[2021] IEHC 268

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 21st day of April, 2021 (Section 537)

1. Section 537 of the Companies Act 2014 provides as follows: -

> *"(1) Where proposals for a compromise or scheme of arrangement are to be formulated in relation to a company, the company may, subject to the approval of the court, affirm or repudiate any contract under which some element of performance other than payment remains to be rendered both by the company and the other contracting party or parties".*

2. Subsections 2 and 3 provide as follows: -

> *"(2) Any person who suffers loss or damage as a result of such repudiation shall stand as an unsecured creditor for the amount of such loss or damage*
>
> *(3) In order to facilitate the formulation, consideration or confirmation of a compromise or scheme of arrangement, the court may hold a hearing and make an order determining the amount of any such loss or damage mentioned in subsection (2) and the amount so determined shall be due by the company to the creditor as a judgment debt."*

3. Applications for approval of a repudiation under this section are made on notice to the counterparties to the relevant contract and to the appointed examiner of the company (s. 537 (4) and RSC O. 74A, r. 19).

4. This judgment relates to applications pursuant to s. 537 (1) by certain of the companies named in the title above for approval of the repudiation of contracts, where the applications are opposed by the counterparties.

5. The companies did not apply for orders under subsection (3) determining the quantum of loss or damage suffered by the counterparties. Instead they proposed that the quantum

be determined by an expert to be appointed under the examiner's proposals for a scheme of arrangement. The opposing parties objected to that approach and submitted that if orders were made approving repudiations the court should hold a hearing pursuant to subsection (3) to determine the quantum of their loss.

6. On 5 March, 2021, I made orders approving repudiations. I also concluded that the court should hold a hearing pursuant to subs. (3) to determine the amount of the loss of the objecting counterparties. The background and reasons for making the orders are summarised in this judgment.

7. This judgment is structured as follows:

(1) Introduction and background to the applications,

(2) The facts relating to the opposed applications,

(3) Identification of the legal issues raised by opposing parties,

(4) Consideration of Section 537 and Part 10 of the Act,

(5) Evidence relevant to the opposed applications,

(6) Conclusions on threshold issues,

(7) Conclusions on discretionary issues,

(8) Extraterritorial jurisdiction and recognition issues,

(9) The Convention on International Interests In Moveable Equipment and the Protocol relating to Aircraft Equipment, made at Cape Town, 16 November 2001.

(10) Mode of determination of the quantum of losses of counterparties.

The examinership

8. On 18 November, 2020, five companies in the Norwegian Group petitioned for the appointment of an examiner pursuant to s. 509 of the Companies Act 2014 ("the Act"). The petitioners were: -

- Arctic Aviation Assets Designated Activity Company ("AAA").
- Norwegian Air International Ltd. ("NAI").
- Drammensfjorden Leasing Ltd ("DLL").
- Torskefjorden Leasing Ltd. ("TLL").
- Lysakerfjorden Leasing Ltd. ("LLL").

9. The petitioners applied also for the appointment of an examiner to a related company, Norwegian Air Shuttle ASA ("NAS"), which is the ultimate shareholder of the Norwegian Group of companies, and an aircraft operating company. I refer to NAS and the petitioners as "the companies".

10. As required by RSC O. 74A, r. 5, on the day on which the petition was presented, the petitioners applied to this Court for directions, and the court appointed Kieran Wallace of KPMG Dublin, as examiner of the companies on an interim basis pending the hearing of the petition.

11. On 7 December, 2020, I heard the petition and appointed Mr. Wallace examiner of the companies.

12. The background to the petition and the reasons why the court was satisfied to appoint the examiner are summarised in a judgment delivered by this Court on 16 December, 2020, (2020 IEHC 664) ("The First Judgment").

13. In the First Judgment, I found that each of the petitioners had its centre of main interests in the State and therefore that these proceedings are main proceedings within the meaning of Article 3.1 of Regulation EU 2015/848 of 20 May 2015 on insolvency proceedings (Recast) ("the Regulation").

14. NAS is incorporated and has its headquarters in Norway. No submission was made that it had its centre of main interests otherwise than in Norway. Accordingly, the Regulation does not apply to NAS. I therefore examined the jurisdiction of this Court to appoint an examiner by reference to the Companies Act 2014. S. 517 of the Act establishes the jurisdiction to appoint an examiner to a company related to a company to which an examiner has been appointed pursuant to s. 509. For that purpose, the definition of a "related company" includes *"any body that is capable of being wound up under this Act"* pursuant to s. 2 (10) and s. 2 (11) of the Act.

15. Chapter 3 of Part 22 of the Act governs the winding up of unregistered companies, which may include a foreign company, subject to the satisfaction of certain conditions for the exercise of this jurisdiction. Having considered the established line of cases on this jurisdiction and the connection between the business and activities of NAS and the State, I concluded that NAS was a company liable to be wound up under Part 22 of the Act and was therefore a related company for the purposes of s. 517 (see paras. 80 – 101 of the First Judgment).

16. In this judgment the term "petitioners" refers to the five companies which presented the petition. The term "companies" refers to the petitioners and NAS. The terms "Norwegian" or "the Group" refer to the companies and other companies in the Norwegian Group registered in the State and elsewhere. It includes companies which are not the subject of these or other insolvency or restructuring proceedings. I refer to those companies as "excluded subsidiaries".

17. NAS and NAI are airline operators. NAS is also the ultimate parent company of the Group and the direct shareholder in NAI and AAA. AAA performs a centralised asset management function for the group as a whole. It manages the Group's new aircraft orders, sources aircraft financing, and manages aircraft leasing from external lessors.

18. AAA has 36 Irish incorporated subsidiary companies, including DLL, TLL and LLL. These subsidiaries typically act as the "head lessee" of aircraft, and sublease aircraft to the operating companies in the Group, including NAS and NAI. DLL, TLL and LLL performed this function for 20, 24 and 28 aircraft respectively.

19. AAA and its subsidiaries are referred to as the *"asset management platform".* AAA conducts its business from its leased office premises at Dublin Airport where it employs seven fulltime employees.

20. At the time of the presentation of the petition a total of 140 aircraft were leased by the Group as a whole, although a smaller number were operating at that time. The debt and leasing obligations associated with the fleet were approximately US$5.19 billion.

21. NAS and AAA also executed guarantees in favour of the ultimate owners and head lessors or other finance parties in respect of the obligations of individual subsidiary lessees and sublessees. Many of those guarantees are the subject of the applications for approval to repudiate.

Restructuring

22. In early 2020, the Group had embarked on intense restructuring activity. The requirement for restructuring was prompted by a combination of the impact in 2019 of the global grounding of all Boeing 737 Max and the impact in 2020 of the COVID-19 pandemic. The restructuring plan entailed the conversion of debt and leasing commitments to equity, adjusting lease rentals to market rates by reference to the value of aircraft, the introduction where possible, by agreement with lessors of a "power by the hour" ("PBH") arrangement whereby leasing payments would reflect the actual utilisation of aircraft, adjustments to payment obligations for maintenance in respect of aircraft and engines, and a postponement of operations outside Norway until the effects of the pandemic had eased.

23. New cash and equity was secured through a public offering and at an early stage of the restructuring, support was provided by a Norwegian government state aid programme.

24. In November 2020, it became clear that although significant savings had been achieved in the restructuring negotiations, the process would take more time and the Group could not survive without availing of further restructuring steps, which included availing of Part 10 of the Act by these proceedings.

25. Following the appointment of the examiner, the companies in conjunction with the examiner continued their restructuring discussions with lessors, financiers and relevant contract counterparties.

26. The Group retained an investment bank, DNB Bank ASA, and industry specialists Seabury Capital Advisors LLC.

27. On 21 December, 2020, Seabury issued to lessors a document described as a *"request for lease restructuring".* Through this document the Group identified the critical changes

which it believed were necessary to the relevant aircraft leases. In particular, it identified the following requirements: -

(1) To reset rent to market levels based on the company's research and experience in the market.

(2) Requiring counterparties to move to a PBH structure.

(3) A revision of the basis upon which maintenance costs would be discharged such as to require lessors to share maintenance costs, a practice which the companies believed was in accordance with market conditions.

28. There was also presented to lessors on 24 December, 2020, a "*slide deck*" containing a detailed presentation of the Group's business plan. This document contained extensive details of the proposed routes to be serviced by the Group in 2021 with a view to "*ramping up*" in 2022 and details of the Group's proposal to position itself as a "smart cost carrier" having regard to cost advantages being sought. The presentation contained details of the Group's strategic plan for the development of its brand and target customer base, details of the portions of the business identified as profitable, the specific intentions of the group regarding the maintenance of its operations in Norway, Sweden, Denmark and Finland, and descriptions of the company's intention going forward to compete at least within Europe. It also contained information as to the Group's proposal to simplify its operations, projections and forecasts with details of cost reductions including aircraft lease costs, intended profit and loss accounts, balance sheet and cash requirement estimates.

29. On 14 January, 2021, the Group made a public announcement of its business plan.

30. As far as concerned the operations of the Group, the business plan entailed the following key features: -

(1) That the Group would focus on its core business in the Nordic countries, operating a short haul network with narrow body aircraft.

(2) That it would cease to operate long haul routes.

(3) That it would initially operate up to 50 Boeing 737 aircraft, operating within Norway and other Nordic countries and between those countries and the rest of Europe.

(4) A significant reduction in the number of aircraft assets leased by the Group and;

(5) A reduction in the volume of services procured by the Group.

31. The announcement also described, on a preliminary basis, the Group's intentions as regards its capital structure going forward. Under the plan new investors in the Group would own approximately 70% of the shares, existing shareholders would own approximately 5% and "*impaired creditors*" would own approximately 25%.

32. The examiner reported to this Court that he was in the course of evaluating the business plan. He stated his preliminary view that he would be in a position to formulate proposals for schemes of arrangement which would facilitate the survival of the companies and the preservation of employment on the basis of the business plan proposed by the Group.

33. One of the petitioner companies, TLL, was the parent company of a sub-group within the asset management platform which focussed on leasing the wide bodied aircraft required to service the Group's long haul activity. Arising from the announcement made on 14 January, 2021, it was apparent that TLL would no longer feature in or form part of the Group's business plan. The examiner so reported on 15 January 2021 and on that date, the court made an order lifting the court protection as regards TLL, discharging him as examiner of TLL, and appointed him as liquidator of TLL.

These applications

34. The companies say that to effectively implement the business plan and permit the continued viability of the companies and the whole or part of their undertakings as a going concern it is necessary to repudiate certain contracts and to address the liabilities arising from such repudiation in schemes of arrangement.

35. To that end the companies issued applications pursuant to s. 537 (1) for approval to repudiate some 425 contracts with 68 counterparties.

36. The first repudiation application was issued on 22 January, 2021. It related to two categories of contracts as follows: -

    (1) Contracts associated for the most part with long haul operations. These were principally contracts relating to ground handling and fuel line services provided to NAS or NAI at a number of US international airports.

    (2) The second group comprised a variety of contracts which it was said were no longer required in the context of the Group's business plan either because they were surplus to the future requirements of the Group in light of its scaled back operations, or where the Group would require in order to achieve the required economies to enter into less expensive contracts or substitute third party contracts with in - house resources.

37. Most of this second group comprised contracts relating to the leasing of aircraft ("head leases") with lessors and financiers including Aercap, DVB Bank, Goshawk, ICB Leasing, Mitsui, Orix, SMBC, Wings Capital, Avalon, Macquarie, Accipiter, Jackson Square Aviation, Aviation Capital Group, Rolls Royce plc and related companies, Engine Lease Finance Corporation, and Willis Lease Finance Corporation. They also included leases and contracts relating to the purchase of aircraft and engines, the supply of in-flight entertainment systems, ground handling services, supply of spare parts, catering services contracts, cleaning related contracts and other airport facility arrangements with such parties as Boeing, Airbus, Lufthansa, Panasonic Avionics, Gate Gourmet, Airdata and others.

38. The second repudiation application related to two groups of leases. Firstly, it related to sub-leases between DLL and LLL, as sub-lessor and aircraft operating companies within the Group principally NAI and NAS.

39. Secondly, it related to sub-leases of an additional 54 aircraft subleased to NAS and NAI by excluded subsidiaries. The interests of those excluded subsidiaries under the subleases had been assigned or were otherwise held for the benefit of third party lessors or finance parties. Therefore, those excluded subsidiaries were not free to agree consensual termination of the subleases.

40. The third application related principally to guarantees given by NAS and AAA in respect of the obligations of other operating companies or companies in the asset management platform, including excluded subsidiaries, in favour of head lessors or other finance parties.

41. The fourth application related to a particular agreement with International Lease Finance Corporation (a "put and call option") and a contract for the installation of seating with an entity referred to as Recaro Aircraft Seating GmbH.

42. The first notice of motion was initially returnable before the court on 28 January, 2021. It was adjourned from time to time to enable the respondents to deliver replying affidavits and legal submissions. The second and third applications were initially returnable before the court on 4 February, 2021, and the fourth application on 15 February, 2021.

43. After a number of preliminary hearings for directions and adjournments to enable the parties exchange affidavit evidence and legal submissions, the opposed applications were listed for hearing together before the court on 23 February, 2021, and heard over a period of five days.

44. At the initial return date and directions hearings, and on each day of the substantive hearing, the court was informed that settlement terms had been concluded with a large number of the counterparties. In a number of cases, parties had agreed consensual termination of the contracts or other modifications to the relevant contracts, and certain of the applications were withdrawn by consent. For others, orders were made under s. 537 (1) by consent. In a number of other cases the applications were unopposed and proceeded. Ultimately, this Court was required to determine the opposed application in respect of three groups of counterparties described below.

45. The three groups in respect of which the applications were opposed, and which are the subject of this judgment can be described by reference to the names of the parties having a commercial interest in the relevant contracts namely, Credit Agricole Corporate and Investment Bank (the "Credit Agricole Group"), Bank of Utah and Citibank NA (the "Utah Citibank Group") and PK Air Finance SARL (the "PK Air Finance Group"). I refer to these groups collectively as "the opposing parties".

Credit Agricole

46. Credit Agricole was the finance party interested in contracts concerning six aircraft. In respect of the first three aircraft (MSN numbers 63310, 63311 and 63312), the aircraft had been acquired by a company referred to as AAAB 7871, being the head lessor, and leased to one of the excluded subsidiaries Sognefjorden Limited. Sognefjorden then subleased the three aircraft to NAS.

47. The acquisition of the aircraft by AAAB 7871 in each case was funded by loans from funders for whom Credit Agricole acted as security trustee.

48. In respect of each of these aircraft, NAS had two sets of contractual obligations: -

    (1) Obligations under the aircraft operating sublease from Sognefjorden to NAS.

    (2) A guarantee given directly to Credit Agricole in respect of the obligations of Sognefjorden to the lessor and to the secured parties.

49. NAS seeks approval to repudiate both the operating lease and the guarantee.

50. Aircraft number 63313, was acquired jointly by three lessor companies, namely Flip No. 70 Limited, Flip No. 171 Limited and Flip No. 172 Company Limited. The aircraft was acquired by the "Flip" companies with funding provided by lenders represented by Credit Agricole. The aircraft was leased to Ofotfjorden Limited, an excluded subsidiary.

51. NAS executed two guarantees in respect of the obligations of Ofotfjorden under the lease, one to the "Flip" companies as lessors and the second to Credit Agricole directly.

52. For aircraft nos. 63314 and 63315, the structure was identical to that for 63313, save that the lessee was a different excluded subsidiary, Tysfjorden Limited.

