[2020] IEHC 144

THE HIGH COURT
COMMERCIAL

[2019 No. 356 COS.]

[2019 No. 137 COM.]

IN THE MATTER OF HIBERNIA REIT PUBLIC LIMITED COMPANY

AND

IN THE MATTER OF THE COMPANIES ACT, 2014

AND

IN THE MATTER OF A PROPOSED REDUCTION OF CAPITAL PURSUANT TO SECTIONS 84 AND 85 OF THE COMPANIES ACT, 2014

JUDGMENT of Mr. Justice David Barniville delivered on the 25th day of March, 2020

Introduction

1. This is my judgment on an application by Hibernia REIT Public Limited Company (the "Company") for orders under part 3, chapter 4 of the Companies Act, 2014 (as amended) (the "2014 Act") confirming a special resolution approving a reduction of the Company's capital and for various ancillary orders.

2. As I explain below, the Company's application was opposed by Richard Farrington who claims to be a creditor of the Company. Mr. Farrington sought to oppose the Company's application on various grounds. Among the grounds relied upon by Mr. Farrington were that the Company was indebted to him in the sum of in excess of €2 billion (on foot of an invoice sent by Mr. Farrington to the Company in late January, 2020) and that the Company's accounts were prepared on an unlawful and improper basis, such that they could not properly be relied upon by the court in determining the Company's application. Various other grounds of opposition were put forward by Mr. Farrington (with the support of Cormac Butler, a person put forward on his behalf as an expert). The grounds of opposition put forward by Mr. Farrington (some of which were supported by Mr. Butler) were strongly resisted by the Company in affidavit evidence before the court and in written and oral submissions.

Structure of Judgment

3. I will in the course of this judgment attempt to summarise the evidence before the court which is relevant to the Company's application. I stress the word "relevant", as much of the material and purported evidence on which Mr. Farrington sought to rely was not evidence in any meaningful sense of the term and was entirely irrelevant to the court's consideration of the Company's application. I will then outline the statutory provisions relevant to the Company's application and to some of the cases relevant to the interpretation and application of those statutory provisions. Having done so, I will consider the grounds of objection sought to be relied upon by Mr. Farrington in the context of my consideration of the application of the relevant statutory provisions. I will then set out my conclusions.

4. It will also be necessary for me, in the course of this judgment, to make certain observations about the purported expert evidence relied upon by Mr. Farrington as, in my view, the expertise of Mr. Butler, in the particular area relevant to this application, was not established. Nor did he make any attempt to demonstrate to the court that he

understood the particular duties and obligations of an expert. Furthermore, Mr. Butler went far beyond what is appropriate for an expert and, in truth, became an advocate for Mr. Farrington. In so acting, Mr. Butler made a number of entirely improper and inappropriate assertions without any justification and which were unsupported by any evidence.

Summary of Conclusions and Decision

5. For the reasons set out in detail in this judgment, I have concluded that the Company has complied with the statutory requirements which must be met in order for the court to confirm a reduction of capital and to make the ancillary orders sought. I have concluded that there is no basis whatsoever for any of the grounds of objection raised by Mr. Farrington. I am not satisfied that Mr. Farrington is a creditor of the Company. Even if, contrary to that conclusion, Mr. Farringdon is a creditor, he has not established an entitlement to object to the Company's application under the applicable statutory provisions. Furthermore, I have concluded that there is no basis whatsoever for any of the other grounds of objection sought to be raised by Mr. Farrington (with the support of Mr. Butler). Finally, insofar as Mr. Farrington requested the court to make a reference to the Court of Justice of the European Union (CJEU), pursuant to Article 267 TFEU, I have concluded that there is no issue of EU law on which the court requires assistance or guidance from the CJEU under the preliminary reference procedure. I have, therefore, declined to make a reference to the CJEU as requested by Mr. Farrington.

6. In conclusion, therefore, I will make the orders sought by the Company.

The Company's Application

7. By an originating notice of motion, issued on 25th September, 2019, the Company sought various orders under ss. 85 and 86 of the 2014 Act. The principal relief sought by the Company was an order pursuant to s. 85(1) of the 2014 Act confirming a special resolution approving the reduction of the Company's capital by reducing the share premium account by €600,000,000 or by such lesser amount as the court might determine, such that the reserve resulting from the reduction of capital could be treated as profits available for distribution within the meaning of s. 117 of the 2014 Act. The Company also sought an order pursuant to s. 85(5) of the 2014 Act that s. 85(4) should not apply as regards any of the classes of creditors of the Company (or should not apply in respect of such class or classes of creditors of the Company as the court might determine). Ancillary orders were also sought under s. 86 of the 2014 Act.

8. The Company's application was grounded on an affidavit sworn by Thomas Edwards-Moss on 25th September, 2019. Mr. Edwards-Moss swore four further affidavits in support of the Company's application. On the same date as the originating notice of motion was issued, a motion was issued on behalf of the Company seeking to have the proceedings entered in the Commercial List. On 14th October, 2019, the High Court (Haughton J.) made an order that the proceedings be entered in the Commercial List. The court listed the Company's reduction of capital application for hearing on 5th November, 2019 and made a number of further directions in respect of the hearing. In addition, the court was satisfied that the provisions of s. 85(2) of the 2014 (as amended) had been complied with

by the Company. Those provisions are designed to ensure that creditors are informed of a company's proposal or intention to apply to the court for an order confirming a resolution authorising a reduction of the relevant company's capital. The court was satisfied that creditors of the Company were duly notified in accordance with the provisions of section 85(2). No issue arises in relation to the Company's compliance with section 85(2). Mr. Farrington has not suggested that the relevant requirements were not complied with. In any event, in my view, Haughton J. correctly concluded, on the evidence, that the requirements of s. 85(2) had been complied with by the Company. Among the directions made by the court on 14th October, 2019 were that any person intending to appear in the proceedings had to give notice in writing of his or her intention to the Company's solicitors by close of business on 1st November, 2019 and, if such person wished to rely on affidavit evidence, such affidavit evidence had to be provided by the same time. Before coming to what occurred on 5th November, 2019, and on subsequent dates on which the Company's application was before the court, it is necessary to say something about the evidence relied upon by the Company.

The Evidence and Procedural Developments

9. The basis for the Company's application was outlined in Mr. Edwards-Moss's first affidavit. The Company sought an order from the court confirming a reduction of the amount standing to the credit of the Company's share premium account by €600,000,000 and stated that it was intended that the reserves resulting from the proposed capital reduction would be treated as realised profits which would be available for distribution pursuant to s. 117 of the 2014 Act.

10. The Company was incorporated on 13th August, 2013 as a private company limited by shares, under the name Hibernia REIT Limited. It was re-registered as a public limited company on 8th November, 2013. The Company was established as a "Real Estate Investment Trust" (REIT) and its principal activity is investment in, and development of, real estate in Ireland (mainly in Dublin) for rental income. It also acts as the holding company of a group of related companies.

11. The Company has an authorised share capital of €100,000,000 divided into 1 billion ordinary shares of €0.10 each of which 689,450,277 ordinary shares are in issue. The Company's ordinary shares are admitted to trading on various markets including Euronext Dublin, the regulated market operated by Euronext Dublin, and on the Main Market, being the regulated market operated by London Stock Exchange plc. The Company was admitted to those markets in December, 2013 following an initial public offering of its shares. The Company has 16 subsidiaries. It is a leading Irish listed property investment company. As a REIT, the Company is required to comply with certain ongoing statutory requirements under the Taxes Consolidation Act, 1997 in order to maintain its REIT status.

12. Mr. Edwards-Moss exhibited a copy of the audited financial statements and annual report of the Company and the group of which it forms part (the "Group"), for the financial year to 31st March, 2019 (the "2019 Annual Accounts"). He explained that the Company had been advised that the 2019 Annual Accounts were prepared "*in accordance with IFRS as*

adopted by the European Union and the 2014 Act" (para. 15 of his first affidavit). I specifically note this here as Mr. Farrington repeatedly contended on affidavit, in his written submissions and in his oral submissions that the Company had not prepared its accounts in accordance with the relevant International Financial Reporting Standards (IFRS) "*as adopted by the European Union*". He was mistaken in that regard.

13. The 2019 Annual Accounts themselves (exhibited at Exhibit "TEM6") contain numerous references to the standards by which its financial statements were prepared. A few examples will suffice. In the "*Directors responsibility statement",* the directors stated (at p. 119 of the 2019 Annual Accounts):-

> *"Irish Company law requires the Directors to prepare financial statements for each financial period. Under that law, the Directors are required to prepare the Group financial statements in accordance with International Financial Reporting Standards, as adopted by the EU (IFRSs) and have elected to prepare the Company financial statements in accordance with IFRSs and Article 4 of IAS Regulations.*
>
> *Under Company law, the Directors must not approve the financial statements unless they are satisfied that they give a true and fair view of the assets, liabilities and financial position of the Group and Company as at the financial year end date and of the profit or loss of the Company for the financial year and otherwise comply with the Companies Act 2014."*

14. The directors further confirmed (on the same page) that, to the best of their knowledge and belief:-

> " *The Annual Report and consolidated financial statements, prepared in accordance with IFRSs as adopted by the European Union, give a true and fair view of the assets, liabilities, financial position for the Group and Company as at 31 March 2019 and of the result for the financial year then ended for the Group and Company…"*

15. In their "Report on the Audit of the Financial Statements", the independent auditors, Deloitte Ireland LLP ("Deloitte Ireland"), expressly confirmed that, in their opinion, the financial statements of the Group and of the Company:-

> "• *give a true and fair view of the assets, liabilities and financial position of the Group and Company as at 31 March 2019 and of the profit of the Group for the financial year then ended; and*
>
> • *have been properly prepared in accordance with the relevant financial reporting framework and, in particular, with the requirements of the Companies Act, 2014 and as regards the Group financial statements, Article 4 of the IAS Regulation."*

16. They further stated that:-

> *"The relevant financial reporting framework that has been applied in the preparation of the Group and Company financial statements is the Companies Act, 2014 and International Financial Reporting Standards (IFRS) as adopted by the European Union ('the relevant financial reporting framework')."*
>
> (p. 120 of the 2019 Annual Accounts)

17. Later, the "*Notes to the consolidated financial statements*" describe the basis of the preparation of the financial statements. Note 2a states:-

> *"The consolidated financial statements of Hibernia REIT plc have been prepared in accordance with International Financial Reporting Standards (IFRS) as adopted by the EU and the Companies Act 2014. IFRS as adopted by the EU differ in certain respects from IFRS as issued by the International Accounting Standards Board (IASB). The Group financial statements therefore comply with Article 4 of the EU IAS Regulation. The consolidated financial statements have been prepared on the historical cost basis, except for the revaluation of investment properties, owner occupied buildings and derivative financial instruments that are measured at fair value at the end of each reporting period. Historical cost is generally based on the fair value of the consideration given in exchange for goods and services. The Group has not early adopted any forthcoming IASB standards (note 3)."*
>
> (p.131 of the 2019 Annual Accounts)

18. Note 3 concerns the application of new and revised IFRSs, and refers to some standards and interpretations which were effective for the Group from 1st April, 2018. However, the note states that they "*did not have a material impact on the results or financial position of the Group"*. Note 3 specifically refers to IFRS 9 Financial Instruments (which replaced IAS 39) and IAS 40 (amendment) Investment Property. These particular standards are expressly referred to and discussed in note 3, but the point is made that they did not have a "*material impact*" on the results or the financial position of the Group.

