THE HIGH COURT

COMMERCIAL

[2020 No. 349 COS.]

IN THE MATTER OF JAZZ PHARMACEUTICALS PLC

AND

IN THE MATTER OF THE COMPANIES ACT, 2014

AND

IN THE MATTER OF A PROPOSED REDUCTION OF CAPITAL PURSUANT TO SECTIONS 84 TO 86 OF THE COMPANIES ACT, 2014

JUDGMENT of Mr. Justice David Barniville delivered on the 1st day of December, 2020

Introduction

1. This is an application by Jazz Pharmaceuticals PLC (the "Company") for orders under the Companies Act, 2014 (the "2014 Act") confirming a special resolution approving the reduction of the Company's share capital and for various ancillary orders which came on for hearing before me on 26th November, 2020.

2. Having heard the application, I decided to grant the orders sought by the Company and gave a short *ex tempore* judgment setting out my reasons for doing so. However, a legal issue arose in the course of the application concerning the jurisdiction of the court to grant an order confirming a special resolution approving the reduction of the share capital of a company in circumstances where the amount of the reduction ultimately sought at the confirmation hearing was greater than the amount of the relevant capital at the date of the resolution. That issue had not previously been considered in this jurisdiction. On that basis I indicated that I would deliver a written judgment addressing the issue.

3. In my *ex tempore* judgment, I concluded that there was no jurisdictional bar to the court granting the order sought notwithstanding the increase in the capital since date of the resolution, having regard to the terms of s. 84(1) the 2014 Act and relevant case law from

other jurisdictions. I made the orders sought immediately following the hearing and agreed to provide this written judgment as soon as possible thereafter.

The Company's Application

4. The principal order sought by the Company was an order pursuant to s. 85(1) of the 2014 Act confirming a special resolution of the Company passed on 30th July, 2020 approving the reduction of the share capital of the Company by the cancellation of the entire amount standing to the credit of the Company's share premium account as at the effective date of the capital reduction or such lesser amount as the court might determine. If confirmed by the court, the effective date of the capital reduction would be the date on which the registration of the court's order and the minute approved by the court by the Registrar of Companies (s. 86(2)). The Company also sought various ancillary orders including an order that the provisions of s. 85(4) of the 2014 Act did not apply as regards any of the classes of the creditors of the Company as the proposed reduction in the Company's capital did not involve either the diminution of liability in respect of unpaid capital or the repayment to any shareholder of any paid up company capital and that it was not otherwise appropriate for the court to direct that the provisions of that subsection should apply. Alternatively, the Company sought an order pursuant to s. 85(5) directing that the provisions of s. 85(4) should not apply as regards any of the classes of creditors of the Company.

Brief Description of the Company

5. The Company was incorporated in the State in March, 2005 and has its registered office in Ireland. It reregistered as a public limited company in October, 2011. The Company is the parent company of the Jazz Pharmaceuticals Group of Companies (the "Group"). The Group is a global biopharmaceutical group which has a diverse portfolio of pharmaceutical products. The Group has in excess of 1,700 employees worldwide and generated total revenues of over US$2.16 billion in the financial year ended 31st December, 2019. The

Company's ordinary shares are listed and traded in the NASDAQ Global Select Market under the symbol "JAZZ".

The Special Resolution

6. At the annual general meeting of the shareholders of the Company held on 30th July, 2020 (the "AGM"), the following special resolution was passed:-

"As a special resolution, that subject to and with the consent of the Irish High Court:

(a) In accordance with the provisions of section 84 of the Companies Act 2014, the share capital of the Company be reduced by the cancellation of the entire amount standing to the credit of the Company's share premium account as at the effective date of the capital reduction (the "Authorised Amount"), or such other lesser amount as one or more of the Company's directors, the Company Secretary or persons designated by the board of directors from time to time as officers of the Company ("Officers") or the Irish High Court may determine and the reserve resulting from the cancellation of the share premium shall be treated as profits available for distribution as defined by section 117 of the Irish Companies Act 2014 (and/or any corresponding provision of any amended or replacement legislation); and

(b) The board of directors, acting through one or more of the Company's directors, the Company Secretary or Officers, be and are hereby authorized, on behalf of the Company, to proceed to seek the confirmation of the Irish High Court to such reduction of share capital."

