[2020] IEHC 664

THE HIGH COURT

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

Judgment of Mr. Justice Quinn delivered on the 16th day of December, 2020.

1. Among the industries hardest hit by the COVID-19 pandemic has been the aviation sector. Norwegian is a case in point. It has met serious challenges before now and has restructured. Radical measures were implemented in 2019 and again in 2020. But still more is required.

2. This petition concerns six companies in the Norwegian Group. They include the parent company, aircraft operating companies and a group of companies through which the Group structures its aircraft sourcing and financing. The survival of those companies is central to the survival of the Group as a whole.

3. Five companies in the Group ("the petitioners") have petitioned this court for the appointment of an examiner pursuant to section 509 of the Companies Act, 2014 ("the Act").

4. The petitioners are:

   Arctic Aviation Assets Designated Activity Company ("AAA");

   Norwegian Air International Limited ("NAI");

   Drammensfjorden Leasing Limited ("DLL");

   Torskefjorden Leasing Limited ("TLL");

   Lysakerfjorden Leasing Limited ("LLL").

5. The petitioners have also applied for the appointment of an examiner to Norwegian Air Shuttle ASA ("NAS") which is the ultimate shareholder of the Norwegian group of

companies and is the direct parent company of AAA and NAI. This application is made on the basis that NAS is a related company pursuant to s. 517 of the Act.

6. The petitioners each have their registered office and centre of main interests in the State, performing their operations from Dublin Airport. (See para. 71 – 79).

7. NAS has its registered office in Oslo, Norway and performs its head office functions at that location.

8. On 7 December, 2020, I heard the petition and delivered my ruling appointing an examiner to the petitioners and NAS. This judgment outlines the reasons for that ruling.

9. Firstly, I shall outline the background to the Companies and the events which led to this petition. Secondly, I consider the jurisdiction of this court in relation to the petitioners under the EU Insolvency Regulation and in relation to NAS under Irish company law, and associated recognition questions. Thirdly, I shall consider the evidence advanced as to the prospects of the survival of the Companies as a going concern and my conclusions.

10. In this judgment, the term "petitioners" refers to the five companies which have presented this petition. The term "Companies" refers to the petitioners and NAS. The terms "Norwegian" or "the Group" refer to the companies and all other companies in the Norwegian group registered in the State and elsewhere and includes companies which are not the subject of these or other insolvency or restructuring proceedings.

The Companies

11. Two of the companies are airline operators, namely NAS and NAI, NAS also being the ultimate parent company of the Group.

12. The other four companies, AAA and its subsidiaries; TLL, DLL and LLL perform a centralised asset management function for the Group as a whole. Their activity is aircraft management, trading, leasing and financing. They act as a "captive lessor" leasing aircraft to the Group airlines, including NAI and NAS. AAA manages the Group's new aircraft orders, sources aircraft financing, manages aircraft leased from external lessors and markets and trades aircraft to certain third parties.

13. AAA has 36 Irish incorporated subsidiary companies. Many of these facilitate the financing, trading and leasing of individual aircraft. DLL, TLL and LLL each perform this function for larger numbers of aircraft, 20, 24, and 28 respectively. AAA and its subsidiaries are referred as the "Asset Management Platform" or "the Platform". AAA manages the Platform from its leased office at Dublin Airport, where it employs 7 full-time employees. AAA also acts as an intergroup lender to its subsidiaries in connection with aircraft leasing and financing activities and as guarantor of financing and leasing arrangements for both the subsidiaries and for the parent, NAS.

14. A total of 140 aircraft were leased by the Group at the time of presentation of the petition, although only a much smaller number were operating at that time. The debt and leasing obligations associated with the fleet are approximately $5.19 billion.

15. In January 2012, NAS contracted to purchase from Boeing 110 Boeing 737-8 Max, 92 of which remain undelivered. In November 2014, that contract was novated to AAA. NAS guaranteed the obligations of AAA thereunder. In October 2015, AAA contracted to purchase a further 19 Boeing 787-9 aircraft, 5 of which remain undelivered. These contract are referred to as OEM Purchase Contracts.

16. In June 2012, NAS contracted to purchase from Airbus 100 Airbus aircraft. On 1 December, 2014, that contract was novated to AAA, and NAS guaranteed the obligations thereunder.

NAI

17. NAI was established in Dublin in 2013 and operates flights within Europe. As of the end of 2019 NAI operated from bases in Denmark, Finland, Spain, Ireland and the UK. Its central base is at Dublin Airport. Prior to the onset of the COVID-19 pandemic it employed 41 employees in its own right. 29 people are still employed by it.

18. The establishment of NAI in 2013 was an important milestone for the Group as it was the Group's first EU licenced airline. This positioned the Group to avail of access to traffic rights through bilateral agreements between the EU and third countries.

19. NAI is a direct subsidiary of NAS.

NAS

20. NAS is listed on the Oslo Børs (the Oslo stock exchange). It is the sole shareholder of AAA and NAI and the holding company for the entire group. It performs group management and corporate functions which include an internal treasury function operating "cash pooling" for the Group. All income generated from ticket sales in the Group is collected and held by NAS. As and when required funds are transferred by NAS to other Group companies including those companies which form part of the Asset Management Platform, to enable them to meet their ongoing obligations.

21. NAS holds an air operator's certificate ("AOC") and functions as an international airline. It leases its fleet of 41 aircraft from the subsidiaries of AAA, which include DLL, LLL, TLL, and other group companies which are not the subject of this petition. These leases are managed in Ireland by AAA. AAA also manages new aircraft orders for NAS, and sources aircraft financing.

22. NAS is the guarantor of the obligations of the Asset Management Platform to third party aircraft lessors and financiers.

23. The Group comprises 65 companies. The protection of this court is sought only in respect of the petitioners and NAS which are regarded as crucial to the future survival of other parts of the Group.

24. The companies in the Platform are entirely reliant on NAS and its airline operating subsidiaries for their income streams. It is said that if NAS were to enter liquidation, it is likely that each of the petitioners would also enter liquidation.