19. Mr. Edwards-Moss explained in his first affidavit how the Company's share premium arose through a series of transactions and events in the period following its incorporation. There was no dispute in relation to the creation of the share premium account and it is, therefore, unnecessary to outline in any detail the circumstances in which it arose. As of the date of his first affidavit, the sum of €630,276,449 stood to the credit of the Company's share premium account. Under s. 71(5) of the 2014 Act, that share premium had to be credited to and form part of the Company's undenominated capital and, for that purpose, transfer to the Company's share premium account. It is an undistributable reserve of the Company.

20. Mr. Edwards-Moss further explained in his first affidavit that the Company's Constitution permits the Company to reduce its share capital. This is provided for in Article 46 of the articles of association of the Company (which he exhibited at "TEM 2"). He also confirmed that, even on the basis of the capital reduction initially sought, the Company's capital

would at all stages exceed the authorised minimum for the purpose of s. 1084 of the 2014 Act.

21. On 31st July, 2019, the Company's shareholders passed a special resolution at its 2019 Annual General Meeting (the "AGM") in the following terms:-

> *"That, subject to and with confirmation from the High Court in accordance with sections 84 and 85 of the Companies Act 2014, the company capital of the Company be reduced in the following manner:-*
>
> *(a) Subject to (b) below, up to €600,000,000 of the amount standing to the credit of the share premium account of the Company immediately preceding the passing of this resolution or such lesser amount as the High Court may determine, be cancelled and extinguished such that the reserve resulting from such cancellation be treated as profits available for distribution as defined by section 117 of the Companies Act 2014; and*
>
> *(b) The Directors of the Company (or any duly authorised committee thereof) be and they are hereby authorised to determine, on behalf of the Company, to proceed to seek confirmation from the High Court to a reduction of up to €600,000,000 of the share premium account or such lesser amount or number as the Directors of the Company (or any duly authorised committee thereof) may approve in their absolute discretion, or to determine not to proceed to seek confirmation of the High Court at all in pursuance of paragraph (a) above."*

As matters transpired, for reasons explained below, the reduction of capital for which the Company now seeks confirmation from the court is a reduction in the Company's share premium account of €50,000,000, such that the balance remaining credited to that account will be €580,276,449.

22. That resolution was passed unanimously by the shareholders at the AGM and was subsequently filed in the Companies Registration Office on 30th August, 2019. Notice of the AGM, together with a circular, had been sent by ordinary prepaid post to the shareholders of the Company on 28th June, 2019 and was published on the Company's website. That documentation included a letter from the Chairman of the Company setting out the nature of, and the reasons for, the resolution.

23. Following the resolution at the AGM, a committee of the Board of Directors met to consider the resolution and determined to seek confirmation of a reduction in the Company's share premium account in the amount initially sought, such that the balance remaining credit to that account would be €30,276,449. Mr. Edwards-Moss explained in his first affidavit that in the event that the then proposed capital reduction was approved by the court, it would result in a realised profit of the Company, as contemplated by s. 117 of the 2014 Act, and a corresponding increase in the distributable reserves of the Company. He explained that that increase would give flexibility to the Company and put it in a better position to consider making further distributions or other returns of capital to

shareholders or to redeem or repurchase shares or otherwise to deploy distributable reserves, as and when determined appropriate by the Board. He further explained that the proposed capital reduction would have no impact on the number of shares held by the shareholders, or on their proportionate interests in the issued share capital of the Company. Nor would there be any change in the number of shares in issue. He also explained that the Board was satisfied that the proposed reduction would not have any impact on the working capital or other funding requirements of the Company or of the Group.

24. Mr. Edwards-Moss set out in some detail the financial position of the Company at section G of his first affidavit. He again explained (at para. 46) that he had been advised that the financial statements, contained in the 2019 Annual Accounts, had been prepared in accordance with IFRSs "*as adopted by the European Union and the 2014 Act*" and that they showed that, on a consolidated basis, the Group had positive net assets of €1,218,538,539 as at 31st March, 2019. He exhibited an unaudited single entity *pro forma* balance sheet for the Company (derived from the 2019 Annual Accounts) which was prepared as at 31st August, 2019 and set out the financial position of the Company as of that date, as well as the prospective financial position of the Company in the event that the reduction of capital sought was approved by the court. This *pro forma* balance sheet was subsequently replaced by an updated document showing the prospective financial position of the Company in the event that the court approved the reduction of capital in the lesser amount now sought. Even with the reduction of capital initially sought, Mr. Edwards-Moss stated (and I accept) that the proposed capital reduction would not adversely affect, in any manner, the discharge by the Company of its liabilities. I will return to this issue when considering the updated *pro forma* balance sheet prepared to reflect the reduction of capital in the lesser amount for which confirmation is now sought. It is also relevant to note at this stage that Mr. Edwards-Moss explained that the Company's lenders had been informed about the proposed capital reduction (and furnished with a copy of the AGM documents) and had raised no objection to the reduction. He confirmed that the proposed reduction did not conflict with or breach any term of the banking or other debt facilities of the Company.

25. As regards the impact of the proposed capital reduction (in the amount initially sought) on the Company's creditors, Mr. Edwards-Moss explained that the Company had made sufficient provisions and put in place suitable safeguards for the Company's creditors. He explained the arrangements made for the provision of notice to the Company's creditors of the passing of the capital reduction resolution at the AGM for the purposes of s. 85(2) of the 2014 Act. This was addressed at paras. 58 to 60 in his affidavit. As noted earlier, Haughton J. was satisfied that the provisions of s. 85(2) of the 2014 Act were duly complied with by means of the advertisements exhibited at Exhibit "TEM11" to Mr. Edwards-Moss's first affidavit and so noted in the Order of 14th October, 2019. While no issue was taken by Mr. Farrington in relation to compliance with that provision, for completeness, I should state that I have considered this issue again and am satisfied that the Company did comply with the provisions of s. 85(2), both in relation to the advertisements placed in the relevant publications and in relation to the notification to

creditors (all of which were described at paras. 58 to 60 of Mr. Edwards-Moss's first affidavit). I confirm, therefore, that the Company duly complied with the provisions of section 85(2).

26. In its order of 14th October, 2019, entering the proceedings in the Commercial List, the court fixed the hearing of the Company's application for 5th November, 2019 and gave further directions concerning persons who wished to appear at the hearing of the Company's application on that date.

27. In advance of the hearing date of 5th November, 2019, Haughton J. was informed that the Company would be making an application to adjourn its capital reduction application on 5th November, 2019. By that stage, Mr. Farrington had been in contact with the Company's solicitors and had communicated his intention to request the court to strike out or stay the Company's application until certain other proceedings which he had brought (albeit not at that stage against the Company) were determined. Mr. Farrington also took issue with the notification he had received about the call over of the case on 1st November, 2019. I have read the relevant email exchanges between Mr. Farrington and the Company's solicitors and am satisfied that nothing improper or untoward occurred and that no prejudice was caused to Mr. Farrington by reason of his absence from the call over on 1st November, 2019.

28. In advance of the initial hearing date of 5th November, 2019, Mr. Edwards-Moss swore his second affidavit on 4th November, 2019. In that affidavit, he explained the basis for the Company's adjournment application. In the period between 14th October, 2019 and the hearing date of 5th November, 2019, the Company became aware of the contents of the Finance Bill (no. 82 of 2019 (the "Finance Bill")). The Finance Bill contained provisions affecting Irish REITs. The Company took the view that until the terms of the Bill were finalised, and the Finance Act 2019 (the"2019 Act") enacted, it could not be certain of the full effects of the changes on the Company and its shareholders and on the capital reduction application. In those circumstances, the Company sought an adjournment of the application so that it could examine the legislation when ultimately enacted. Mr. Edwards-Moss also referred to and exhibited to that affidavit the correspondence exchanged with Mr. Farrington to which I have just referred. He explained that the Company was of the view that Mr. Farrington had no claim against it and no *bona fide* interest in the proceedings as he is neither a shareholder in, nor a creditor of, the Company. Without prejudice to that contention, the Company had furnished Mr. Farrington with a copy of the papers in respect of the capital reduction application.

29. The Company's application was listed before me on 5th November, 2019. It was confirmed that, apart from Mr. Farrington, no other person had given an indication of an interest in or an intention to appear at the hearing of the Company's application. Mr. Farrington appeared in person on that date. An application for an adjournment was made on behalf of the Company for the reasons set out in Mr. Edwards-Moss's second affidavit. It was suggested that the proceedings be adjourned for mention to a date in late January, 2020, when the position in relation to the Finance Bill/the Finance Act would be clearer.

Various ancillary directions were also sought. Having heard from counsel on behalf of the Company and from Mr. Farrington (who did not oppose the adjournment application), I granted the adjournment and listed the Company's application for mention on 28th January, 2020. Having noted that the Company had agreed to publish an updated notice on its website, I directed that no further advertisement or notification of the adjournment of the Company's application was necessary. I further directed that in the event of any person, other than Mr. Farrington, intending to appear in the proceedings, notice of such intention had to be given to the Company's solicitor by 24th January, 2020 and that, in the event that Mr. Farrington or any other person intended to rely upon affidavit evidence in respect of the Company's application, that evidence had to be made available by the same date.

30. In compliance with the directions made on 5th November, 2019, Mr. Farrington swore an affidavit on 24th January, 2020 in response to the Company's capital reduction application. This was the first of two affidavits sworn by Mr. Farrington in respect of the Company's application. The affidavit was short and contained a number of exhibits. Mr. Farrington exhibited a copy of a motion which he had issued on 23rd January, 2020 in separate plenary proceedings which he had issued against a number of defendants, namely, Stephen Tennant, Grant Thornton, Ulster Bank DAC ("Ulster Bank") and Promontoria (Oyster) DAC (Record No. 2019 no.816 P) ("Mr. Farrington's proceedings"). The motion sought to join the Company and its solicitors as parties to Mr. Farrington's proceedings. It also sought to "adjoin" the Company's capital reduction application to Mr. Farrington's proceedings.