7. The reduction of share capital of the Company approved by the special resolution was somewhat different to the form of reduction which is typically sought on a confirmation application such as this in that what was sought was the cancellation of the entire amount standing to the credit of the Company's share premium account as at the effective date of the

capital reduction (or a lesser amount as provided for in the resolution) as opposed to a reduction of a stated amount standing to the credit of the share premium account. As of the date of the special resolution, the amount standing to the credit of the Company's share premium account was US$894,659,000. As the Company continued to issue shares in the period following the special resolution as share options continued to be exercised, that amount increased between the date of the special resolution and the date of the hearing of the Company's confirmation application. As of the date of the hearing, the amount standing to the credit of the Company's share premium account had increased to US$951,152,875 (an increase of US$56,493,875). Therefore, the amount of the reduction of capital in respect of which confirmation was sought from the court on the Company's application was greater than the amount of that capital at the date of the special resolution. That is what was unusual about this application and that is what gave rise to the particular legal issue which I address later in this judgment.

Notice of the AGM

8. Notice of the AGM was circulated to the shareholders of the Company in advance of the AGM. The notice explained the background to, and the purpose of, the proposed capital reduction. Copies of the special resolution and of the notice were exhibited to the grounding affidavit in respect of the application sworn on behalf of the Company by Aislinn Doody on 30th October, 2020 (at exhibits "AD2" and "AD3").

The Company's Articles of Association

9. Ms. Doody also exhibited a copy of the Company's articles of association (the "Articles"). Under Article 66.2 of the Articles, the Company has the power to reduce its share premium account by special resolution, in accordance with s. 84 of the 2014 Act.

Purpose of and Reasons for the Company's Application

10. In her grounding affidavit, Ms. Doody explained that the intention of the Company, in the event that the court was to grant the relief sought by it, was that the reserve to be created by the capital reduction would be treated as profits available for distribution, as defined by s. 177 of the 2014 Act, which would give the Board flexibility to repurchase or redeem shares or to make other distributions to shareholders in the form of dividends. Ms. Doody stated that the Company does not currently plan to pay cash dividends in the foreseeable future although it has an ongoing share repurchase programme.

The Legal Issue on Jurisdiction

11. At the outset of the application, counsel for the Company explained that the terms of the capital reduction in respect of which confirmation was sought by the Company on this application were somewhat different to the terms of a capital reduction typically considered by the court. He explained that the difference was that in this case confirmation was being sought for the reduction of the Company's share capital by the cancellation of the entire amount standing to the credit of the Company's share premium account as at the effective date of the capital reduction as opposed to a reduction of a specified amount set out in the relevant special resolution. He explained that in the period since the special resolution, the amount standing to the credit of the share premium account had increased to the extent mentioned earlier, as a consequence of which the Company was seeking the court's authorisation for the reduction of the Company's capital in an amount which was greater than the amount of the relevant capital as of the date of the special resolution. He explained that a possible argument could be made that this had implications for the court's jurisdiction to make an order under s. 85 of the 2014 Act confirming the special resolution. However, counsel submitted that while such an argument could be made, there were very good answers to it and the argument would be clearly unsustainable. Counsel sought to demolish the

possible argument on jurisdiction by reference to the terms of s. 85(1) and case law from other common law jurisdictions.

12. Counsel contended that there was no jurisdictional bar to the court making the order sought by the Company in this case, notwithstanding that the amount of the capital had increased since the date of the special resolution. In my *ex tempore* judgment delivered followed the hearing, I agreed with the Company's submissions and ruled that there was no jurisdictional bar to the court making the orders sought. I set out below my reasons for so concluding.