25. Similarly, it is said that a liquidation of the Platform companies would cause severe disruption to NAS, in circumstances where NAS requires access to the fleet of aircraft to service its routes. That access is currently achieved through the Platform.

Recent trading

26. The reported trading results for the Group for the years 2017, 2018 and 2019 show increases in revenue up to 31 December, 2019. Total revenues of the Group to the end of December 2019 reached approximately €4 bn, of which approximately €3.2 bn was derived from ticket sales. The balance is derived from ancillary passenger revenue freight, "*third party products*", and other revenue.

27. The two most significant events which have contributed to the current status of the Group are:

    (1) The impact of the global grounding of Boeing 737 Max in 2019.

    (2) The COVID-19 pandemic.

28. On 12 March, 2019, eight of the Group's Boeing 737 Max aircraft were grounded by global aviation regulators due to two fatal accidents (on flights of different airlines) involving this aircraft type, one on 29 October, 2018, and a second on 10 March, 2019.

29. The Group also encountered serious operational and maintenance problems with a different Boeing aircraft, the 787 Dreamliner.

30. In February 2020, the Group had been targeting a net profit for 2020. Within a matter of weeks from identifying these targets, the impact from the COVID-19 pandemic emerged and the Group's focus shifted immediately from anticipated growth to survival.

31. The effect of the pandemic on the Group can be summarised as follows:

    a) It lost most of its revenues. Demand for bookings fell by 99% in the second quarter of 2020.

    b) From January 2020 to the presentation of the petition on 18 November, 2020, the Group carried 6.3 million passengers compared to 28.62 million for the same period in 2019, a fall in passenger numbers of 78%.

    c) Revenue for the Group in the third quarter of 2020 was approximately €119 m compared to €1.13 bn for the same period in 2019, a decrease of 91%. The year to date revenues have fallen by 76%; and,

    d) Operating losses for the Group in the year to date amount to €593 m, compared to a total loss of €149 m for the full year 2019.

32. In April and May 2020, the Group embarked on a restructuring plan entailing the conversion of debt and leasing commitments to equity, adjusting lease rentals to market by reference to the value of aircraft, the introduction of a "*power by the hour*"

arrangement, whereby leasing payments would reflect the actual utilisation of aircraft, and a postponement of operations outside Norway until the COVID-19 pandemic eased.

33. Through these measures, the Group converted debt of approximately €1.2 bn to equity and raised approximately €37 m in new cash and equity through a public offering. These achievements fulfilled conditions necessary to avail of a Norwegian Government State Aid package consisting of loan guarantees worth approximately €278 m.

34. Further savings were achieved in restructuring negotiations with lessors and this process is ongoing.

35. The petitioners say that the 2020 restructuring provided the Group with sufficient liquidity and financial headroom to maintain its current "hibernation mode" until the end of the first quarter 2021, provided the companies achieve the protection of this court.

36. On 9 November, 2020, the Norwegian Government announced that it would not at that point in time be providing any further financial support to the Group.

37. In the final quarter of 2020 already the Group has furloughed additional employees, leaving 600 persons currently employed by the Group and only six aircraft currently in use.

Creditor actions and litigation

ACG

38. On 20 July, 2020, Aviation Capital Group ("ACG") through two special purpose subsidiaries filed a claim in the Commercial Court of England and Wales for the payment of back rent in respect of rent payments for the lease of aircraft. The proceedings were issued against DLL as lessee and NAS as guarantor. On 6 November, 2020, the Court granted summary judgment on this claim for sums totalling $6.287 m, and ordered that these payments should be made on or before 4 pm on 18 December, 2020.

Wings Capital

39. Wings Capital has issued claims and default notices in respect of amounts totalling $2.2 m, again against DLL as lessee and NAS as guarantor.

Lease agreements

40. A number of the lessors to the Companies have served termination notices reserving their rights generally.

Boeing

41. Boeing holds significant advance payments in relation to undelivered aircraft pursuant to OEM purchase contracts entered into originally in January 2012 and 2015.

42. In June 2020, NAS and AAA filed a complaint against Boeing in the State of Illinois alleging breach of contract, breach of good faith and fair dealing, fraudulent inducement, claiming damages, and seeking rescission of the OEM purchase contracts and of service contracts.

Insolvency

43. The petitioners estimate that without further restructuring the Companies will no longer have sufficient working capital during the first quarter of 2021. The Group has a cash burn rate of approximately $10 m per month.

44. I shall return to other information concerning the balance sheets of the Companies (para. 48 – 53). As far as immediate cash flow status is concerned, the petitioners say the following: -

    (a) NAS has total debts to parties outside of the Group of approximately $1.4 bn, and is not in a position to meet all of these liabilities.

    (b) DLL, LLL and TLL have accumulated arrears to third parties totalling approximately $22 m, $18.4 m and $1.3 m respectively and do not have the cash with which to meet these debts.

    (c) AAA is dependent on NAS for the payment of salaries and other operating expenses and in the absence of any further loan or investment from NAS has "*no visible means of making these payments*".

    (d) NAI has outstanding debts to vendors totalling approximately $65 m and no cash to meet those debts.

Independent Expert's Report ("IER")

45. As required by s. 511 of the Act, the petition is accompanied by a report in relation to the Companies prepared by an Independent Expert, Mr. Ken Fennell of Deloitte, Dublin.

46. Mr. Fennell has analysed the trading history of the Companies and the reported financial results for the periods 2017, 2018 and 2019, and to 30 September, 2020.

47. In respect of each of the Companies the subject of the petition, Mr. Fennell has compared the potential out turn of a winding up with the going concern statement of affairs. He reports that the potential out turn on a going concern basis is significantly more favourable for all stakeholders than would arise on a winding up.

48. In the case of NAS, Mr. Fennell reports that on a going concern basis the company has a positive net asset position of $2.4 bn, by contrast with a deficit on a winding up of $7.1 bn. He states that the net asset figure of $2.45 bn has as its "*primary driver*" investment in subsidiaries and intercompany receivables of just below $1.7 bn. He reports that the underlying value of these investments and receivables in the current circumstances is significantly impaired. Uncertainty regarding viability of the petitioners in the absence of an overall group restructuring is such that the Group will run out of working capital in January 2021 and be unable to meet its ongoing obligations as they fall due.

