

**THE HIGH COURT  
COMMERCIAL**

**Record No. 2020/100 COS**

**IN THE MATTER OF ALLERGAN PLC  
AND IN THE MATTER OF THE COMPANIES ACT 2014  
AND IN THE MATTER OF A PROPOSAL FOR A SCHEME OF ARRANGEMENT  
PURSUANT TO PART 9, CHAPTER 1 OF THE COMPANIES ACT 2014  
AND IN THE MATTER OF THE IRISH TAKEOVER PANEL ACT 1887**

**JUDGMENT of Mr Justice David Barniville delivered on the 11th day of May 2020**

**Introduction**

1. The applicant, Allergan plc (the "Company"), seeks orders pursuant to the Companies Act, 2014 (the "2014 Act") for, (a) the sanctioning of a proposed scheme of arrangement between it and holders of certain shares in the Company (the "scheme") under Part 9, Chapter 1 of the 2014 Act and (b) confirming a special resolution approving a reduction of the capital of the Company by cancelling and extinguishing certain of its shares under s. 85(1).
2. The application arises in the context of an acquisition of the Company's share capital by a subsidiary of AbbVie Inc. ("AbbVie"), a Delaware company, in a US\$63 billion transaction announced in June 2019. The purpose of the proposed scheme is to effect the acquisition of the entire issued, and to be issued, share capital of the Company by Venice Subsidiary LLC ("Venice"), a direct wholly owned subsidiary of AbbVie such that, on completion of the acquisition, the Company will be a wholly owned subsidiary of AbbVie. The Company is the parent company of a global pharmaceutical business with operations in more than 100 countries with approximately 17,000 employees. AbbVie is a global biopharmaceutical company with operations in 75 countries and approximately 30,000 employees.
3. I heard the Company's application for the orders referred to above on 6 May 2020 and in an ex tempore ruling that day, made orders sanctioning the proposed scheme and confirming the special resolution approving the reduction in the Company's capital as well as various ancillary orders. I was satisfied that it was appropriate to do so in light of the relevant legal tests as applied to the facts set out in the various affidavits sworn in support of the application. However, as the application raised an issue which, while present in a number of previous similar applications, has not yet been the subject of a written judgment of the Irish courts. I agreed to produce a written judgment addressing the issue and setting out my reasons for granting the Company's application.
4. The issue arises from the fact that more than 99% of the shares the subject of the scheme are held by investors in book entry form through the Depository Trust Corporation ("DTC") in the United States, whose nominee, Cede & Co ("Cede") is the registered holder and legal owner of the relevant shares. Those investors are beneficial owners and not legal owners of these shares. The balance of the shares (less than 1%) are held by persons other than Cede. Those persons are the registered and legal owners of the shares. As we shall see, Cede cast votes at the scheme meeting convened by the court in favour of and against the proposed scheme, to reflect the instructions given to the DTC by the beneficial owners of the relevant shares. This raises a number of

questions in terms of the test applicable to the sanctioning by the court of schemes of arrangement, which it is appropriate to address in this judgment.