13. The main argument which might be raised to contest the jurisdiction of the court to confirm a special resolution authorising a reduction in capital when the amount of the relevant capital has increased since the date of the resolution would be based on a judgment of Harman J. in the Chancery Division of the High Court of England and Wales in *Re Transfesa Terminals Limited* (1987) 3 B.C.C. 647 ("*Transfesa*"). In that case, Harman J. refused to confirm a reduction of share capital under s. 135(1) of the English Companies Act, 1985 (the "English 1985 Act"). The reason given for refusing to confirm the reduction sought was that a reduction resolution had to relate to share capital which the company had at the time of the resolution. That reasoning was based on Harman J.'s interpretation of s. 135(1) of the English 1985 Act.

14. Section 135(1) provided:-

> *"Subject to confirmation by the court, a company limited by shares or a company limited by guarantee and having a share capital may, if so authorised by its articles, by special resolution reduce its share capital in any way."*

15. Harman J. treated the words *"and having a share capital"* as qualifying *"a company limited by shares"* and not just *"a company limited by guarantee"*. As a result of that

treatment, Harman J. held that the reduction of the share capital *"must be of the share capital which the company has, and that must be which it has at the date of the resolution"*.

16. Counsel for the Company submitted that if *Transfesa* were correct, it might create a jurisdictional bar to the court confirming the special resolution in the present case in circumstances where the amount of the capital the subject of the proposed reduction had increased in the period between the date of the special resolution and the date of the hearing of the confirmation application. However, he submitted that the terms of s. 84(1) of the 2014 Act are very different to the terms of s. 135(1) of the English 1985 Act and would not support a similar conclusion to that reached by Harman J. in *Transfesa*. However, counsel also submitted that Harman J.'s interpretation of s. 135(1) was dissented from in a subsequent decision and, in any event, was inconsistent with a number of earlier authorities.

17. In *Re TIP-Europe Limited* [1988] BCLC 231 ("*TIP*"), Peter Gibson J. in the Chancery Division of the High Court of England and Wales disagreed with Harman J. as to the interpretation of s. 135(1). He disagreed that the words *"and having a share capital"* in that subsection qualified the words *"a company limited by shares"* and disagreed with Harman J.'s conclusion based on his incorrect interpretation of the subsection. Peter Gibson J. stated that s. 135(1) did allow a company limited by shares *"validly to pass resolutions affecting the share capital as it will be when increased or reduced, and the court can confirm a reduction the subject of such a resolution provided that the contingency to which the resolution for reduction is made subject, has occurred by the time the court confirms the reduction"* (at 237).

18. The conclusion reached by Peter Gibson J. in *TIP* was consistent with two earlier cases to which he referred in his judgment. The first was *Re Castiglione, Erskine & Co. Limited* [1958] 1 WLR 688 ("*Castiglione*") and the second was a judgment of Street C.J. in the Australian case of *Re Castlereagh Securities Limited* [1973] 1 N.S.W.L.R. 624

("*Castlereagh*"). While the wording of the New South Wales statute was different to that of s. 135(1) of the English 1985 Act and did not include the words *"a company limited by shares or a company limited by guarantee and having a share capital"*, Street C.J. did not advert to that difference between the statutory provisions in reaching his decision although he did refer to the *Castiglione* case. It was argued in *Castlereagh* that the cancellation the subject of the reduction application had to be in respect of the paid up capital as at the date of the resolution. That submission was rejected by Street C.J. He stated:-

> *"I am prepared for present purposes to assent to the proposition that a reduction purporting to be of fully paid shares might well not be valid if it operated in respect of capital not paid up as at the date of confirmation and lodging of the order but only to be paid up thereafter…"*

19. However, Street C.J. continued:-

> *"I do not read sec. 64* [of the Companies Act 1961 (New South Wales) which was the equivalent of s. 135 of the English 1985 Act] *as denying to a company freedom to pass a special resolution for reduction with a condition such as is here introduced, namely a condition which will in fact be fulfilled before the court's confirmation is granted. The reduction which is involved is, by the time the matter comes to confirmation by the court, a reduction of paid up capital, and I see no justification, either inherent in the text, or in the general policy of law in administering a provision of this nature, which should deny to a company freedom to implement a reduction along such lines as is presently proposed in the case of* [Company C]*."* (at 629-630)

