WILLIAM FRY

The Examinership of Norwegian Air
– Key Features

On 26 May 2021 Norwegian Air Shuttle ASA (**NAS**) and related companies (**Norwegian Air**) exited examinership in Ireland. Through the restructuring Norwegian Air:

- raised NOK 6 billion (€590 million) in new capital through share and hybrid debt offerings;
- reduced its total debt since the end of 2019 by approximately NOK 63 - 65 billion to approximately NOK 16 - 18 billion (€1.57 to €1.77 billion);
- discontinued its long haul operations;
- reduced its fleet from 156 aircraft to 51 aircraft and secured competitive leasing arrangements on its retained fleet, including "Power by the Hour" agreements through Q1 2022;
- terminated aircraft purchased orders representing CAPEX commitments of approximately NOK 85 billion in aggregated value; and
- pivoted to a short-haul network primarily operating in Norway and the Nordics or from Norway/ the Nordics to Continental Europe.

Norwegian Air has since begun a new chapter as a restructured, slimmed-down Nordic focused airline with a strong balance sheet and flexible aircraft leasing arrangements.

The restructuring, which principally occurred through the Irish examinership process under Part 10 of the Companies Act 2014, had many key and innovative features in terms of cross border restructurings, restructurings in the aviation sector and the Irish examinership process. Over the course of the examinership, the Irish High Court (the **Court**) delivered four separate judgments on key issues ranging from the appointment of Kieran Wallace of KPMG Ireland as examiner (the **Examiner**) to a Norwegian incorporated company, the repudiation of English law aircraft leasing arrangements, and the approval of highly complex and innovative schemes of arrangement formulated by the Examiner to restructure the companies.

A William Fry team, led by Ruairi Rynn, advised the Examiner on the formulation and ultimate approval of the unique schemes of arrangement to restructure NAS and the four Irish companies in examinership and we discuss the following key features of the restructuring in this note:

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What is examinership?

Examinership is a statutory framework for restructuring companies in financial difficulty but which otherwise have a reasonable prospect of survival as a going concern post-restructuring. It is broadly comparable to chapter 11 of the US Bankruptcy Code and the recently introduced restructuring plan in the UK.

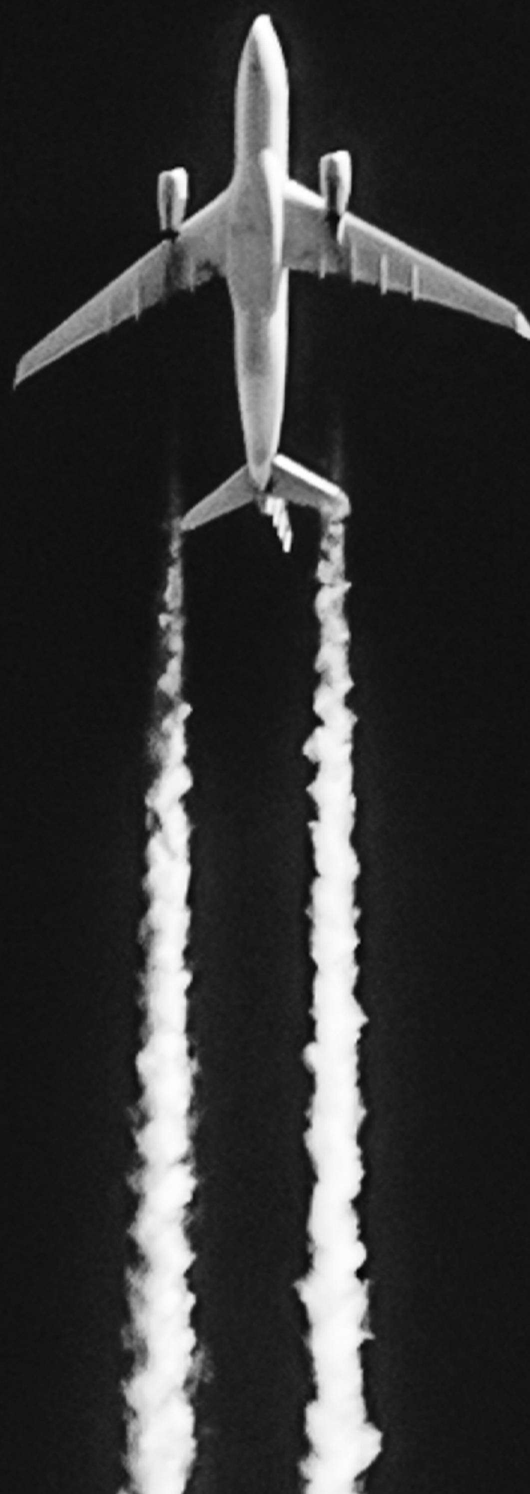
The essential features of examinership include:

- an automatic stay of 70 days (extendable to 150 days) on creditor enforcement action (subject to the application of Alternative A of the Cape Town Convention (see below));
- an examiner nominated by the applicant (typically the company) and appointed by the court formulates a scheme of arrangement for the restructuring of the company which, once approved, is binding on the company, its members and creditors;
- only one class of impaired creditor is required to approve the scheme of arrangement formulated by the examiner (acting by a majority in number representing a majority in value of those voting), which readily facilitates cross-class cram down; and
- the examiner's scheme is subject to confirmation by the Irish High Court which will principally consider whether the scheme is fair and equitable, provides the company with a reasonable prospect of surviving and whether any creditor is unfairly prejudiced or worse off under the scheme than in the most likely alternative scenario.

A wide range of solutions have been and can be employed to facilitate the survival of companies through examinership, including cross-class cram down of debt, terminating existing contractual commitments, introducing new debt or equity investment, replacing existing equity in full and debt for equity swaps. Furthermore, the process can be readily used in conjunction with other international processes and is capable of recognition and enforcement internationally (including automatic recognition across the EU).

Cross-Border Features –

Examinership of a Norwegian Incorporated Company



- A central aspect of the restructuring was the restructuring of NAS - the Norwegian incorporated parent company of the group whose shares were listed on the Oslo Stock Exchange and was the main operating company within the group.
- In the decision appointing the Examiner to the companies (**Petition Decision** – see here), the Court determined that:
  - The Court's jurisdiction to appoint an examiner to a company extended to a non-Irish debtor company that did not have its centre of main interests (**COMI**) in Ireland, or any other EU country, but which was related to another company (e.g. a parent, subsidiary or sister company) that (i) had its COMI in Ireland, (ii) was in examinership and (iii) where the debtor had a "sufficient connection" to Ireland.
  - NAS was a related company to its five direct and indirect Irish incorporated subsidiaries to which the Examiner was being appointed (one of which, Torskefjorden Leasing Limited, was ultimately liquidated).
  - NAS was deemed to have a sufficient connection to Ireland on the basis 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".*

    The connections included substantial direct and indirect Irish subsidiaries of NAS and its wider commercial operations located in the State. These NAS subsidiaries included an operating airline, the corporate structure through which its aircraft were owned or leased and whose liabilities were guaranteed by NAS and a separate subsidiary that hold the group's intellectual property rights.
  - The Court endorsed and adopted the sufficient connection test set out in the leading decisions of the English High Court in *Re Drax Holdings Ltd* and *Re Rodenstock* in the context of English law schemes of arrangement.
  - In addition to recognising the court's broad jurisdiction to appoint an examiner, the decision bolsters the view that the Irish courts have jurisdiction to approve Irish law schemes of arrangement under Part 9 of the Companies Act 2014 (**Part 9 Schemes**) for non-Irish companies with a sufficient connection to the jurisdiction[1].

[1]Part 9 Schemes are separate and distinct from examinership schemes of arrangement - for more detail on Part 9 Schemes and the landmark case of *Re Ballantyne plc* see here.

