry.

172. The examiner has, very properly, expressed his confidence in the viability of the companies in the future in circumspect terms. He states that all of these facts "*support my belief that the companies in examinership would be likely to survive as going concerns*

if the proposals are approved and ultimately become effective following confirmation by the Norwegian court and the successful completion of the investment."

173. The examiner then concludes that he is confident that implementing the proposals will facilitate the ongoing survival of the companies in examinership.

174. It is clear from his report that he has worked closely with the company in the development of the business plan, analysed its cash flow status and projections and carefully expresses his opinion as to its future viability in that light. I accept the evidence of the examiner on these issues and am satisfied that if the proposals are confirmed and implemented they will facilitate the survival of the companies and all or part of their undertaking as a going concern.

The investment arrangements and conditionality

175. The proposals provide that they shall only come into effect after the following conditions have been satisfied:

(1) The proposals for each of the companies have been confirmed by this court.

(2) That the Norwegian restructuring plan, which mirrors the fundamentals of the proposals, has been sanctioned by the Norwegian court.

(3) That the Group has raised investment proceeds of no less than the minimum gross proceeds threshold of NOK 4.5 billion by a combination of the Rights Offering, The Private Placement and the New Capital Perpetual Bonds Offering.

176. The conditions referred to in the proposals include a number of ancillary conditions which concern the verification of each of the above three by independent auditors and by the examiner.

177. As regards confirmation of the Norwegian restructuring plan in Oslo, the proposals confer on the examiner power and authority to exercise the voting rights of creditors. The court has also been referred to the provisions of the Norwegian restructuring plan, which implement these proposals without modification, save for any modification made to these proposals by this court.

178. As regards the effective date, s.542(3) provides as follows:

> *"A compromise or scheme of arrangement, proposals for which have been confirmed under s.541, shall come into effect from a date fixed by the court, which date (unless the court deems it appropriate to fix a later one) shall be a date falling no later than 21 days after the date of the proposals confirmation." (emphasis added)*

179. It is clear from the underlined words above that the court has jurisdiction to fix an effective date greater than 21 days after the date of confirmation. As a general rule, the court will fix dates within that period of 21 days and in many cases, the effective date is immediate on confirmation of the proposals. However, I am persuaded that the

complexities of this case are such that it is appropriate to fix the effective date proposed of 26 May, 2021.

180. The only parts of the proposals which will take effect earlier than that date are clause 6, which confers on the examiner the authority to vote on behalf of creditors in respect of the Norwegian plan, and clause 11 which governs the expert determination process for adjudicating on the claims of unagreed creditors.

181. If the conditions and events so justify the examiner has liberty to apply to extend the effective date, but subject at all times to a long stop date of 30 June, 2021. If the conditions, including the receipt of the minimum investment proceeds into locked accounts, have not been implemented by that time such amounts as have been advanced by investors will be refunded, the claims of creditors will not be impaired or written down and the proposals will not come into effect.

182. The traditional approach of the court has been to decline confirmation of proposals where the investment required to implement them has not been unconditionally committed. See *Re Wogans (Drogheda) Limited (No.3)* (HC, unreported, 9 February 1993) (Costello J), *Re Cisti Gugan Barra Teoranta* [2009] 1 ILRM 182, [2008] IEHC 251 and *Re Eylewood Limited* [2010] IEHC 57.

183. In these cases, the agreements with the relevant investors contained conditionality which had the effect of reserving to the investor the right to withdraw or amend its proposed investment. Such conditionality was deemed inappropriate.

184. In *Re Cisti Gugan Barra Teoranta* , the court expanded on the reasons why in that case it was not appropriate to confirm the proposals as follows.

    (a) The confirmation would have the effect that the claims of creditors would be impaired on confirmation without certainty that the company would receive the necessary investment to pay the dividends.

    (b) Approving a conditional scheme of arrangement could give rise to practical issues if the investment monies were not subsequently paid, as occurred in *Re Antigen Holdings Limited* [2001] 4 IR 600.

185. There are good reasons why the court, as a general rule, would lean against confirmation of proposals for a scheme of arrangement where there is uncertainty or conditionality regarding the delivery of the investment required to implement the proposals. In *Re Cisti Gugan Barra Teoranta,* Finlay Geoghegan J. emphasised that to confirm proposals and render them effective as against the companies' creditors and counterparties, is a far-reaching remedy and in the exercise of its discretion, the court should first be satisfied that such an order will serve the intended objectives.