20. Peter Gibson J. in *TIP* described the decision in *Castlereagh* as being one of *"sound common sense"* (at 236). While the particular issue before the court in *TIP* was different to the issue which arises in the present case, the decision reached by Peter Gibson J. is of assistance. The resolutions which were at issue in *TIP* provided for the authorised share

capital first to be increased and shares allotted following that increase. A second resolution (passed at the same time) then provided that subject to the allotment of the new shares at a premium, the share premium account was then to be reduced. The share capital at the time of the application to confirm the reduction resolution was, therefore, different to what it was at the date that resolution was passed. However, Peter Gibson J. held that that did not create a jurisdictional bar to the court confirming the reduction resolution. He stated:-

> *"Unless compelled by the language of the statute I would be reluctant to require companies to adopt what would often be the inconvenient course of separate resolutions at different times so as to delay the resolution for reduction until after an increase in capital has taken place. I cannot see why Parliament would have wished to limit resolutions for the reduction of capital to those which affected share capital as at the time of the resolution."* (at 236)

21. Peter Gibson J. did, however, go on to state that:-

> *"Of course it is conceivable that there could be a significant delay between the passing of the resolution and the event conditional on which the resolution is to take effect and that material events could occur in that time, but the court in the exercise of its discretion when it looks at the matter afresh at the time of confirmation could in such circumstances refuse to confirm the reduction and could insist on the matter being the subject of a further resolution by the company."* (at 236)

22. Peter Gibson J. then proceeded to refer to and to disagree with the interpretation of s. 135(1) of the English 1985 Act given by Harman J. in *Transfesa* and concluded that the section allowed a company limited by shares validly to pass resolutions affecting the share capital as it would be when increased or reduced and that the court could confirm a reduction the subject of such a resolution provided that the contingency to which the reduction resolution was made subject had occurred by the time of the application to the court to

confirm the reduction resolution. He held, therefore, that the court had jurisdiction to and should confirm the resolution approving the reduction.

23. The upshot of all of this is that although the decision in *Transfesa* might have suggested that there was a jurisdictional issue to a court confirming a resolution approving a reduction of share capital where the company did not have the share capital at the date of the resolution, the reasoning contained in that decision was very shortly afterwards dissented from in *TIP*. The approach adopted in *TIP* is consistent with earlier authority, including the judgments in *Castiglione* and *Castlereagh*.

24. Significantly, however, s. 84(1) of the 2014 Act is in different terms to s. 135(1) of the English 1985 Act. The relevant part of s. 84(1) states that:-

> *"..., a company may, subject to the provisions of this section and sections 85 to 87, reduce its company capital in any way it thinks expedient..."*

Section 84(1) does not contain the words which were found in s. 135(1) of the English 1985 Act and which gave rise to the interpretation adopted by Harman J. in *Transfesa*: *"a company limited by shares or a company limited by guarantee and having a share capital..."*. Since those words are not contained in s. 84(1), the problem which briefly emerged following *Transfesa*, does not arise in respect of an application made under s. 84(1) of the 2014 Act in this jurisdiction.

25. However, I agree with the approach taken by Peter Gibson J. in *TIP* that unless the words of the section compelled a conclusion to the contrary, it is difficult to see why, in an Irish context, the Oireachtas would have wished to limit resolutions for the reduction of capital to those which affected the share capital as at the date of the resolution. Such a construction is not compelled by the words of s. 84(1) of the 2014 Act. Nor am I otherwise compelled to adopt that construction.