53. An important feature of s. 537 is that the court can only be asked to approve repudiation of contracts: -

> *"under which some element of performance other than payment remains to be rendered both by the company and the other contracting party or parties".*

54. To show that this threshold test is met, the contracts of lease and contracts of guarantee, together with the other contracts the subject of these applications, were all exhibited. Having regard to the volume of contracts and the multiplicity of documents involved there was exhibited also what were referred to as "Contract Summaries". For the purpose of these applications the contents of these contract summaries were accepted as valid summaries of the contracts.

55. Each of the contract summaries was prepared by the companies' solicitors, Matheson. The contracts the subject of this judgment were expressed to be governed by English law and subject to the exclusive jurisdiction of the Courts of England. Therefore, the companies exhibited opinion letters by the companies' English counsel Hogan Lovells which confirmed, by reference to English law, the following: -

(1) That the description of the relevant agreements and of their provisions in the contract summaries was correct, save where expressly corrected, and;

(2) That the clauses identified in the contract summaries as constituting obligations of the parties to the agreements in respect of which some element of performance other than payment remains to be rendered, constitute obligations to do something other than the payment of money ("non-monetary obligations"). Such contracts are generally referred to as executory contracts.

56. Since the judgment of the Supreme Court in *Re Linen Supply of Ireland Limited* (Unreported, 10 December 2009), it has been accepted that leases of property constitute contracts to which the provisions of s. 537 (and its predecessor s. 20 of the Companies (Amendment) Act 1990) apply.

57. It has not been disputed in these applications that the leases of aircraft or other aircraft objects, being either aircraft bodies or engines, are executory contracts for the purpose of s. 537. The position regarding guarantees is less clear, and I shall return later to that question (paras 189 and 190). Therefore the evidence of Hogan Lovells as to the categorisation of contracts as executory is important and is considered in more detail below.

Aircraft MSN 63310 – Sub-Lease Sognefjorden to NAS

58. This was an aircraft operating lease made on 3 May, 2018, between Sognefjorden Limited and NAS, which operated the aircraft with the benefit of its aircraft operator's certificate ("AOC"). As regards non-monetary obligations of the lessee the contract summary refers to the following: -

- Clause 8: Operational undertakings whereby the lessee undertook throughout the lease period and until redelivery that it would ensure that the aircraft was operated in accordance with the terms of the head lease including certain operational covenants, covenants regarding possession and sub-leasing, and maintenance and repair of the aircraft.

- Clause 8.1 contained a covenant that the lessee would at all times ensure that the aircraft is used operated maintained and controlled in accordance with the requirements of the relevant Aviation Authority of each jurisdiction to which the lessee is subject.

- Clause 8.2: Obligations to observe and comply with all laws, regulations, codes and standards applicable.

- Clause 8.3 imposed the obligation to procure that accurate complete and current records are kept of all flights, of all hours and cycles completed by each engine and each part and of all maintenance and repairs carried out to the aircraft.

- Clause 8.4 provided that the lessee would not permit the aircraft to leave its possession other than for the purpose of overhaul, repair, modification or

maintenance in accordance with the terms of the agreement and may not sub – lease the aircraft without the prior written consent of the lessor and the security trustee.

- Clause 9.1 contained obligations to ensure that the aircraft is maintained and repaired in accordance with the terms of the head lease and to ensure that the aircraft is serviced, repaired, maintained, overhauled, tested and where applicable, stored as set out in the agreement.

- Clause 10 contained obligations to register and maintain the registration of the aircraft and to protect the lessor, owner and financiers interest against the claims of any other persons.

- Clause 12 contained the obligation on the lessee to effect and maintain insurance in respect of the aircraft.

- Clause 13.1 imposed the obligation on the lessee to redeliver the aircraft to the lessor on the expiry date of the lease.

- Clause 13.2 contained obligations to provide not later than six months prior to the expiry date a technical report in a prescribed form.

- Clause 13.3 obliges the lessee to take the aircraft out of service at least two weeks prior to the expiry of the lease period to ensure the condition of the aircraft complies with redelivery conditions.

- Clause 13.4 contained obligations to make all relevant aircraft documents available to the lessor for inspection at least 90 days before the redelivery date.

- Clause 13.5 contained obligations, after completion of final maintenance, on the lessee to perform ground tests on the aircraft to demonstrate to the lessor the satisfactory ground operation of the aircraft.

- Clause 13.6 contained an obligation on the lessee, after completion of ground tests to perform a test flight.

- Clause 13.9 contained the basic obligation that the lessee would withdraw the aircraft from commercial service and begin the work required to comply with redelivery condition on a date prior to the expiry date.

59. As regards obligations to be rendered by the lessor, the following were identified as the non-monetary obligations: -

- Clause 2.1: the obligation to lease the aircraft to the lessee.

- Clause 2.3: the obligation to provide not less than five business days prior written notice to the lessee in the event of any early termination notice.

- Clause 13.8 contains obligations on completion of the final inspection and the correction of any defects to execute and deliver a return acceptance certificate.

Aircraft MSN 63310: Guarantee NAS to Credit Agricole

60. The contract summary recites that Credit Agricole is the beneficiary of the guarantee, in its capacity as security trustee for secured lenders named in the associated transaction documents.

61. The monetary obligations of NAS as the guarantor are to guarantee to the beneficiary the due and punctual payment, performance and discharge by the lessee of the guaranteed obligations. The guaranteed obligations are defined to mean "*all monies, liabilities and obligations (whether actual or contingent … and whether or not for the payment of money and including any obligation or liability to pay damages) from time to time owing by the lessee to the lessor and to the secured parties."*

62. The guarantor undertook to the beneficiary that whenever the lessee would not pay perform or discharge any of the guaranteed obligations when due, the guarantor would immediately on demand pay or discharge such guaranteed obligations as if it was the principal obligor.

63. The non-monetary obligations of the guarantor are summarised as follows: -

- Clause 7.1 contains an obligation to comply with and do all that which is necessary to maintain in full force and effect any authorisation required by any law or regulation.

- Clause 7.2 contains an obligation to comply in all respects with all relevant laws to which it is subject.

- Clause 7.5 obliges the guarantor to provide to the beneficiary a copy of its annual audited financial statements for each relevant financial year of the term of the lease.

64. The contract summary also states that by guaranteeing the performance obligations of the lessee the guarantor has potential obligations in respect of the maintenance, storage, insurance and other non-monetary obligations of the lessee under the lease agreement itself.

65. In respect of non-monetary obligations remaining to be rendered by the beneficiary, reference is made to obligations of confidentiality, albeit that they are stated to be contained in an associated "*all parties agreement",* which confers obligations of confidentiality in respect of all relevant transaction documents, stated to include the guarantee.

66. Although the reference to the obligation of confidentiality is derived from an "*all parties agreement*" which was not exhibited to the court, the contract summary recites that this obligation is transposed into each transaction document, which includes the guarantee.

67. The evidence of Hogan Lovells in their confirmatory letter, in this case dated 5 February, 2021, is that the contract contains obligations "to do something other than the payment of money". That evidence has not been contradicted on this application.

68. Clause 4.4 provides that where the guarantor makes a "Tax Payment" and the beneficiary later determines that a tax credit is attributable to that payment and where the relevant tax credit has been obtained utilised and retained by the beneficiary, the beneficiary may be obliged to make a payment to the guarantor to place the guarantor in the same after tax position as it would have been in had the tax payment not been required to be made by the guarantor. This was referred to in the contract summary as a "non-monetary obligation". I had some doubt as to whether it could seriously be suggested, despite the contents of the contract summary, that such a clause constitutes an obligation other than the payment of money. It is surprising that although the court's attention was drawn to Cl. 4.4, counsel did not refer the court to the fact that Appendix D to the Hogan Lovells letter specifically corrected this, and confirmed that Clause 4.4 was a monetary obligation. Therefore, the reference by the companies to C. 4.4. is of no assistance.

69. Similar contract summaries and opinions of Hogan Lovells were provided in respect of aircraft numbers 63311 and 63312, also leased by AAAB 7871 to Sognefjorden and the subject of guarantees given by NAS to Credit Agricole.

Aircrafts MSN 63313, 63314 and 63315

70. The lessee of MSN 63313 is Ofotfjorden Limited. For 63314 and 63315 it is Tysfjorden Limited. These are excluded subsidiaries. Therefore s. 537 cannot be invoked to repudiate the leases. The section is invoked to repudiate the two guarantees granted by NAS in respect of each aircraft, one in favour of the borrower lessor being the relevant "Flip" company, and a second in favour of Credit Agricole, as the finance party.

71. The contract summary relating to these guarantees describes the obligation on the part of NAS as guarantor to guarantee the due and punctual payment, performance and discharge by the lessee of the guaranteed obligations.

72. The non-monetary obligations of the guarantor were described to include the following: -

- Clause 7.1: the obligation to obtain and comply with all required authorisations under any law or regulation.

- Clause 7.2: the obligation to comply with all laws to which the lessees may be subject.

- Clause 7.5: Information obligations including the obligation to deliver copies of the lessees annual audited financial statements.

73. It was also stated in the contract summary that by guaranteeing the performance obligations of the lessee, the guarantor potentially has obligations in respect of maintenance, storage, insurance and other non-monetary obligations of the lessee under the lease agreement.

74. As regards non-monetary obligations of the beneficiary, reference was made, again unhelpfully and incorrectly, to a clause 4.4 concerning tax credits and a potential repayment of a tax amount.

75. The contract summary states that "*where the Guarantor is called upon pursuant to the Guarantee, to perform obligations of the Lessee under the Lease, the Beneficiaries/Representative Beneficiary will have non-monetary obligations in favour of the Guarantor in those circumstances to enable the Guarantor to fulfil its obligations qua Lessee pursuant to the Lease*". It was submitted that this was a reference to the potential for the beneficiary to call on the guarantor to "*step in*" to the lease in which event the beneficiary would attract obligations corresponding to those of the lessor.

76. No particular provision or term of the borrower guarantee or of the finance party guarantee was cited in support of this proposition. Nonetheless, the guarantee is expressed to be governed by the laws of England and Wales and the only evidence before the court on this point is the exhibited opinion of Hogan Lovells to the effect that these provisions constitute non-monetary obligations. No contrary evidence was proffered.

Bank of Utah / Citibank NA

77. Each of the Bank of Utah and Citibank, and funders represented by them is the beneficiary of guarantees given by both NAS and AAA.

78. In relation to Citibank, the structure relevant to six aircraft being MSN numbers 42825 to 42830 inclusive, was that the aircraft were acquired by AAA Max One Limited, the lessor, with the benefit of funding provided by secured parties for whom Citibank was acting as trustee. The relevant aircraft were then leased to Hardangerfjorden Limited, an excluded subsidiary. Each of NAS and AAA granted a guarantee in favour of Citibank guaranteeing payment of the obligations owing by the lessee Hardangerfjorden to the lessor, AAA Max One Limited, and to the secured parties.

79. In addition to guaranteeing the payment of rent and other charges under the lease, the contract summary describes the non-monetary obligations of the guarantors as follows: -

- Clause 7.1: registration.
- Clause 7.2: Maintenance.
- Clause 7.3: Operational obligations under the lease.
- Clause 7.6 (a): Restrictions on the use of the aircraft.
- Clause 7.6 (k): Obligations regarding inspection facilities.
- Clause 7.7: Information obligations concerning the aircraft and engines.
- Clause 10: Insurance.

80. The guarantor is also obliged to provide copies of all relevant authorisations and to ensure compliance with all governing laws, and to provide its audited financial statements.

81. In respect of non-monetary obligations of the beneficiary, reference is made in the contract summaries to obligations of confidentiality, albeit that they are conferred under a "Participation Agreement" governing the relationship between the parties. Reference is also made to obligations to notify the guarantor of any amendment, modification waiver discharge termination or other change which the beneficiary has signed or agreed to sign.

82. The references to non-monetary obligations, on the part of the beneficiary are limited. However, the uncontradicted evidence before the court is the opinion of Hogan Lovells, in their letter of 5 February 2021 that the contract, being a contract governed by English law, is a contract which contains obligations "to do something other than the payment of money."

83. A similar guarantee is granted in favour of Citibank by AAA.

84. The Bank of Utah funded the acquisition by another company in the group, AAAB 787, of a further eight aircraft which were leased to three other excluded subsidiaries, namely Nordfjorden Limited, Trollsfjorden Limited and Ulsfjorden Limited. The form of the guarantees in favour of the Bank of Utah broadly correspond with the provisions given in favour of Citibank and guarantees were given again by each of NAS and AAA.

PK Air Finance

85. Three aircraft, namely MSN 39002, 39162 and 39164 were acquired by so-called "Flip" companies namely Flip No. 156 Company Ltd., Flip No. 159 Company Ltd., and Flip No. 158 Company Ltd. The relevant "Flip" company in each case acted as lessor of the aircraft to DYI Aviation Ireland Ltd. which in turn sub-leased the aircraft to Norwegian Air Sweden AB, another excluded subsidiary.

86. In respect of each of these transactions, NAS executed guarantees in favour of the relevant "Flip" companies, and PK Air Finance holds the commercial interest in the benefit of the guarantees as the security trustee for the lenders to the "Flip" companies.

87. In respect of one of these aircraft the application for approval to repudiate was withdrawn, namely MSN 39002. In respect of the remaining two, the contracts of guarantee were in identical form and are described in the contract summaries. The contract summaries note that the relevant aircraft were leased by the "Flip" company to DYI Aviation Ireland Limited, which in turn sub-leased the aircraft to Norwegian Air Sweden AB. The guarantee provided by NAS in favour of the relevant "Flip" company was a guarantee of all of the obligations of DYI Aviation.

88. The non-monetary obligations remaining to be rendered by the guarantor are stated in the summary to include the following: -

- Clause 7.2: Obligation to comply with all relevant laws and regulations.

- Clause 7.5: The obligation throughout the relevant lease period to provide annual consolidated audited financial statements and to deliver copies of all reports notices and financial statements which the guarantor makes available to its stakeholders.

- Clause 7.6: Requires the guarantor NAS at all times to remain in control of the lessee.

89. In this case, the beneficiary of the guarantee is also the head lessee. Its non-monetary obligations are described as including the following: -

    - Confidentiality: albeit pursuant to the lease, but incorporated by reference as a *"relevant document";*

    - Clause 2.1: The obligation to lease the relevant aircraft to the lessee under the corresponding lease agreement;

    - Clause 10: Prohibitions on assignment or transfer of any of the rights or obligations under the guarantee.

90. It was also submitted that in circumstances where the guarantor is required to perform the obligations of the lessee under the lease on an enforcement of the guarantee the lessor, in such a "step in" scenario, would have corresponding non-monetary obligations in favour of the guarantor to enable the guarantor to render performance of the lessee's obligations.

91. The exhibited letter of opinion as to English law as by Messrs. Hogan Lovells confirms their opinion that the guarantee contains obligations to do something other than the payment of money and no contrary evidence was proffered.

92. The issues which I am required to determine on this application may be summarised as follows.

Threshold issues: -

(1) Are proposals for a compromise or scheme of arrangement "*to be formulated*" in relation to the companies?

(2) Are the relevant contracts such that some element of performance other than payment remains to be rendered both by the company and the other contracting party or parties?

Discretionary issues

(3) What is the standard of review which the court should apply in considering an application for approval of a repudiation?

(4) Is the evidence before the court sufficient to satisfy the court that it should approve repudiations of the contracts?