186. This case is in a different category to cases such as *Re Wogans* (Drogheda), *Re Cisti Gugan Barra Teoranta* and *Re Antigen Holdings*. Nonetheless, it is only in exceptional

cases that the court should confirm proposals in the absence of evidence of binding investment arrangements.

187. I have been referred to a number of recent cases in which the court has sanctioned confirmed proposals where aspects, including the investment commitments, remain conditional, notably *Re Weatherford International plc* (ex tempore, 12 December 2019) and *Re Cityjet DAC* (*ex tempore*, 11 August 2020). In those cases, the court heard the examiner's application and announced its intention to confirm the proposals. In *Re Weatherford*, the effective date was deferred to coincide with the final date on which all of the relevant conditions under "interlocking" restructuring plans in other jurisdictions were fulfilled.

188. In *Re Cityjet*, this Court considered the proposals and delivered an ex tempore judgment stating its intention to confirm the proposals. The court deferred the making of final orders for the short period necessary to allow execution of final documents for certain aspects of the investments, following which orders confirming the scheme were made.

189. In a number of other cases, the court has been willing to indicate its intention to confirm proposals for schemes of arrangement but deferred making the final orders pending regulatory or other external approvals. In *Re Maximum Media Network Limited* (*ex tempore*, 7 October 2020), confirmation was deferred pending approval by the Competition and Consumer Protection Commission and the Minister for Communications. In *Re Cara Pharmacy Unlimited Company* [2021] IEHC 123, the court again indicated its willingness in principle to confirm the scheme subject to the approval of the Health Service Executive. Following the relevant approval, the court made the orders confirming the scheme.

190. There is no rule which precludes the court from adopting a flexible approach in an appropriate case. The special circumstances and complexity of a case may warrant the making of an order confirming proposals even where certain conditions remain to be fulfilled. In this case, the examiner has carefully considered the question of whether the necessary investment will be secured. He has identified six reasons why he believes that the necessary investment can be secured such that the proposals will ultimately become effective. These may be summarised as follows: -

    (1) The examiner says that based on his discussions and engagement with senior management in NAS he understands that discussions with a number of prominent investors are at an advanced stage and that NAS management is confident of securing the support of those investors and raising the investment required.

    (2) The examiner reports that he has received written confirmation from a large investor committing NOK 1 billion to the purchase of shares in the Private Placement. He says that there are a number of conditions attached to that commitment, including the condition that current shareholdings retain a significant shareholding identified as approximately 5%.

(3) The parliament of Norway has approved the intention of the Norwegian government to participate in the New Capital Perpetual Bonds Offering up to an amount not exceeding NOK 1.5 billion.

(4) The examiner has reviewed correspondence from the companies' investment banking adviser, DNB Markets which states its confidence that a successful capital raise can be achieved based on the information provided to them.

(5) Since the announcement of the principal features of the restructuring, the share price of NAS has increased. The examiner fairly states that he does not consider it appropriate for him to speculate as to the reasoning for this. Nonetheless, he believes that the general investor base has drawn positive conclusions from the proposals.

(6) The proposals have received the support of most classes of members and creditors of the companies. The examiner states that this suggests to him that the wide constituency of members and creditors, therefore, have formed the view that the proposed restructuring is likely to succeed in facilitating the survival of the companies in examinership, and therefore that a sufficient number of them will avail of the associated investment opportunity.

191. The examiner states that the scale of new capital required is such that no one or other small number of investors would commit to it. Therefore, the investment needs to be secured from either public markets or from large investment funds. His conclusion is that the optimal way to obtain the necessary investment was through the combined equity and hybrid capital raises provided for in the investment section of the proposals. He also states as follows: -

> *"The nature and scale of the investment sought was such that it would have been extremely difficult, if not impossible, to undertake the type of public offering envisaged while uncertainty remained about the ultimate restructuring of NAS (and the companies in examinership) and whether for example the restructuring would be approved by creditors and ultimately confirmed by the Irish court and the Norwegian court".*

192. The examiner concludes that it was only by eliminating those risks and developing the proposals, seeking their confirmation by this Court and confirmation of the Norwegian restructuring plan by the Norwegian court that he would have been in a position to put to the investors any assurance as to the level of certainty required about the outcome of the proposed restructuring before they would commit the necessary funds.