26. Reading s. 84(1) with s. 85(1), which provides for a company to apply to the court for an order confirming the resolution, it seems to me that there is nothing in those provisions which imposes a jurisdictional bar on the court confirming a resolution approving a reduction of company capital where the capital in question has altered between the date of the resolution and the date on which the court is asked to confirm the reduction. The relevant point in time is the latter date. In my view, there is no jurisdictional bar on the court confirming a resolution approving a capital reduction where the relevant capital has increased between the date of the resolution and the date on which the court is asked to confirm that resolution, which is what happened in the present case.

27. I do accept, however, that there may be circumstances in which there is a significant delay between the passing of the resolution and the date of the confirmation application and that material events may have occurred in the intervening period such that the court could exercise its discretion at the time of the confirmation application to refuse to confirm the resolution and to require that the reduction be dealt with by means of a further resolution. That would be a matter for the discretion of the court depending on the particular circumstances.

28. There was no suggestion in the present case that, apart from the increase in the amount standing to the credit of the Company's share premium account during the period between the resolution and confirmation application, any other material event occurred which might require the court to exercise its discretion to refuse to confirm the resolution. Nor has there been any significant delay between the date of the special resolution which was passed on 30th July, 2020 and the hearing of the application to confirm the resolution. There would be no reason, therefore, for the court to exercise its discretion to refuse to confirm the resolution and, instead, to require that a further resolution be adopted.

29. In conclusion, therefore, in my *ex tempore* judgment, I agreed that the fact that the amount standing to the credit of the Company's share premium account had increased to the extent previously described between the date of the resolution and the date of the hearing of the confirmation application did not amount to a jurisdictional bar on the court considering the application. Nor did it provide any basis on which the court should exercise its discretion to decline to deal with the application. For those reasons, I concluded that it was appropriate to proceed to consider the substance of the Company's application.

Relevant Statutory Provisions and Test to be applied

30. No particular issue arose in relation to the Company's compliance with the applicable statutory provisions and with the well-established test to be applied by the court in determining whether to confirm a resolution approving a reduction of a Company's capital.

31. The relevant statutory provisions and the test to be applied were outlined in some detail by me in *In Re Hibernia REIT plc* [2020] IEHC 144 ("*Hibernia*"). The factors to be taken into account by the court were considered (under the pre-2014 Act regime) by the High Court (Barrett J.) in *Re Permanent TSB Group Holdings plc* [2015] IEHC 500 and by the Court of Appeal on appeal in the same case [2020] IECA 1 ("*Permanent TSB*"). In making the orders sought by the Company, I was satisfied that the statutory provisions had been complied with by the Company as were the various requirements which the courts have stated must be complied with before an order can be made confirming a capital reduction.

32. In summary, I reached the following conclusions, which I set out in my *ex tempore* judgment at the conclusion of the hearing.

33. First, I was satisfied that the Company had complied with the directions which I made on 9th November, 2020 when entering the proceedings in the Commercial List and fixing the hearing date for the confirmation application. Evidence of that compliance was provided in a supplemental affidavit sworn by Ms. Doody on 26th November, 2020.

34. Second, I was satisfied that the requirements contained in s. 85(2) of the 2014 Act were complied with. The Company did cause notice of its intention to make the application for an order confirming the resolution to be advertised in the Irish Times on 27th October, 2020 as required by s. 85(2)(a). The required notifications were sent by email to the Company's non-resident creditors on 27th and 28th October, 2020 as required by s. 85(2)(b). The advertisement and the notifications made (which were exhibited by Ms. Doody at exhibits "AD7" and "AD8" to her grounding affidavit) complied with the substantive requirements contained in s. 85(2). Further, in the event that the claimants in certain US litigation involving the Company and other Group Companies were considered to be contingent creditors, notices were sent to counsel acting for the claimants in the US proceedings in which the Company is a defendant. Notices were also sent to holders of certain notes guaranteed by the Company on the basis that they might also be considered to be contingent creditors of the Company. For reasons explained by Ms. Doody, the holders of those notes were notified by means of a notice sent to the Depositary Trust Company ("DTC") as trustee in respect of the notes. Notices were also sent to lenders under a credit agreement described by Ms. Doody in her grounding affidavit. I was satisfied that the requirements of s. 85(2) were fully complied with by the Company.