Parallel Norwegian Reconstruction

- The Irish examinership was the lead restructuring process for NAS and the only process for the Irish incorporated companies. It was supplemented and implemented in Norway through a parallel Norwegian law reconstruction process. Mr Havard Wiker was appointed as the reconstructor and ultimately proposed a reconstruction plan for NAS that replicated and implemented in full the terms of the Examiner's scheme for NAS under Norwegian law (**Norwegian Reconstruction Plan**).
- Whilst the examinership was the lead process for NAS, the examinership scheme for NAS adopted certain necessary elements of Norwegian law, including the priorities in a Norwegian law liquidation of NAS and the procedure for determining the value of assets under Norwegian law in order to ensure sufficient alignment between the two processes. In addition, the effectiveness of the examinership scheme was conditional on the approval of the Norwegian Reconstruction Plan.
- The approval of the Norwegian Reconstruction Plan required the support of 50% of the ordinary/unsecured creditors by value of NAS, which was higher than the creditor approval threshold in examinership (see above). In order to ensure the approval of the Norwegian Reconstruction Plan and the implementation of the examinership scheme, the scheme authorised the Examiner to vote in favour of Norwegian Reconstruction Plan on behalf of all of the creditors of NAS. The votes of the Examiner, on behalf of creditors bound by the examinership scheme, ensured the approval of the Norwegian Reconstruction Plan by the creditors of NAS and facilitated the confirmation of that plan by the Norwegian court.
- The case demonstrates, not for the first time, that an examinership can be used in parallel with another international restructuring process to secure the implementation of a complex cross border restructuring.

Restructuring of English law and US law debt

- The Court was satisfied, having considered English law and the relevant provisions of the Cape Town Convention, that the examinership scheme for NAS and repudiations of English law leasing arrangements (see further below) were capable of recognition and enforcement in England and Wales under Section 426 of the Insolvency Act, 1986. Consequently, any orders made by the Court, including orders appointing the Examiner and confirming the Examiner's scheme, would not be without effect in the key jurisdiction of England and Wales.
- In addition to restructuring Norwegian, Irish, and English law debts, the examinership schemes for NAS and Arctic Aviation Assets DAC (**AAA**) addressed certain US law liabilities. In order to ensure the recognition and enforcement of the restructuring, the companies obtained orders recognising the examinership schemes and the Norwegian Reconstruction Plan under Chapter 15 of the US Bankruptcy Code.

Repudiation of English law contracts

- A significant feature of the examinership was the Court's approval of the proposed repudiation of English law aircraft leases, sub-leases, and related guarantees.
- In the decision approving the repudiation of certain aircraft leasing arrangements (**Repudiation Decision** – see here) the court determined:
  - insofar as the four Irish incorporated companies had their COMI in Ireland, the court had jurisdiction to approve the repudiations under EU Recast Insolvency Regulation 848/2015, in particular Articles 7, 19 and 32, which continued to apply in England and Wales on the basis the examinership commenced before the end of the BREXIT transition period on 31 December 2020;
  - on the basis the Court had jurisdiction to place NAS into examinership, which fell outside the terms of the EU Recast Insolvency Regulation 848/2015, that jurisdiction included all of the tools and processes that were available in an examinership. In doing so, the court considered the likelihood of recognition of such an Order in England and Wales and the non-applicability of the Rome Regulation.