193. The structure by which it is proposed to attract the investment required to implement the proposals is more complex than many previous schemes which have been presented to this court for confirmation pursuant to section 541. The necessity for certain conditionally has been well-explained by the examiner. It takes this case out the realm of those cases where the court has refused confirmation because the conditionality serves the interests

of a particular investor or shareholder. I am satisfied that the complexity and conditionality in this case is a necessary feature of the restructuring and that confirmation is consistent with the objectives of Part 10 and with the purpose for which the examiner was appointed.

NAI – Environmental Protection Agency

194. The proposals for NAI contain a class of creditors referred to as Contingent Unagreed Creditor. The sole member of that class is the EPA.

195. The proposals provide at paras. 10.5.10 that as at the date of the proposals the liability and the quantum if any to the EPA has not been determined, agreed or crystallised. They provide that unless agreed and crystallised prior to the effective date the claim of the EPA should be determined by the expert determination process.

196. The proposals treat the EPA as an unsecured creditor and that any amount due or found to be due to the EPA is subject to the same treatment as unsecured creditors. The dividend for unsecured creditors of NAI is a cash dividend of 1% of its net agreed debt or of its determined debt.

197. In a letter of 19 March, 2021, addressed to NAI the EPA informed the company that it did not accept the proposal contained in the examiner's proposals. By letter dated 20 March 2021 the examiner's solicitors William Fry informed the EPA that the examiner noted that the EPA "*cannot accept the proposals*", and that the effect of the proposals, if confirmed would be the payment of a cash dividend of 1% of any amount determined to be due, in full and final satisfaction of the total amount of any liability.

198. The EPA attended the statutory meeting and voted against the proposals. By letter dated 24 March 2021 the solicitors for the EPA Fieldfisher LLP confirmed to the examiner that they would not be attending the confirmation hearing. They concluded by stating "our client is governed by the provisions of the EU ETS Directive and the relevant EU and Irish regulations and we reserve our clients position in that regard."

199. The attention of the court was drawn to the provisions of European Communities (Greenhouse Gas Emissions Trading) (Aviation) Regulations 2010, SI 261/2010.

200. These Regulations implement in the State Directive 2003/87/EC of the European Parliament and of the Council of 13 October, 2003, which establishes a scheme for greenhouse gas emission allowance trading within the EU.

201. The Regulations govern the monitoring of emissions by operators holding a valid operating licence granted by the Commission for Aviation Regulation and impose obligations on operators requiring them to report and verify emissions from aircraft, and to apply for or acquire an allocation of carbon allowances for emissions ("Allowances"). Regulation 23 establishes certain offences for failure to comply and provides for the imposition of penalties and other sanctions for non-compliance.

202. The Regulations require that by 31 March in each year aircraft operators submit to the agency a report on its "*verified emissions figures*" in respect of the previous year. By 30 April each year, the operator is required to surrender a corresponding number of Allowances to the EPA.

203. If the operator does not provide sufficient Allowances to account for the previous year's emissions an excess emissions penalty of €100 per ton of carbon is applied, (referred to as the "Penalty"), and the operator remains under an obligation to surrender the correct number of outstanding Allowances.

204. NAI has complied with these obligations each year since 2015. It is said that it will also comply with the obligation by 31 March, 2021, to file its report as to its emissions figures for 2020. However, it does not expect that the company will be in a position to surrender Allowances by 30 April, 2021. Accordingly, it is expected to become liable for penalties.

205. Based on recorded traffic data and estimates of associated emissions for 2020 the EPA has estimated the financial liability for NAI in respect of 2020 Allowances in the amount of €7.4 million which will become due on 30 April, 2021.

206. The examiner states that NAI's own estimate of the liability in respect of the 2020 allowances is for the slightly lower amount of between €6,745,040 and €7,082,292. He says that if those figures are applied and if the Allowances are not surrendered to correspond with these, the estimated total liability including the Penalty will be €16,862,600.

207. The examiner states that the emissions in respect of 2020 were emitted in the period prior to the presentation of the petition in these proceedings on 18 November, 2020.

208. In circumstances where NAI will not have sufficient assets or cash with which to discharge the liability for Allowances, or for the Penalty, it is submitted that the proposals for the payment of a dividend of 1% will apply to those pecuniary liabilities.