35. Third, I was also satisfied that the provisions of s. 85(4) of the 2014 did not apply. The proposed reduction does not involve either (1) the diminution of liability in respect of unpaid company capital or (2) the payment to any shareholder of any paid up company capital. Nor did I regard this as otherwise being an appropriate case (or *"other case"*) to which the provisions of s. 85(4) should be applied. Nonetheless, I accepted the submission made on behalf of the Company that the court should adopt a cautious approach in considering the position of creditors. I was, however, satisfied on the evidence that no creditor of the Company could *"credibly demonstrate"* that the proposed reduction in capital

would be likely to prejudice the position of that creditor. Since that is a precondition to a creditor's entitlement to object to the reduction under s. 85(4)(a), no creditor was entitled to object to the reduction. As a matter of fact, no creditor did object to the reduction. The requirement under s. 85(4)(b) for the court to settle a list of creditors and the other provisions of that sub-section did not, therefore, apply.

36. Fourth, I was satisfied that the Company had demonstrated compliance with each of the requirements of the test set out by Barrett J. in *Permanent TSB*. My reasons for so concluding are briefly stated below.

(1) Section 84(1)/the Company's Articles of Association

37. Under s. 84(1) of the 2014 Act, unless the constitution of the relevant company otherwise provides, a company may reduce its capital. The constitution of the Company here does not prevent the Company from reducing its capital. On the contrary, Article 66.2 of the Articles expressly permits the Company to reduce its share capital and any capital redemption reserve fund, share premium account or undenominated capital.

(2) The Company must have duly resolved by special resolution to reduce its share capital

38. The Company did resolve by special resolution to reduce its share capital by the cancellation of the entire amount standing to the credit of its share premium account, subject to the confirmation of that resolution by the court. The special resolution was comfortably passed on 30th July, 2020. A copy of the special resolution was exhibited at exhibit "AD2" to Ms. Doody's grounding affidavit.

(3) The reduction proposals must have been properly explained to the shareholders so that they could exercise an informed judgment

39. The notice of the AGM furnished to shareholders prior to the AGM which was exhibited at exhibit "AD3" to Ms. Doody's grounding affidavit clearly set out the nature of

the special resolution and the reasons for it. I was satisfied that the capital resolution proposals were properly explained to the shareholders in that notice and that they could, therefore, exercise an informed judgment in relation to the proposals.

(4) The reduction of share capital must be for a discernible purpose

40. The purpose of the capital reduction was clearly outlined in the notice of the AGM and in Ms. Doody's grounding affidavit. I have referred earlier to the reasons for the reduction. It is not for the court to second guess the commercial wisdom of the proposed reduction. However, I was satisfied that the Company had demonstrated a *"discernible and bona fide purpose"* for the proposed reduction, to adopt the term used by Collins J. in the Court of Appeal in *Permanent TSB*.

(5) All shareholders must be treated equitably

41. There was no issue in relation to the treatment of shareholders. I was satisfied on the evidence that all of the Company's shareholders were treated equitably in relation to the proposed capital reduction.

(6) The creditors of the Company must be safeguarded

42. This is the final factor or requirement which must be considered by the court. I touched on this earlier when considering s. 85(4) of the 2014 Act.

43. A great deal of financial information was put before the court by the Company. In addition to preparing consolidated group accounts in accordance with US generally accepted accounting principles ("USGAAP") for filing with the United States Securities in Exchange Commission, the Company also prepares the following accounts in order to comply with the requirements of the 2014 Act: consolidated audited financial statements in accordance with Irish law and International Financial Reporting Standards, including an individual unconsolidated balance sheet and notes (the "Irish Financial Statements").