### **Procedural Background**

5. On 10 September 2019, the High Court (Haughton J.) entered the proceedings in the Commercial List and made various further orders and directions in connection with the proposed scheme. The court ordered, pursuant to s. 450 (3), that a meeting of the holders of the Scheme Shares (as defined in the scheme) be convened to consider the proposed scheme and ordered that such meeting of scheme shareholders take place on 14 October 2019. The court further ordered pursuant to s. 450 (5), that all of the holders of the scheme shares would comprise one class for the purposes of the scheme meeting. The court ordered that the scheme meeting be advertised in a number of Irish and international publications and made various other orders concerning the conduct of the scheme meeting itself. Among those orders and directions was an order that each member of the Company entitled to more than one vote was not required, if it voted, to use its all of its votes or to cast all the votes used in the same way.
6. The scheme meeting went ahead on 14 October 2019. Cede was counted as voting both for and against the scheme. The scheme was approved by an overwhelming majority. The scheme was approved by 91.36% in number of the votes cast, representing 99.64% in value of the holders of the scheme shares present and voting in person or by proxy at the scheme meeting.
7. An extraordinary general meeting (the "EGM") was held after the scheme meeting on 14 October 2019. Among the resolutions passed at the EGM was a special resolution approving the reduction in the Company's capital by cancelling and extinguishing all of the "cancellation shares" (as defined in the scheme) without thereby reducing the authorised share capital of the Company. The holders of shares, representing 99.79% of the shares in the company, voted in favour of that special resolution.
8. By an originating notice of motion dated 11 March 2020, the Company applied for orders sanctioning the proposed scheme and confirming the special resolution approving the reduction in the Company's capital. The application was grounded on a very detailed affidavit sworn by a Robert D. Bailey on 5 March 2020. Mr Bailey is the Company's Executive Vice President, Chief Legal Officer and Corporate Secretary. Affidavits were also sworn on behalf of the Company by Brenton L Saunders, the Company's Chairman, President and Chief Executive Officer, on 2 March 2020, by Sandra Lynn Moore of Computershare Trust Company N.A., on 6 February 2020, by Michelle Gribulis of Broadridge Investor Communications, on 21 February 2020 and by Donal Breatnach of Arthur Cox on, 16 March 2020.
9. On 16 March 2020, I fixed the hearing date for the Company's application for 6 May 2020. I gave directions in relation to the advertising of the hearing in a number of Irish and international publications. I also directed that if any interested party wished to appear at the hearing to support or oppose the making of any order, that party had to give notice of

its intention to appear by 5:30pm on 1 May 2020, and had to file and serve an affidavit in support of such appearance by the same date.

10. Mr Breatnach swore a further affidavit in support of the Company's application on 6 May 2020. In that affidavit, he confirmed that the outstanding United States anti-trust clearance required was obtained by the Company from the Federal Trade Commission on 5 May 2020. All of the required anti-trust clearances had, therefore, been obtained by the Company. Consequently, all of the conditions to the acquisition, and to the scheme, were at that stage satisfied (save for those to be dealt with by the court on the Company's application). Mr Breatnach also provided evidence of the Company's compliance with the directions made by the court on 16 March 2020. He further confirmed that no interested party had given notice of its intention to appear at the hearing, although he pointed out that one potentially interested party had made enquiries about the hearing. That party did not, however, seek to appear to oppose or support the orders being sought. Finally, as the proceedings are "takeover proceedings" within the meaning of order 75 rule 18 of the Rules of the Superior Courts (as amended). Mr Breatnach explained that the Irish Takeover Panel (the "Panel") was on notice of the Company's application and had been kept updated in relation to the hearing of the application. The Panel confirmed that it did not intend to appear at the hearing.

#### **Sanction of the Scheme of Arrangement**

11. The test to be applied by the court in deciding whether to sanction a scheme of arrangement is well established and has been considered and applied in a number of recent judgments of the Irish courts. In *Re Colonia Insurance (Ireland) Ltd* [2005] 1 IR 497 ("*Colonia*"), the High Court (Kelly J.) set out the test to be applied in the case of a scheme of arrangement in relation to a solvent company. The test was subsequently applied to takeover or acquisition schemes, such as the scheme at issue in the present case: In *Re Depfa Bank plc* [2007] IEHC 463 ("*Depfa*") (Kelly J.) and In *Re SCISYS Group plc* [2019] IEHC 904 ("*SCISYS*") (Barniville J.). The test has also been applied to schemes of arrangement providing for corporate restructuring in other situations (In *Re UBS EFTs public limited company* [2019] IEHC 860 ("*UBS*") (Barniville J.) and to schemes of arrangement concerning insolvent companies (In *Re Ballantyne plc* [2019] IEHC 407 (Barniville J.)). I am satisfied that the test set out in *Colonia* and referred to, and applied, in those other cases is the appropriate test to be applied in considering the Company's application for court sanction in respect of the proposed scheme and I apply it here.
12. In summary the test requires the court to be satisfied that the following five requirements have been fulfilled, namely, that:
  1. Sufficient steps have been taken to identify and notify all interested parties;
  2. The statutory requirements and all directions of the court have been complied with;
  3. The class of members (in the case of a scheme of arrangement between the company and its members) has been properly constituted;