Jurisdiction and recognition questions

(5) Can s. 537 be invoked to approve repudiation of a contract having effect outside the jurisdiction of the State?

(6) Can s. 537 be invoked to repudiate contracts which are expressed to be subject to the laws of another State and which provide that any disputes in relation to such contracts shall be resolved in the courts of that other State?

Other questions

(7) The impact, if any, of the Convention on International Interests in Mobile Equipment and the Protocol thereto, on matters specific to Aircraft Equipment, adopted in Cape Town, South Africa, 16 November 2001.

(8) The manner of determination of the quantum of loss or damage suffered by any person as a result of any repudiation approved by the court. (s. 537 (3) of the Act).

Examinership generally

93. Before turning to the evidence before the court on this application it is appropriate to place s. 537 and these applications in their context.

94. The restructuring remedy of examinership was first introduced in the Companies (Amendment) Act 1990. It has been the subject of a number of amendments from time to time, and is now governed by Part 10 of the Companies Act 2014.

95. Where a company is unable to pay its debts or unlikely to be able to pay its debts the court may appoint an examiner for the purpose of examining the state of the company's affairs and performing such functions in relation to the company as may be conferred by or under the Act.

96. An examiner may only be appointed where the court is satisfied that the company and all or part of its undertaking has a reasonable prospect of survival as a going concern.

97. The core functions of the examiner are to formulate proposals for a compromise or a scheme of arrangement in relation to the company. Where the examiner formulates such proposals he convenes statutory meetings of members and creditors to consider and vote on the proposals. Provided at least one class of creditors approves the proposals, the examiner may then present them to the court for confirmation pursuant to s. 541 of the Act.

98. Subject to due compliance with the requirements of the Act and rules as to the formulation of proposals, the contents of the proposals, the convening and conduct of the statutory meetings, the provision of relevant information, and the absence of irregularities or impropriety, the court may confirm the proposals if: -

(1) 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;

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

99. Subject to the fundamental test of fairness and the absence of unfair prejudice, a member or creditor whose interests or claim would be impaired by the proposals may object to confirmation on a number of grounds including the following: -

(1) That there has been some material irregularity at or in relation to the statutory meetings.

(2) That the acceptance of the proposals by the meeting was obtained by an improper purpose.

(3) That the proposals were put forward for an improper purpose.

(4) That the proposals unfairly prejudice the interests of the objector.

100. Once confirmed, the proposals are rendered binding on the company and on all members and creditors affected by the proposals, including parties and classes of parties who have voted against the proposals.

101. Commencing on the day on which the petition for the appointment of the examiner is presented the company is under the protection of the court, which is the equivalent of an "automatic stay". No proceedings for the winding up of the company or resolution for a winding up may have effect, no receiver may be appointed over assets of the company, no attachment sequestration distress or execution may be effected against the assets of the company except with the consent of the examiner, no action may be taken to realise the whole or any part of any security held over assets of the company except with the consent of the examiner, no steps may be taken to repossess goods in the company's possession under hire purchase agreements or retention of title agreements and no other proceedings may be commenced or continued against the company without leave of the court.

102. The examinership process is limited in its duration. The examiner is required to formulate his proposals, hold the statutory meetings and report to the court on the outcome within 35 days of his appointment. That period can be extended initially for a further period of 35 days, and ultimately up to a period of 100 days from the date of his appointment.

103. The Companies (Miscellaneous Provisions) (COVID-19) Act 2020 provided at s. 13 for extensions of the period of court protection and the time for final reports of the examiner by a period not more than 50 days to enable the examiner to make his final report, in exceptional circumstances. The term "exceptional circumstances" was defined by that section to include the nature and potential or actual impact of COVID-19 on the company. This provision for extension was initially intended to apply up to 31 December, 2020, but was subsequently extended by order of the Minister. In this case the initial period within which the examiner was obliged to report was extended to 25 February, 2021. On 19 February, 2021, the examiner applied to this Court for, and was granted an extension up to and including 16 April, 2021.

104. For the duration of an examinership, the company remains in possession and control of its assets and business under the continuing authority and responsibility of its directors. It is essentially a "debtor in possession" remedy. The essence of the process is that the company continues its business in the ordinary way, and the examiner is charged with the responsibility of formulating proposals for a scheme of arrangement in accordance with the Act. This is generally done, as in this case, in collaboration with the company.

105. The Act provides a number of special "tools" to enable the objectives of rescue and restructuring to be achieved. A number of these special powers are conferred on the examiner, and other provisions are particular to the company itself.

106. The examiner is given certain powers of information which he may invoke in order to secure cooperation of officers and shareholders. These powers include the right to attend at or convene meetings of the directors and shareholders, the right to require production of documents and evidence and other records (s. 526), the right to deal with certain charged property after prior application to the court (s. 530) and the right to apply to the court for orders for the return of assets improperly transferred from the company (s.557).

107. On an exceptional basis the examiner may apply to the court for an order transferring to him certain functions or powers of the directors (s. 528).

108. Whilst the company is expected to conduct its business in the normal fashion, there are certain restrictions on its activities. For example, s. 521 prohibits the payment of pre-petition debts of the company, save where the report of the independent expert accompanying the petition so recommended or where the court otherwise orders on an application for that purpose. The company is obliged to cooperate in all respects with any requirements of the examiner, including the production of documents and information and to give him all assistance he may require in the performance of his function (s. 526).

Repudiation of contracts

109. In this framework of the powers of the examiner and limitations on the powers of the company, s. 537 sits as a special and unique provision. It confers the power to repudiate executory contracts on the company and not on the examiner and may only be exercised with the prior approval of the court.

110. The purpose of the section is to enable the company to repudiate certain contracts where doing so is appropriate and necessary to facilitate the survival of the company and all or part of its undertaking as a going concern.

111. The objectors on this application submit that before a court approves a repudiation it must be shown in respect of each contract the subject of an application for approval that its repudiation is absolutely necessary to the formulation of proposals and the survival of the company as a going concern.

112. In the scheme of the Act, it is clear that the purpose of s. 537 is that a contract which might otherwise have been capable of being enforced by specific performance after the company exits examinership may be repudiated. The remedy of the counterparty for any

loss or damage which flows from the repudiation is that it shall stand as an unsecured creditor for the amount of that loss or damage (s. 537 (2)).

113. Although there has been extensive case law relating to Part 10 of the Act since the original introduction of examinership in 1990, much of it relates to cases in which the appointment of an examiner is contested or cases where objection is made to the confirmation of proposals for a scheme of arrangement. Throughout these judgments, much emphasis has been placed by the court on the objective of the rescue of all or part of the undertaking of the company as a going concern, with the consequential benefits in terms of the company's commercial and business activities, and the saving of employment associated with its activities.

114. Although s. 537 has been invoked in numerous cases since the enactment of the legislation, there are relatively few cases in which applications under s. 537 have been opposed. Only three such cases have been the subject of extensive reporting and have been referred to in the course of submissions in this case, namely *Re Linen Supply of Ireland Limited* (unreported, SC, 10 December 2009), *Re Bestseller Retail Ireland Limited* [2010] IEHC 155 and *Re O'Brien's Irish Sandwich Bars Limited* [2009] IEHC 465.

115. In *Re Linen Supply of Ireland Limited*, the court was invited to consider, for the first time since the enactment of the legislation, the question of whether s. 20 of the Companies (Amendment) Act 1990 (the predecessor of s. 537) properly construed could be invoked to repudiate a lease. In the High Court, the court found that a lease was not appropriate for the utilisation of s. 20. This decision was overturned by the Supreme Court. Murray C.J. said: -

> *"The issue concerning the interpretation of s. 20 centred on whether the reference to the repudiation of "any contract" in that section included repudiation of a lease. The section must first of all be interpreted in accordance with the ordinary meaning to be attributed to the words used and in its ordinary meaning the word 'contract' includes leases. Leases as a matter of law are contracts. Moreover, if the Oireachtas intended to exclude leases from the term 'contract' by which they are normally covered it would have said so explicitly.*
>
> *Furthermore, certain arguments centred on the phrase in s. 20(1) which confined the repudiation of contracts to those "under which some element of performance other than payment remains to be rendered" by the company and other contracting parties. However, a lease by its very nature involves the performance of obligations by both the lessor and the lessee other than payment of money. Some of these obligations have been referred to in the course of the hearing such as the right to quiet enjoyment and to obligations to insure. It has not been shown that the obligations arising under the leases in this case are confined to the making of payments.*

> *Accordingly, in my view, s. 20 must be interpreted as conferring jurisdiction on the High Court to decide whether it should approve or otherwise a repudiation of a contract which is a lease".*

116. This judgment is significant in the context of the case before me for two reasons.

117. Firstly, it establishes beyond doubt that s. 537 can be invoked in respect of a lease. Secondly, the analysis of whether a contract contains "an element of performance other than payment remains to be rendered" is significant. In that case, a question had been raised as to whether what was being described as the "passive" obligation of conferring quiet enjoyment on a lessee constituted an obligation within the meaning of the section. Murray C.J. made it clear that to take a contract outside of the scope of the section it must be shown that obligations remaining to be performed under the relevant agreement "are confined to the making of payments".

118. *Re Bestseller Retail Ireland Limited* concerned an application by the company for approval to repudiate leases of retail outlets. It emerged during the course of the hearing that although all of the company's outlets were operating at a loss, no repudiation of a lease had been sought where the lease obligations were guaranteed by the applicant's parent company, which was not in examinership.

119. The court found this to be unfair, and concluded that the dominant motive for excluding those properties from the application for approval to repudiate was not to protect the interests of the company and its creditors, but to protect the interests of its shareholders. The court found that in that case the applications were "*designed to help shareholders whose investment has proved to be unsuccessful*", quoting Clarke J. in *Re Traffic Group Limited,* and found that this was outside the scope and purpose of the Act.

120. In making these findings, McGovern J. made a number of observations in relation to the objectives of the Act and the context of repudiation applications pursuant to the then – s. 20. He stated as follows: -

> *"It is clear on the evidence that if the Company is allowed repudiate the leases, the landlords concerned will suffer significant loss. As this is a loss affecting a property right of a landlord, it is something which can only be done in exceptional circumstances and where permitted in law. The Supreme Court has held in Re Linen Supply of Ireland Ltd. (10th December, 2009) that the High Court has jurisdiction under s. 20 to decide whether it should approve, or otherwise, a repudiation of a contract which is a lease. In each case, the court has to exercise its discretion, depending on the particular circumstances that arise".*

121. The court expressed its dissatisfaction that no reasonable explanation had been given for the fact that the company had selected for repudiation only those leases in respect of which there was no parent company guarantee in place. The court concluded that it was:

> *"…difficult to escape the conclusion that the company is seeking to repudiate these leases because a guarantee has been given by the holding company".*

122. McGovern J. continued: -

> *"The repudiation of a lease under s. 20 of the Act is a significant interference with the property rights of a landlord and it must not be exercised lightly. The court has a wide discretion. I must consider the overall purpose of the examinership legislation".*

123. Part of the complaint made in that case by objectors was that the company had failed to provide clarification and confirmation of the criteria which had been applied in selecting the leases to be repudiated. In the absence of that information, coupled with the finding that the company had sought to repudiate only leases in respect of which there were no parent company guarantees, the court found that the process embarked upon by the company was not intended to serve the objectives of the legislation in facilitating the survival of the company and its undertaking as a going concern, but was instead *"designed to help the shareholders".*

124. In *Re O'Brien's Irish Sandwich Bars Limited*, the company sought to repudiate leases as part of a scheme under which it was intended that the sub-lessees, who were franchisees of the company, would assume the company's liability under the leases to the head lessors, thereby in effect becoming direct lessees.

125. Ryan J. found that such a scheme, under which the sub-lessees and franchisees would be imposed on the lessors carried with it a range of uncertainties, not least from the perspective of landlord and tenant legislation, that wholesale repudiations of the leases were not permissible on such a basis.

126. The company invited the court to determine the quantum of the losses of the counterparties as part of the same hearing. The court noted that the only evidence before the court on that issue was a report of a chartered surveyor engaged by the company itself.

127. The court held that where the application had been brought very close in time to the expiry of the time limit for the examiner to report on the schemes of arrangement, it would not have been possible for the court to comply with the basic constitutional requirements for a fair hearing of the matter of quantum, although it noted that it had been accepted by the company that a hearing as to quantum in that case may have been capable of being postponed.

128. The exceptional powers which are conferred on an examiner or a company in other aspects of Part 10 contain express requirements that they may only be exercised in circumstances where the failure to do so would considerably reduce the prospects of the survival of the company or would prejudice the survival of the company as a going concern.

129. The power to make payments in respect of pre-petition debts only after the approval of the court has been granted is subject to the condition that it must be shown that a failure to discharge or satisfy the relevant payment would considerably reduce the prospects of the company or the whole or part of its undertakings surviving as a going concern.

130. Section 525 confers on an examiner power to take steps to prevent or rectify the effects of certain acts, omissions, course of conduct, decisions or contracts where he is of the opinion that failure to do so would be likely to prejudice the survival of the company or the whole or part of its undertaking as a going concern.

131. Section 529 permits an examiner in certain circumstances to certify as expenses properly incurred by him liabilities incurred by the company during the protection period, where in the opinion of the examiner the survival of the company as a going concern during the protection period would otherwise be seriously prejudiced.

132. Section 530 establishes a power to dispose of charged property on certain conditions where doing so would be likely to facilitate the survival of the whole or any part of the company as a going concern.

133. Section 517, which establishes the power to appoint an examiner to a related company, may only be exercised in circumstances where the court is satisfied that there is a reasonable prospect of the survival of the related company and the whole or part of its undertaking as a going concern, and the court is required to take into account whether the making of the order would be likely to facilitate the survival of the company or of the related company and the whole or part of its undertaking as a going concern.

134. None of these tests concerning necessity in the context of the survival of the company as a going concern are stated in s. 537. This does not mean that the court is "at large" in the exercise of its discretion

135. The requirement to give notice of an application to the examiner (s. 537 (4)) and to the counterparty (O. 74A, r. 19) clearly means that the court is required to consider the interests of the counterparties in determining an application for approval. This must mean that the court must balance the interests of individual counterparties in the context of the objectives of the examinership as a whole and therefore against the interests of the members and creditors of the company as a whole.

136. Repudiation of a contract is traditionally understood to mean the termination of a contract by one party which is justified by conduct on the part of the other party which amounts to what is referred to as a repudiatory breach. Section 537 creates a statutory exception to this by conferring on a company the power to repudiate a contract, without establishing repudiatory breach on the part of the counterparty.

137. In the absence of a requirement to establish a repudiatory breach, subs. 2 and 3 of the Section recognise that such a repudiation, not being justified by the conduct of the counterparty, will invariably give rise to loss or damage suffered by the counterparty for

which there is a remedy in damages, the amount of which ranks as an unsecured claim against the company. Subsection 3 then provides a facility for the court to determine the quantum of those damages.

138. Because of the exceptional nature of the power to repudiate, and the effects on the rights of counterparties, as per *Re Bestseller*, it is not sufficient to simply demonstrate that repudiation will facilitate the formulation of proposals for a scheme of arrangement or the survival of the company as a going concern. It seems to me that it necessarily follows that where such an exceptional power is to be invoked it is necessary to illustrate that, as with the other exceptional powers referred to above, the very survival of the company will be prejudiced if the repudiation is not effected. I now turn to the evidence before the court supporting these applications.