44. The most recent Irish Financial Statements in respect of the Company were for the year ended 31st December, 2019 (the "2019 Financial Statements"). They disclosed that as at 31st December, 2019, on a consolidated basis, the Group had total revenues of in excess of US$2.1 billion, with total assets of more than US$5.8 billion and total liabilities of just over US$2.8 billion. On a non-consolidated basis, the Company had total assets of more than US$3 billion and total liabilities of US$617 million.

45. On 2nd November, 2020, the Group released unaudited consolidated financial results prepared in accordance with USGAAP for the nine-month period ended 30th September, 2020. During that period, the Group had total revenues of almost US$1.7 billion with total assets of more than US$6.2 billion and total liabilities of approximately US$2.9 billion.

46. Ms. Doody exhibited a *pro forma* balance sheet at exhibit "AD6" to her grounding affidavit. That showed that as at 30th June, 2020, the Company had on a non-consolidated, standalone and unaudited basis total assets of just under US$2.9 billion and total liabilities of just over US$610 million. Ms. Doody explained that (in her supplemental affidavit) the vast majority (just under US$600 million) of those liabilities is attributable to sums owed to Group undertakings, as was the case at 31st December, 2019, as noted in the 2019 Financial Statements. It is evident that the Company is in a very robustly solvent and solvent financial position.

47. It is notable that notwithstanding the advertisement of the Company's application and of the confirmation hearing, and notwithstanding the notification to creditors (discussed earlier), no creditor objected to the Company's application.

48. I was satisfied on the evidence that the position of creditors was not in any way adversely affected by the capital reduction the subject of the Company's application. As I explained earlier, I was also satisfied that, on the basis of the financial evidence put before the court, I concluded that no creditor could *"credibly demonstrate"* that the proposed capital

reduction would be likely adversely to affect its position. In considering the potential effect of the capital reduction on the position of creditors, I had regard to the approach discussed by Norris J. in the Chancery Division of the High Court of England and Wales in *Re Liberty International plc* [2010] 2 BCLC 665 ("*Liberty*"). I considered the judgment in *Liberty* at paras. 94 to 95 of my judgment in *Hibernia*. I also considered it when reaching my conclusion on the hearing of the Company's application in the present case that the position of creditors would not in any way be adversely affected by the capital reduction the subject of the Company's application.

49. While, as pointed out in *Hibernia*, the statutory test discussed by Norris J. in *Liberty* is expressed in slightly different terms to that contained in s. 85(4), ultimately, both statutory provisions derive from Directive 2006/68/EC of the European Parliament and of the Council. For that reason, in *Hibernia*, I felt that it was of assistance to see how the Courts of England and Wales interpreted and applied the test in the legislation applicable in that jurisdiction. I felt that it was appropriate to consider the test applied there in assessing whether creditors might be adversely affected by the capital reduction the subject of the Company's application. I was satisfied that the evidence clearly demonstrated that creditors would not be adversely affected.

Conclusion

50. In conclusion, I was satisfied that the court had jurisdiction to deal with the Company's application for confirmation of the special resolution approving the capital reduction, notwithstanding that the amount standing to the credit of the Company's share premium account had increased in the period between the date of the special resolution and the date of the hearing of the confirmation application. I was also satisfied that there was no reason why the court should exercise its discretion to decline to deal with the application and to require that another special resolution be passed.

51. Having reached those conclusions, I proceeded to consider the relevant statutory provisions. I was satisfied on the evidence that the Company had complied with the requirements contained in s. 85(2) of the 2014 Act. I was also satisfied on the evidence that the provisions of s. 85(4) did not apply and that there was no reason for the court to settle a list of creditors. Finally, I was satisfied on the evidence that the various factors or requirements to be considered by the court and to be complied with by the Company as set out in the well-established case law of the Irish courts were all fully addressed and complied with in the affidavit evidence relied on by the Company.

52. For all of those reasons, I gave an *ex tempore* judgment at the conclusion of the hearing of the Company's application to confirm the special resolution reducing the Company's capital. I acceded to the application and made orders under s. 85(1) of the 2014 Act and the various ancillary orders sought by the Company.