49. In the case of NAI, Mr. Fennell has identified a net asset position on a going concern basis of $41 m against a deficit on a winding up of $267.8 m.

50. As regards the net asset position of NAI, he says that the "primary driver" is an entry for intercompany balances of $170 m from other Group entities, several of which are petitioners. Uncertainty regarding viability of those entities in the absence of a restructuring is such as to anticipate the company running out of working capital in January 2021.

51. The figures estimated for NAI are subject also to a contingent claim of the Revenue Commissioners in the amount of $28.5 m.

52. For AAA, Mr. Fennell identifies a going concern net asset position of $1.38 bn, against a deficit on a winding up of $77.7 m. Again, however, the net asset position has its "primary driver" in the investment value of subsidiaries, which is significantly impaired.

53. For each of DLL, TLL, and LLL a corresponding contrast appears. The going concern statements of affairs for these three companies show net asset positions respectively of $41.9 m, $602.7m and $50.7m. In each of these, the positive position is largely driven by a value attributable to "right of use" assets. This is an accounting treatment of leased aircraft which depreciate over the term of the lease. Mr. Fennell says that this value is not realisable by the relevant companies, regardless of the value of the aircraft. The effect of this analysis for those three companies is to eliminate entirely the net asset position shown on the "going concern statement of affairs". The deficit he identifies on a winding up basis for these companies respectively is $256 m, $9.8 m and $147.5 m.

54. Mr. Fennell states that within the Group of petitioner companies there is a reliance upon the success of NAS and NAI. He states that the prospect of survival as a going concern of the petitioners and the remainder of the Group is directly linked to the survival of NAS and/or NAI.

55. Mr. Fennell identified the features of a restructuring plan which he believes will be necessary to secure the survival of the companies as follows: -

    (a) Adjustment of aircraft leasing payments to market value;

    (b) Seeking longer term "*power by the hour*" deals to conserve cash while aircraft remain parked due to COVID-19;

    (c) Extension of existing power by hour agreements beyond the first quarter of 2021;

    (d) Adjustment to the companies' future orders of aircraft in line with future operating requirements;

    (e) Deferrals and restructured payments for loans secured by aircraft that are necessary for the operation;

    (f) In addition to the restructuring of the overall cost base, he says that the operating group will need to raise additional capital;

(g) With regard to subsidiaries of AAA which are not subject to the petition, he says that the company will need to reach consensual agreement to modify their financial arrangements, in default of which the relevant companies could themselves be liquidated.

56. Mr. Fennell says: -

> *"It is expected that the process of restructuring the overall operating fleet, and raising new capital, will be interdependent as both fleet creditors and potential new capital providers will want to know that the other is committed to the business going forward".*

57. Mr. Fennell concludes that the Companies have a reasonable prospect of survival as a going concern if the following conditions are satisfied: -

(1) The Companies are granted a period of protection by the High Court;

(2) The relevant Companies' lessors provide the necessary support throughout the protection period and that management proposals with regard to long term restructure of the operational fleet can be implemented;

(3) That the petitioning group is able to secure additional working capital in the form of fresh capital investment;

(4) That the Companies restructure their long term obligations under aircraft acquisition contracts, including arrangements for advance payments;

(5) The High Court confirms proposals for a scheme of arrangement.

58. Mr. Fennell has stressed that although he believes the Companies have a reasonable prospect of survival, it is beyond the scope of his report at this time to provide a detailed assessment of the long term commercial impact on trading of the COVID-19 pandemic. He states however that: -

> *"The current assumption that the petitioning group, as a consequence of international restrictions, will not be conducting flying operations until market conditions attain some degree of normality is a realistic and prudent assumption".*

59. In section 11 of his Report, Mr. Fennell has, as required by s. 511 (3)(j) of the Act, examined the funding requirements of the Companies to trade during the statutory period of court protection and the sources of that funding. Notwithstanding the severe predictions regarding the cashflow projections for early 2021, he states that the petitioning group will rely on existing working capital and can access the cash pooling arrangements provided by NAS. He says that through a combination of forecasted revenues and access to the cash pooling arrangements, the Companies will be in a position to meet their payment obligations as projected during the protection period, and any additional liabilities or costs arising.

Issues arising from the IER

60. At the hearing of the petition two points of important clarification in connection with the report of the Independent Expert were drawn to the court's attention.

61. One relates to the treatment in the IER of prepayments in respect of aircraft purchase agreements with Airbus S.A.S. The second relates to the treatment of refunds due to passengers from cancelled flights.

Airbus

62. The agreements for the purchase of aircraft with Boeing and with Airbus provide for payment of agreed purchase prices in advance in a number of stages, with a final balance becoming due for payment on delivery of the aircraft. In the case of Airbus, typically 30% of the total price is paid by this method prior to delivery of the aircraft. These stage payments are referred to as Pre-Delivery Payments ("PDP") and are made pursuant to an agreed schedule set out in the purchase agreement.

63. An affidavit of Mr. Benoit De Saint-Exupery of Airbus was opened at the hearing. Mr. De Saint-Exupery states that once a PDP has been made under a purchase agreement, the PDP becomes an asset of and the property of Airbus save in certain very limited circumstances which he says do not arise on the facts. Mr. De Saint-Exupery is concerned that references are made in the going concern statements of affairs appended to the IER to PDPs totalling $505.2 m. He says that PDP's totalling $46 m have been made by AAA to Airbus in respect of aircraft not yet delivered under purchase agreements and that the inclusion of PDP's as an asset of the relevant companies is incorrect.

64. Mr. De Saint-Exupery says that under the provisions of the purchase agreements, the seller, namely Airbus, is entitled to hold and use any pre-delivery payments as absolute owner. The purchase agreements provide that in the event of a termination of the agreement following any default by the buyer, which includes any default arising by reason of the filing of insolvency or similar proceedings, Airbus remains entitled to retain all pre-delivery payments.