Evidence of the companies

139. The petition for the appointment of the examiner described the Group's negotiations with lessors and financiers of aircraft with a view to securing reductions in the cost of sourcing and holding aircraft. Reference was made to agreements which had previously been made with certain lessors and finance creditors and to continuing engagement with more such parties. It is said on this application that the applications for approval of repudiations are necessary in the case of those counterparties with whom it has not been possible to reach such agreement.

140. The petition refers also to the status of the excluded subsidiaries. These are aircraft holding companies mostly with multiple aircraft but each of which has only one principal third party creditor. The third party creditors typically held security interests in the aircraft held by the excluded subsidiaries. The benefit of any lease and/or sub-lease between the excluded subsidiaries and NAS, NAI or other operating companies in the Group stands assigned to the third party creditors by way of security assignment. Whether the excluded subsidiaries could continue as going concerns is dependent on whether the relevant principal creditors in each case would agree to revised trading terms on their aircraft leases or secured loans. The Group was continuing to engage with the creditors of those subsidiaries in the hope of successfully negotiating revised terms. Where negotiation of suitably revised economic terms could not be achieved, it was likely that the relevant aircraft would have to be handed back to the ultimate owner or the secured creditor. In such a case the relevant excluded subsidiary would ultimately be liquidated in accordance with Irish law.

141. As regards the companies entering examinership, it was said that there would have to be a restructuring of the remaining forward-looking obligations of the relevant companies to facilitate the attraction of additional capital to support the future business of the companies and the Group as a going concern.

142. The applications were grounded on a series of affidavits sworn by Mr. Tore Jenssen on 22 January, 2021, 29 January, 2021, 1 February, 2021, 9 February, 2021, 16 February, 2021. Mr Jenssen is a director of each of the companies except NAS.

143. Affidavits were sworn in support of the application by the examiner on 28 January 2021, 8 February 2021, 17 February 2021 and 22 February 2021.

144. Mr. Jenssen referred to the background and exhibited the contracts and contract summaries.

145. Mr. Jenssen referred to the stated intention of the examiner to formulate proposals for a scheme of arrangement in respect of the companies. Mr. Jenssen said that the examiner has determined, together with NAS, that a number of agreements to which the companies are a party are required to be terminated in order to enable the examiner to finalise his proposals for a scheme of arrangement in respect of the companies.

146. In his first affidavit, referring to the contracts principally relating to long haul business, Mr. Jenssen said as follows: -

> *"In order most effectively to implement the business plan and thereby permit the continued viability of the companies, and the whole or part of their undertakings, the companies believe that it is necessary to repudiate certain contracts and to address the liabilities arising from such repudiation (both direct liabilities of any relevant company and liabilities by way of guarantee on the part of any other company) in schemes of arrangement to be brought forward. As such the companies are of the view that repudiation facilitates, and indeed is necessary, to the formulation of proposals for schemes of arrangement by the examiner."*

147. In relation to the contracts relating to long haul operations, Mr. Jenssen continued: -

> *"These contracts, which are described in the table below, relate, for the most part, to ground handling and/or fuel line services provided to NAS and/or NAI at a number of US international airports. Consequent upon the decision to dispense with long haul operations, such US-based services are no longer required by the group and it is for this reason that NAS and NAI are seeking the leave of this Honourable Court to repudiate the relevant contracts".*

148. In relation to the leases of aircraft and aircraft engines and a number of other contracts, Mr. Jenssen said the following: -

> *"There are a number of contracts (including aircraft and aircraft engine leases) which are no longer required in the context of the group's business plan. This is because they are either surplus to the group's future requirements in light of its scaled back operations (particularly in the case of aircraft and aircraft engine leases) or where the group will require, in order to achieve the required economies, to enter into less expensive contracts or substitute third party contract counterparties with in-house resources."*

149. In his affidavit grounding the second repudiation application sworn on 29 January, 2021, Mr. Jenssen referred to the business plan which had been announced by the Group at the

Oslo Børs on 14 January, 2021, and to the liquidation of TLL. He continued that the examiner remained of the view based on the group's business plan "*which in turn is premised inter alia on the repudiation of contracts the subject of the present application and* [the first repudiation application*] that it is possible for him to formulate proposals for a scheme of arrangement in respect of the companies*". Mr. Jenssen said that the examiner had determined that a number of the agreements to which the companies are a party are required to be terminated in order to enable him to finalise those proposals.

150. Mr. Jenssen expanded on the companies' explanations regarding the manner in which they had treated lessors generally. In response to a complaint made by certain objectors to the application that insufficient information had been placed before the court as to the manner in which the companies had reached the commercial conclusion that those objectors' contracts ought to be repudiated, Mr. Jenssen said the following: -

> *"The applicants affirmed their view that they had treated the relevant notice parties fairly and had given them, on a number of occasions, the opportunity to continue to lease aircraft to the applicants on the terms offered to other parties. The applicants reiterated that it was their belief that the group would be in a position to secure a number of aircraft specified by the examiner on terms that are consistent with the group's business plan. I confirm that the contracts the subject of the first repudiation application and indeed this application have been chosen on a consistent basis. This followed engagement with the various lessors and a proposal made to each of them concerning the retention of aircraft on a substantially similar basis. These proposals included the moving of lease payments to a new arrangement which was based on a model which was proposed uniformly. These proposals, which are known to all the parties, contained specific monetary proposals which are commercially sensitive to the parties and which I do not propose to exhibit here but can as necessary be made available to this Honourable Court on a confidential basis. Accordingly, the choice of contracts for repudiation were fair as between the counterparties, and in the management's view were determined by the requirements of the group's business plan".*

151. In the affidavit grounding the third application, sworn on 1 February, 2021, Mr. Jenssen expanded on the rationale for the application to repudiate guarantees of lease and other finance obligations when he stated as follows: -

> *"The guarantees [the subject of this application] constitute the vast majority of the guarantees given by NAS (or as the context requires AAA), in respect of counterparties to operating leases, finance leases and financing in respect of the purchase of aircraft. All of the guarantees contain an undertaking by NAS and/or AAA, as guarantor that in the event of the failure by the relevant group entity which is a party to the underlying lease or finance arrangement in respect of the aircraft, to pay or perform its obligations under the relevant lease or finance arrangement NAS [and/or AAA where appropriate] will pay or perform such*

obligations as primary obligor. Because all of the relevant leases contain obligations to effect performance other than payment of money (such as, for example the maintenance and storage of aircraft), NAS or as the case may be, AAA, is arguably required under the guarantees to effect performance other than payment of money. To the extent that NAS (and/or AAA where appropriate) has what might best be termed step in obligations (of a monetary and non – monetary nature) in respect (typically) of an aircraft lease, it appears to follow that the lessor/beneficiary of the guarantee will have performance obligations in respect of NAS (and/or AAA where appropriate) in such circumstances".

152. In a supplemental affidavit sworn on 16 February, 2021, Mr. Jenssen restates and updates the position regarding the intention to liquidate the excluded subsidiaries in cases where restructuring of lease and finance terms remain unagreed with the relevant external counterparties.

Evidence of the examiner

153. In his affidavit of 28 January, 2021, the examiner referred to the business plan announced by the company on 14 January, 2021. He said that the business plan proposed that the Norwegian group would: -

(1) Focus on its core business in the Nordic countries, operating a short haul network with narrow body aircraft.

(2) Cease to operate long haul routes.

(3) Initially hold up to 50 Boeing 737 aircraft (owned and leased), primarily operating within Norway and the other Nordic countries and between those countries and the rest of Europe.

(4) The requirement for a significant reduction in the number of aircraft assets held by the group and of other services used by the group.

154. The examiner indicated that he and his team had been assisting the companies in assessing the fleet and services which would be required after the restructuring.

155. The examiner continued: -

"My team and I have and are continuing to carefully consider the Company's Proposal as a basis for proposals for a scheme of arrangement for the Company. Whilst the evaluation is ongoing I am of the view that I will be in a position to formulate schemes of arrangement that would facilitate the survival of the companies and the preservation of employment on the basis of the business plan proposed by the company.

In my view, the termination of the contracts the subject of the company's application would facilitate the formulation of proposals for schemes of

arrangement in respect of the companies in examinership. The approval of the repudiation of those contracts would, in my view, significantly enhance the prospect of the companies attracting the substantial investment that will be necessary to fund a scheme of arrangement to ensure the future survival of the companies and to finance the companies' future working capital requirements.

In particular, the approval of the repudiation of those contracts would: -

(1) Help to reduce the group's fleet to a size that is consistent with its future scaled – down operating requirements (for example by terminating leases for aircraft and engine leases which are no longer required).

(2) Ensure that the companies are not burdened by ongoing obligations under contracts that relate to services which are surplus to the company's future requirements (for example ground handling or fuel line contracts at airports located in the United States).

(3) Help to reduce the company's operating costs to levels that will enable them to operate sustainably in the future".

156. The examiner continued that it was envisaged that a reduction in the company's fleet size and a restructuring of contractual obligations would be necessary. He referred to the report of the independent expert, Mr. Fennell, which had accompanied the petition for his appointment and in which the independent expert had identified conditions for the companies' survival as a going concern including that "*…a long term restructure of the operational fleet can be implemented*" and that "*the Companies restructure their long-term OEM obligations with regard to new fleet acquisitions*". The examiner stated that he agreed that the company's prospects of survival depend on the conditions identified by the independent expert being satisfied."

157. In a second affidavit sworn on 8 February, 2021, the examiner expressed the view that the business plan, and in particular the focus on the companies' operations on a "*Nordic-centric short haul business*", was critical to ensuring the survival of the companies as a going concern. He repeated his view that the approval of the repudiation of the contracts the subjects of these applications would "*significantly enhance the prospect of the companies attracting the substantial investment that will be necessary to fund a scheme of arrangement to ensure the future survival of the companies and to finance the companies' future working capital requirements*".

158. In the context of the application to repudiate contracts of guarantee the examiner explained that any given aircraft may be the subject of a lease between an external lessor and an entity within the group's asset management platform, including excluded subsidiaries, and the same aircraft may be subleased to an operating company within the group. In many of those cases guarantees were provided by NAS and/or AAA to the external lessor in respect of those leases. The examiner continued: -

"I believe that in order for the group to achieve the benefits of a reduction in its fleet size, it is essential that all contracts related to a given aircraft asset are addressed as part of the examinership process. There would be limited benefit to the group in, for example, terminating one of the company's obligations under a lease unless NAS's guarantee obligations in respect of that same lease were also released and discharged as part of the examinership".

Are proposals for a compromise or a scheme of arrangement to be formulated in relation to the company?

159. The sworn evidence of the examiner is that he is in the course of formulating proposals for a scheme of arrangement in relation to the company.

160. I accept the evidence of the companies and of the examiner that the applications were brought at the point in time that it could confidently be said that proposals "*are to be formulated".*

161. During the course of the hearing certain complaints were made by opposing parties as to the timing of these applications. It was said that they ought to have been issued earlier in the examinership proceedings, and that their timing was designed to place maximum pressure on counterparties in the context of any ongoing negotiations to restructure the relevant contracts. They did not challenge the assertion that proposals for a scheme of arrangement "*are to be formulated*".

162. Subject to certain observations I make in pars. 330 and 331 about timing, I am satisfied that there was nothing inappropriate about the timing of the applications for approvals under s. 537.

Are the relevant leases, guarantees and other agreements "*contracts under which some element of performance other than payment remains to be rendered both by the company and the other contracting party or parties*"?

163. No party has submitted that leases of objects are not executory contracts for the purpose of the section. This question was put beyond doubt by Murray C.J. in *Re Linen Supply of Ireland Limited*, where he said the following: -

> *". . . a lease by its very nature involves the performance of obligations by both the lessor and the lessee other than payment of money. Some of these obligations have been referred to in the course of the hearing such as the right to quiet enjoyment and to obligations to insure. It has not been shown that the obligations arising under the leases in this case are confined to the making of payments".*
> (emphasis added)

164. The question of whether the contracts of guarantee are executory contracts is less clear, and requires an examination of the contracts in each case.

165. The traditional approach to guarantee obligations in an examiner's scheme of arrangement is to treat them as contingent liabilities capable of being subjected to the provisions of the scheme itself, typically with the scheme recognising the obligation at the level of priority which the claim would enjoy on the occurrence of the contingency.

166. Each of the guarantees the subject of this judgment, contains a clause expressing it to be subject to the laws of England and contains a submission to the jurisdiction of the courts of England. The companies have exhibited the opinion of their own English solicitors, Hogan Lovells, in which they express their view on this question having regard to the Contract Summaries exhibited. The critical paragraph in their opinion letters in each case is para. 6 in which they state as follows: -

> *"Based on the foregoing and the assumptions in Appendix A to this report (which we have taken no steps to verify) and subject to the qualifications and observations set out below and to any matters not disclosed to us, we confirm that:*
>
> *(a) Save for the items identified in Appendix D to this report, the description of the Agreements and their provisions in the Contract Summaries is correct.*
>
> *(b) Without prejudice to the generality of para. (a) above, the clauses identified in the contract summaries as constituting obligations of the parties to the Agreements, in respect of which some element of performance other than payment remains to be rendered, constitute obligations to do something other than the payment of money ("Non-Monetary Obligations")".*

167. The letter refers in each case to the Contract Summary prepared by Matheson. The exhibited opinions of Messrs. Hogan Lovells are evidence as to the description of non-monetary obligations in each case and no contrary evidence has been proffered. That evidence is that the contracts contain non-monetary obligations, as required by s. 537.

Credit Agricole

168. In the case of Credit Agricole the Contract Summary refers to the basic obligations whereby the guarantor NAS guarantees to the beneficiary Credit Agricole the due and punctual payment performance and discharge by the lessee of the guaranteed obligations. The lessees are excluded subsidiaries: Sognefjorden Limited, Ofatjorden Limited, and Tysfjorden Limited.

169. The guaranteed obligations are defined to mean "*any and all monies liabilities and obligations (whether actual or contingent, whether now existing or hereafter arising, whether or not for the payment of money and including without limitation any obligation or liability to pay damages) from time to time owing by the Lessee to the Lessor and the Secured Parties under the Lessee Documents*."

170. The non-monetary obligations of the guarantor are described to include the following:-

- The obligation to comply with all authorisations, laws and regulations.
- To provide such information as may be required and in any event to provide within 180 days after the end of each financial year to the beneficiary a copy of its annual audited financial statements for that year.

171. Reference is then made to the potential obligations of the guarantor in respect of other performance obligations such as maintenance, storage, insurance.

172. Turning to the non-monetary obligations of the beneficiary, the summary refers to obligations of confidentiality. The obligation of confidentiality appears to derive not under the guarantee document itself but under a related All Parties' Agreement which governs the guarantee, the leases and related instruments. The All Parties' Agreement also contains other obligations on the part of the beneficiary and notes the beneficiary acceding to such obligations as the quiet enjoyment covenants under the relevant leases.

173. Although the confidentiality obligation is not expressly contained within the guarantee contract, the All Parties' Agreement requires that the guarantee be read in conjunction with the entire suite of agreements relating to the relevant asset. Accordingly the confidentiality obligation is an integral feature of the contractual obligations between the parties.

174. It was submitted by the objectors that an obligation of confidentiality is so passive as to not be a performance obligation other than the payment of money as required by s. 527(1). It is clear from the judgment Murray C.J. in *Re Linen Supply* that unless it can be said that the contract is strictly or confined to the making of payments, it qualifies under the section.