Cape Town Convention and Termination of Aircraft Leases

- In the Repudiation Decision, the Court adopted the uncontroverted position that examinership is an *"insolvency proceeding"* and an *"insolvency related event"* for the purpose of the Cape Town Convention. Therefore, Alternative A of the Aircraft Protocol applied. In addition, the Court determined that due to the nature of the examinership process the debtor company fell within the definition of an *"insolvency administrator"*, which includes a debtor in possession.
- Consequently, the 60 day waiting period and other creditor protections, including the prohibition on modifications of aircraft related contracts without creditor consent, applied with the ongoing maintenance obligations falling on the company as debtor in possession (rather than the Examiner).
- The Court was satisfied that the Cape Town Convention did not prohibit the Court from approving the repudiation of aircraft leasing arrangements and associated guarantees. In particular, the Court found that a repudiation on application by the company, was a termination permitted under Paragraph 11 of the Protocol to the Convention rather than a *"modification"* that required lessor consent under Paragraph 10 of the Protocol. The Court was also satisfied that the Norwegian Air companies' liabilities on foot of the terminations could be written down by the examinership scheme.
- The Court also determined that to the extent third parties, such as airport authorities or suppliers, were asserting liens over the subject aircraft, this did not prohibit the Court from approving the repudiation. The Court held that any such additional costs incurred by the lessors in discharging the liens to obtain possession of the aircraft would form part of the damages claim against the relevant Norwegian Air company.
- As the repudiation and consensual terminations of the aircraft leases and other contracts did not take effect until the effective date (26 May 2021), the examinership schemes provided for the writing down of the post-petition pre-termination liabilities on the repudiated and consensually terminated contracts.
- The ability to repudiate aircraft leasing arrangements and associated guarantees through the examinership process allowed the airline to decrease its fleet from over 150 to 51 aircraft. It also allowed the airline to shed the wide bodied aircraft that were no longer necessary for its new Nordic focused business model and to agree flexible power by the hour arrangements and competitive rental rates with lessors on the retained fleet. The companies also used the repudiation process to terminate ground handling and fuel line services provided at a number of US international airports that were no longer necessary for its business, to terminate supply or service contracts to replace them with less expensive contracts or substitute third party contract counterparties with in-house resources and to exit aircraft purchase contracts.

Group Restructuring through Examinership

- In an examinership each company must have a separate scheme of arrangement that deals with the liabilities of each company and meets the requirements of the governing legislation.
- The Examiner formulated separate but highly interconnected schemes for each of the companies in examinership. The NAS scheme was the lead scheme providing funding for the cash dividends by the other remaining four companies (one of the original examinership companies having entered into liquidation), and crucially the release of joint or overlapping obligations of the other companies.
- On that basis, the Court assessed the fairness of the examinership schemes by reference to their combined effect on the creditors of the companies as a whole rather than solely as individual schemes. In other words, it adopted a group analysis of the examinership schemes. This was crucial where the schemes provided for single dividends and consequential releases for related or overlapping claims (see below) against the other companies in examinership.
- In addition, the Court was satisfied that certain lease in - lease out SPVs within the group were going concerns that were capable of availing of the examinership process.

Releases of Related Companies / Third Parties through Examinership

- The nature of the group was such that there were several interlocking claims across the companies in examinership. For example, most of the aircraft lease arrangements where structured such that:
  - one company (for example, Lysakerforden Leasing Limited (**LLL**)) was a lessee of an aircraft from an external lessor under a head lease;
  - it sub-leased the aircraft to an operating company (for example, Norwegian Air International Limited (**NAI**)), with the external lessor holding security over the sub-lease; and
  - the obligations of LLL under the head lease were guaranteed by NAS.
- Under the examinership schemes, NAS paid a dividend under its guarantee obligations to the external lessor and provided for a release of the obligations of LLL under the head lease and NAI under the sub-lease. These releases were reflected in the respective LLL and NAI schemes with the relevant creditors receiving nil dividends under the schemes.
- Adopting the pro-release approach seen in *Re Ballantyne* and *Re Nordic Aviation DAC* in the context of Part 9 Schemes, the Court approved these releases in the decision confirming the examinership schemes (**Confirmation Decision** – see here) on the basis there was a "*sufficient nexus*" between the liabilities of NAS and the released companies.

The Conditional Investment

- One unique feature of the examinership was the structure and timing of the proposed investment.
- There were three components to the proposed investment (which had a minimum target amount of NOK 4.5 billion):
  - A rights offering to existing shareholders of up to NOK 395 million with tradable subscription rights. The rights offering was ultimately oversubscribed and raised the full amount of NOK 395 million.
  - A private placement of new shares, listed on the Oslo Stock Exchange, with key investors and certain creditors of the companies which ultimately raised gross proceeds of NOK 3.73 billion.
  - A hybrid debt instrument referred to as the New Capital Perpetual Bonds Offering. This was a perpetual debt instrument paying cash and payment in kind interest with an equity conversion right. The New Capital Perpetual Bond Offering was only available to creditors of the companies. It raised NOK 1.875 billion.