209. Regulation 23 contains the following provisions: -

> *"(11) An aircraft operator who fails to surrender allowances as required by Regulation 16(3), not later than 30 April of each year and commencing after 1 January 2013, to cover its emissions during the preceding year shall be liable for payment to the Agency of an excess emissions penalty in the amount of €100 for each tonne of carbon dioxide equivalent emitted for which the aircraft operator has not surrendered allowances.*
>
> *(12) Payment of the excess emissions penalty specified in this Regulation shall not release the aircraft operator from the obligation to surrender an amount of allowances equal to those excess emissions when surrendering allowances in relation to the following calendar year.*

(13) An excess emissions penalty under this Regulation may be recovered by the Agency, as a simple contract debt in a court of competent jurisdiction.

(14) In the event that an aircraft operator fails to comply with the requirements of these Regulations and where other enforcement measures have failed to ensure compliance, the Agency may, with the approval of the Minister, request the Commission to decide on the imposition of an operating ban on an aircraft operator and shall submit a report to the Commission in accordance with paragraph 15".

210. A report pursuant to para. 15 contains details of any non-compliance and any enforcement action taken by the agency and recommendations concerning the scope of any operating ban.

211. The examiner submits that any pecuniary obligations, being any liability which NIA would incur for the acquisition of Allowances which would be surrendered under the regulations and any Penalty for which NAI is liable constitute debt obligations to which the Proposals will apply and that once the Expert has determined the quantum of any such liabilities, the amount due will attract the dividend of 1% provided for under the proposals.

212. The treatment of unsecured creditors is described in para. 10.5.3 of the proposals as follows: -

> *"Each unsecured creditor shall be paid a cash dividend of 1% of the net agreed debt in full and final satisfaction of the total amount of such unsecured creditor's claims. Consequently, the unsecured creditors are impaired by these proposals".*

213. The operative provision of Clause 10.5.10, which relates specifically to the EPA, contains the following provision regarding releases: -

> *"The Contingent Unagreed Creditor shall be deemed to have absolutely, irrevocably and unconditionally discharged and released each relevant related company from any liability associated or related to the contingent and agreed creditor's claims. Each such related company shall be treated as so discharged and released by operation of these proposals without any further action on the part of the related companies under the related proposals or otherwise".*

214. Attention was drawn also to the definition of the term "claim" in the proposals, as follows:-

> *"Claim means any claim or right of action which a creditor may have against the company as at the petition date, including but not limited to any right to payment whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, prospective, matured, unmatured, disputed, undisputed, ascertained, unascertained, legal equitable secured, or unsecured (and including for the avoidance of doubt and without limitation (1) the right to payment of any repudiation post-petition liabilities, and (2) any claim from the counter indemnity*

creditor or a Contingent Unagreed Creditor that has not crystallised". (emphasis added)

215. Although the EPA voted against the proposals it has not articulated any objection to the confirmation of the proposals and specifically informed the examiner that it did not intend to participate in the hearing to confirm the proposals.

216. In their letter of 24 March, 2021, Messrs. Fieldfisher on behalf of the EPA stated: -

"Our client is governed by the provisions of the EU ETS Directive and the relevant EU and Irish regulations and we reserve our client's position in that regard".

217. There can be no doubt that the EPA in its activity, which includes its response to these proposals, is governed by the ETS Directive and relevant EU and Irish regulations. The companies are of course subject also to those regulations but equally to the provisions of the Companies Act 2014. In that regard, any claims against the company would on a liquidation be governed by the provisions of Part 11 of the Act and in an examinership by the provisions of Part 10.

218. I have not been referred to any provision either in the regulations or in the Companies Act which confers priority status on pecuniary obligations under the regulations. In the absence of such express priority, there can be no objection to the treatment in the proposals of the EPA for a dividend comparable to that payable to unsecured creditors. This is consistent with the judgment of Carroll J. in *Re Irish ISPAT Limited (in voluntary liquidation)* [2005] 2 IR 338, where the court refused an application by the agency for orders requiring the liquidator to undertake and discharge the costs associated with remedial work pursuant to s. 58 of the Waste Management Act 1996 in priority to other claims against the company. This being the case, I am satisfied that it is appropriate to confirm the proposals of the examiner.