175. It was submitted by the companies that because the guarantor may be called on to perform obligations of the lessee which are non-monetary, such as maintenance, repair and other compliance obligations, this places the beneficiary in a position where if it calls on the guarantor to perform such obligations it will attract corresponding obligations to the guarantor to enable the guarantor to fulfil its obligations qua lessee.

176. This is a somewhat inventive analysis and was not the subject of any detailed submissions. However, it was not contested by the objectors.

177. Taking into account the obligations referred to above, and the uncontested evidence of Messrs. Hogan Lovells as to the nature of the obligations, I am satisfied that the relevant contracts meet the test identified by Murray C.J. in *Re Linen Supply* in that they are not confined to the payment of money.

Utah and Citibank Group

178. The contract summaries relating to the guarantees in favour of Citibank NA refer to guaranteed obligations as meaning "*any and all monies, liabilities and obligations (whether actual or contingent, whether now existing or hereafter arising, whether or not for the payment of money and including, without limitation any obligation or liability to pay damages) from time to time owing by the Lessee to the Lessor and the Secured Parties under the Operative Documents"*.

179. The Operative Documents are defined to mean a suite of agreements governing such matters as the leases themselves, payment undertakings, insurance policies, security agreements, notices of assignment of subleases and acknowledgments thereof, aircraft

mortgages, aircraft insurance assignments, notices to aircraft insurers, aircraft reinsurance assignments, share charges, purchase assignment supplements, powers of attorney, funding requests, inter creditor deeds, declarations of trust and numerous other agreements.

180. The non-monetary obligations remaining to be rendered by the guarantor are stated to extend to a guarantee of "*the due and punctual payment, performance and discharge by the lessee of the guaranteed obligations*" (emphasis added). These are stated to include obligations relating to registration, maintenance, operation, use, inspection, insurance and information concerning the aircraft and engines.

181. As regards the beneficiaries, the non-monetary obligations are stated to include the obligation of confidentiality incorporated by a Participation Agreement which is one of the relevant Operative Agreements.

182. Having regard to the obligation of confidentiality referred to, and the potential reciprocal obligations in the event that the guarantor is called upon to perform obligations under the lease, taken together with the uncontested evidence of Hogan Lovells, I am satisfied that the guarantee agreement is not one in which the obligations of the beneficiary are confined to the making of payments.

183. Similar contract summaries and conclusions arise in relation to the guarantees in favour of Bank of Utah.

PK Air Finance

184. In relation to PK Air Finance, the guarantees sought to be repudiated were granted in favour of Flip no. 156 Company Ltd. and Flip no. 158 Company Ltd, which, importantly, are also the head lessors.

185. They are expressed to be guarantees of all of the monetary obligations under the terms of the relevant leases and of non-monetary obligations comprising the obligation to perform or discharge any of the lessee guaranteed obligations, which include such matters as the obligations to ensure continued compliance with laws and regulations, obligations concerning information and production of financial statements, and obligations by the guarantor, NAS, concerning the retention of ownership of the relevant lessee.

186. The non-monetary obligations on the part of the head lessor as beneficiary of the guarantee are expressed to include the following: -

- Confidentiality.
- Obligations concerning the provisions of notices in respect of any defaults by the lessee.
- Objections concerning the assignment or transfer of rights.

187. It is also submitted in relation to the guarantees that in any case where the guarantor is required to perform the obligations of the lessee under the lease, the beneficiary, being

also the lessor would attract corresponding non-monetary obligations in favour of the guarantor to enable the guarantor to render and deliver performance of the remaining obligations under the lease.

188. Taking account of the provisions referred to above, and the uncontested opinion of Hogan Lovells, I am satisfied that the guarantees in these cases also meet the test identified by the Chief Justice in *Re Linen Supply*.

189. It is unusual to characterise guarantees as executory contracts. Typically they impose predominantly monetary obligations. However, the contract summaries have referred me in each case to non-monetary obligations. In certain cases, those non-monetary obligations are limited and the predominant feature of the guarantees is the monetary obligations. Nonetheless, it is clear from *Re Linen Supply* that unless the contract obligations are found to be confined to monetary obligations and nothing more, they satisfy the test of being an executory contract which is a threshold for the application of s.537.

190. Having regard to the terms of the Contract Summaries and the Hogan Lovells' opinions, I am satisfied that it cannot be said of the relevant leases or of the guarantees that they establish obligations which are confined to the payment of money. Therefore, they satisfy the test described by Murray CJ. in *Re Linen Supply*, and are contracts to which s. 537 applies.

Exercise of the court's discretion – the standard of review

191. The companies submit that it is not the function of the court on this application to enter into an appraisal of the commercial merits of the companies' decisions to repudiate contracts or to substitute its own judgment for that of the companies. They submit that provided the company is acting in good faith and rationally the court should not enter this sphere. The submission continues that the court should allow considerable scope to the company itself to determine what is commercially necessary to enable a sustainable and "*investible*" business to be rescued and emerge from examinership. It submits that the court should only concern itself with scrutinising whether the company in selecting particular contracts for repudiation has done so for a proper purpose, in good faith and in pursuit of the business rationale of the survival of the company as a going concern.

192. The companies submit that the scheme of the Act is such that when the companies determine to repudiate contracts and apply to court for approval under s. 537 (1) they must present evidence of a rational position and belief on their part that the proposed repudiations will facilitate the bringing forward of proposals for a scheme of arrangement which in turn will facilitate the survival of all or part of the companies and the whole or part of its undertaking as a going concern. They say that the focus of the court should be to ensure, before approving a repudiation that the companies have undertaken a genuine process of deliberation that is not obviously flawed and that there is a rational connection between the proposed repudiation and the survival objective. It is submitted that it is proper for the court to inquire whether the decision as to intended repudiations are made

in good faith and for proper purpose and genuinely aimed at what the company believes is a satisfactory optimal restructuring.

193. The companies cite the judgment of McGovern J. in *Re Bestseller Retail Ireland Limited* [2010] IEHC 155, as an instance of the court finding that the decision of a company was made for a different purpose than the objective of Part 10 of the Act. In that case, the court had found that the selection decision in terms of which contracts to repudiate was made in order to shelter the parent company from demands under guarantees.

194. The companies submit that in accordance with the judgments of the court in *Re Ladbrokes (Ireland) Limited* [2015] IEHC 381, [2015] 1 IR 243, and Re Eircom Limited [2012] IEHC 158, it is appropriate to afford a measure of deference to the decisions of the company. They submit that since the examiner has endorsed the company's approach and stated that the repudiation of the contracts is necessary, and will make the companies investible the principle in *Ladbrokes* and *Eircom* (followed by this Court in *Re MDY Construction* [2018] IEHC 676) should be applied, namely that a degree of curial deference should be afforded to the decisions of the companies.

195. The objectors submit as follows: -

(1) That the principle in *Eircom/Ladbrokes* applies to the special position of the examiner and not to the companies.

(2) That there is no reason to afford the same deference to the decision of the companies as the court in those judgments afforded to the examiner.

(3) That the onus is on the companies to explain intelligibly and with evidence the commercial rationale underpinning the decision and the perceived undesirability of maintaining each individual contracts ought to be repudiated.

(4) That particular evidence should be provided in respect of each individual contract sought to be repudiated. That only if this is done can the counterparties and the court engage with the decisions and analyse whether a repudiation was truly necessary to facilitate the formulation of proposals by the examiner and to facilitate the survival of the company as a going concern.

(5) That the companies have not in this case put before the court the evidence, in respect of each of the contracts to be repudiated, to show why repudiation of each such contract is necessary. That the general evidence of the company's restructuring plan, involving as it does a resetting of the levels of cost associated with contracts, both leases and others, albeit endorsed by the examiner, is not sufficient to meet the proper test to be applied.

(6) That the judgments in *Ladbrokes* and *Eircom* do not mean that a lower standard of review should be applied than would otherwise be applied to the commercial decisions of the company.

(7) That *Bestseller* is not authority for a proposition that only if an improper purpose can be shown should the court refuse approval.

(8) It is submitted that the court should not simply "rubber stamp" the decisions to repudiate.

(9) That the constitutionally protected property right of the counterparties in their contracts cannot be defeated merely based on the company's assertion that repudiation is necessary, and therefore that repudiation should be approved only on an exceptional basis.

196. The objectors do not submit that the decisions of the company are improperly motivated. They submit that the timing of the applications, and the bringing of such wholesale applications reveal a strategy on the part of the companies to apply pressure on counterparties to negotiate more favourable terms going forward.

197. The objectors accept that it is not essential that it is shown that the contracts are "onerous" within the meaning of that term defined by s. 615 for the purpose of disclaimer by a liquidator. They submit instead that it should at least be proved that the relevant contract is commercially detrimental to the company to such a degree that its repudiation is necessary for the restructuring.

198. It is submitted that the default position in an examinership is that a company should exit examinership with its commercial contracts undisturbed and that the facility of repudiation under s. 537 is an exceptional facility to be used sparingly.

199. *Re Eircom Limited* concerned an application under s. 13 (7) of the Companies (Amendment) Act 1990, the direct equivalent of s. 532, subs. 9 of the Companies Act 2014. That section provides that where an examiner has been appointed to a company: -

> *"…any interested party may apply to the court for the determination of any question arising out of the performance or otherwise by the examiner of his or her functions".*

200. The application was made by a party which was a creditor of the company and which had also sought unsuccessfully to participate in the process of investment in the subject company. The applicant sought orders directing the examiner to engage with the applicant, to disclose certain valuation reports which had been prepared for the examiner and an order postponing of statutory meetings of creditors, pending further engagement between the examiner and the applicant.

201. The court declined the application finding that if the court were to make the orders sought it would be micromanaging the examinership and embarking on a form of judicial review of the examiner's decisions, which decisions involved a commercial judgment being exercised by him.

202. Kelly J. noted that it was important that the role of an examiner is conferred on persons who were appointed by the court who have particular knowledge and expertise. The court noted the requirement for an affidavit verifying the fitness of the person nominated as examiner. The court continued: -

> *"The court has neither the expertise, nor indeed the backup to make commercial decisions. The court is here in a supervisory role and to decide legal issues. And in the event of the examiner either misbehaving or doing something which is wrong in law there may well be an ability for the court to intervene in such circumstances. But in areas of commercial judgement it seems to me that the court's scope for intervention is very limited. And I am not sure at all that the Act envisaged anything like an application of this sort because it doesn't envisage an appeal mechanism or a judicial review mechanism".*

203. As to the standard by which the conduct of the examiner would be judged, Kelly J. continued: -

> *"There is no authority in point in respect of an examinership in this jurisdiction but I am very much inclined to take the view that the observations of the courts in England, which are encapsulated in a passage from Lightman and Moss on the Law of Administrators and Receivers of Companies is persuasive. It persuades me that the court should only intervene in respect of the behaviour of an examiner in very limited circumstances".*

Kelly J. then quoted the passage from Lightman & Moss on the Law of Administrators and Receivers of Companies which he believed summarised the appropriate test: -

> *"When called upon to review the exercise by insolvency office-holders of their powers, the Court has said that in the absence of fraud it will only interfere if they have done something so utterly unreasonable and absurd that no reasonable man would have done it. The question is not whether the Court would have acted in the same way or would have reached the same conclusion as the insolvency practitioner. Nor will the resulting transaction be set aside where it is established merely that a reasonable practitioner may have acted differently or reached a different conclusion as long as the course of action pursued by the administrator was one that a reasonable practitioner could reasonably have contemplated. The legal basis for interference is the office-holder's perversity or irrationality. To this extent it can be said that in exercising its power for their proper purposes the administrator is under a duty to act rationally".*

204. Kelly J. held that this quote represented the appropriate standard to apply in assessing the decisions of the examiner which were sought in that case to be impugned.

205. In *Re Ladbrokes (Ireland) Limited*, an application was made under the same section by a potential investor in the companies in examinership. The examiner had invited parties to

submit final offers. In doing so he declined to provide certain commercial information concerning shops operated by the companies which were sought by the applicant. The court refused an order directing the examiner to provide the additional information sought by the applicant.

206. Cregan J. adopted the test described by Kelly J. in *Re Eircom Limited.*

207. In the course of his decision Cregan J. analysed the question of whether the decision made regarding access to information sought by the applicant was a decision of the examiner or a decision of the company. He concluded that the decision to withhold the relevant confidential information was a decision of the examiner in the exercise by him of his commercial judgment.

208. Cregan J. then cited with approval the passages quoted above from the decision of Kelly J. in *Re Eircom Limited* and the passage from *Lightman & Moss on the Law of Administrators and Receivers of Companies* (5th edn, Sweet & Maxwell 2011) as to the standard of review to be applied to decisions of the insolvency office holder.

209. It is clear from the judgments of Kelly J. and of Cregan J. that they were conferring on the decision of the examiner a measure of deference having regard to the commercial judgment being exercised by him and having regard to his particular position as an independent insolvency office holder appointed by the court pursuant to the provisions of the Act and having regard to his credentials and expertise in the conduct of examinership matters.

210. By contrast, the decision to invoke s. 537 to repudiate contracts is a decision of the company and not of the examiner. The fact that the decision to repudiate requires the approval of the court does not elevate the decision to being one of the examiner.

211. It was submitted on behalf of the companies that inasmuch as the examiner endorsed the decisions made by the companies as to which contracts to repudiate the court should accord a measure of deference to that professional judgment in a fashion akin to the approach followed in *Eircom* and *Ladbrokes*.

212. The support of the examiner is relevant and informative, but does not alter the fact that the decisions are those of the companies, and must be assessed in that light.

213. None of this is to say that the court should substitute its judgment for that of the commercial judgment of the companies themselves. I have earlier in this judgment analysed the context of s. 537 and concluded that as the power to repudiate is an exceptional power, it is necessary to show not only that the repudiation will facilitate the formulation of proposals for a scheme of arrangement and the survival of the company as a going concern, but that the relevant repudiations are actually necessary to achieve that purpose.

214. It seems to me that the following sequence of questions should be asked: -

(1) Has the company made its decisions as to repudiations in furtherance of the objective and purpose of Part 10 of the Act and the purpose for which the examiner was appointed by this Court, namely the formulation, consideration and confirmation of proposals for a scheme of arrangement which will facilitate the survival of the company and all or part of its undertaking as a going concern?

(2) Has the company established that repudiation of the contracts is necessary to achieve that purpose?

(3) If (1) and (2) above have been satisfied, the court should balance the interests of the individual counterparty against the interests of the company and the members and creditors of the company as a whole.

215. It is a necessary part of the analysis at (1) above to consider if there is any evidence that the choice of contracts to be repudiated was made by reference to a purpose different from the purpose of the Act and of the examiner's appointment.

216. Earlier in this judgment I have quoted extensively from the evidence of Mr. Jenssen and the evidence of the examiner. There is some force in the submissions made by the objectors that the information placed before the court is generic in nature and lacks an evidence-based analysis for each individual contract as to why repudiation thereof is necessary to achieve the objectives of the Act. Nonetheless, the time constraints in Part 10 of the Act rendered it necessary to commence these applications before all possible negotiations had been exhausted. Therefore, when the applications were first issued, it was said that the repudiation of 425 contracts with approximately 68 counterparties was necessary. Up to and including the hearing of these applications, and over the course of the five days during which they were at hearing progress was made by the companies in negotiations with the counterparties culminating in the withdrawal of a large number of the applications.

217. In the particular circumstances of this complex case the evidence which was placed before the court for the purpose of the hearing, which of necessity did not take account of the final outcome of all of the negotiations with every counterparty, demonstrates that the repudiations were necessary. No evidence has been put before the court that the contracts with the counterparties who are still maintaining their objections were selected for any improper purpose or inconsistently with the objective of the Act and of the Section.