31. As well as exhibiting a copy of the motion (which had a return date of 24th February, 2020), Mr. Farrington also exhibited a copy of the affidavit he swore for the purpose of grounding that motion on 23rd January, 2020. That affidavit was difficult to follow but, as far as I could determine, it contained a number of allegations against various persons and entities. Much of the affidavit concerned allegations concerning a property in Limerick from which Mr. Farrington alleged items and documents had been unlawfully removed. The affidavit contained allegations and claims apparently being made by Mr. Farrington against Ulster Bank in the course of those proceedings. Ulster Bank and the other persons and entities referred to in that affidavit were not parties to the application before me and it would be unfair, in those circumstances, to outline in any detail the extent of the allegations and claims made by Mr. Farrington in that affidavit. In any event, those allegations appear to me to have nothing whatsoever to do with the Company.

32. Insofar as the Company is concerned, Mr. Farrington asserted (at para. 32) that he was "*previously registered as the owner of Block 1, Clanwilliam Court, Clanwilliam Place, Dublin 2, a property that (Hibernia Reit plc) claim they now own*". At para. 33, he stated that an invoice relating to that property had been provided to Ulster Bank and to the Company and that he had informed the Company, prior to its purchase of the property, that there was "*an investigation taking place*". At para. 39 of that affidavit, Mr. Farrington referred to the motion papers in respect of the Company's capital reduction application. In that paragraph, he stated that in the motion papers "*it is consistently stated that the*

company known as (Hibernia Reit plc) uses the economic measurement IFRS 'as adopted by the EU'". He then stated, at para. 40, that "*IFRS 'as adopted by the EU' is the correct Economic Measurement as set down by European law*". He continued, at para. 41, that Ulster Bank was "*using IFRS and not IFRS 'as adopted by the EU'"* and at para. 42 he stated that "*using IFRS was illegal*". He then stated (at para. 43) that "*the proceeds of this illegal practice*" by Ulster Bank (being its alleged failure to use the correct accounting standard) "*are being enjoyed*" by the Company whose solicitors are the same as those acting for Ulster Bank. Mr. Farrington went on to state (at para. 43) that he had "*cancelled*" certain contracts and facilities with Ulster Bank, including contracts referable to Block 1, Clanwilliam Court and the property in Limerick (although he did not explain what he meant by cancelling those contracts). Mr. Farrington concluded that affidavit by asserting breaches of various legal provisions, including the European Convention on Human Rights (the "ECHR").

33. That was the affidavit which Mr. Farrington exhibited to the affidavit which he swore in response to the Company's application. He also exhibited a copy of the invoice referred to in that affidavit. The invoice is dated 21st January, 2020 and was issued to the Company. In the subject line, it was stated that the invoice was "*for the return of capital and return on capital and damages relating to, Block 1, Clanwilliam Court, Clanwilliam Place, Dublin 2".* Under the heading "*Invoice Description",* it was stated:-

> *"In accordance with Hibernia Reit Public Limited Company Memorandum and (sic) association 3 (b) and 3 (p) to undertake all liabilities relating to Block 1, Clanwilliam Court, Clanwilliam Place, Dublin 2."*

The payment terms were stated to be "*Demand to pay in full within seven days"* and the due was stated to be 21st January, 2020 (being the date of the invoice). Under the heading *"Invoice Calculation from Initial Consideration 2005"*, there were two entries. The first was stated to relate to:-

> *"Initial return of capital of €7,000,000 and return on capital of 13% per annum compound from 2005 as set down by the EU. Contracts and related facilities were cancelled ab initio with Ulster Bank Ireland Limited under European Directive 85/557. Ref: Paul Stanley CEO Ulster Bank Ireland DAC."*

The sum sought in respect of this item on the invoice was €38,743,257.00.

34. Under item two of the invoice, which claimed the amount of €2 billion, the following was stated:-

> *"In accordance with of (sic) Hibernia REIT Public Limited Company Memorandum and (sic) Association 3 (b) and 3 (p) to undertake all liabilities relating to Block 1, Clanwilliam Court, Clanwilliam, Place, Dublin 2*
>
> *(€2 billion damages) Ref: High Court Record No. 2019/816 (Beneficiaries) 1 (8)"*

35. The invoice then contained a subtotal which was stated to be €2,038,743,257.00 and a total of €2,038,414,148.00 (the difference between the subtotal and the total was nowhere explained on the invoice).

36. At the foot of the invoice (after Mr. Farrington's name and address), it was stated that Mr. Farrington was a creditor of the company. Below that, it was stated that:-

> *"Terms and Conditions of Prompt Payment Act apply. Rate of return on capital 13% per annum, reference WESTDEUTSCHE LANDESBANK"*

37. On the basis of that invoice, it was asserted by Mr. Farrington in the affidavit he swore on 24th January, 2020 in response to the Company's application that he is an "*outstanding creditor*" of the Company. He then referred to the memorandum of association of the Company and, in particular, to paras. 3(b) and 3(p) of the memorandum (which set out two of the objects of the Company). It was not was not clear from his affidavit why Mr. Farrington was referring to those objects of the Company, but it appeared to be his case (at that stage at least) that by virtue of those objects of the Company, the Company had accepted some form of liability to Mr. Farrington (in the sum of €2 billion) on its acquisition of the property at Block 1, Clanwilliam Court.

38. In addition to referring to the invoice, and relying upon those objects in the memorandum of association of the Company, Mr. Farrington also drew the court's attention to the fact that reference was made in the motion papers in respect of the Company's capital reduction application to IFRS standards "*as adopted by the European Union*". It was unclear what Mr. Farrington meant by that but it may have been intended to link in with Mr. Farrington's contention (in the other affidavit which he had exhibited) that Ulster Bank were not using the correct accounting standards in respect of its accounts. The relevance of all of this to the Company, it has to be said, was not readily apparent, at that stage, nor has its relevance become clear since then. I will, however, set out my conclusions in relation to the contentions made in Mr. Farrington's affidavit, so far as I could understand them, later in this judgment. At the conclusion of his affidavit, Mr. Farrington asked the court to stay the Company's application pending the determination of his proceedings.

39. Mr. Edwards-Moss swore a short affidavit (his third affidavit) on 28th January, 2020. In that affidavit, he stated that, in light of the Finance Act, it was no longer in the interests of the shareholders for the Company to hold distributable reserves in the amount originally contemplated. He explained that the Company's intention to seek a reduction of capital in the amount of €600 million had been revised due the provisions of the Finance Act and that, as a result, the Company intended to seek a reduction in a lower amount than previously envisaged. He sought a new date for the Company's application and informed the court that the Board of Directors of the Company would be meeting on 4th February, 2020 and would determine at that meeting the amount by which the Company would seek to reduce its capital. He explained that a further affidavit would be sworn following that meeting and that that affidavit would also respond in detail to Mr. Farrington's first affidavit. Mr. Edwards-Moss did, however, provide an initial response to

that affidavit. He rejected the suggestion that the Company's application be adjourned pending the determination of Mr. Farrington's proceedings. He commented on the invoice sent by Mr. Farrington on 21st January, 2020 and contended that Mr. Farrington had failed, on the basis of that invoice, to prove or establish himself to be a creditor of the Company and that his claim to that effect was vexatious and/or frivolous. He also explained that the Company was opposing Mr. Farrington's application to join it as a co-defendant to Mr. Farrington's proceedings. He concluded by asserting that Mr. Farrington had no connection with, and no claim against, the Company and no *bona fide* interest in the proceedings as he is neither a creditor of, nor a shareholder in, the Company and did not otherwise have any legitimate interest in the proceedings.

40. The Company's application was listed for mention before me again on 28th January, 2020. On that occasion, the Company was represented by counsel and solicitors and Mr. Farrington appeared in person. There is a transcript of the hearing before me on that date. While Mr. Farrington subsequently contended, in correspondence with the Company's solicitors that he did not receive a fair hearing on that occasion, he never repeated that submission to the court. In any event, having reviewed the transcript of the hearing on that occasion, I am satisfied that there is no basis for any suggestion that the hearing was anything other than scrupulously fair, both to the Company and to Mr. Farrington.

41. An order was made and perfected following the hearing on that occasion. While Mr. Farrington took issue with the terms of the order, in correspondence with the Company's solicitors, I am satisfied that the order correctly reflects the orders and directions made that day. The Company sought a new hearing date for its application. Mr. Farrington asked that the Company's application be struck out. I acceded the Company's application to fix a new date for the hearing of the Company's application and fixed 4th March, 2020 as the date for the hearing of that application. I refused Mr. Farrington's application to strike out the proceedings. I should add that, in the course of doing so, I indicated that one of the issues at the hearing would be whether Mr. Farrington was a creditor of the Company and entitled to be heard on the application and that another would be whether the application should be struck out. I declined to strike out the application that day. I made further directions in relation to the exchange of affidavits and submissions and in relation to the publication of an updated notice on the Company's website.

42. Mr. Edwards-Moss swore a fourth affidavit on 6th February, 2020. The purpose of that affidavit was essentially threefold. First, it explained that in light of the recent legislative changes under the 2019 Act, the directors of the Company decided to seek the court's confirmation of a reduction in the Company's share premium account of €50,000,000 in place of the original amount of €600,000,000, such that the balance remaining credited to that account would be €580,276,449. On that basis, the Company prepared an updated single entity *pro forma* balance sheet which set out the financial position of the Company as at 30th September, 2019 and its prospective financial position in the event that the court were to approve the proposed capital reduction in the amount of €50,000,000 (a copy was exhibited at "3TEM2"). Mr. Edwards-Moss reconfirmed that the proposed capital

reduction in that amount would have no impact on the number of shares held by shareholders, or on their proportionate interests in the issued share capital of the Company and also that there would be no change in the number of shares in issue.

43. Second, the affidavit provided evidence of compliance with the directions made by the court on 5th November, 2019 and 28th January, 2020, as regards notification of the developments in the proceedings on the Company's website. Mr. Edwards-Moss confirmed that, other than Mr. Farrington, the Company had not received notification from any other person of an intention to appear at the hearing of the Company's application.

44. Third, the affidavit addressed Mr. Farrington's claims and exhibited the correspondence exchanged between the Company and its solicitors, on the one hand, and Mr. Farrington on the other. The Company disputed Mr. Farrington's claim to be a creditor and contended that Mr. Farrington had not disclosed that the Company had any liability to him, whether in relation to Block 1, Clanwilliam Court or otherwise. Mr. Edwards-Moss commented on the invoice sent by Mr. Farrington on 21st January, 2020 and confirmed that at no stage had the Company dealt with Mr. Farrington, nor with any agent on his behalf in respect of any matter and that the Company had not acquired Block 1, Clanwilliam Court from Mr. Farrington, or from any receivers appointed over any interest of Mr. Farrington in that property. He further stated that it was impossible to discern the nature of the claimed legal connection between Mr. Farrington and the Company, or any legal wrong allegedly committed by the Company against Mr. Farrington. He rejected the contention that the proceeds of some allegedly illegal practice on the part of Ulster Bank were being used by the Company. Finally, he pointed to the apparent misunderstanding on the part of Mr. Farrington as to the objects clause in a memorandum of association and that the objects stated in the memorandum of association are permissive only and do not confer a right of indemnity on a third party, as apparently claimed by Mr. Farrington. He explained that the directors had determined that no provision be made in respect of the claims made by Mr. Farrington. In those circumstances, Mr. Edwards-Moss contended that Mr. Farrington had failed to demonstrate that he was a creditor or that there were credible grounds for the court to conclude that the proposed capital reduction sought by the Company would be likely to put the satisfaction of any debt or claim he might have at risk.