65. Mr. De Saint-Exupery also refers to the fact that AAA is due to make a PDP of $1.99 m to Airbus in January 2021 and he observes that the cash flows exhibited in the appendix to the IER make no provision for the making of this payment.

66. In a letter exhibited at the hearing, dated 6 December, 2020, the Independent Expert refers to the affidavit of Mr. De Saint-Exupery and clarifies that he has not in the course of preparing his report sought to determine the treatment of pre-delivery payments made by the company within his report. He says that having considered the point made by Mr. De Saint-Exupery, this does not alter the opinion expressed by him as to the prospect of the survival of the company as a going concern.

67. It will remain to be seen during the course of the examinership what, if any, restructuring of the Airbus and other purchase agreements will be possible. That will be a matter for the examiner and the Companies. Although the amounts referred to are not small, I

accept the clarification provided by Mr. Fennell in his letter of 6 December, 2020, for the purpose of this stage of the proceedings.

Passenger refunds

68. In an affidavit of Mr. Brendan Colgan, partner at Matheson Solicitors for the petitioners, sworn on 7 December, 2020, reference is made to a liability of NAS of approximately €22.6 m owing to passengers in respect of outstanding refunds for flights cancelled prior to the presentation of the petition. Mr. Colgan states that due to an oversight this liability was not reflected in the financial information which was provided to Mr. Fennell at the time of the preparation of his report.

69. In his letter of clarification of 6 December, 2020, Mr. Fennell refers to this information which has now been brought to his attention. He confirms also that this amount should have been included in the liabilities of NAS. He confirms that the inclusion of such an amount does not impact on the opinions provided in his Report.

70. Even in the context of a Group having liabilities of the scale described earlier in this judgment, an amount of €22.6 m is not small. Nonetheless, I am satisfied with the clarification given by Mr. Fennell and his confirmation that this amount ought to have been included in the liabilities of NAS. This and any other such matters as may emerge will need to be taken into account by the examiner in the formulation of his proposals.

EU Insolvency Regulation

71. Article 4 of Regulation (EU) 2015/848 of 20 May, 2015, on insolvency proceedings (recast) ("the Regulation") requires that I examine whether this court has jurisdiction to open these proceedings pursuant to Article 3. (Annex A to the Regulation lists the form of proceedings which in each Member State constitute insolvency proceedings for the purpose of the Regulation. For Ireland, this list includes examinership.)

72. Article 3.1 of the Regulation provides that the courts of the Member State within the territory of which the centre of main interests is situated have jurisdiction to open "*main insolvency proceedings*".

73. The centre of main interests is described in Article 3.1 as "*the place where the debtor conducts the administration of its interests on a regular basis and which is ascertainable by third parties."*

74. In the case of a company, the place of the registered office is presumed to be the centre of its main interests. This presumption is stated to be subject to two qualifications:

    (a) It applies only in the absence of proof to the contrary,

    (b) It applies only if the registered office has not been moved to another Member State within a period of 3 months prior to the request for the opening of the insolvency proceedings, which in this case is the date of presentation of the petition.

75. Each of the petitioners was incorporated in the State and has its registered office in the State. No evidence has been presented contrary to the presumption that the centre of main interests is also within the State.

76. NAI holds an airline operator's certificate ("AOC") granted by the Irish Aviation Authority and an air carrier operating licence ("ACOL") granted by the Commission for Aviation Regulation.

77. NAI is tax resident and domiciled in Ireland. Its operations are administered from an office at Dublin Airport and its principal activity is the provision of scheduled and chartered airline services to support the operations and expansion of the group. Prior to the COVID-19 pandemic, it employed 41 persons directly. It currently employs 29 persons.

78. AAA and its subsidiaries DLL, TLL and LLL, perform the function of financing, trading and leasing of aircraft from their offices at Dublin Airport. AAA employs 7 full-time employees at that location.

79. The evidence before the court is that each of the petitioners conducts the majority of its business within the State, and that this is as perceived by third parties transacting business with them. The majority of their directors are resident in the State and their board meetings are held in Dublin. I am satisfied that each of the petitioners has its centre of main interests within the State. Therefore, these proceedings are main proceedings within the meaning of Article 3.1 of the Regulation.

Related company – NAS

80. NAS was incorporated in Norway and has its headquarters in Norway. There is no suggestion or evidence that it has its "*centre of main interests*" elsewhere.

81. The Regulation applies only to an entity which has its centre of main interests in a Member State. Norway is not a Member State. Therefore, the Regulation does not apply to NAS. Accordingly, I am required to consider the jurisdiction of this court to appoint an examiner to NAS by reference to national law, namely the Companies Act 2014.

82. Section 517 of the Act provides that:

> *"where the court appoints an examiner to a company, it may, at the same or any time thereafter, make an order—*
>
> *(a) appointing the examiner to be examiner for the purposes of this Act to a related company; or*
>
> *(b) conferring on the examiner, in relation to such company, all or any of the functions conferred on him or her in relation to the first-mentioned company.*
>
> *(2) In deciding whether to make an order under subsection (1), the court shall have regard to whether the making of the order would be likely to facilitate the survival*

of the company, or of the related company, or both, and the whole or any part of its or their undertaking, as a going concern.

(3) However, the court shall not, in any case, make such an order unless it is satisfied that there is a reasonable prospect of the survival of the related company, and the whole or any part of its undertaking, as a going concern."

83. I shall return later to the application in this case of the tests in subsections (2) and (3). In the first instance the court must be satisfied that NAS falls within the definition of a "*related company*" for the purpose of s. 517.

84. S. 2(10) of the Act defines related companies to include a company which is a "*holding company or subsidiary*" of a company. As the direct holding company for AAA and NAI, NAS is therefore a company related to all of the petitioners.

85. S. 2(11) of the Act provides that for the purpose of ss. 10 the term "*company*" includes "*any body that is capable of being wound up under this Act*".

86. Part 22 of the Act governs unregistered companies. In Chapter 3 of that Part, s. 1328 provides for the winding up of unregistered companies as follows: -

"Subject to the provisions of this Chapter, any unregistered company may be wound up under Part 11 (the winding up provisions) and all the provisions of Part 11 relating to winding up shall apply to an unregistered company with the exceptions and additions mentioned in this section".