4. There is no improper coercion of any of the members concerned; and
  5. The scheme is such that an intelligent and honest person, being a member of the class concerned, acting in his or her interest, might reasonably approve of it.
13. In addition to those five requirements, the court must also be satisfied that the scheme is not *ultra vires* the company the subject of the application. That might be the case where the scheme at issue involved the sale of the entirety of a company's undertaking, in circumstances where there was no power in the company's constitution permitting such a radical alteration in its position (for example: *In Re Oceanic Steam Navigation Co. Ltd* [1939] CH 41). There is no question of that arising in the present case. The purpose of the scheme here is to give effect to the proposed acquisition which will alter the identity of the Company's members, but not its activities. There is, therefore, no question of the proposed scheme being *ultra vires* the Company.
14. An additional factor which arises in the present case is that, as the Company is a "relevant company" and the transaction the subject of the proposed scheme is a "takeover", as those terms are defined in the Irish Takeover Panel Act, 1997 (the "1997 Act"), the transaction must be conducted in accordance with the provisions of that Act and the Takeover Rules, subject to the supervision of the Panel. A similar position applied in the case of the scheme of arrangement which was considered in *In Re Readymix plc* [2012] IEHC 194, where Kelly J. noted that the transactions envisaged by the scheme at issue in that case were required to be conducted in accordance with the provisions of the 1997 Act and the Takeover Rules. He was satisfied on the evidence that there had been close liaison between the company at issue and the Panel which had, by direction of the court, been served with the application and did not appear before the court. Kelly J. was satisfied on the evidence that the scheme and the procedures relating to it were proposed and conducted in compliance with the Takeover Rules.
15. Similarly, in the present case, the evidence establishes that the Company and its advisers have liaised with the Panel throughout the entire process. The Panel commented on the draft scheme circular sent by the Company and subsequently confirmed to the Company that it had no further comments. The Panel was served with the papers in respect of the application (and the earlier application to convene the meeting of scheme shareholders). The Company kept the Panel updated in relation to developments in the application. The Panel decided that it did not need to appear at the hearing. I am satisfied on the evidence that the provisions of the 1997 Act and the Takeover Rules have been fully complied with and that no issue arises in relation to those provisions.
16. I will now deal with each of the five requirements derived from *Colonia* and considered and applied in the other cases referred to earlier.
- (1) *Steps to identify and notify interested parties*
17. One of the unusual features of this case concerns the shareholding structure of the company. As noted earlier, and as explained in detail in Mr Bailey's affidavit, similar to