45. Mr. Farrington swore a second affidavit in respect of the Company's application on 21st February, 2020. He exhibited to that affidavit a "*submission*" by Cormac Butler dated 21st February, 2020. Mr. Farrington described Mr. Butler as a "*financial expert".* When objection was taken by the Company at the call-over on 28th February, 2020 to this "*submission*" on various grounds, including on the ground that it amounted to unsworn evidence, Mr. Farrington arranged for an affidavit in substantially the same terms to be sworn by Mr. Butler later that day (28th February, 2020). I will come to that affidavit shortly. Mr. Farrington then made a number of further assertions in his affidavit. He claimed that the "*accounts prepared under the International Financial Reporting Standards, as interpreted by auditors Deloitte Ireland, are flawed and cannot be used to support an application for a reduction of capital*" (para. 4). He sought to rely on Mr.

Butler's "*submission*" in support of that claim. As noted earlier, Mr. Farrington had previously asserted (in the affidavit which he swore for the purpose of the motion to join the Company as a co-defendant in Mr. Farrington's proceedings) that the accounts of Ulster Bank (not the Company) were allegedly defective, on the grounds that they used the IFRS standards and not the IFRS standards "*as adopted by the EU*" (paras. 40 to 42 of that affidavit). However, he appeared to change the focus of his attack, in his latest affidavit, to the Company's accounts and sought to rely in support of his claims on Mr. Butler's "*submission*".

46. Mr. Farrington further claimed that he was "*a former owner*" of Block 1, Clanwilliam Court and is an "*outstanding creditor*" of the Company. Again, he relied on Mr. Butler's "*submission*" in support of that contention. However, I conclude, neither the "*submission*", nor Mr. Butler's affidavit, provides any support for that contention. Finally, Mr. Farrington expressed the view that the court should make a reference to the CJEU under Article 267 TFEU on "*a question on the interpretation or validity of EU law",* although he did not explain what the issue of EU law which should be the subject of that reference was.

47. Mr. Butler's affidavit was sworn on 28th February, 2020 and served on the Company's solicitors on 2nd March, 2020. In that affidavit, Mr. Butler described himself as a "*banking consultant*" and stated that he had "*trained over 100 bank regulators*" and is the author of two books, namely, "*Accounting for Derivatives*" and "*Mastering Value at Risk",* which he stated were concerned with "*risk management and regulation for the financial sector*". He referred to the fact that he had given evidence on the "*banking crisis*" to the House of Lords in the UK, to the European Parliament and to the Oireachtas as well as having written a report on the "*European banking crisis*" for the European Parliament and having given evidence to the Oireachtas Committee on Finance, Public Expenditure and Reform on 28th May, 2019. That was all stated at para. 1 of Mr. Butler's affidavit. Apart from that, Mr. Butler gave no indication as to his professional or academic qualifications. He did not exhibit a *curriculum vitae* setting out his qualifications, experience and publications. He did not give any indication to the court as to any relevant qualifications and experience he might have in relation to property investment companies, in general, and REITs, in particular, still less any indication as to what relevant qualifications or experience he may have in relation to other areas on which he sought to opine in his affidavit. Nor did Mr. Butler give any indication in his affidavit as to his understanding of the particular duties owed by an expert giving evidence, as would be expected in the case of any person holding himself or herself out as an expert giving evidence before the Irish Courts. Mr. Butler's affidavit did not set out what information, material or instructions were provided to him by Mr. Farrington. Nor did he state in his affidavit the particular facts (or assumed facts) on the basis of which he was advancing the contentions set out in his affidavit. Finally, Mr. Butler did not give any indication as to the terms on which he was engaged by Mr. Farrington to proffer evidence to the court on his behalf. All of these factors are relevant when it comes to assessing Mr. Butler's evidence and, in particular, his alleged expertise to give evidence on matters relevant to the Company's application.

48. At para. 2 of his affidavit, Mr. Butler contended that the evidence given by Mr. Edwards-Moss and, in particular, the revised *pro forma* balance sheet exhibited at Exhibit "3TEM2" to Mr. Edwards-Moss's affidavit of 6th February, 2020 was "*unreliable*", as the figures used were taken from the Company's audited financial accounts for the year end of 31st March, 2019. The basis for this contention was that the accounts were audited by Deloitte Ireland and that it was allegedly in a conflict of interest situation because of its alleged "*interpretation*" of accounting standards. No evidence was proffered by Mr. Butler in support of that contention.

49. At para. 3 of his affidavit, Mr. Butler contended that one of the independent non-executive directors of the Company, Terence O'Rourke, (who is also the chair of the Company's Audit Committee) was in a conflict of interest situation on the basis of what he allegedly said in relation to IFRS. That contention was based on evidence given by that director at the Oireachtas Banking Inquiry in 2015 (paras. 7 and 8 of Mr. Butler's affidavit). However, no explanation was given by Mr. Butler as to how any of that is relevant to the accounts of the Company, which is a property investment company and a REIT and is not a bank.

50. Mr. Butler then proceeded to make, what appear to me to be, a series of wild and outlandish allegations at para. 4 of his affidavit alleging "*potentially illegal*" and "*criminal*" conduct on the part of Deloitte LLP and the director concerned. The basis for that outlandish allegation concerned the use of IFRS by the "*big four accounting firms*" and references made in that regard to a report of a "*UK Parliamentary inquiry*" (which was not exhibited by Mr. Butler and no context was given by him). No attempt was made by Mr. Butler to tie what he said at paras. 4 and 5 of his affidavit to the accounts of the Company (and I have referred earlier to those accounts).

51. Having made those allegations (without a shred of relevant evidence), Mr. Butler felt it appropriate to state (at para. 9 of his affidavit) "*for the reasons outlined above*", the Company "*has not portrayed its financial position correctly to the court*" and that "*the application to reduce the capital is deeply flawed*". He went on to state that it is *"an offence under Irish company law to use flawed accounting standards to portray the financial position of a company for the purpose of attempting to reduce the capital of that company or to report to shareholders*". This was an extraordinary assertion to make and was made entirely without reference to the actual accounts of the Company which had been put before the court and to the statements made in those accounts as to the accounting standards used in their preparation.

52. Mr. Butler then went on to make a series of even more extraordinary and outlandish allegations (for an alleged expert) concerning Block 1, Clanwilliam Court. At para. 10 of his affidavit, Mr. Butler stated that "*there is doubt as to the true ownership*" of Block 1, Clanwilliam Court. However, Mr. Butler's explanation for this doubt is bizarre and entirely unsupported by any relevant evidence. He made a series of allegations concerning Ulster Bank and its parent, Royal Bank of Scotland, leading to the sweeping assertion that Ulster Bank did not have the authority to acquire the property "*legally*" and that a sale by West

Register (Republic of Ireland) Property Limited, "*particularly at distressed prices*", should be treated as "*null and void*". I am afraid that I have no idea how Mr. Butler could come to that conclusion on the basis of what he stated at paras. 10, 11 and 12 of his affidavit (or elsewhere in that affidavit). Nor can I understand how Mr. Butler could then state that the "*true owner*" of Block 1, Clanwilliam Court is a creditor of the Company who is entitled to object to the Company's capital reduction application. Mr. Butler did not state who the "*true owner*" was, but I assume that he was intending to refer to Mr. Farrington. However, Mr. Butler offered no evidence in support of that contention, or any evidence on foot of which he could responsibly have formed that view, or indeed any basis on which he concluded that he had any expertise on any of those issues.

53. At para. 13 of his affidavit, Mr. Butler set out an extract from evidence apparently given before a "*UK Parliamentary Inquiry*" by a Mr. Connolly from "*Deloitte UK*". Having set out that extract (which he did not exhibit), Mr. Butler then stated (at para. 14) that the evidence (set out in the extract quoted) "*suggests that Royal Bank of Scotland and its subsidiary Ulster Bank acted improperly by concealing losses*". It is not clear to me how Mr. Butler reached that conclusion, or how it is said that it is in any way relevant to the issues properly before the court on the Company's capital reduction application. In the same paragraph, Mr. Butler went on to refer to the sale of Block 1, Clanwilliam Court as being "*potentially at a possible distressed price*" and that it was "*therefore, illegal".* What Mr. Butler meant by stating that the sale of the property was "*potentially*" at a "*possible distressed price"* is entirely unclear. It is so qualified and unsupported by any actual evidence (still less admissible evidence) as to the sale, the price, the factors involved and to the alleged distressed price as to be utterly meaningless and of no assistance whatsoever to the court. What Mr. Butler meant by his assertion that the sale was "*therefore, illegal*" is even more difficult to understand. How Mr. Butler felt it appropriate to seek to draw a legal conclusion is nowhere explained. If anything, Mr. Butler's subsequent conclusion from those unsubstantiated and unsupported assertions is even worse. He concluded para. 14 by stating as follows:-

> *"It follows that Hibernia REIT, may not be the true owners of the property which makes the original owner, a potential creditor to Hibernia REIT."*

How that assertion follows from what Mr. Butler stated previously is beyond me and how Mr. Butler felt it appropriate to suggest (albeit in a highly qualified manner – "*may not be"*) is entirely unclear. In my view, nothing which Mr. Butler stated in the preceding paragraphs of his affidavit could afford any support for the assertion made (albeit in the qualified terms in which it was made) that the Company might not be the "*true owners"* of Block 1, Clanwilliam Court. How any of that is said to "*make*" the "*original owner*" a "*potential creditor"* of the Company is unclear and unexplained by Mr. Butler. Again, assuming that Mr. Butler was intending to refer to Mr. Farrington by the term the "*original owner*", I consider it below and set out my conclusions on that issue when considering the relevant statutory provisions.

54. Mr. Butler concluded his affidavit by making the assertion that the Company's accounts are in breach of "*EU Regulation 1606/2002*" (Regulation (EC) No. 1606/2002 of the European Parliament and of the Council of 19th July, 2002 on the application of international accounting standards) and, in particular, Article 3(2) of that Regulation by reason of the Company's interpretation of IFRS. Mr. Butler expressed the view (although it is unclear on what basis he felt qualified to do so) that the court was required to "*refer a question on the interpretation or validity of EU law*" to the CJEU under Article 267 TFEU. He did not indicate what question on the interpretation or validity of EU law he felt had to be referred, or how it was relevant to the Company's application. As regards Mr. Butler's contention that the Company's accounts were in breach of the relevant regulation, I will come shortly to the Company's response.