218. The objectors submit that it is not enough for the companies to contend that the companies will be more "investible" after these contracts have been repudiated. It seems to me that in circumstances where the examiner has sworn that he believes that repudiations of these contracts are necessary to secure the investment necessary to underpin the scheme of arrangement and has detailed the basis for this belief, the requirement of necessity has been established.

219. The information has been presented fairly and in a balanced fashion and across the range of contracts the subject of these applications. The court is now left with the question of whether to authorise the repudiation of those contracts with counterparties in respect of whom no consensual outcome has proved possible.

220. I accept the evidence of the company that it has set about this process in an even-handed and balanced fashion. The examiner was appointed at a time when the companies found that court protection and a formal restructuring by a scheme of arrangement pursuant to Part 10 of the Act was necessary for their survival as a going concern.

221. After the examiner was appointed the company continued its efforts to secure consensual resolution or restructuring of contracts and this process continued following the appointment of the examiner and up to and including the commencement of these applications and continued through to the dates on which they were heard.

222. Inasmuch as the evidence was somewhat generic, and, apart from basic factual information, not individual to each and every contract as far as concerns the question of necessity, this in turn was a necessary consequence of the scale of the application and the complexity of this examinership as a whole. I therefore concluded that the presentation of that information was sufficient to illustrate such necessity.

223. Since the issue and service of the applications and even after the commencement of the hearing of these motions, a number of the applications were withdrawn, and a number of orders approving repudiation were made on terms which have been agreed between the parties. Although the court was informed of the fact that such progress was being made and that consent orders could be made, the court was not informed of precisely the terms on which the vast majority of the 425 contracts have been either terminated, repudiated or amended by an agreement.

224. Against this background of 425 contracts and 68 counterparties, all of whom were notice parties on these applications, I have come to the conclusion that the information presented to the court is sufficient to conclude that the applications before the court were made for the proper purposes intended by Part 10 of the Act and that repudiation of the contracts the subject of these applications are necessary and will facilitate the survival of the companies as a going concern.

225. Inasmuch as the repudiations trespass on the rights of counterparties to the contracts, the companies were clearly insolvent at the time of the presentation of the petition. The evidence before the court is that their return to viability is dependent not only on the investment and the restructuring proposals which will be brought forward by the examiner, but also on the restructuring of the cost base of the companies sought to be achieved by the repudiations.

226. If the companies were to enter liquidation they would by definition be unable to perform the contracts and the counterparties claim for damages flowing from the breach would

rank as unsecured claims. The effect of s. 537 (2) is that the Act respects their rights in respect of damages, to be recognised in the scheme of arrangement.

Are there any factors pertaining to the three groups of objecting counterparties which would justify refusal of approval in their particular cases?

Credit Agricole

227. NAS seeks approval to repudiate the subleases of three aircraft from Sognefjorden Limited (an excluded subsidiary). The undisputed evidence is that the three aircraft concerned were "*wide bodied aircraft*", utilised typically in the context of the long haul operations of the group, which it is said are being discontinued. That evidence is not contradicted and it is clear therefore that if inasmuch as the business plan entails a discontinuance of the long haul business, the repudiation of leases associated with that business is necessary for the restructuring.

228. Only the sublease to NAS can be the subject of a s. 537 repudiation and Sognefjorden Limited as an excluded subsidiary cannot avail of the section.

229. The evidence of the companies is that in such cases, it will be a matter for the excluded subsidiary to negotiate a return of the aircraft to the lessor and if ultimately terms cannot be agreed the excluded subsidiary will itself be liquidated. Against that background, NAS seeks approval to repudiate the guarantee it granted in respect of Sognefjorden's obligations to the head lessor and to Credit Agricole.

230. If there were evidence before the court that any of the companies or any of the excluded subsidiaries intended to retain and continue to avail of the benefit of an aircraft or object, the court would not permit the repudiation of a guarantee granted to the head lessor or finance party in respect of obligations corresponding to that object. That is not the evidence here, and Sognefjorden is an excluded subsidiary which it is said will be liquidated. Therefore, the head lease is surplus to the Group's requirements and repudiation of the corresponding guarantee is consistent with the repudiation of the sublease and the inevitable termination of the head lease.

231. Similarly, in relation to the three aircraft leased to Ofotfjorden and Tysfjorden, again being excluded subsidiaries, the destination of the aircraft themselves is outside the scope of the examinership in that these excluded subsidiaries cannot avail of s. 537. However, the evidence is that these excluded subsidiaries will not be retaining the aircraft or operating the aircraft in the future. Therefore, repudiation of the corresponding guarantees by NAS is consistent with the requirements described by the companies and the examiner.

Bank of Utah and Citibank NA

232. Fourteen aircraft are relevant to these objectors. All are leased to excluded subsidiaries. The excluded subsidiaries cannot avail of s. 537.

233. The application relating to these parties concerns only the guarantees of the leasing obligations granted by both NAS and AAA in favour of Citibank and Utah.

234. The evidence of the company is that these excluded subsidiaries will not be retaining the benefit of the relevant aircraft. Although the court does not have before it direct evidence as to precisely what has transpired between these excluded subsidiaries and the relevant lessors and finance parties, this is consistent with the stated business plan in the evidence of the companies and there are no particular factors would justify refusing approval of the repudiation of the corresponding guarantees.

PK Air Finance

235. In this case, a resolution was concluded in relation to one of the aircraft and one of the three applications was withdrawn. Nonetheless, the application for approval was pursued in respect of guarantees issued by NAS in respect of the obligation under a lease to DYI Aviation and a sublease to Norwegian Air Sweden. Both of these companies are excluded subsidiaries. It was not in dispute that it was not the intention of any of these companies to retain the benefit of the relevant aircraft. In those circumstances no special reason exists for refusing to sanction or approve the repudiation of the corresponding guarantees

236. Certain issues were raised by PK Air Finance in relation to the application of the Cape Town Convention, which I shall consider below (para. 302 et seq.).

Jurisdiction

237. Submissions were made by the opposing parties to the effect that orders should not be made pursuant to s. 537 in circumstances where they would purport to have extraterritorial effect. It is submitted that there is nothing in the Act to justify the enlargement of the court's jurisdiction to affect contracts entered into with a Norwegian company where those contracts are governed by English law and contain exclusive jurisdiction clauses in favour of the courts of England. It is submitted that as a matter of basic statutory interpretation, s. 537 is not intended to and does not have extraterritorial effect.

238. These submissions relate only to the applications made by NAS. They do not extend to the applications made by AAA because, AAA has been found to have its centre of main interests in the State and is therefore a company to which the provisions of Regulation EU 2015/848 on Insolvency Proceedings (Recast) apply. Because a number of the submissions as to an absence of extraterritorial effect in the case of NAS are made by way of contrast with the position which prevails with AAA, it is appropriate to refer briefly to the provisions of the Regulation on this subject ("the Regulation").

239. Article 3 of the Regulation provides that the courts of the member state in which the centre of main interests of a debtor is situated have jurisdiction to open main insolvency proceedings in relation to the company.

240. I have already found ([2020] IEHC 664) that NAI, AAA and each of the subsidiaries of AAA has its centre of main interests in this State and accordingly these proceedings are main proceedings for the purpose of the Regulation.

241. Article 5 provides that a debtor or any creditor may challenge the decision to open main insolvency proceedings on the grounds of international jurisdiction. No such challenge has been made in this case.

242. Article 6 provides: -

> *"The courts of the Member State within the territory of which insolvency proceedings have been opened in accordance with Article 3 shall have jurisdiction for any action which derives directly from the insolvency proceedings and is closely linked with them, such as avoidance actions".*

243. Again, in the context of AAA, it has not been suggested that an application pursuant to s. 537 is otherwise than an action "which derives directly from the insolvency proceedings".

244. Article 7 governs applicable law and provides inter alia: -

> *"2. The law of the State of the opening of proceedings shall determine the conditions for the opening of those proceedings, their conduct and their closure. In particular, it shall determine the following: …[where relevant]*
>
> *(c) the respective powers of the debtor and the insolvency practitioner; …*
>
> *(e) the effects of insolvency proceedings on current contracts to which the debtor is party;* (emphasis added)
>
> *(g) the claims which are to be lodged against the debtor's insolvency estate and the treatment of claims arising after the opening of insolvency proceedings;*
>
> *(h) the rules governing the lodging, verification and admission of claims;*
>
> *(i) the rules governing the distribution of proceeds from the realisation of assets, the ranking of claims and the rights of creditors who have obtained partial satisfaction after the opening of insolvency proceedings by virtue of a right in rem or through a set-off".*

245. It has not been suggested that applications under s. 537 do not relate to the conduct and closure of these proceedings in relation to AAA and clearly s. 537 relates to the "*effects of insolvency proceedings on current contracts to which the debtor is a party".*

246. Article 19 provides as follows: -

> *"1. Any judgment opening insolvency proceedings handed down by a court of a Member State which has jurisdiction pursuant to Article 3 shall be recognised in all other Member States from the moment that it becomes effective in the State of the opening of proceedings".*

247. Article 32 provides as follows: -

"Judgments handed down by a court whose judgment concerning the opening of proceedings is recognised in accordance with Article 19 and which concern the course and closure of insolvency proceedings, and compositions approved by that court, shall also be recognised with no further formalities. Such judgments shall be enforced in accordance with Articles 39 to 44 and 47 to 57 of Regulation (EU) No 1215/2012.

The first subparagraph shall also apply to judgments deriving directly from the insolvency proceedings and which are closely linked with them, even if they were handed down by another court".

248. As regards the effect of the Regulation in England and Wales the court was informed that by virtue of the European Union (Withdrawal Agreement) Act 2020 (c. 1), the Regulation applied to insolvency proceedings which had been opened before the end of the transition period ended 31 December, 2020. These proceedings had been commenced on 18 November, 2020. Accordingly, it was not in dispute that the Regulation applied to AAA and that these proceedings and orders made in the matter of AAA would have full force and effect in England and Wales in accordance with the Regulation.

249. On behalf of the Credit Agricole creditors and PK Air Finance it was submitted that the jurisdiction of a domestic court to determine rights affecting parties outside of its jurisdiction can only be established by international treaty. The submission continues that there is no such treaty which vests jurisdiction in an Irish court to make orders affecting NAS because the Regulation does not apply to it.

250. This submission fundamentally misunderstands the purpose and effect of the Regulation.

251. The Regulation does not set out to harmonise substantive rules on insolvency law. It harmonises the rules concerning the jurisdiction of courts as between member states and the rules regarding applicable law governing those proceedings and concerning the recognition of orders made in such proceedings.

252. A perusal of the recitals to the Regulation reinforces this conclusion where it states as follows: -

- "*The proper functioning of the internal market requires that cross-border insolvency proceedings should operate efficiently and effectively*" (Recital 3).

- *"It is necessary for the proper functioning of the internal market to avoid incentives for parties to transfer assets or judicial proceedings from one Member State to another, seeking to obtain a more favourable legal position to the detriment of the general body of creditors (forum shopping)"* (Recital 5).

- "*In order to achieve the aim of improving the efficiency and effectiveness of insolvency proceedings having cross-border effects, it is necessary, and appropriate, that the provisions on jurisdiction, recognition and applicable law in*

this area should be contained in a Union measure which is binding and directly applicable in Member States" (Recital 8). (emphasis added)

253. The recitals therefore recognise that the purpose of the Regulation is to improve the regime concerning jurisdiction and recognition, and the avoidance of forum shopping. Article 3 governs the question of whether insolvency proceedings opened in relation to a debtor to which the Regulation applies, namely a debtor having its centre of main interests within a Member State, are main proceedings or secondary proceedings and accordingly the scope of their effect.

254. Article 7 then addresses the question of applicable law and Articles 8 to 18 contain special rules governing the applicable laws as regards the effect of insolvency proceedings on particular matters and asset categories.

255. In relation to a debtor which does not have its centre of main interests in a Member State, the national laws govern the question of jurisdiction, in the case of Ireland by the Companies Act 2014. In relation to such a debtor, that jurisdiction is no less today than it was before the enactment of the original Regulation in 2002.

256. The submission of the opposing parties was to the effect that the default position under domestic law is that which obtained prior to the insolvency regulation, and which it is said that regulation was necessary to overcome, namely that an Irish court had no jurisdiction in an insolvency context to extraterritorially "*interfere with*" matters within the jurisdiction of a foreign court such as England. It was submitted that the result or effect which NAS is contending for in these applications is to be treated as though it were an entity to which the Insolvency Regulations (Recast) applied in circumstances where that regulation does not apply.

257. For the reasons I have identified earlier, this is not what NAS seeks to do and therefore I now return to the basic question of whether, outwith the Regulation, the court has jurisdiction to make orders under s. 537.

258. The objectors cited Dodd on *Statutory Interpretation in Ireland* where the following was relied upon: -

> *"Unless the contrary intention appears, enactments generally are not intended to apply to persons who are not citizens or residents of the Republic of Ireland in respect of their affairs or conduct which are outside of the territory of the Republic of Ireland. Comity refers to the convention of mutual recognition and respect afforded by sovereign nations to each other. Under the comity of nations, the legislature of one country is presumed not to legislate for persons or matters the jurisdiction over which properly belongs to another sovereign state. Courts are likely to be disposed to interpret a provision so that it will not infringe the generally recognised principles of international law, and issues of enforcement and comity will inform interpretation. By way of general comment*, where there is some relevant

nexus with the State, arguments against extraterritorial scope of an enactment may be less well received". (Emphasis added).

259. In the First Judgment in these proceedings delivered on 16 December, 2020, (2020 IEHC 664), I found as a matter of fact that there was such a nexus with the State, and that NAS had a sufficient connection with the State to enable the jurisdiction under Part 22 of the Act to be invoked and therefore that the company was a company liable to be wound up under Part 22 of the Act. I found as follows: -

> *"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".*

260. The examiner was appointed to NAS under the provisions of s. 517 of the Act which established the jurisdiction to appoint an examiner to a company related to a company to which an examiner was appointed under the principal jurisdiction conferred by s.509.

261. Having regard to the objectives and purposes of Part 10 of the Act as a whole, it seems to me that to read and apply Part 10 and in particular s. 537, such as to limit its effects to only those members, creditors and counterparties of the company which are themselves within the jurisdiction of the State would undermine the objective of the legislation, and would deprive Part 10 of its purpose.

262. Insofar as Part 22 relates to a company incorporated outside Ireland, and the court exercises the jurisdiction to appoint an examiner on the basis that it is a company capable of being wound up in the State, this almost by definition, means that it is an entity having multinational transactions. The very decision to extend the appointment of the examiner to NAS as a related company, recognises that the court in making the appointment is exercising jurisdiction over a company which has sufficient connection for that purpose to the State and may have substantial assets and undertakings, including contracts with counter parties, outside the State. To find that this Court had such jurisdiction and then to limit the effects of the proceedings, and of the tools necessary for the achievement of the objectives of the proceedings pursuant to Part 10, to activities and counterparties within the State would defeat the purpose of the jurisdiction conferred by the Act and which this Court has already determined to exercise in relation to NAS.