87. The jurisdiction of this Court to make an order under the provisions of the predecessor of s. 1328 for the winding up of a non-Irish company, was considered by Laffoy J. in *Re Harley Medical Group (Ireland) Ltd* [2013] 2 IR 596.

88. In that case, Laffoy J. found that the company had its centre of main interests in the State and therefore the Regulation applied ('pre-recast'). She also considered the jurisdiction under s. 345 of the Companies Act 1963 (the predecessor of s.1328) and jurisprudence regarding that jurisdiction. Laffoy J. quoted from Courtney, *The Law of Companies*, where he summarised that jurisprudence: -

"In Stocznia Gdanska SA v. Latreefers Inc. [(No. 2) [2000] TLR 182; [2001] 2 BCLC 116] the English Court of Appeal endorsed the finding of Lloyd J. that, as the law has evolved, there are three core requirements before a court will exercise its discretion to order the winding up of an unregistered company:

(1) there must be a sufficient connection with England and Wales which may, but does not necessarily have to, consist of assets within the jurisdiction;

(2) there must be a reasonable possibility, if a winding up order is made, of benefit to those applying for the winding up order;

(3) one or more persons interested in the distribution of the assets of the company must be persons over whom the court can exercise jurisdiction."

89. The application before me in relation to NAS is of course not for a winding up. Nonetheless, the test of a "*sufficient connection*" endorsed by Laffoy J. is the starting point as to the jurisdiction now under s. 517 to appoint an examiner to NAS as a related company.

90. The principles identified by the Court of Appeal in *Latreefers* were considered by the High Court of England and Wales in *Re Drax Holdings Ltd* [2003] EWHC 2743 (Ch), [2004] 1 WLR 1049 ("*Drax*"), and in *Re Rodenstock* [2011] EWHC 1104 (CH).

91. In Drax, Lawrence Collins J. concluded that the application of the three conditions informed the exercise of the court's discretion and did not each necessarily go to the jurisdiction of the court. In *Drax*, the company had no assets within England. The trust deed which governed its raising of finance contained an English law clause and a non-exclusive submission to the jurisdiction of the English courts. The court held that the absence of assets within England was not a bar to the jurisdiction of the court, and was satisfied that the proposed scheme of arrangement would bind the creditors subject to the English jurisdiction.

92. Similarly, in *Rodenstock*, the essence of the finding of a "*sufficient connection*" was the combination of the choice of law clause and submission to the jurisdiction of the English court found in the facilities agreements governing the relationship between the company and its bondholders intended to be bound by the proposed scheme of arrangement.

93. Whilst these authorities are informative, it seems to me that the connections of NAS to the State, summarised in para. 99 below, are at the very least as meaningful, if not more so, than the connection derived from choice of law and jurisdiction clauses.

94. I was referred also to the judgment of Megarry J. in *Re Compania Merabello San Nicholas* SA [1973] 1 Ch 75. In that case, the court made a winding up order in respect of a foreign company in circumstances where the only asset of the company in England was its claim against a mutual insurance association.

95. Megarry J. summarised what he described as the essentials of the relevant law related to the existence of jurisdiction to make a winding up order in respect of a foreign company as follows: -

"(1) There is no need to establish that the company ever had a place of business here.

(2) There is no need to establish that the company ever carried on business here, unless perhaps the petition is based on the company carrying on or having carried on business.

(3) A proper connection with the jurisdiction must be established by sufficient evidence to show (a) that the company has some asset or assets within the jurisdiction, and

(b) that there are one or more persons concerned in the proper distribution of the assets over whom the jurisdiction is exercisable.

(4) It suffices if the assets of the company within the jurisdiction are of any nature; they need not be 'commercial' assets, or assets which indicate that the company formerly carried on business here.

(5) The assets need not be assets which will be distributable to creditors by the liquidator in the winding-up: it suffices if by the making of the winding-up order they will be of benefit to a creditor or creditors in some other way.

(6) If it is shown that there is no reasonable possibility of benefit accruing to creditors from making the winding-up order, the jurisdiction is excluded.".

96. Whilst that judgment related to the jurisdiction to make a winding up order, and appeared, unlike the later judgments, to include the presence of assets as a requirement, the conditions identified by Megarry J. are of assistance in this case in applying the principles referred to by Laffoy J. in *Re Harley Medical Group.*

97. NAS fulfils two core functions within the Group. Firstly, it is the parent company of the entire Group. Secondly, it is an airline operating company, holding an AOC from its regulator in Norway.

98. In its capacity as the holding company, NAS performs group management and group corporate functions. This includes the receipt of income generated from ticket sales in the Group, following which funds are distributed as required through cash pooling.

99. The only assets directly held by NAS in this jurisdiction are its shares in subsidiaries. However, its connection to the State is not limited to the holding of shares, and may be summarised as follows: -

(1) NAS has a longstanding connection with the State, through its commercial relationships with third party Irish lessors of aircraft owned, financed or registered in Ireland, and its operation of flights to and from Ireland. Many of those lessors have substantial operations in Ireland.

(2) The connection of NAS with Ireland was strengthened from 2013 onwards when it implemented a strategic reorganisation which included the establishment of (i) a subsidiary airline, NAI, to operate from Dublin; and (ii) the NAS Asset Management Platform utilising AAA and its subsidiaries;

(3) NAS's direct subsidiary, AAA is the holding company for the Irish aircraft leasing and financing platform through which NAS finances and leases its fleet of aircraft. The commercial terms of the leasing and financing arrangements are in part predicated on the utilisation of the Irish leasing structure and benefits it is said to provide for financiers and lessors.

(4) NAS has guaranteed a large proportion of the lease obligations of the NAS Asset Management Platform.

(5) The Asset Management Platform provides flexibility to transition aircraft between the airlines within the Group.

(6) The Group's aircraft purchase contracts (with Boeing and Airbus) are managed and negotiated from Ireland by AAA and guaranteed by NAS.