other companies that have effected a corporate migration to Ireland, the Company has a shareholding structure which is normal for US listed companies (the Company's shares are traded on the New York Stock Exchange), but is unusual in Ireland. More than 99% of the Company's issued and outstanding shares are held by investors who are the beneficial owners of the shares but are not the legal owners. The investors are not, therefore, "members" of the Company for the purpose of s. 168 of the 2014 Act. The investors hold their shares/securities in book-entry form through the DTC. Cede is the nominee of the DTC and is the registered holder and legal owner of the shares. A tiny percentage (less than 1%) of the total shares in issue are held by persons other than Cede. Those persons are the registered holders and legal owners of those shares. Mr Bailey explained that the DTC was established in 1973 to address the issues created by rising volumes of securities trading transactions in the US securities industries in the late 1960s. Prior to that, stockbrokers physically exchanged share certificates and relied on manuscript records to evidence title shares. That system was inefficient and expensive. The DTC was created to reduce costs and to provide clearing and settlement efficiencies by making book entry changes to the ownership of the securities. Securities are deposited into the DTC by participants who are typically banks and brokers (the "DTC Participants"). Cede becomes the legal owner of the securities deposited with the DTC and is registered in the register of members of the Company for the purposes of s. 168 of the 2014 Act. The DTC maintains records of how much of each security is held by each DTC Participant. Securities are eligible for transfer among DTC Participants by book entry delivery within the DTC. This occurs by way of electronic instruction issued through the DTC, transferring the rights to a particular number of deposited securities from one DTC Participant to another. However, Cede remains the registered holder and legal owner of the securities throughout the process. The number of securities held on behalf of each DTC Participant, and the terms on which the DTC holds them as depository for such participant are set out in the records of ownership and the rules of the DTC respectively. As noted earlier, DTC Participants are typically banks and brokers. In many, if not most cases, such DTC Participants will have invested in securities through the DTC on behalf of clients. Those clients may be retail investors or other financial institutions or investment firms (who may, in turn, hold them for other institutions or for retail investors). The DTC Participants usually have contractual or trust-based relationships with the clients for whom they hold the beneficial interest in the Company's shares (described by Mr Bailey as the "underlying interest – holders"). The Company's experience is that there are numerous layers of contractual, or trust-based relationships involved between Cede and the ultimate beneficial owners of Cede's shareholding in the Company. These relationships may take many forms and can be governed by the laws of several different jurisdictions.

18. Almost all trading in the Company's shares takes place through the DTC. The register of members of the Company refers to Cede holding 99.8% of the Company's issued, and outstanding, share capital as at 2 March 2020. As at the same date, there were 2,962 other registered members. Cede is the sole registered owner of the Company's securities deposited with the DTC. While the Company can request from the DTC a "*securities position listing*" as of a specified date which will identify the DTC Participants having a position in the Company's securities and the number of securities held by each DTC

Participant on that date, this will not disclose the identity of the persons (if any) on whose behalf the DTC Participants are holding the securities. When the Company receives such a securities position listing, DTC Participants can be asked to identify the underlying interest – holders who are their immediate clients and those persons can in turn be asked to identify the underlying interest – holders (if any) on whose behalf they have invested and so on. As a consequence, and due to the number of layers of interests involved in the differing legal relationships governing each layer of underlying interest – holders, it is impossible for the Company to be completely certain at any time of the identity of all of its underlying interest – holders. Mr Bailey explained that underlying interest – holders in the Company have been informed that they are not the legal owners of the shares and that that is apparent from shareholder communications issued by the Company since it was incorporated in Ireland. As required by US securities laws, the Company takes steps to ensure that the registered holders of the shares and underlying interest – holders are aware of and able to vote on resolutions proposed at the Company’s shareholder meetings. The evidence discloses that the Company undertook a number of procedures to seek to ensure that all of those interested parties received shareholder materials in relation to the scheme meeting. I accept that evidence.