263. *Bilta (UK) Ltd (in Liquidation) v Nazir* [2015] UKSC 23, [2016] AC 1, concerned proceedings by liquidators under s. 213 of the Insolvency Act 1986 seeking to hold certain parties personally liable for fraudulent trading. Certain of the defendants contended that the claim was bound to fail because the section had no extra territorial effect. Lord Sumption rejected this argument stating as follows: -

"Most codes of insolvency law contain provisions empowering the court to make orders setting aside certain classes of transactions which preceded the commencement of the liquidation and may have contributed to the company's insolvency or depleted the insolvent estate. They will usually be accompanied by powers to require those responsible to make good the loss to the estate for the benefit of creditors. Such powers have been part of the corporate insolvency law of the United Kingdom for many years. In the case of a company trading internationally, it is difficult to see how such provisions can achieve their object if their effect is confined to the United Kingdom".

264. Lord Sumption referred to the discretionary power to impose personal liability, noting that the relevant section contained no express limits on its territorial application. He referred also to s. 238 of the Insolvency Act 1986 (UK), which deals with preferences and transactions at an undervalue and which was held by the Court of Appeal to apply without territorial limitations in *Re Paramount Airways Limited* [1993] CH 223. At para. 110, he quoted from the leading judgment in that case of Sir Donald Nicholls V-C where he observed as follows: -

"(i) that current patterns of cross-border business weaken the presumption against extra-territorial effect as applied to the exercise of the courts' powers in conducting the liquidation of a UK company;

(ii) that the absence in the statute of any test for what would constitute presence in the UK makes it unlikely that presence there was intended to be a condition of the exercise of the power".

265. Lord Sumption referred also to the submission to the effect that the words "*any persons"* in s. 213 meant only persons in the UK. He said that in his opinion that argument was misconceived. The submission made by the opposing parties in this case requires the court to find that the word "*contract*" in s. 537 (1) was intended to mean only a contract entered into with a counterparty within the State.

266. Again in *Bilta*, Lord Toulson and Lord Hodge stated the following: -

"Whether a court has such subject matter jurisdiction is a question of the construction of the relevant statute. In the past it was held as a universal principle that a UK statute applied only to UK subjects or foreigners present in and thus subjecting themselves to a UK jurisdiction unless the Act expressly or by necessary implication provided to the contrary…That principle has evolved into a question of interpreting the particular statute …

…In Cox v Ergo Lord Sumption suggested that an intention to give a statute extra-territorial effect could be implied if the purpose of the legislation could not effectually be achieved without such effect.".

267. Their Lordships continued: -

> *"It would seriously handicap the efficient winding up of a British company in an increasingly globalised economy if the jurisdiction of the court responsible for the winding up of an insolvent company did not extend to people and corporate bodies resident overseas who had been involved in the carrying on of the company's business".*

268. If a company is permitted to avail of the examinership regime prescribed in Part 10 of the Act but the tools contained in the Act, including s. 537, were limited in their effect in the manner suggested by the objectors, the purpose of the legislation itself, particularly in circumstances of a company having an airline business, would be defeated.

269. Reference was made by the objectors to the judgment of Carroll J. in *Chemical Bank v McCormack* [1983] ILRM 350, concerning the Banker's Books (Evidence) Act 1879 and to the judgment of McKechnie J. in *Walsh v National Irish Bank* [2013] 1 IR 294, concerning s. 908 of the Taxes Consolidation Act 1997. In both of these cases the court found that in the absence of express provisions regarding extraterritorial effect, the relevant Acts should be presumed to be limited in their application to the State. These cases were relied on as authority for a presumption that the legislature did not intend s. 537 to have extraterritorial effect.

270. A critical difference between the issues under consideration in *Chemical Bank v McCormack* and Walsh v *National Irish Bank* and the present case is that the provisions of the Parts 10 and 11 of the Act relate to the collective effect of insolvency and restructuring proceedings on a company and its counterparties. That collective effect is at the heart of the application of a system of rules governing the effect of the insolvency on all counterparties, including its effect on transactions and the rules governing priorities. To deprive those proceedings of such universal effect would set at nought the purpose of the Act. Therefore, I am not persuaded that there is any basis to find that s.537 of this Part, should be limited in the manner suggested by the objectors.

Regulation (EC) No. 593/2008 on the Law Applicable to Contractual Obligations (Rome I)

271. Brief references were made to the provisions of the Rome I Regulation, which confers primacy to contractual choice of law clauses.

272. Article 1.2 (f) excludes from the application of the Regulation: -

> *"questions governed by the law of companies and other bodies, corporate or unincorporated, such as the creation, by registration or otherwise, legal capacity, internal organisation or winding-up of companies and other bodies, corporate or unincorporated, and the personal liability of officers and members as such for the obligations of the company or body".*

273. The court was referred to extracts from the Giuliano-Lagarde Report (OJ C 282, 31.10.1980, p. 1–50). That Report makes it clear that all questions governed by the law of companies are excluded by Article 1.2 (f). and that this was the clear intention of that Article. Although the "winding up" of companies is specifically referenced in the exclusion,

no express reference is made to reorganisation or restructuring proceedings. Nonetheless, it is clear that Part 10 is part of the law of companies in Ireland, and an application pursuant to s.537 is a "*question governed by the law of companies*". Rome I cannot therefore be invoked to limit the application of that Section to contracts expressed to be subject to the laws of Ireland.

Recognition of an order as a discretionary consideration

274. It was submitted that in the exercise of its discretion, this Court should take into account the prospect that orders made approving repudiation of contracts by the companies could be found ultimately to have been made in vain because of doubt as to their recognition outside the State.

275. In the First Judgment I referred to the case of *Re Business City Express Limited* [1997] 2 BCLC 510. That was a pre-Regulation case in which Rattee J. in the English High Court granted an application under s. 426 of the Insolvency Act 1986 (UK) for recognition of a scheme of arrangement following confirmation of the scheme by this Court (Kelly J. as he then was) in proceedings under the Companies (Amendment) Act 1990, being the predecessor of Part 10 of the Act. Rattee J. considered the provisions of the Companies (Amendment) Act 1990 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".*

276. The dearth of recent authorities on recognition of Irish restructuring and insolvency proceedings pursuant to s. 426 is largely due to the fact that for the last 19 years the Insolvency Regulation has been in force and has governed insolvency proceedings regarding companies having their centre of main interests in either England or Ireland. Nonetheless, the persuasive authority of the decision in *Re Business City Express Limited* is undiminished.

277. In the context of the petition for the appointment of the examiner to NAS there was exhibited an opinion from Mr. Daniel Bayfield QC of South Square, London, dated 4 December, 2020. Citing, *inter alia*, the decision of Rattee J. in *Re Business City Express,* Mr. Bayfield opined that a scheme confirmed by this Court pursuant to Part 10 of the Act would fall within the definition of "insolvency law" which would be recognised by the procedure provided for in s. 426. A supplemental opinion of Mr. Bayfield dated 22 February, 2021, was exhibited in the context of this application. In this opinion Mr. Bayfield considered the question of whether s. 537 fell within the definition of *"insolvency law*", again for the purpose of potential assistance and recognition by reference to s. 426. Addressing the absence in English law of a provision directly corresponding to s. 437, Mr. Bayfield stated as follows: -

> "The authorities suggest that a broad approach should be taken to the meaning of 'corresponds' and that it is not necessary that the foreign law be the same as the 1986 Act provisions, or, at least, to involve the same approach or procedure. I say

'suggest' because little judicial consideration appears to have been given to the meaning of 'corresponds to' within the meaning of s. 426 (10)(d). Nevertheless, the authorities do tend to contain detailed comparative analysis of the relevant provisions".

278. Mr. Bayfield expressed his opinion to the effect that s. 437 is part of the "insolvency law" of Ireland which would be afforded recognition by way of assistance under s. 426. Mr. Bayfield's Opinion is the evidence of English law before this court and no evidence was relied on by the opposing parties to contradict his opinion.

279. The question of recognition and enforceability of an order made was considered by Snowden J. in *Noble Group Ltd* [2018] EWHC 3092 (Ch) where he quoted from a prior judgment of his own in *Van Gansewinkel Groep B.V. and Others* [2015] EWHC 2151 (Ch) as follows: -

> *"The English court does not need certainty as to the position under foreign law – but it ought to have some credible evidence to the effect that it would not be acting in vain".*

280. The opinion of Mr. Bayfield is more than credible evidence as to the prospect of recognition of orders made or repudiations effected pursuant to an approval granted under s. 537. This taken together with the authority of *Re Business City Express Limited* is good reason for the court to be satisfied that orders made as sought in these applications would not be made in vain.

The Cape Town Convention

281. A number of submissions were made by the opposing parties concerning the effect on this application of the Convention on International Interests in Mobile Equipment signed at Cape Town on 16 November, 2001, and the Protocol to the Convention on matters specific to aircraft equipment (the "Convention" and the "Protocol").

282. The Cape Town Convention has the force of law in the State pursuant to International Interests in Mobile Equipment (Cape Town Convention) Act 2005.

283. The Convention establishes international standards for regulating the registration of interests in mobile equipment, including contracts, security interests and leases.

284. The Convention and the Protocol contain provisions concerning the registration and protection of such interests, and protecting the remedies of the holders of such interests in circumstances of default by parties in possession of movable objects, and on the occurrence of insolvency of a debtor.

285. Article 11 of the Protocol provides for alternate remedies on insolvency. As permitted under the Protocol the Government of Ireland elected for the application of Alternative A, the key relevant provisions of which are summarised below.

286. The Convention defines "insolvency proceedings" as follows: -

"bankruptcy, liquidation or other collective judicial or administrative proceedings, including interim proceedings, in which the assets and affairs of the debtor are subject to control or supervision by a court for the purposes of reorganisation or liquidation".

287. It has not been disputed that examinership pursuant to Part 10 of the Act is a form of insolvency proceedings for the purpose of the Convention.

288. Under Alternative A, the relevant provisions are as follows: -

"2. Upon the occurrence of an insolvency-related event, the insolvency administrator or the debtor, as applicable, shall, subject to paragraph 7, give possession of the aircraft object to the creditor no later than the earlier of:

(a) the end of the waiting period; (which in the case of Ireland is prescribed to be 60 days); and

(b) the date on which the creditor would be entitled to possession of the aircraft object if this Article did not apply.

5. Unless and until the creditor is given the opportunity to take possession under paragraph 2:

(a) the insolvency administrator or the debtor, as applicable, shall preserve the aircraft object and maintain it and its value in accordance with the agreement; and

(b) the creditor shall be entitled to apply for any other forms of interim relief available under the applicable law.

6. Sub-paragraph (a) of the preceding paragraph shall not preclude the use of the aircraft object under arrangements designed to preserve the aircraft object and maintain it and its value.

9. No exercise of remedies permitted by the Convention or this Protocol may be prevented or delayed after the date specified in paragraph 2.

10. No obligations of the debtor under the agreement may be modified without the consent of the creditor.

11. Nothing in the preceding paragraph shall be construed to affect the authority, if any, of the insolvency administrator under the applicable law to terminate the agreement". (emphasis added)

289. The term "*insolvency administrator*" is defined in the Convention to include "*a debtor in possession if permitted by the applicable insolvency law*". Under Part 10, the company is clearly "*a debtor in possession".*

290. The Convention and the Protocol are designed to protect interests in objects and the enforcement remedies available to the holders of security and lessors and sellers, which are rights *in rem*. Therefore, it does not follow that its provisions affect the proposed repudiation of guarantees. However, it is clearly relevant to the opposed applications for approval of the repudiation by NAS of the three leases granted to it by Sognefjorden, an excluded subsidiary.

291. Para. 10 of Article 11 of the Protocol prohibits the modification of an agreement without the consent of the counterparty. Para. 11 makes it clear that the Protocol does not preclude an act of termination. Repudiation of a contract is an act of termination and not modification and is therefore not prohibited by the Protocol.

292. Insofar as the definition of "insolvency administrator" extends to the "debtor in possession" (Article 1 of the Convention), the act of repudiation by the company, if approved by this court, pursuant to s. 537 (1) is clearly not prohibited.

293. The interaction between the Cape Town Convention and national insolvency rules was considered by the Federal Court of Australia in *VB Leaseco Pty Ltd (administrators appointed) v Wells Fargo Trust Company, National Association (trustee)* [2020] FCAFC 168.

294. In that case, it was argued by lessors that the obligation to "give possession" of aircraft objects contained in para. 2 of Alternative A of Article 11 of the Protocol required the insolvency administrators of the debtor lessee to redeliver the aircraft objects in accordance with provisions governing the physical return of those objects in an existing agreement between the parties. This would have required the administrators at their expense or at the expense of the debtor's estate to incur the cost of redelivery of the relevant objects from their current location in Australia to a location at Florida, USA.

295. The court of first instance had determined that there was such an obligation on the insolvency administrators and this was overturned by the Federal Court.

296. In its judgment the court considered the meaning of the phrase "*to give possession*" in Article XI (2) and observed as follows: -

> *"Once it is understood that the content of an obligation to 'give possession' under Article XI (2) does not include an obligation to effect a physical redelivery as if the lease were at an end, the question of the commercial reasonableness of the exercise of a remedy agreed upon by the parties does not arise.*
>
> *The effect of the construction of Article XI of the protocol preferred by the primary judge is that the funds available to creditors generally in the insolvent administration would have to be applied to meet the costs of redelivery and priority to any other claim (including claims by the insolvency administrator to administration costs and other claims afforded statutory priority such as, in Australia, employee claims and taxation liability.)*

On such an approach, instead of the creditor being confined to claims against the relevant aircraft object (being the extent of its security or property interests as the case may be) it would be able to look to the insolvency administrator (and thereby the insolvent administration) to cover the costs of redelivery of the object. In effect the creditor would stand first in line to secure out of the insolvency administration the costs of effecting redelivery (which may be considerable) to the necessary detriment of all other creditors.

As a result, funds, which in the ordinary course of things would be shared equally between general creditors, subject to priority claims such as the costs of the insolvent administration and statutory claims, would instead be made available first and foremost to the creditor to meet the costs of redelivery. The claims of other creditors to be administered in insolvency would then be entirely subjected to the need to meet the costs of redelivery of the aircraft object to the creditor. Indeed, it appears that such a construction may be pressed so far as to burden the insolvency administrator with having to satisfy claims made by third parties (such as those with prior legal claims to the object by way of lien or otherwise) that need to be met in order for the insolvency administrator to be able to effect redelivery as required under the agreement.

In our view, it is tolerably clear that the Convention and the Protocol were not intended to operate in a way that would result in such a reworking of generally accepted principles of insolvency law". (emphasis added).

297. In *AirAsia X Berhad v BOC Aviation Limited* (WA-24NCC-467-10/2020), the High Court of Malaysia considered the Cape Town Convention and Protocol in the context of proposals for a scheme of arrangement. The court considered the provisions of Alternative A of the Protocol and Articles XI, parargraphs 7, 10 and 11 as follows: -

"*[290] To my mind, reading Article XI (7), (10) and (11) together, Alternative A of the Protocol provides the following protection to the creditor, namely, in the event the debtor chooses not to terminate the agreement when an insolvency-related event has occurred or the creditor does not exercise its right to repossess the aircraft, the obligations under the agreement including the obligation to pay the rentals cannot be modified by the debtor unless with the consent of the creditor.*

[291] For example, if the Scheme seeks to provide for a variation to the obligation to pay the rentals (either a reduced sum or a deferral in payment), this would be in contravention of Article XI (10) as AAX [the company proposing the scheme] would be seeking to modify its obligations under the Lease Agreements and the consent of the Lessors have not been procured.