(7) IP rights to the NAS brand/trademark are held by Norwegian Bank Limited, an Irish incorporated sister company of AAA which is also 100% controlled by NAS.

100. It was pointed out that until the restrictions introduced in response to the COVID-19 pandemic, NAS operated a service between Dublin and Oslo, which is currently suspended. The fact of flying aircraft into Dublin is part of the connection, but could never of itself be a basis for satisfying the sufficient connection test.

101. Whilst much of the above activity is performed through the subsidiary companies incorporated in Ireland, it is clear that the commercial operations of the Group taken together with the range of legal transactions entered into by both NAS and its subsidiaries are so closely linked and interdependent that NAS has a real and deep connection to the State, and meets the test of a sufficient connection endorsed by Laffoy J. in *Re Harley Medical Group*. Accordingly, NAS is liable to be wound up under Part 22 of the Act and is a related company for the purpose of s. 517.

Recognition of these proceedings in Norway

102. The principles in *Re Latreefers Inc* as approved by Laffoy J. in *Harley*, include a consideration as to whether an order or judgment of the Court will bind the parties intended to be affected. This Court needs to be satisfied that its orders will not be in vain.

103. The petitioners exhibited an opinion of Norwegian counsel, BAHR AS.

104. BAHR express the opinion that "*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*". BAHR stated that, to their knowledge, there has been no previous case before the courts in Norway where the question of recognition of a foreign scheme of arrangement has been decided. However, they point out that most of NAS's major creditors' claims are based on written agreements which provide that they are governed by the law of jurisdictions other than Norway. They advise that, under Norwegian law, the consequence of a foreign choice of law and legal venue in such agreements is that a claim to enforce those rights cannot be heard in the Norwegian Courts, but would respect the choice of law and legal venue provisions.

105. BAHR conclude: -

> *"…as an Irish examinership and scheme of arrangement is capable of recognition by the English courts and English judgments are capable of recognition in Norway, NAS*

creditors should not be able to pursue their claims towards NAS in Norway due to the Irish examinership scheme of arrangement."

106. BAHR further opine that, if necessary, NAS could open separate reconstruction proceedings in Norway "*to fend off dissenting creditors seeking to bypass the moratorium on claims resulting from the Irish examinership*". They say that in such a case, the "*reconstructor in Norway*" would probably coordinate his process with the Irish examinership.

107. Mr. Colgan's affidavit states that the board of NAS propose to apply to court in Norway to have NAS placed in a restructuring process there, entitled a "*Rekonstruksjonsforhandling*", in which the "reconstructor" would perform a role similar to an examiner. He says that whilst this process would continue in parallel with the examinership, it is envisaged that the examinership would be the primary process with regard to NAS. Once the Irish examinership concludes and if proposals for a scheme of arrangement are sanctioned by this Court, an order would be sought if necessary to give effect to those proposals as part of the Norwegian process.

Recognition in England

108. The advice of Norwegian counsel presented to this Court is dependent upon the proposition that an English Court would recognise the examinership. The petitioners have exhibited a letter of advice dated 18 November, 2020, from the petitioners' counsel Hogan Lovells, London, and an opinion of Mr. Daniel Bayfield, Queen's Counsel.

109. Hogan Lovells identify two possible grounds upon which an English Court would recognise an examinership of NAS. Firstly, they refer to s. 426 of the Insolvency Act, 1986 and, secondly, to common law.

110. Section 426 (4) of the Insolvency Act, 1986 provides: -

"The courts having jurisdiction in relation to insolvency law in any part of the United Kingdom shall assist the courts having the corresponding jurisdiction in any other part of the United Kingdom or any relevant country or territory."

This section can be activated by a letter of request.

111. Hogan Lovells confirmed that Ireland is a "*relevant country or territory*" designated by Statutory Instrument for the purpose of s. 426.

112. As regards common law, Hogan Lovells advise that the mere fact that the insolvency regime in another jurisdiction is "*not on all fours with English law is of itself insufficient to deny recognition*". They conclude as follows: -

"The fact that Ireland like England is a common law jurisdiction with a well-regarded judicial system means that recognition at common law is more likely than not. Further support for such a conclusion lies in the similarities between the Irish

examinership process and scheme of arrangement to the English administration procedure and its "rescue" objectives."

113. Mr. Bayfield describes the jurisdiction under s. 426. He considers the general principle of comity and advises that the English Court would apply flexibility when determining the appropriate approach.

114. Mr. Bayfield examines Parts 9 and 10 of the Companies Act 2014. He says that examinership under Part 10 can only be commenced where the company is unable to pay its debts or is likely to become unable to pay its debts, and therefore:

> *"…carries the hallmark of an insolvency proceeding and the insolvency proceeding which most closely resembles examinership in England and Wales is the administration regime under Part II of the Insolvency Act, 1986, which can only be commenced if a near identical insolvency is satisfied."*

115. He concludes that: -

> *"…the 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, impose a stay corresponding to the stay under s. 520(4) of the Act of 2014 and order that creditors be bound by and take no steps inconsistent with the terms of the scheme of arrangement."*

116. Hogan Lovells and Mr. Bayfield both refer to *Re Business City Express Ltd* [1997] 2 BCLC 510, a pre-Insolvency Regulation case. In that case, Rattee J. granted an application under s. 426 for recognition of a scheme of arrangement following confirmation of the scheme by this Court (Kelly J. (as he then was)).

117. Rattee J. considered the provisions of the Companies (Amendment) Act, 1990 (the predecessor of Part 10 of the Act of 2014) and the process which led to the confirmation of the scheme of arrangement, namely, the formulation of proposals for a scheme of arrangement by the examiner, the consideration and approval of those proposals at statutory meetings of members and creditors, and the sanction by the court. He described the Irish examiner as "*roughly (but only roughly) equivalent to an English administrator*".

Conclusion as regards recognition

118. Although *Re Business City Express* related to recognition of a scheme of arrangement confirmed in examinership proceedings, it is the clearest authority on recognition in England and Wales of orders made in an examinership, outwith the Regulation. Having regard to the opinions of English law and Norwegian law, I am satisfied that the purpose of these proceedings, in particular the protection afforded by s.520 and a scheme pursuant to s.541, can be achieved as regards the creditors and counterparties of the Companies, including NAS.