19. The procedures adopted by the Company, in that regard, were described in the affidavit sworn on behalf of the Company by Matthew E. Walsh and filed on 3 September 2019, and are referred to in the order of the High Court of 10 September 2019. At paragraph 3 of that order, the court directed that notice of the scheme meeting be sent to the members of the Company (determined by reference to the register of members of the Company at a specified time and date) commencing on or about 16 September 2019, by means of a notice and that such notice was to be sent to the DTC Participants and the underlying interest – holders in the manner described by Mr Walsh. The affidavit evidence of Mr Bailey, Ms Moore and Ms Gribulis, demonstrates to my satisfaction that, in compliance with the order of 10 September 2019, the relevant documents, including the notice and proxy statement, were sent to the registered shareholders and to the underlying – interest holders by post or electronically not less than 21 clear days before the scheme meeting. Extensive steps were taken by the Company with a view to ensuring that the underlying interest – holders received those documents. The Company used the services of Computershare, its registrar and transfer agent, and Broadridge, an investor communications company, to assist in those steps. The Company did so in order to ensure that the DTC Participants and the underlying interest – holders had sufficient notice of the scheme meeting, as well as the registered shareholders of the company. The precise steps taken by, and on behalf of, the Company were set out at paragraphs 77 to 87 of Mr Bailey’s affidavit, and in the affidavits sworn by Ms Moore and Ms Gribulis.
20. I am satisfied that this very extensive affidavit evidence demonstrates clearly that the Company has fulfilled the first requirement which must be met in order for the court to sanction the scheme. While there is no previous reported decision of the Irish courts which considered the sanctioning of a scheme of arrangement where the company at issue had a shareholding structure similar to that of the Company subject of the present application, Mr Bailey explained on affidavit that the Company’s solicitors, Arthur Cox,

advised the Company that the High Court previously sanctioned a number of schemes of arrangement involving companies which had migrated to Ireland and which had the vast majority of their issued share capital held by Cede through the DTC system. Those approved schemes included schemes in respect of *Cooper Industries plc*, *Warner Chilcott plc*, and *Covidien plc*. Mr Bailey exclaimed that Arthur Cox had advised that materially identical procedures were undertaken in respect of those schemes and sanctioned by the court to ensure that shareholders and underlying interest holders were aware of, and able to cast votes on the resolutions proposed at the relevant scheme meetings. While that information is of interest, and does provide some comfort to the court in considering the procedures followed in the present case, I am in any event satisfied that on the basis of the extensive evidence provided by the Company, sufficient steps were taken by, and on behalf of, the Company to identify and notify interested parties of the scheme meeting.

(2) *Compliance with statutory requirements and court directions*

21. The statutory requirements which have to be fulfilled before a scheme of arrangement can become binding on the members of the company concerned (in the case of a scheme between a company and its members) are set out in s. 453 of the 2014 Act. Section 453 (1) provides that a scheme will become binding on the members of the company concerned if certain conditions are satisfied. Those conditions are set out in s. 453 (2). In summary the conditions are as follows:
- (a) There must be a "*special majority*" of those voting at the scheme meeting in favour of a resolution agreeing to the scheme. A "*special majority*" is a majority in number representing at least three fourths in value of the members;
  - (b) Notice of the passing of the resolution at the scheme meeting, and that an application will be made to the court in relation to the scheme of arrangement, must be advertised in at least 2 daily newspapers circulating in the district where the registered office or principal place of business of the company is situated; and
  - (c) The scheme must be sanctioned by the court.
22. As to the first of those statutory requirements, evidence has been provided in the form of Mr Bailey's affidavit and in the affidavit of Mr Saunders, that the requisite "*special majority*" requirement was satisfied. 91.36% of the members by number representing 99.64% of the votes cast in value voted in favour of the scheme at the scheme meeting. Mr Bailey explained that Cede, which holds almost all of the Company's issued and outstanding share capital, was counted as voting both for and against the scheme to reflect the instructions given by certain of the beneficial owners of those shares to the DTC. Some of those beneficial owners instructed the DTC to vote against the scheme. Two points arise out of that. The first is that it should be noted that, the order of 10 September 2019 expressly provided (at paragraph 9) that members of the Company entitled to vote were not required to cast all their votes in the same way. Second, s. 190 of the 2014 Act expressly entitles a member of a company, entitled to more than one vote, not to cast all of its votes in the same way in a poll taken at a meeting of the

members of the company. There was, therefore, no problem with Cede voting some of its shares in favour of and some against the scheme.