[292] But in this case, the Scheme provides for the termination of the Lease Agreements which under Article XI (11), AAX is entitled to do. With the termination, the Lessors would be left with the remedies of repossession under

the Convention as provided under Article XI (7). These remedies are not interfered with under the Scheme at all.

[293] With the termination of the Lease Agreements, apart from the right to repossession under the Cape Town Convention, the Lessors also have the right to claim against AAX for damages which comprises both the accrued rentals that were unpaid and the future rentals under the remaining terms of the Lease Agreements subject to the duty to mitigate.

[294] This claim for damages arises from the termination of the Lease Agreements. This is the same claim that the Lessors would make against AAX in the event of liquidation where the Lessors would have to share pari passu with other unsecured creditors in the assets of AAX. What the Scheme is seeking to do is to compromise this claim for damages. To my mind, this has nothing to do with Article XI (10) (modification) of Alternative A of the Protocol.

[295] For the reasons above, it is my judgment that AAX does not require the consent of the Lessors in respect of the "cram-down" provision under the Scheme in the form of a 99.7% hair-cut of their claims".

298. The conclusions I draw from these cases are as follows: -

(1) The company cannot unilaterally modify the terms of any leases or guarantees. Of course, Part 10 itself does not permit such modification.

(2) The company may terminate contracts under applicable law, which includes a repudiation in exercise of the power conferred by s. 537.

(3) There is nothing in the Cape Town Convention or Protocol to preclude a lessor or holder of security from exercising the self-help remedy of taking possession of the asset.

(4) It would not be appropriate to enter as a condition of an approval under s. 537 a requirement that the company discharge the claims of third part lienholders, for the benefit of the contract counterparty and in priority to all other claims against the company.

(5) The remedy of damages arising from the repudiation is respected, again to be addressed in accordance with the law applicable to the company, in this case to sound in an unsecured claim for such damages.

299. If any of the companies sought to rely against lessors on the protection of the court conferred by s. 520, the automatic stay, different questions would arise by reference to the Convention and the Protocol. But the essence of s. 537 is that by repudiating the agreement the company no longer seeks to retain possession of or the benefit of the asset.

300. Monetary claims such as those necessary to meet the claims of any lien holders form part of claims which can be made by way of damages for breach of the contract.

301. As discussed earlier in this judgment, if there were any evidence before the court that either the company seeking to repudiate pursuant to s. 537, or any of the companies in the Group, including excluded subsidiaries, were to seek to retain the benefit of the aircraft or the engine or other objects the court would take a different view in relation to the repudiation of a guarantee of those obligations by a company in examinership. That is not the case as it has been described to me.

302. Particular issues arose by reference to the Cape Town Convention in the case of the interests represented by PK Air Finance.

303. PK Air Finance is the beneficiary of guarantees given by NAS in respect of three aircraft leased to DYI Aviation, a Norwegian group company and subleased to Norwegian Air Sweden, an excluded subsidiary.

304. The court was informed that the dispute in relation to one of the three aircraft has since been resolved. During the course of the hearing the court was also informed that in in one case the relevant aircraft is located in Bucharest and that one of the engines is at a Lufthansa facility. In the case of the second aircraft, it is located in Oslo but at a Lufthansa facility.

305. The parties were in disagreement both as to the up to date facts concerning the status of the aircraft and the questions of law. Limited evidence was given as to the status of the aircraft. It appeared that the companies asserted that they were willing to release the aircraft to PK Air Finance, but that the aircraft were in locations under the control of Lufthansa, which was exercising a lien in respect of charges for works previously undertaken by Lufthansa on the relevant engines. The companies say that they are willing to return the aircraft, in compliance with the Convention, but that their obligations under the Convention do not extend to funding the cost of discharging the claim of the lienholder.

306. Neither DYI Aviation or Norwegian Air Sweden are in examinership. They are therefore not subject to the jurisdiction of this Court in these proceedings. It is clear from the position taken by the companies that they are desirous of permitting the lessor to take possession of the relevant aircraft, but assert that the lien claims of the third parties are matters for the lessors.

307. The remedies of repossession which are available to PK Air Finance and its borrower are not stayed or restricted by these proceedings, nor does this Court have jurisdiction to make any orders imposing any terms regarding their obligations on return of the aircraft.

308. In circumstances where there is no evidence that either the lessees or sublessee, or NAS or any other group company is seeking to retain the benefit of the relevant aircraft or engines the existence of these lien claims would not justify refusing approval of

repudiation of the guarantee in this case. Any additional cost associated with the repossession of the aircraft, including any payments PK Air Finance finds it necessary to make to lienholders, will be relevant to the determination of the quantum of its losses.

Quantification of losses

309. Subsection 3 of s. 537 provides that: -

> *"In order to facilitate the formulation, consideration or confirmation of a compromise or scheme of arrangement, the court may hold a hearing and make an order determining the amount of any such loss or damage mentioned in subsection (2) and the amount so determined shall be due by the company to the creditor as a judgment debt".*

310. The common practice which the court has seen in previous applications under s. 537 is to include an application for an order pursuant to subs. 3 determining the quantum of the loss of the counterparty to any contract the subject of a repudiation. In this case, no application has been made by the companies under subs. 3. The applicants propose that the quantum of losses, which would rank as unsecured claims pursuant to subs. 2, would be determined by the procedure for the resolution by an expert of unagreed claims of creditors to be provided for in the examiner's proposals for a scheme of arrangement.

311. Provisions for expert determination of unagreed claims, although not expressly provided for anywhere in Part 10, are commonly and invariably contained in schemes of arrangement approved by this Court.

312. In this case the examiner has indicated in his affidavits that he proposes to include in that process the claims of any counterparties whose contracts are repudiated pursuant to s. 537 and where the quantum is not agreed.

313. The structure of such a resolution procedure is that within a defined period after the confirmation of the schemes, in this instance 14 days, the counterparty would submit a proof of claim to the company. The company will have a defined period within which to state whether it accepts the claim. If the claim is not accepted the counterparty has the right to refer the dispute to an expert for determination. The proposals will contain provisions for the exchange of submissions in writing and the quantum of the claim will be determined by the expert whose decision will be final and binding on both parties.

314. The examiner has indicated that his current proposal is that such an expert determination process would be completed within 60 days of the date on which the scheme of arrangement is confirmed by the court.

315. The examiner states that the legal principles which will be applied by the expert in determining the amount of the claim would be the same principles which would be applied by a court on a hearing under s. 537 (3) to determine the amount of any loss and damage.

316. Reservations were expressed by the objectors as to whether the expert, who in many cases is charged to resolve ordinary trade creditor claims, may not have the level of expertise to adjudicate on the quantum of claims of this nature in this case. The examiner proposes that an aviation specialist with industry expertise and experience would be appointed as an expert for this group of claims. That expert would have the ability to take any legal advice required. The examiner is considering a suitable pool of candidates and intends to consult with the affected creditors prior to finalising the selection of the expert to be appointed. He indicated that he was considering making a separate provision for the determination of claims by customers, and therefore the aviation expert would be dedicated to the process of resolving claims of this nature.

317. As is also common in such procedures the examiner proposes that the costs of the expert determination process would be borne on a 50:50 basis between the relevant company and the creditor.

318. It is submitted on behalf of the companies as follows: -

(1) That the holding of a hearing under subs. 3 would not facilitate the formulation consideration or confirmation of a compromise or scheme of arrangement, as the terms of subs. 3 require.

(2) That the use of the word "*may*" in subs. 3 means that the court has a discretion as to whether to hold such a hearing.

(3) That the expert process would be the most efficient way of dealing with these claims. The burden of participating in a court hearing under subs. 3 whilst at the same time participating in the ongoing process of statutory meetings and holding a confirmation hearing would be excessive in terms of the demands on the company and its resources.

(4) That at the level of principle, because subs. 2 provides that the quantum of damages ranks as an unsecured claim, this is no different from determining the quantum of other unagreed creditors' claims and therefore is appropriate for the expert dispute resolution process.

(5) That the "*decades long practice*" of having claims determined by an expert appointed in the scheme of arrangement is unobjectionable on a point of principle and desirable from a practical perspective.

(6) That there are practical considerations that can make court-based hearings cumbersome and excessively time consuming. Reference is made to the procedural protections of normal court process such as cross-examination and the provisions for appeals and that these could undermine the "*race to save a company and might even be used strategically for that purpose".*

(7) That a less involved proof or determination process under the scheme is fair and practicable given the company's insolvency and the fact that the resultant "*award*"

will generate not a full payment but only a dividend pursuant to the scheme of arrangement.

319. It was submitted on behalf of the companies that should there be any unfairness in the procedure proposed for the resolution of claims by an expert, this will be a matter which can be raised at the hearing to confirm the proposals for a scheme of arrangement.

320. The objectors submit that the only means of measuring damages is by agreement or by the court holding a hearing as envisaged by subs. 3. The objectors submit the following: -

(1) That if the company's interpretation of s. 537(3) is accepted a court may never hold a hearing as provided for under that subsection.

(2) That the court should not rely on the anecdotal evidence provided by the company to the effect that the practice of having claims of unagreed creditors adjudicated by an expert appointed under the scheme of arrangement has operated for many decades without challenge.

(3) That ordinary creditors, who do not have the benefit of a judgment, have no alternative but to participate in an expert process for resolving unagreed claims.

That, by contrast, express provision is made to the effect that creditors whose contract has been repudiated pursuant to subs. 1 may have the quantum of their damages assessed by the court.

(4) That the practical obstacles in terms of resources and timing identified by the company in its submissions should not stand in the way of the entitlement of counterparties to the benefit of hearings specifically envisaged by subs. 3.

(5) That it is necessary to have the quantum of these claims determined in advance of the holding of meetings of creditors so that the objectors will be in an informed position to vote on the proposals for a scheme of arrangement.

Conclusion as regards subsection (3)

321. The companies and the examiner submit that the process of determining claims by an expert process has been utilised and endorsed by the court for many decades. That statement is correct as regards unagreed claims of creditors. It is incorrect as regards the determination of the quantum of claims of counterparties to contracts repudiated pursuant to s. 537. When pressed for precedent on this, counsel for the companies referred the court to one case, namely *FCR Media Limited (ex tempore*, HC, 9 November 2017), in which the scheme of arrangement provided that the unagreed amount of losses pursuant to claims arising from repudiation of contracts would be determined by an expert. I was referred to no judicial consideration of the issue now before the court and *FCR Media Limited* was the only instance cited to me. It is clearly is not a "decades long" precedent.

322. The invariable practice in many applications under s. 537 before has been to include in the notice of motion an application for an order determining the quantum of damages pursuant to subs. 3.

323. The submission that there is no difference in principle between the proposed method of determining the unagreed claims of other categories of creditors and claim of the repudiated counterparties ignores the very existence of subs. 3. No equivalent provision is to be found in the Act for the determination of claims of other classes of creditors.

324. The wording of subs. 3 refers to the holding of a hearing *"in order to facilitate the formulation consideration or confirmation of a compromise of scheme of arrangement"*. It is not necessary to establish that the holding of such a hearing must facilitate each of the formulation, consideration and confirmation of a scheme of arrangement. There is no reason why even when such a hearing is pending, the examiner could not proceed with the formulation of his proposals, and hold meetings for their consideration. It may be that in such circumstances the outcome of a hearing as to quantum would inform the court at a hearing to confirm the proposals for a scheme of arrangement, but even that is not a prerequisite to the holding of such a hearing.

325. It is the policy of this Court as a general rule to uphold clauses providing for referral to an expert adjudicator in appropriate cases, provided there is nothing patently flawed or unjust about the procedure being embarked upon. I was referred to a number of English judgments relating to schemes of arrangement, in which the court upheld provisions for binding determination of disputes by a scheme adjudicator (*Re Hawk Insurance Company Limited* [2002] 2 BCLC 480, and *Re Pan Atlantic Insurance Company Limited* [2003] EWHC 1696 (Ch), [2003] 2 BCLC 678). In these cases, the court upheld the efficacy of clauses contained in the schemes which required disputes to be referred to a scheme adjudicator whose decision was to be final and conclusive.

326. A critical feature of those cases cited, and of Part 9 of the Act which governs schemes of arrangement outwith examinerships, is that they relate to scheme adjudication provisions in cases under a statutory framework, including Part 9, which contains no direct equivalent of subs. 3.

327. The court is always conscious of the practicality and time pressures which apply to companies and examiners during an examinership process. These pressures may be eased if, as suggested here, the process of determination of these claims by an expert would only commence after the court confirms a scheme of arrangement. That pragmatic consideration is no reason to deprive the counterparties of the recourse to this Court expressly provided for in subs. 3.

328. In *Re O'Brien's Sandwich Bars Limited*, the court found that although it was legally permissible under the section to arrange for a postponed determination of loss or damage pursuant to subs. 3, it was not possible in that case because of the time constraints including those imposed by the proposed investor. Ryan J. said that in such a case: -

"For the High Court to adopt such an unsatisfactory procedure would seem to me to put business exigencies, even though they are undoubtedly very important, above the fundamental requirements of justice and constitutionally mandated protections".

329. Ryan J. found that in that particular case, the timetable proposed for the determination of losses if orders were made was such as to deprive the counterparties of the opportunity of formulating and presenting their claims and obtaining appropriate professional advice for that purpose.

330. Where a company presenting a petition for the appointment of an examiner and/or the appointed examiner anticipates the need to repudiate executory contracts and anticipates the prospect that applications for approval of repudiation and/or for the determination of quantum will be contested, they should commence the process as early as possible following the appointment of the examiner. This may not always be practicable, but in a case of scale and complexity, such planning cannot be beyond the resources of the moving parties.

331. Where a court sees fit to appoint an examiner it invariably does so with a view to proposals for a scheme of arrangement being formulated. One of the matters which the independent expert is required to address is whether the formulation of proposals will facilitate the survival of the company as a going concern. I am not persuaded that it is necessary to defer the commencement of an application for repudiation until such time as the examiner has concluded definitively that he will be in a position to formulate such proposals. The very appointment of an examiner envisages that proposals will be formulated. It does not seem to me that an application under s. 537 would be refused on the grounds of prematurity if brought at very early stage in an examinership, but I am not required to determine such a question in this instance.

332. Mechanisms in schemes of arrangement for the binding determination of unagreed creditors' claims by an expert, as invariably proposed, are desirable and appropriate. They have the advantage that an expert with suitable expertise in the relevant industry can be appointed. It is also recognised that such a process is desirable from a costs proportionality perspective in circumstances where the outcome will not deliver a full payment but only a dividend. I am also conscious that examiners do not have a function of adjudicating liabilities which is conferred on a liquidator. Accordingly, there are good reasons for including an expert adjudication processes in schemes of arrangement. I would go so far as to say that there may be cases where it is appropriate that the determination of the quantum of claims of counterparties repudiated pursuant to s. 537 be referred to an expert and not determined by the court pursuant to subs. 3. This judgment does not mean that such a route will never be appropriate in a suitable case. However, for the reasons stated above, I concluded that this is not an appropriate case in which to deprive the counterparties of a hearing pursuant to subs. (3).

Conclusion

333. For these reasons I concluded that the court should grant approval under s. 537 (1) for the repudiation of the contracts the subject of the notices of motion, save for those which the court was informed were to stand withdrawn.

334. I also concluded that the quantum of the loss or damage suffered by the counterparties to such repudiations be determined at a hearing pursuant to s. 537 (3).

335. After I declared that the court would hold such a hearing under subs. 3, directions were made and a date fixed for that hearing. The court was subsequently informed that the parties had agreed the quantum, and that hearing date was vacated.