55. The final affidavit to be considered in respect of the Company's application is a further affidavit sworn by Mr. Edwards-Moss on 3rd March, 2020, in response to Mr. Butler's affidavit. This was the fifth affidavit sworn by Mr. Edwards-Moss in connection with the Company's application. Its purpose was to respond to Mr. Butler's affidavit. While disputing the admissibility of Mr. Butler's affidavit on various grounds, and questioning Mr. Butler's expertise as an expert in relation to the proper application of accounting standards to the Company, Mr. Edwards-Moss did nonetheless proceed to address the contentions contained in Mr. Butler's affidavit.

56. At para. 7 of his affidavit, Mr. Edwards-Moss contended that any concerns regarding capital maintenance expressed by Mr. Butler were not relevant to the Company as it does not delay loss recognition in its accounts and that it is clear from a reading of those accounts that the Company recognises fair value losses at the valuation date. Although Mr. Butler appeared to be arguing that there might be a potential defect in the IFRS accounting system whereby losses not yet occurred, but which will occur, cannot be reflected in a balance sheet, and while that might have a particular relevance to the banking sector, Mr. Edwards-Moss asserted that it has no relevance to the Company, as its primary business is property investment and "*it has next to no financial instruments, and it reflects fair value losses in the accounts as at the balance sheet date"* (para. 7). I entirely accept that evidence as it specifically addressed the primary business of the Company, which is a property investment company (a REIT) and is not a bank. It follows that I reject any evidence, or rather assertion, to the contrary sought to be given or made by Mr. Butler.

57. In subsequent paragraphs of his affidavit, Mr. Edwards-Moss rejected the allegations of a conflict of interest on the part of the named director of the Company. I am satisfied that no conflict of interest on the part of that director has been made out on the evidence and that the comments made by the director related to the application of accounting standards to banks, and other financial institutions, and not to a property investment company such as the Company.

58. I also agree and accept what Mr. Edwards-Moss stated at para. 9 of his affidavit that Mr. Butler had not established that the Company had failed to follow the law in relation to the

preparation of its accounts. I accept the evidence that it has complied with its legal obligations in relation to the preparation of those accounts. In particular, I am satisfied that neither Mr. Farrington nor Mr. Butler has raised sufficient doubt about the accounts to prevent me from properly assessing the Company's application in accordance with the relevant statutory provisions.

59. I note what Mr. Edwards-Moss stated at para. 10 of his affidavit to the effect that, as a REIT, the relevant accounting provisions are IFRS 13 (fair value) and IAS 40 (investment property). At para. 13 of his affidavit, Mr. Edwards-Moss repeated the averment previously made (at para. 46 of his first affidavit), that he was advised that the 2019 Annual Accounts had been audited by the Company's auditors and that the financial statements were prepared in accordance with "*IFRS as adopted by the European Union and the 2014 Act*". I am not satisfied that Mr. Farrington or Mr. Butler have demonstrated, on the evidence before the court, that that averment is incorrect. I proceed on the basis that it is correct.

60. At para. 15 of his affidavit, Mr. Edwards-Moss dealt with the assertions made by Mr. Butler in relation to Block 1, Clanwilliam Court. While taking issue with the extraordinary character of Mr. Butler's assertions, Mr. Edwards-Moss contended that the purchase of that property by the Company was legal and correct and that the Company was a "*bona fide purchaser for value without notice*". He further contended (at para. 16) that no credible evidence was provided by Mr. Butler, or by Mr. Farrington, in relation to the allegation that the Company was anything other than a *"legitimate bona fide purchaser for value without notice of the property or indeed any property*". I agree with those contentions and accept that nothing advanced by Mr. Farrington or by Mr. Butler has demonstrated any doubt as to the ownership of Block 1, Clanwilliam Court by the Company.

Statutory Provisions and Test to be Applied

61. The relevant statutory provisions applicable to the Company's application are set out in part 3, chapter 4 of the 2014 Act and, as the Company is a plc, in ss. 1002 and 1084 of that Act.

62. Section 84(1) provides as follows: -

> *"Save to the extent that its constitution otherwise provides, 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 and, without prejudice to the generality of the foregoing, may thereby –*
>
> *(a) extinguish or reduce the liability on any of its shares in respect of share capital not paid up;*
>
> *(b) either with or without extinguishing or reducing liability on any of its shares, cancel any paid up company capital which is lost or unrepresented by available assets; or*

(c) either with or without extinguishing or reducing liability on any of its shares, pay off any paid up company capital which is in excess of the wants of the company.

63. By virtue of s. 84(2) and s. 1002, as a PLC, a reduction of company capital by the Company can only be effected by the Company passing a special resolution which is then confirmed by the court. In addition, under s. 1084, as a PLC, the Company may not reduce its capital below the authorised minimum. On the evidence in this case, the capital of the Company will exceed the authorised minimum in the event of the court acceding to the Company's application.

64. Section 85 provides for what is to happen when a company has passed a special resolution under s. 84(2)(b) for reducing its company capital. Under s. 85(1), the company may apply to the court for an order confirming the resolution. Section 85(2) provides that if a company proposes to apply to the court for an order confirming the resolution, it must cause notice of its intention to make such an application to be advertised in a particular manner and to be notified by electronic means to all creditors of the company who are resident, or have their principal place of business, outside the State and to provide certain details in relation to the hearing. As noted earlier, Haughton J. was satisfied that the provisions of s. 85(2) of the 2014 Act, had been duly complied with by the Company. Mr. Farrington did not take any issue with that and, as stated earlier, I have considered this issue afresh and am satisfied that the Company did comply with the provisions of section 85(2).

65. Section 85(3) provides that in determining any preliminary application for directions as to the hearing of an application under s. 85, the court is required to have regard to compliance by the Company with the requirements of s. 85(2). The Company did comply with the requirements of s. 85(2) and, therefore, no issue arose in that regard at the application for directions, as to the hearing of the Company's application.

66. Section 85(4) provides that where the proposed reduction of capital involves "*either diminution of liability in respect of unpaid company capital, or the payment to any shareholder of any paid up company capital, and in any other case if the court so directs",* certain provisions "*shall have effect (but subject to subsection (5)*)". Of most relevance for present purposes is s. 85(4)(a), which provides that:

"Every creditor of the company who –

(i) at the date fixed by the court, is entitled to a debt or claim that, if that date were the commencement of the winding up of the company, would be admissible in proof against the company; and

(ii) can credibly demonstrate that the proposed reduction in company capital would be likely to put the satisfaction of that debt or claim at risk, and that no adequate safeguards have been obtained from the company, is entitled to object to the reduction".

67. There is then provision for the court to "*settle a list of creditors entitled to object"* (ss. 85(4)(b) and (c)).

68. Section 85(5) provides as follows:

> *"Where a proposed reduction of company capital involves either the diminution of any liability in respect of any unpaid company capital or the payment to any shareholder of any paid up company capital, the court may, if, having regard to any special circumstances of the case, it thinks proper so to do, direct that subsection (4) shall not apply as regards any class or any classes of creditors."*

69. Under s. 85(6), the court may make an order confirming the resolution "*on such terms and conditions as it thinks fit*", provided that it is satisfied that the requirement contained in s. 85(7) is satisfied. The requirement in s. 85(7) is that "*in relation to every creditor of the company who, under this section is entitled to object to the confirmation, either –*

(a) the creditor's consent to the confirmation has been obtained, or

(b) the creditor's debt or claim has been discharged or has terminated, or has been secured."

70. It will be noted that this latter requirement is dependent upon the relevant creditor being "*entitled to object*" to the confirmation. Such a creditor is a person who fulfils the requirements set out at s. 85(4)(a) (set out above). The obvious question in the present case is whether Mr. Farrington is a creditor of the Company who is "*entitled to object"* to the reduction of capital or the confirmation of the special resolution of the members of the Company. If Mr. Farrington is not such a creditor "*entitled to object*", then he has no standing to appear and to object to the Company's application. I will address that question shortly.

71. Various ancillary orders arise where the court makes an order confirming the relevant resolution (s. 85(8) and s. 86 of the 2014 Act). No issue arises in relation to those provisions and it is unnecessary therefore to dwell upon them in this judgment.

72. Both the High Court and the Court of Appeal have considered the approach to be taken by the court in consideration of an application by a company for an order confirming a resolution reducing its capital. The issue was very fully addressed by the High Court (Barrett J.) in *Re Permanent TSB Group Holdings plc* [2015] IEHC 500 ("*Permanent TSB 2015*"). Although that case concerned an objection by a small number of shareholders to a reduction in the company's capital, the relevant factors were helpfully stated by the court in general terms and some are clearly applicable to a case where a purported creditor of the company seeks to object to the company's application. Citing *British American Trustee and Finance Corporation v. Couper* [1894] A.C. 399 and Re Thomas de la Rue & Co [1911] 2 Ch. 361, Barrett J. observed that the court "*enjoys a discretion to approve or not to approve the reduction of capital"*. He considered that the principles to be applied in the exercise of that discretion were apparent from the judgment of Harman

J. in the High Court of England and Wales in *Re Ratners Group plc* [1988] BCLC 685. In his judgment in that case, Harman J. identified as one of the three principles on which the court would require to be satisfied before it could sanction the reduction of share capital sought the fact that the creditors of the company would have to be "*safeguarded so that money cannot be applied in any way which would be detrimental to the creditors"* (at p. 687). Barrett J. then set out six matters or factors with which the court would have to be satisfied before it could confirm the proposed capital reduction. They were as follows:

> *"(1) In a case to which the Act of 1963 applies, the company is authorised by its articles of association to resolve to reduce its capital.*
>
> *(2) The company duly resolved by special resolution to reduce its share capital.*
>
> *(3) The reduction proposals were properly explained to the shareholders so that they could exercise an informed judgment;*
>
> *(4) the reduction of share capital is for a discernible purpose;*
>
> *(5) all shareholders are treated equitably; and*
>
> *(6) the creditors of the company are safeguarded."*
>
> (Per Barrett J. at para. 42)

73. These factors were cited with approval in the judgment I delivered in *Re Scisys Group plc* [2019] IEHC 904 and have recently been approved by the Court of Appeal in *Re Permanent TSB Group Holdings plc* [2020] IECA 1 ("*Permanent TSB 2020*"). Although that was another case in which objection to the reduction of capital came from a small group of shareholders, nonetheless, in his judgment on behalf of the Court of Appeal, Collins J. made a number of observations which are relevant to the present case. At para. 81, Collins J. stated:

> *"There is no doubt that the fact that a capital reduction resolution has been approved by a large majority of shareholders is not, in itself, determinative of the issue of whether it ought to be confirmed or not. Were it otherwise, no useful purpose would be served by requiring court confirmation, given that the passing of a special resolution is a statutory pre-requisite in any event. But section 85 is equally not to be construed as conferring a minority veto on a capital reduction. An objecting shareholder(s) is in every case obliged to establish a basis for their objections sufficient to justify the exercise [of] the court's discretion against giving the confirmation sought."*

74. With regard to the requirement that the reduction of share capital must be for a "*discernible purpose*", Collins J. commented upon the conclusion by the trial judge in that case (Haughton J.) that the application before him was made "*genuinely*" and continued:

"*What was required was evidence that the reduction had a discernible and bona fide purpose and I agree with the Judge that the evidence was all one way on that issue."* (Para. 82).