Appointment of examiner

119. The jurisdiction to appoint an examiner in relation to the petitioners is governed by s. 509 of the Companies Act, 2014. In the first instance, it must appear to the court that: -

(a) the company is, or is likely to be unable to pay its debts;

(b) no resolution subsists for the winding up of the company; and,

(c) no order has been made for the winding up of the company.

120. I have already considered the information provided in the petition and in IER from which it is clear that each of the petitioners is unable to pay its debts and that no resolution has been passed for the winding up of the company or order made for its winding up. This test having been met, the appointment of an examiner is a discretionary matter for the court.

121. Section 509(2) provides the first "threshold" to consider in the exercise of discretion as follows: -

> *"The court shall not make an order under this section unless it is satisfied that there is a reasonable prospect of the survival of the company and the whole or any part of its undertaking as a going concern".*

122. Section 517 extends the application of this test to a petition to appoint an examiner to a related company: -

> *"(2) In deciding whether to make an order under subsection (1), the court shall have regard to whether the making of the order would be likely to facilitate the survival of the company, or of the related company, or both, and the whole or any part of its or their undertaking, as a going concern.*
>
> *(3) However, the court shall not, in any case, make such an order unless it is satisfied that there is a reasonable prospect of the survival of the related company, and the whole or any part of its undertaking, as a going concern."*

123. Although the test of "reasonable prospect of survival" must be applied to each company, the affairs and fortunes of the petitioners and of NAS are so closely interlinked that it is appropriate to consider them together.

124. In *Re Vantive Holdings* [2009] IESC 68, Murray C.J., at page 19, identified a two-stage process. He focussed firstly on the requirement to establish that the company is capable of surviving as a going concern and thereafter on the wider discretion as to whether to make the appointment.

125. In *Re Gallium* [2009] 2 ILRM, Fennelly J. considered the test extensively, noting that there is an onus of proof on the petitioner to establish that there is a reasonable prospect of the survival of the company and all or part of its undertaking as a going concern. He continued, at para. 46: -

"…the statutory requirement is to show that "there is a reasonable prospect of the survival of the company..."A petitioner does not, by getting over that threshold, acquire a right to have an order made. I still think it is fair to say that the section confers a "wide discretion" on the court, or alternatively, that the court should take account of all the circumstances. The establishment of a reasonable prospect of the survival merely triggers the power, which remains discretionary. The view of Lardner J, as expressed In re Atlantic Magnetics could be described as pragmatic: he asked whether it "seems worthwhile to order an investigation by the examiner into the Company's affairs." The court has the power to appoint an examiner if satisfied that there is a reasonable prospect of survival of the company.

47. The entire purpose of examinership is to make it possible to rescue companies in difficulty. The protection period is there to facilitate examination of the prospects of rescue. However, that protection may prejudice the interests of some creditors. The court will weigh the existence and degree of any such prejudice in the balance. It will have regard to the report of the independent accountant.

48. The Court has to take account of all relevant interests. The independent accountant must consider whether examinership would be "be more advantageous to the members as a whole and the creditors as a whole than a winding-up of the company..."This does not limit the range of interests to be taken into account by the court under section 2. [the predecessor of s. 509] The interests of employees cannot be excluded. In the case of an insolvent company, it is natural that the creditors will have the greatest interest in the future, if any, of the company. The court will take a balanced approach, as suggested by the reference to the creditors as a whole."

126. In relation to the interests of members and creditors as a whole, Fennelly J. continued:-

"In the case of an insolvent company, it is natural that the creditors will have the greatest interest in the future, if any, of the company. The court will take a balanced approach, as suggested by the reference to the creditors as a whole."

127. In light of this observation, I have taken into account the submissions and positions which have been taken by the creditors and other interested parties.

Submissions of Creditors

128. Represented at the hearing of the petition were the Revenue Commissioners, a trustee for certain bondholders, and a number of leasing and finance creditors including BOC Aviation, AerCap IC Airlease, Engine Lease Finance Corporation, FPG Aviation Ltd, SMBC Aviation Ltd, Goshawk Aviation Leasing Ltd, Otra Aviation Leasing Ltd, Jackson Square Aviation, Mitsui, SMBC, Rolls Royce, Airbus S.A.S., Lufthansa Technik, Wells Fargo and others.

129. The only party to express support for the petition was Rolls Royce.

130. No party opposed the petition.

131. The Revenue Commissioners had raised in correspondence with the petitioners a number of questions and the reply was shown to the court. Their queries related to matters such as the basis for cash flow assumptions, further information regarding the Group's strategy and business plans, why the Companies did not seek to avail of any Revenue support in terms of warehousing of liabilities, whether the companies had availed of COVID-19 relieving measures or arrangements in any other jurisdictions, questions concerning staffing levels and certain of the litigation cases pending between the company and other parties in other jurisdictions. Counsel for Revenue stated that they were "*guardedly neutral*" in relation to the petition.

132. Mr. Steen, solicitor for Airbus SE, referred to the affidavit of Mr. De Saint-Exupery, in which he had taken issue with the accuracy of certain aspects of the IER. I have already considered those issues earlier in this judgment (para. 64 - 69). He did not oppose the petition, and stated that Airbus were "*guardedly neutral*".

133. On behalf of Aviation Capital Group, Mr. Thomas Ryan, solicitor, stated that his clients were neutral as regards the appointment of the examiner but reserved their position as regards the extraterritorial effect of these proceedings. No submissions were made on this question by Mr. Ryan.

134. Counsel and solicitors for the leasing companies, bondholders, financial institutions and others all stated that they were neutral as to the appointment of the examiner, in most cases stating also that they reserved their position as regards the proceedings generally.