219. The court raised with the examiner during the hearing a question as to whether confirmation of these proposals would eliminate any prospect of the agency requesting the commission to decide on the imposition of an operating ban in accordance with the provisions of Regulation 23.14. In response, it was not submitted to the court that in circumstances where the company would discharge any pecuniary liability in respect of allowances or penalties by payment only of the dividend under the scheme once confirmed, this would render the company compliant for the purpose of para. 14. The court was therefore not asked to make a finding on such a question and I expressed some doubt as to whether doing so in the absence of any submissions by the agency would be appropriate. The remaining question for the court was whether the possibility of any remedy later being invoked by the agency pursuant to para. 14 should inform or alter the opinion expressed by the examiner as to the viability of the company itself having regard to the very radical remedy of an operating ban provided for in para. 14.

220. It was submitted on behalf of the examiner that neither the companies nor the examiner had any direct experience of such a remedy actually being invoked. The court was

informed that the examiner was of the view that were this to arise it could in due course be met by the company and therefore, this question did not undermine his opinion as to the future viability of the company.

221. A good argument could be made to the effect that payments made pursuant to the scheme and therefore in accordance with company law, would render the company compliant for the purposes of para. 23.14 of the Regulations. It is unnecessary for me to make a finding on that subject and, in the absence of participation and submissions by the Agency, I did not do so. I accept the statement of the examiner that this question does not undermine the view expressed by him as to the viability of the company and accordingly would not justify refusal of confirmation of the proposals.

Recognition of a confirmed scheme of arrangement

222. In the First Judgment, delivered 16 December, 2020, I considered the question of the jurisdiction of this Court in relation to each of the companies.

223. In summary, I found that NAI, AAA, DLL and LLL each had its centre of main interests in the State. Accordingly, these proceedings are main proceedings within the meaning of Article 3.1 of the Regulation (EU) 2015/848 of the European Parliament and the Council of 20 May 2015 on Insolvency Proceedings (Recast) ("the Regulation"). Therefore, the jurisdiction to confirm the proposals in respect of those companies and the law governing those proposals is, in accordance with Article 7 of that Regulation, the laws of this State. Pursuant to Article 19 of the Regulation, the proposals once confirmed will enjoy automatic recognition within the United Kingdom, having regard to the provisions of the European Union (Withdrawal Agreement) Act 2020 (UK) (c. 1).

224. NAS does not have a centre of main interest within the State or within the EU. Therefore, the Regulation does not apply to it. These proceedings were commenced in respect of NAS on the basis that it was a related company for the purpose of s. 517 of the Act. That section permits the appointment of an examiner to a related company, and the definition of a company contained in s. 2.11 of the Act expressly provides that the term "*company*" includes "*any company that is capable of being wound up under this Act*".

225. Part 22 Chapter 3 of the Act provides for the winding up of unregistered companies, including companies incorporated outside the State, and establishes the jurisdiction to do so.

226. Having considered relevant case law including *Re Harley Medical Group (Ireland) Ltd [*2013] IEHC 219, [2013] 2 IR 596, *Re Drax Holdings Ltd* [2003] EWHC 2743 (Ch), [2004] 1 WLR 1049, Chancery, *Re Rodenstock GmbH* [2011] EWHC 1104 (Ch), [2011] Bus LR 1245, and *Stocznia Gdanska SA v Latreefers Inc*. [2001] 2 BCLC 116, [2000] CPLR 65, [2001] BCC 174, I also considered the evidence which had been tendered at the petition and not contradicted, as to the connection between NAS and the State and found that NAS had a real and deep connection to the State and met the sufficient connection test endorsed by Laffoy J. in *Re Harley Medical Group (Ireland) Ltd*. I found that it was a

company liable to be wound up and therefore eligible to have an examiner appointed pursuant to s. 517.

227. As regards recognition of these proceedings, I also accepted in the First Judgment the evidence of English law, principally contained in an opinion of Mr. Daniel Bayfield QC exhibited to the court in which he cited, in particular, the judgment of Rattee J. *Re Business City Express Ltd* [1997] 2 BCLC 510, to the effect that an English court would be likely (if requested to do so) to recognise the examinership "*and any scheme confirmed by the High Court as part of the examinership*". That finding, which predated the Regulation, was not stated to be dependent on the debtor company having a centre of main interests in the State. It notes in particular that examinership was a process in which affected parties, wheresoever located, had the opportunity to participate, including the right to be heard at a "fairness" hearing.