75. The balance of the judgment of Collins J. in the Court of Appeal concerned the particular treatment of the shareholders in the Company in question and is not relevant for present purposes.

76. Before turning to consider the factors set out by Barrett J. in *Permanent TSB 2015*, it is necessary to draw attention to a number of other principles which are relevant to the exercise by the court to its discretion on a capital reduction application.

77. First, as noted by Barrett J. in *Permanent TSB 2015*, it is "*well established that the onus lies on the opponents of a petition for confirmation of a proposed capital reduction*" (para. 86). In support, Barrett J. cited Lord Normand in the House of Lords in *Scottish Insurance Corporation v. Wilsons and Clyde Coal* [1949] A.C. 462.

78. Second, even where there are no objecting creditors, the court nonetheless has a discretion as to whether or not to approve the reduction of capital sought:

Courtney: The Law of Companies (4th Edition) at para. 10.107, p. 659.

79. Third, where complaint is made in relation to the preparation of the applicant company's accounts, the circumstances in which a shareholder of that Company may complain about the preparation of the accounts are "*highly limited*" (per. Barrett J. *Permanent TSB 2015* at para. 113). Barrett J. cited with approval the following statement by Dillon J. in *Devlin v. Slough Estates Limited* [1983] BCLC 497 where he said:

> *"Furthermore, insofar as the formulation of the accounts involves matters of judgement such as I have mentioned, that is a matter of business judgement. The court does not interfere with the business judgement of directors in the absence of mala fides. The duty of causing the accounts to be prepared and presented to the company is laid on the directors by the Act and by the articles, and there is no allegation of bad faith on the part of the directors."* (Per Dillon J. at pp. 503-504).

Barrett J. found on the facts of that case that it was not open to the objectors to ask the court to "*look behind audited accounts that have patently been prepared in good faith by the directors of the Company*" (para. 114). While those observations were expressly directed to the entitlement of a member of the company to complain about the preparation of the accounts of the company, it seems to me that they apply equally to the approach which the court should take when considering an objection made by a purported creditor of the Company, to the extent that that person is entitled to object to the Company's pplication.

Application of Statutory Provisions and Test to the Facts

80. I now consider those of the factors set out by Barrett J. in *Permanent TSB 2015* which are relevant to the present case.

(1) In a case to which the Act of 1963 applies, the company is authorised by its articles of association to resolve to reduce its capital.

81. The position under s. 84(1) of the 2014 Act is that, unless the constitution of the company otherwise provides, a company may reduce its capital. The constitution of the applicant Company does not prevent the Company from doing so. On the contrary, Article 46 of the articles of association of the Company expressly permit the Company to reduce its share capital by special resolution. Mr. Farrington did not suggest otherwise. I am satisfied that, not only does the constitution of the Company not preclude the Company from reducing its capital, it is expressly empowered to do so under Article 46 of the Articles of Association.

(2) The company duly resolved by special resolution to reduce its share capital.

82. I am satisfied on the basis of the evidence before the court that the Company did duly resolve by special resolution to reduce its share capital. The Company's shareholders passed a special resolution at the AGM on 31st July, 2019 providing for the Company capital of the Company to be reduced, subject to confirmation from the High Court in accordance with ss. 84 and 85 of the 2014 Act. The terms of the special resolution were set out earlier in this judgment. The amount of the reduction sought has since been reduced, for reasons explained by the Company and discussed by me earlier. The directors of the Company determined, on behalf of the Company, to proceed to seek confirmation from the High Court of a reduction of the lesser amount of €50,000,000. Mr. Farrington did not raise any particular issue in relation to the special resolution of the Company or in relation to the directors' subsequent determination. In any event, I am satisfied on the evidence that the Company did duly resolve by special resolution to reduce its share capital.

(3) The reduction proposals were properly explained to the shareholders so that they could exercise an informed judgment.

83. The explanation for the capital reduction proposals the subject of the special resolution put to the Company's shareholders at the AGM were set out in a notice of AGM and circular dated 28th June, 2019 which was sent to the Company's shareholders and was published on the Company's website. This material incorporated a letter from the Chairman of the Company which set out the details of and reasons for the proposed capital reduction. That material was exhibited at Exhibit "TEM7" to the first affidavit sworn by Mr. Edwards-Moss on 25th September, 2019. Mr. Farrington raised no particular issue in relation to this material. In any event, I am satisfied that the capital reduction proposals were properly explained to the shareholders in that material so that they could exercise an informed judgment. The resolution was passed unanimously by the shareholders at the AGM.

(4) The reduction of share capital is for a discernible purpose.

84. The purpose of the initial reduction of capital sought by the Company was explained in the notice of AGM and circular and, in particular, in the Chairman's letter of 28th June, 2019 and was further explained by Mr. Edwards-Moss at paras. 37-45 of his first affidavit. The reasons for the reduction, in the amount of the reduction of capital now sought by the Company, were set out in the third supplementary affidavit which was sworn by Mr. Edwards-Moss on 6th February, 2020, at paragraphs 7-13. As noted by Collins J. in the Court of Appeal in *Permanent TSB 2020*, what was required was evidence that the reduction of capital sought had a "*discernible and bona fide purpose".* I am satisfied on the evidence that the reduction of capital now sought is for a *"discernible and bona fide purpose"*. Nothing advanced by, or on behalf of, Mr. Farrington has persuaded by otherwise. I am, therefore, satisfied that this particular requirement has been complied with in the present case.

(5) All shareholders are treated equitably.

85. I am satisfied on the evidence that all of the Company's shareholders are treated equitably in relation to the proposed capital reduction. It is clear, on the evidence, that there is no differentiation in the treatment received by the shareholders in relation to the proposed capital reduction. The evidence establishes that the proposed capital reduction will have no impact on the number of shares held by shareholders or on their proportionate interests in the issued share capital of the Company. Nor will there be any change in the number of shares in issue by the Company. Similarly, all shareholders benefit equally from the reduction and from the corresponding increase in the Company's distributable reserves. I am satisfied, therefore, that this requirement has been met.

(6) The creditors of the Company are safeguarded.

86. Of all the factors identified by Barrett J. in *Permanent TSB 2015*, this is the factor which is most relevant for present purposes. Mr. Farrington claims to be a creditor of the Company and one of the grounds on which he has sought to oppose the Company's application is that his interests, as a purported creditor of the Company, have not been safeguarded. For reasons set out in the next section of this judgment, I have concluded that on the evidence, Mr. Farrington is not a creditor, still less a creditor who is "*entitled to object*" to the Company's application, as that term is properly understood under s. 85 of the 2014 Act. As I explain below, I am not satisfied that Mr. Farrington is a creditor of the Company at all, still less a creditor who could "*credibly demonstrate*" that the proposed reduction in the Company's capital would be likely to put the satisfaction of his alleged claim or debt at risk. In those circumstances, for reasons set out below, I have concluded that Mr. Farrington is not a creditor of the Company who is "*entitled to object*" to the Company's application for confirmation of the resolution reducing the Company's capital. Nor am I satisfied that any of the other grounds of objection advanced by Mr. Farrington, irrespective of his status as a purported creditor of the Company, have any basis in law or in fact.

Mr. Farrington's Grounds of Objection to the Company's Application

(1) The Creditor Objection

87. As noted in the previous paragraph, one of the grounds on which Mr. Farrington opposed the Company's application was on the basis that he was a creditor of the Company. Mr. Farrington advanced that contention on the basis of the invoice which he sent to the Company on 21st January, 2020. While Mr. Farrington did not expressly rely upon that invoice, or on his alleged status as a creditor of the Company, in the outline written submissions filed by him on 2nd March, 2020, he did pursue that case in the course of his oral submissions. As I have already outlined, the invoice sent by Mr. Farrington to the Company sought payment of a sum in excess of €2 billion. That sum was made up of two items. The first was in respect of an "*initial return of capital of €7,000,000 and return on capital of 13% compound from 2005 as set down by the EU" and was stated to refer to "contracts and related facilities" which were "cancelled ab initio with Ulster Bank Ireland Limited under European Directive 85/577*". The amount claimed in respect of this item was in excess of €38m. The second item on the invoice sought payment of the sum of €2 billion. The basis for that claim was stated on the invoice to arise in accordance with paras. 3(b) and 3(p) of the Company's memorandum of association under which it was asserted in the invoice the Company had agreed "*to undertake all liabilities relating to Block 1, Clanwilliam Court, Clanwilliam Place, Dublin 2*". Reference was made to a "*claim for €2 billion damages*" in Mr. Farrington's proceedings.

88. Mr. Farrington's evidence and the affidavit sworn by Mr. Butler provided no explanation as to how this invoice came to be sent to the Company in late January 2020. Nor was Mr. Farrington in a position to provide any understandable explanation for the invoice during the course of the hearing. His overarching contention was that the Company is in some way liable to him in respect of all of the claims he has against other parties concerning Block 1, Clanwilliam Court. The basis on which he asserted that the Company was liable in respect of those claims was that paras. 3(b) and 3(p) of the memorandum of association of the Company so provided. However, it is clear that Mr. Farrington has misunderstood the legal status of the memorandum of association which sets out the objects of the Company. It is one of the constitutional documents of the Company which, together with the articles of association, constitutes the statutory contract binding the Company and its members and the members as between themselves. It does not create contractual or other legal relations between the Company and non-members, such as persons purporting to be creditors like Mr. Farrington. Mr. Farrington does not assert the existence of any other contract with the Company.

89. Paragraphs 3(b) and 3(p) of the memorandum of association set out some of the Company's objects, as is made clear from the commencement of para. 3 of the memorandum where it states:

> "The *objects* for which the company is established are:"

The paragraph then lists a series of objects in subparagraphs. (a) to (r). These are objects of the Company and not obligations of the Company whether to its members or to

outsiders, such as Mr. Farrington. Insofar as Mr. Farrington sought to rely on the objects of the Company set out in paras. 3(b) and 3(p) of the memorandum to confer some legal right on him and to impose some corresponding legal obligation upon the Company, he was fundamentally mistaken. It is not open to Mr. Farrington to rely on those objects in support of any purported claim against the Company.