- Creditors who decided to participate in the Private Placement and New Capital Perpetual Bonds Offering were entitled to receive additional "Retained Claims Bonds" in partial discharge of their claims against the companies. The Retained Claims Bonds preserved part of their claims in an amount equivalent to 200% of their investment and were repayable with interest by NAS at a future date.
- The nature and scale of the investment required for the restructuring meant that it was impractical to undertake the type of public offerings required to secure the investment until the restructuring was approved. Otherwise the inherent uncertainty pending approval and the attendant risks would have significantly undermined the prospects of a successful capital raise.
- Consequently, and in a significant departure from established practice, the Examiner presented the examinership scheme for approval to the creditors and to the court *before* binding investment commitments were in place. In order to protect creditors, the examinership scheme (and the Norwegian Reconstruction Plan) was structured so the terms of the restructuring, in particular the write-down of obligations to creditors, would not take effect ***unless and until*** the minimum capital investment of NOK 4.5 billion was raised.
- In addition, the Court having approved the examinership schemes on 26 March 2021 in the Confirmation Decision fixed the effective date under the schemes as 26 May 2021 to facilitate the completion of the capital raising process by NAS. The Court thereby extended the examinership of the five companies and the appointment of the Examiner to 26 May 2021, beyond the previously extended 150 day protection period.
- The capital raise was completed on 21 May 2021 and the restructuring became effective on 26 May 2021.
- In approving this aspect of the examinership, the Court demonstrated a willingness to deviate from established practice and provide the necessary flexibility to facilitate the complex capital raise required to secure the airline's survival.

The Blended Dividend

- In addition to the novel approach to securing the investment, the examinership scheme for NAS provided for a "*blended dividend*" to unsecured creditors representing 5% of their claim comprising:
  - a proportionate share of a cash pot of NOK 500 million;
  - with the balance of the dividend converting into a convertible debt instrument described as a Dividend Claim.
- The Dividend Claims were Norwegian law-governed interest-bearing 7-year debt instruments. They were convertible in aggregate to up to 25.4% of the equity in the restructured airline (subject to a number of assumptions, including that the capital raised did not exceed NOK 4.5 billion, with the aggregate share of the equity falling as the level of capital raised increased).
- Under the Dividend Claims, creditors had three options:
  - retain the Dividend Claims as tradable debt instruments pending maturity;
  - convert the Dividend Claims to equity and take an equity position in NAS; or
  - convert the Dividend Claims to equity and participate in a disposal as part of a structured sale with other converting creditors.
- The third option was the default under the NAS scheme subject to a creditor opting out of either the conversion or the subsequent sale process.

The Treatment of Existing Equity

- Before the examinership, NAS had undergone a previous debt to equity conversion. This led to many leasing creditors taking significant equity positions in the company. In turn, this diluted the position of existing shareholders, a large number of which were retail investors.
- The restructuring of the NAS under the examinership required further dilution of the existing equity but not the complete extinguishment of their position. Rather, and excluding any new investment, existing shareholders were diluted to 4.6% (assuming the full exercise of conversion rights under the Dividend Claims and the New Capital Perpetual Bonds and that the capital raised did not exceed NOK 4.5 billion).
- The Court was satisfied that the significant, but not complete, dilution of existing equity holders was appropriate where the retention of a small portion of the equity preserved value and liquidity in the shares which through the Dividend Claims, were a key part of the dividend to creditors of NAS.

Concluding Remarks

The examinership schemes were some of the most complex and innovative examinership schemes of arrangement considered and approved by the courts since the introduction of the process in 1990.

Through the examinership Norwegian Air has been able to transform its business into a flexible, Nordic focused airline with a strong balance sheet. In doing so, it has shed significant legacy obligations under aircraft purchase contracts and leasing arrangements, its entire long haul fleet and associated service arrangements.

The complexities and success of the restructuring underline the effectiveness of the examinership process (in addition to Part 9 Schemes) to implement complex international restructurings in Ireland. The innovative and novel features in the schemes formulated by the Examiner and ultimately approved by the Court are striking. The judgments demonstrate the fundamental strengths of the examinership process that also provide companies with automatic and effective protection against creditor actions, the ability to achieve cross-class cram downs and to terminate legacy contracts.

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