228. As regards recognition of these proceedings and of the scheme in Norway, I was referred also to evidence, uncontradicted, of Norwegian law to the effect that to quote the exhibited opinion of Norwegian counsel: -

> *"A successful examinership process in Ireland will be capable of recognition and thus have direct and beneficial effects on the solvency and future viability of NAS".*

229. I was also informed that was intended that NAS would apply to the court in Norway to place the company under a restructuring proceeding in that jurisdiction. Such proceedings were ultimately commenced and I am now informed that it is intended to apply to the court in Oslo for confirmation of the Norwegian restructuring plan, which reflects the fundamentals of the proposals.

230. I was also informed that it is intended, if necessary, to seek relief in the United States pursuant to Chapter 11 of the US Bankruptcy Code. I previously made an order sanctioning the appointment of a foreign representative for the purpose of any application necessary under Chapter 15 of the US Bankruptcy Code.

231. In *Re Noble Group Limited* [2018] EWHC 2911 (Ch), Snowden J. held that it was not necessary for the court to be persuaded definitively that each and every provision of its orders would be recognised in another jurisdiction. He found that it was sufficient for the court to be satisfied that there was a probability of such recognition. For the reasons described above, there is more than a probability of recognition of the order of this Court confirming the proposed scheme of arrangement in any jurisdiction where such recognition becomes necessary.

Modifications

232. The examiner has identified a number of modifications to the proposals. Certain of the modifications had been laid before the statutory meetings of members and creditors. Others are proposed by the examiner which had been not been laid before the meeting of members of creditors.

233. In *Re Goodman International* (HC, unreported, 28 January 1991) (Hamilton P.), the court considered the discretion to approve proposals containing modifications which differed in any respect from those voted on by members and creditors and said: -

> *"It is of course a discretion that must be exercised judicially and if the modifications suggested were to fundamentally alter the proposals which had been considered by the members and creditors of "the Companies", then a Court would be slow to modify the scheme in a fundamental manner without having the modifications considered by the members and creditors".*

234. The modifications proposed by the examiner and which were not laid before the statutory meetings are clarification of amendments to definitions, minor changes to the estimated outcome on certain proposals and corrections to names and claim amounts contained in creditors' schedules. It is unnecessary to detail them in this judgment, but I was satisfied at the hearing that they do not establish any prejudice to any party or fundamentally alter the proposals. Accordingly the principle in Re: Goodman International applies and I was satisfied to confirm the proposals as so modified.

Conclusion

235. Having regard to the evidence and the submissions of the examiner, I have come to the following conclusions: -

(1) The proposals have been approved by the members of each of the companies.

(2) At least one class of creditors has approved the proposals.

(3) There is no suggestion that the sole or primary purpose of the proposals is the avoidance of payment of tax due or that the proposals have been put forward for any improper purpose.

(4) No irregularity has occurred in relation to any of the statutory meetings at which the proposals have been considered.

(5) The proposals are fair and equitable in relation to each class of creditors which has not accepted the proposals and whose interests or claims would be impaired by implementation.

(6) The proposals are not unfairly prejudicial to the interests of any interested party.

236. The evidence of the examiner, which has not been contested, is that he is confident that the investment required to implement the proposals can be secured such that the purpose of the proposals can be achieved. Unusually, the court is being asked to confirm the proposals in circumstances where a series of further steps need to be implemented, including, most critically, the raising of the funds necessary to implement the proposals. The examiner's expression of confidence is based on his account of his engagement with the companies, with certain significant investors, and the evidence of the support for the investment by the government of Norway, and the support of members and creditors. In

the exceptional circumstances of this case, I accept this evidence and find that the evidence as to the prospect of securing the necessary investment is sufficiently compelling that I should confirm the proposals notwithstanding their conditionality.

237. The examiner has also reported on the viability of the companies should the court confirm the proposals. Again, this analysis has been recorded in detail in the report of the examiner and I am satisfied that if the proposals are confirmed and implemented, the restructuring thereby achieved will facilitate the ongoing survival of the companies as going concerns, and thereby achieve for members, creditors and others, including employees, an outcome more favourable than would arise if the companies were wound up.

238. I have therefore made the order confirming the proposals in the form appended to the order made by me on 26 March, 2021.