90. Mr. Farrington sought to explain the basis on which the two items in the invoice allegedly arose. However, this was not done on affidavit and his explanation was very difficult to follow. The first item was apparently based on his alleged cancellation of contracts which he had with Ulster Bank. No evidence was provided in respect of those contracts, or the circumstances in which he allegedly cancelled them. In any event, whatever issues Mr. Farrington had or has with Ulster Bank have no relevance to Mr. Farrington's status as an alleged creditor of the Company, or to the plausibility of any claim he may have against the Company. Insofar as the first item claimed in the invoice is concerned, Mr. Farrington has failed to establish any basis for a claim in respect of that item against the Company. As regards the second item (the €2 billion damages claim), this is a farfetched and farcical claim. From the explanation Mr. Farrington sought to provide in respect of this claim during the hearing, it seems to relate to a potential mining deal in the United States which Mr. Farrington brought to Grant Thornton for advice and which did not work out in circumstances where Mr. Farrington claimed that Grant Thornton had a conflict of interest. Grant Thornton is one of the defendants in Mr. Farrington's proceedings. Grant Thornton was not a party to the Company's application and was not in a position to respond to the allegations made by Mr. Farrington. Nonetheless, it is clear that whatever claim Mr. Farrington has against the parties to his proceedings (and it was very difficult to understand the claims made in those proceedings), in my view, they have no relevance whatsoever to the Company's reduction of capital application. While Mr. Farrington has brought an application to join the Company as a co-defendant to his proceedings and that motion is to be heard later this year, I do not see any basis for a claim by Mr. Farrington against the Company in respect of any of the matters set out in the affidavit which he swore for the purpose of grounding his application still less the relevance to the Company's capital reduction application of those claims.

91. As stated earlier, the onus lies on Mr. Farrington to establish that he is a creditor of the Company in order to bring himself within the category of persons entitled to object to the Company's application. Mr. Farrington has failed by a country mile to discharge that initial onus. He has failed to establish that he is a creditor of the Company on the basis of any of the matters raised by him. I conclude that he is not a creditor of the Company.

92. If I am wrong in holding that Mr. Farrington has not established that he is a creditor of the Company, I am nonetheless satisfied that Mr. Farrington is not a creditor who is "*entitled to object*" to the Company's application under s. 85 of the 2014 Act. I am not satisfied that the claim sought to be advanced by Mr. Farrington on foot of the invoice (or indeed on any of the other grounds of opposition advanced by him) amounts to a claim that would be admissible in proof against the Company in a winding up (for the purposes of s. 85(4)(a)(i) of the 2014 Act). If one was dealing with a winding up of the Company, I

do not believe that the claim advanced by Mr. Farrington would be admissible in proof against the Company in that winding up, having regard to the extraordinary nature of the claim and the purported basis for it.

93. If I am wrong about that, there is a further reason why, in my view, Mr. Farrington has failed to establish that he is a creditor "*entitled to object*" to the Company's application. He has not satisfied the requirement in s. 85(4)(a)(ii) to "*credibly demonstrate that the proposed reduction in company capital would be likely to put the satisfaction of* [the] *debt or claim at risk, and that no adequate safeguards have been obtained from the company*".

94. I agree with the submission advanced on behalf of the Company that some assistance can be derived from the case law from England and Wales and from Scotland on equivalent statutory provisions. It is necessary to refer only to one judgment and that is the judgment of Norris J. in the Chancery Division of the High Court of England and Wales *Re Liberty International plc* [2010] 2 BCLC 665 ("*Liberty*"). The equivalent section of the Companies Act, 2006 (in England and Wales) to s. 85 of the 2014 Act is section 646. That section requires a creditor, in order to demonstrate its entitlement to object to a reduction of capital application, amongst other things, to show that there is a *"real likelihood that the reduction would result in the company being unable to discharge his debt or claim when it fell due"*. The requirement to establish a "*real likelihood*" is not identical to the requirement in s. 85(4)(a)(ii) to "*credibly demonstrate*" that the proposed capital reduction would be likely to put the satisfaction of the debt or claim at risk. However, both provisions seek to transpose into national law the provisions of the same EU Directive, namely, Directive 2006/68/EC of the European Parliament and of the Council. In those circumstances, it is of assistance to see how the courts of England and Wales have interpreted and applied the test in the legislation applicable there. In a very helpful description of the test to be applied under s. 646, Norris J. in *Liberty* stated as follows:

> *"[17.] Where the section calls upon a creditor to show 'a real likelihood' that the reduction 'would' result in an inability to discharge the debt when it becomes due, it is calling upon the creditor to demonstrate a particular present assessment about a future state of affairs. In considering the evidence, I identified three elements: What follows is descriptive of the course I followed, not prescriptive as a course to be adopted by others.*
>
> *[18.] First, I looked at the factual: Whatever assessment is made has to be well grounded in the facts as they are now known. Although one is looking to the future, one has to avoid the purely speculative.*
>
> *[19.] Second, there is a temporal element. One is looking forward for a period in relation to which it is sensible to make predictions. That period will, of course, be affected by the nature and duration of the liability in question. So a continuing direct liability under a lease may indicate that a correspondingly long-term view must be taken. But in general the more remote in time the contemplated event that will make payment fall due the more difficult it must be to establish the reality of the*

likelihood that the return of capital will itself result in inability to discharge the debt. For private companies' directors are required to look forward for twelve months. I do not suggest that implicitly the same period applies where the sanction of the court is necessary: But I do consider that in any given case there will be a natural temporal boundary beyond which sensible assessment of likelihood is not possible.

[20.] Third, the section obviously does not require a creditor to prove that a future event will happen: It is concerned to evaluate the chance of the event (the company's inability to discharge the debt because it has returned capital). It describes the chance as 'real likelihood', thereby requiring the objecting creditor to go some way up the probability scale, beyond the merely possible, but short of the probable. That is the 'degree of persuasion' (as it was put by Hoffmann J. in Re Harris Simons Construction Limited [1989] BCLC 202 at 204) for which I have looked in assessing the evidence."

(Per Norris J. at pp. 670-671).

95. It seems to me that this description of the test is of assistance, but is obviously not binding upon me. In any event, bearing in mind the claim advanced by Mr. Farrington on foot of the invoice, and having regard to the outlandish nature of that claim, I do not accept that Mr. Farrington has put forward evidence to "*credibly demonstrate*" that the satisfaction of any purported claim he might have on foot of the invoice would be likely to be put at risk. I do not find the case advanced by Mr. Farrington on foot of the invoice to be "*credible*". Moreover, looking at each of the elements of the test discussed in *Liberty*, namely, the factual, the temporal and the degree of proof required, it is very clear that Mr. Farrington has not put forward the type of evidence required in order to bring himself within the category of a creditor who is "*entitled to object*" to the Company's application.

96. Finally, in this context, and before returning briefly to the other grounds of objection advanced by Mr. Farrington, I should comment on the financial position of the Company. In my view, on the basis of the evidence provided to the court, the Company is in a very strong financial position and the satisfaction of the debts or claims of existing creditors could not credibly be said to be put at risk by the proposed capital reduction. I form that view on the basis of the original *pro forma* balance sheet exhibited to the first affidavit sworn by Mr. Edwards-Moss and on the basis of the revised and updated *pro forma* balance sheet exhibited to his third supplementary affidavit (at exhibit "3TEM2"). That latter balance sheet (in respect of the unaudited figures to 30th September, 2019) discloses non-current assets of just under €1.4 billion, total current assets of just over €28 million and total assets of over €1.4 billion. It also discloses total non-current liabilities of just under €270 million and total current liabilities of just under €23 million. The Company's total liabilities are stated to be just over €290 million. It is clear from those figures that the Company's current assets exceed its current liabilities and its non-current assets greatly exceed its non-current liabilities. It also has an issued share capital of just under €69 million and, prior to the proposed reduction, a share premium of just over €630 million. In the event of the proposed capital reduction being confirmed by the

court, the share premium will stand at in excess of €580 million. These figures disclose an extremely healthy financial position. Even if Mr. Farrington has a claim against the Company (and it is extremely difficult to see how he does), the financial position of the Company is such that it will be in a position to meet any claim by him, even if the proposed capital reduction is confirmed by the court. The Company's assets will exceed its liabilities by more than €1.1 billion.

97. For these reasons, I am not satisfied that Mr. Farrington has demonstrated that he is a creditor of the Company who is "*entitled to object*" to the Company's application under s. 85 of the 2014 Act. Even if he were a creditor of the Company (and I do not accept that he is), he has not credibly demonstrated that the proposed reduction of capital would be likely to put the satisfaction of his claim at risk or that no adequate safeguards have been obtained from the Company. The Company's financial position is such that if the proposed capital reduction is confirmed by the court, the Company has more than adequate resources to meet any reasonable claim that might be advanced by Mr. Farrington. The claim for in excess of €2 billion advanced to date by Mr. Farrington, in the manner already described, could not be described as a reasonable claim or one requiring serious consideration by the court.

(2) Other Grounds of Objection

98. I now turn to some of the other grounds of objection sought to be raised by Mr. Farrington. I do so, notwithstanding that I have concluded that he is not a creditor who is *"entitled to object"* to the Company's application under s. 85 of the 2014 Act and without prejudice to that conclusion.

99. As outlined earlier, when reviewing the affidavit evidence before the court in respect of the Company's application, apart from relying upon the invoice sent to the Company in late January, 2020, Mr. Farrington (with the support of Mr. Butler) advanced various other grounds of objection to the Company's application. They centred on (1) alleged flaws in the accounts of Ulster Bank, (2) alleged flaws in the Company's accounts and (3) an alleged defect in the acquisition by the Company of the ownership of Block 1, Clanwilliam Court.

100. When reviewing the affidavit evidence, I set out my assessment of, and conclusions on, the assertions made by Mr. Farrington and by Mr. Butler in relation to these various issues. I do not propose to rehearse that assessment or those conclusions here. I will, however, summarise my conclusions in relation to each of these other grounds of objection.

(a) Ulster Bank

101. First, as regards the alleged flaws in the accounts of Ulster Bank, I reject the contentions advanced in that regard by Mr. Farrington. The accounts of Ulster Bank have no relevance whatsoever to the Company's reduction of capital application. Neither Mr. Farrington nor Mr. Butler has demonstrated any basis on which the court could conclude that any of the allegations made against Ulster Bank could have any material bearing on the Company's

application. The suggestion that because the Company may indirectly have acquired one of its properties, namely, Block 1, Clanwilliam Court from Ulster Bank, or an entity connected with Ulster Bank (and I express no conclusion whether it did), meant that the Company was in some way receiving the benefit of the proceeds of a crime is without foundation and I reject it entirely.