Report of the Interim Examiner

135. At the first application for directions in these proceedings on 18 November, 2020, I appointed Kieran Wallace of KPMG 1, Stokes Place, St. Stephen's Green, Dublin 2 to be examiner of each of the companies on an interim basis pending the hearing of the petition. At the hearing of the petition the court had the benefit of a report of the Interim Examiner. In his report, Mr. Wallace outlines the actions which he has taken since his appointment and his initial engagement both with the directors and management of the Companies and with key creditors and stakeholders. Based on his initial engagement he states that he believes that the conditions for the survival of the company as a going concern as identified by the Independent Expert are in the course of being achieved or are capable of being achieved during the examinership period. He states that he has no reason to disagree with the conclusions reached in the IER that the Companies have a reasonable prospect of survival as a going concern.

Do the companies have a reasonable prospect of survival?

136. Since the establishment of the Group in 1993 it has grown from operating only short flights and flights within Europe, to eventually longer haul flights.

137. The establishment in 2013 of the Asset Management Platform, and the commencement of operations from Dublin through NAI has been a central feature of the development of the Group, principally in the manner in which it sources and finances aircraft.

138. The setbacks of the global grounding of the Boeing 737 Max in 2019, and the COVID-19 pandemic in 2020 drove restructuring action.

139. Restructuring measures in 2019 achieved cost savings of approximately $327 m across the Group. Despite the implementation of these cost savings and other restructuring measures, the Group suffered a significant loss in value with its stock price down more than 85% from the previous years.

140. Further restructuring and cost mitigation measures were implemented in 2020, including the following:

    (1) The cancellation of 85% of flights and the temporary lay-off of approximately 7,300 workers.

    (2) Reduction of the active fleet in March 2020 to 7. There was some resurgence in the third quarter of 2020 but further flight reductions and suspensions were necessary in the final quarter, leaving the Group currently employing 600 persons and only six aircraft in operations.

    (3) The Group engaged with its principal lessors and finance creditors to restructure lease and loan agreements including the following measures –

        i. Debt to equity conversions;
        ii. financial restructuring;
        iii. "power by the hour" agreements (whereby payments are made by the reference to the utilisation of aircraft, with the differential between the contractual rent and cash rent paid being discharged by conversion to equity proposed).

141. The success of these measures enabled the Group to access a State Aid package from the Norwegian Government.

142. In their forecasts, the Companies project an incremental increase in returning to pre-COVID-19 operations from April 2021 onwards with the hope of returning to profit for the full year 2022. This relies on the assumption that smaller aircraft and regional capabilities will recover quickly after the pandemic whereas larger international flights may recover at a slower pace.

143. Against this background, the Group's stated intention is to maintain its business in "a reasonable state of readiness in order to return to operations". This requires the Group to maintain its obligations in respect of maintenance and upkeep of aircraft and therefore significant holding costs continue.

144. The petitioners have received expressions of interest by potential investors. Understandably, the identities of such parties were not provided in court. Nor were any details of the current status of such interest. It is said that investment activity has in the past been sourced from the aviation industry itself, from international financial institutions

with an interest in investing in the aviation industry and fundraising through public offerings.

145. Mr. Colgan's affidavit informs the Court that NAS has convened an extraordinary general meeting for Thursday, 17 December, 2020. The agenda for this meeting includes proposals for resolutions altering the designation of shares in NAS to comply with certain requirements of the Oslo Børs. It also includes proposals to authorise the board of NAS to issue new shares, bonds and convertible loans and to propose further rights offerings and debt for equity conversions. The notice convening the EGM and its explanatory attachment were exhibited. In this attachment NAS outlines its current status and the restructuring process for the Group, including these examinership proceedings. It says that no agreement has been entered into with creditors or investors to contribute further equity to the company. Therefore, the resolutions are proposed for the purpose of authorising the board to progress equity raising measures.

146. It is also said that the Group remain hopeful that upon completion of a restructuring and the emergence of a more streamlined operation, the Norwegian Government may alter is position and support further investment into the future. In light of the most recent decision taken by the Norwegian Government, this is no more than an aspiration, but I shall not disregard it.

147. The Independent Expert expresses the opinion that the Companies have a reasonable prospect of survival as a going concern. He has identified the conditions which are necessary for such survival (see para. 57). He says that there can be no certainty as to the long term intention of the Companies' lessors and secured lenders.

148. Mr. Fennell is realistic in the expression of his opinion when he states that it is beyond the scope of his report to provide a detailed assessment of the long-term commercial impact on trading of the COVID-19 pandemic. He says that the effect of the pandemic has been to "all but" cease international and regional air travel. As of now it is unknown when normal trading conditions will return, but he states that the current assumption that the petitioning group, as a consequence of international restrictions, will not be conducting flying operations until market conditions attain a degree of normality is a realistic and prudent assumption.

149. I have taken into account the following: -

    (1) The trading history and expansion of the core business and brand of the Group;

    (2) The successes already achieved in cost reduction and restructuring measures adapted by the Group in the face of the grounding of Boeing 737 Max and the COVID-19 pandemic;

    (3) The support which the Group has enjoyed to date in restructuring debt and leasing obligations;

(4) The opinion of the Independent Expert that the companies have a reasonable prospect of survival as a going concern, and that an attempt to continue the whole or any part of the undertaking of the companies would be likely to be more advantageous to the members and creditors as a whole than a winding up of the companies,

(5) The Group's history of attracting investment, and the steps NAS continue to take to facilitate investment.

150. There is a measure of caution in the opinion of Mr. Fennell, where he states that the long-term commercial impact of the pandemic is beyond the scope of his report. Such a reservation is to be expected and the opinion is therefore not unrealistic. However, having regard to the evidence summarised above, I find that the petitioners have a reasonable prospect of survival as a going concern and that it is appropriate to appoint an examiner pursuant to s.509 of the Act.

151. NAS has a sufficiently close connection with the State to qualify as a related company for the purpose of s.517 of the Act. Its business and fortunes are inextricably linked with those of the petitioners. I am satisfied that NAS has a reasonable prospect of survival as a going concern and that the appointment of an Examiner to it is likely to facilitate the survival of it and of the petitioners.

152. For these reasons, I have made the order appointing the examiner to the petitioner companies and to NAS.