(b) The Company's Accounts

102. As regards the contention made by Mr. Farrington and by Mr. Butler that the Company's accounts were incorrectly prepared and that the incorrect standard was applied in the preparation of its accounts, I also reject that contention. I referred earlier to the basis on which the Company's accounts were prepared by reference to express statements contained in the 2019 Annual Accounts themselves and in the affidavits sworn on behalf of the Company by Mr. Edwards-Moss. When reviewing the evidence put forward by Mr. Farrington and by Mr. Butler, on the one hand, and by Mr. Edwards-Moss, on the other, earlier in this judgment, I outlined the evidence I was accepting and the evidence I was rejecting.

103. To recap, I reject the evidence advanced by Mr. Farrington and by Mr. Butler to the effect that the Company's accounts were prepared on an improper or illegal basis. I accept the evidence put forward on behalf of the Company as to the basis for the preparation of its accounts. In my judgment, neither Mr. Farrington nor Mr. Butler have provided any basis on which the court could conclude that the Company's accounts were not properly prepared. Neither provided any basis on which the court could, or should look behind the Company's audited accounts which, in the absence of any countervailing evidence, I accept and find were prepared and audited in good faith. Although it may be unnecessary to do so, I go further than that and I entirely accept the evidence adduced on behalf of the Company that its accounts were properly prepared in accordance with the relevant IFRS standards as adopted by the European Union, having regard to the primary business of the Company which is property investment.

104. The suggestion made by Mr. Farrington and, on affidavit, by Mr. Butler that the Company (and by implication, its directors) committed an offence or offences under s. 292 of the 2014 Act by using *"flawed accounting standards to portray the financial position"* of the Company is manifestly without foundation. The allegation should never have been made, particularly by Mr. Butler, a person put forward to the court as an expert. From my review of the Company's 2019 Annual Accounts and from my consideration of the evidence, I unequivocally find that the Company and its directors complied with the requirements of s. 292 of the 2014 Act and complied with the relevant IFRS standards in the preparation of the Company's accounts. I completely reject the contention advanced to the contrary by Mr. Farrington and by Mr. Butler. Accordingly, I reject any ground of opposition to the Company's application on the basis of any alleged flaws in the Company's accounts.

(c) Block 1, Clanwilliam Court

105. As outlined earlier, both Mr. Farrington and Mr. Butler sought to impugn the Company's ownership of Block 1, Clanwilliam Court. I have set out my views in relation to the evidence advanced in support of those contentions earlier in this judgment. I explained that Mr. Farrington and Mr. Butler have adduced no evidence in support of their contention that there was some doubt or issue in relation to the Company's ownership of that property. Insofar as Mr. Farrington appeared to suggest that the Company could not have acquired ownership of the property on the basis that it represented the proceeds of crime (by reason of some alleged flaw in the Ulster Bank's accounts), I reject that contention. There is simply no basis in law or in fact for it. Insofar as Mr. Butler sought, on affidavit, to express "*doubt*" about the "*true ownership*" of Block 1, Clanwilliam Court, I set out my views in relation to Mr. Butler's evidence earlier in this judgment when considering his affidavit. I find the allegations made by Mr. Butler in that regard to be extraordinary, bizarre and entirely unsupported by relevant evidence. The contention advanced by him (without any evidence) that the sale of the property to the Company should be treated as "*null and void*" is completely misconceived and lacks any basis in law or in fact. No evidence was advanced by Mr. Farrington or by Mr. Butler in support of their contentions impugning the Company's ownership of Block 1, Clanwilliam Court. No legal principle was advanced to the court which could conceivably lead the court to conclude that there exists any doubt in relation to the Company's ownership of that property. Accordingly, I reject entirely the ground of opposition to the Company's application advanced by Mr. Farrington, with the support of Mr. Butler, based on an alleged doubt as to the Company's ownership of Block 1, Clanwilliam Court. Mr. Farrington and Mr. Butler have not demonstrated that, as a matter of fact or of law, there is any doubt as to the Company's ownership of that property.

Alleged Expert Evidence

106. Finally, having rejected all of the grounds of objection advanced by Mr. Farrington, it is necessary for me to make some observations in relation to the purported expert evidence of Mr. Butler.

107. I have been extremely critical of the evidence advanced by Mr. Butler and have rejected his evidence in its entirety. Mr. Butler was held out as an expert but gave no evidence of his professional or academic qualifications. He gave no evidence to the court as to any relevant qualifications, or experience he might have in relation to property investment companies, in general, and REITs, in particular. He did not acknowledge in his affidavit whether he had an understanding of the particular duties owed by an expert giving evidence before an Irish Court. He did not set out in his affidavit the information, material and instructions provided to him by Mr. Farrington. He did not state in his affidavit the particular facts, or assumed facts on the basis of which he was advancing the contentions made in his affidavit. He did not set out the terms on which he was engaged by Mr. Farrington. He made a series of wild and outlandish allegations in his affidavit, some of which were directed to parties who were not before the court (such as Deloitte LLP, Deloitte Ireland, KPMG, Royal Bank of Scotland and Ulster Bank). He made allegations in relation to the Company's accounts without reference to the accounts themselves. He made no effort to comment specifically on the Company's 2019 Annual Accounts (which

he must have seen) and yet felt it appropriate to allege that the Company (and, by implication, its directors) had committed an offence in relation to the manner in which its accounts were prepared. He made a series of bizarre and extraordinary allegations, entirely unsupported by evidence, concerning Block 1, Clanwilliam Court. Without any basis in fact, Mr. Butler sought to cast doubt on the Company's ownership of Block 1, Clanwilliam Court and asserted (again, without any evidence) that the "*true owner*" of that property is someone else, described as "*a creditor*" of the Company, which I have taken to mean Mr. Farrington. Mr. Butler provided no evidence in support of that contention or any evidence on foot of which he could responsibly have formed and stated that view.

108. It is worth remembering what the Supreme Court said recently in relation to the important role played by expert witnesses in court proceedings and the importance of persons held out as experts acting with independence and impartiality. In *O'Leary v. Mercy University Hospital Cork Limited* [2019] IESC 48 ("O'Leary"), MacMenamin J. (in delivering the judgment of the Supreme Court) stated:-

> *"Expert witnesses have played an important role in court proceedings since the earliest evolution of the common law. Such witnesses are often essential in assisting courts when reaching a conclusion on complex issues, whether they arise in a personal injury action, a commercial case, or a patent proceeding. However, there are, unfortunately, occasions when expert witnesses do not always appreciate their fundamental duty of independence and impartiality. Their primary duty is always owed to the court and not to their client or the person who retains them. The cost of obtaining expert testimony can form a significant component in overall litigation expenses. What may not always be clear, is that some cases where the ultimate outcome will be clear-cut actually come as far as the courtroom because of what are called 'hired gun' witnesses on one side or the other. Quite often the deficiencies in the testimony of such witnesses are discovered only at the door of the court or in the hearing itself, by which time the parties may have incurred significant costs. This problem not only concerns private litigants and their advisers. At a time when litigation and insurance costs are a source of public concern, these problems can have a broader impact on the public."* (para. 1)

Those observations have a particular relevance in the present case, having regard to the deficiencies in the purported evidence provided by Mr. Butler on behalf of Mr. Farrington.

109. Later in its judgment in *O'Leary*, the Supreme Court re-emphasised why the duties of expert witnesses require "*clear identification and definition"* (para. 17). Unlike a witness as to fact, who is not permitted to express and opinion in relation to the matters in issue between the parties, an expert witness may express opinions in respect of such facts (see *AG (Ruddy) v. Kenny* [1960] 94 ILTR 185). The Court referred to the earlier judgment of Charleton J. in the High Court in *Flynn v. Bus Átha Cliath* [2012] IEHC 398, where he drew attention to the fact that the entitlement of an expert to express an opinion was *"predicated upon informing the court of the factors which made up that opinion, and*

supplying the court with the elements of knowledge which study and experience had furnished, and which formed the basis of the opinion, so that, in the circumstances, the court may be enabled to take a different view to theirs" (para. 17). Unfortunately, Mr. Butler did not do any of this.

110. The Supreme Court in *O'Leary* approved the principles applicable to, and the responsibilities of, expert witnesses listed by Cresswell J. in *National Justice Compania Naviera S.A. v. Prudential Assurance Company Limited (The Ikarian Reefer*) [1993] 2 Lloyd's Rep 68. Amongst the duties and responsibilities of expert witnesses listed in that case were the following:-

> *"1. Expert evidence presented to the Court should be, and should be seen to be, the independent product of the expert uninfluenced as to form or content by the exigencies of litigation…*
>
> *2. An expert witness should provide independent assistance to the Court by way of objective unbiased opinion in relation to matters within his expertise… An expert witness should never assume the role of advocate.*
>
> *3. An expert witness should state the facts or assumptions upon which his opinion is based. He should not omit to consider material facts which detract from his concluded opinion…*
>
> *4. An expert witness should make it clear when a particular question or issue falls outside his expertise.*
>
> *5. If an expert's opinion is not properly researched because he considers that insufficient data is available then this must be stated with an indication that the opinion is no more than a provisional one…"*
>
> (per Cresswell J. at pp. 81-82)

111. These are amongst the duties and responsibilities of expert witnesses. I cannot be satisfied on the evidence in this case that those duties and responsibilities were complied with in the present case. In particular, I am not satisfied that Mr. Butler understood the need to be, and to be seen to be, independent of Mr. Farrington. Nor am I satisfied that the evidence he provided in the form of his affidavit was unbiased and related to matters within his expertise. Mr. Butler acted more as an advocate for Mr. Farrington's cause than an independent expert.

112. For these reasons, I have reached the conclusion that I cannot rely on the purported evidence advanced by Mr. Butler as a claimed expert. On that basis, it would have been open to me to refuse to admit Mr. Butler's affidavit. However, rather than adopting that course, I proceeded to consider the contents of Mr. Butler's affidavit and, insofar as they were based on that affidavit, the "*outline submissions"* furnished by Mr. Farrington. Having done so, I have concluded that all of the grounds of objection advanced by Mr. Farrington should be rejected.

Conclusions

113. For the reasons set out in this judgment, I am satisfied that it is appropriate to grant the reliefs sought by the Company. I will, therefore, make an order under s. 85(1) of the 2014 Act confirming the special resolution approving the reduction of the Company's capital by reducing the share premium account by the reduced sum of €50,000,000, such that the reserve resulting from the reduction will be treated as profits available for distribution within the meaning of s. 117 of the 2014 Act. I will further direct that pursuant to s. 85(5) of the 2014 Act, the provisions of s. 85(4) shall not apply as regards any of the classes of creditors of the Company. I will make an order pursuant to s. 86 of the 2014 Act approving a revised minute of the reduction of capital to reflect the reduced amount now sought by the Company. I will also make the balance of the orders sought in the originating notice of motion. Finally, I will give the Company liberty to apply.