23. As regards the second of the statutory requirements, Mr Breatnach's affidavit of 16 March 2020 establishes that the relevant notices were published in the Irish Times and in the Irish Independent on 11 March 2020. The requirements of s. 453 (2)(b) have, therefore, been fulfilled in this case.
24. As regards the directions made by the court in its order of 10 September 2019, Mr Bailey's affidavit demonstrates clearly that the directions given by the court in that order were all complied with. He explained, in some detail, the circumstances in which the relevant notices and other documents (including the proxy statement and circular) were sent to the members and other interested persons (further evidence of this is contained in the affidavits of Ms Moore and Ms Gribulis). In addition, Mr Bailey explained how the various other directions made in that order were complied with. Mr Saunders also explained in his affidavit how the scheme meeting was conducted. Mr Bailey also referred to, and exhibited, the advertisements published in respect of the scheme meeting directed by the court. I am satisfied that the evidence establishes that the directions made by the court on 10 September 2019 were fully complied with by the Company.
25. As regards the directions made by the court on 16 March 2020, Mr Breatnach's second affidavit (sworn on 6 May 2020) demonstrated that the relevant advertisements were published on 21 April 2020 in respect of the court sanction hearing and that announcements were published by the Company and filed with the SEC, in compliance with those directions on 21 April 2020. Mr Breatnach also explained that no interested party had given notice of its intention to appear to oppose or support the company's application and exhibited correspondence exchanged between one potentially interested party which ultimately decided not to appear.
26. I am satisfied that all of the directions made by the court in its orders of 10 September 2019 and 16 March 2020 were complied with.

(3) *Class of members properly constituted*

27. The next requirement which has to be fulfilled by the Company is to persuade the court that the class of members which voted at the scheme meeting on 14 October 2019 was properly constituted. As noted earlier, in his order of 10 September 2019, Haughton J. ordered pursuant to s. 450 (5) of the 2014 Act, that all holders of the scheme shares would comprise one class for the purposes of the scheme meeting. The meeting was convened and took place on that basis. The court had evidence before it that it was appropriate to so order. The evidence was given by Mr Walsh in his affidavit filed on 3 September 2019. In that affidavit, Mr Walsh explained that the Company had considered different groups of members who could potentially be considered as forming separate classes. However, it was explained that the Company had formed the view, on legal advice, that those groups did not properly constitute separate classes and that a single



class of members was appropriate. The court agreed and so ordered on 10 September 2020, on an *ex parte* basis.

28. No objection has been taken by any person to the fact that the scheme meeting was conducted on the basis of a single class of members. While Haughton J. made the order that the meeting would take place on the basis of a single class, on an *ex parte* basis, the court should be slow to reach a different view on this application to that reached by Haughton J. when convening the meeting. That is a view I have previously expressed and is an approach supported by the authorities (see for example: *UBS* and *SCISYS*). I agree with the view expressed by Chadwick LJ. in *Re Hawk Insurance Co. Ltd* [2001] EWCA Civ 241, that an applicant would be "*entitled to feel aggrieved*" if the court, in the absence of any opposition and of its own motion, were to reach a different view of the appropriateness of the class composition to that reached at the earlier stage of the process. However, as the court is not a rubber stamp, it is necessary for me to reconsider the position on this application.
29. The Company has provided further detailed evidence on this application to demonstrate the appropriateness of the scheme meeting proceeding on the basis of a single class of members. The different groups which could potentially constitute separate classes for the purposes of the meeting were identified by Mr Bailey at paragraph 74 of his affidavit. Those groups included the directors and executive officers of the Company, who had the right to vote in respect of certain shares and who had indicated that they intended voting in favour of the scheme, the Chief Executive Officer of the Company, who had entered into an employment agreement with the Company at the time he commenced in that role which provided for certain termination provisions and payment entitlements and releases, other executive officers of the Company who participate in certain executive severance plans, holders of equity awards, participants in the Company's annual incentive programme, employees who might receive retention bonuses as a result of the acquisition, executive officers of the Company who might receive "parachute payments" as a result of the acquisition, directors who have interests in AbbVie shares and options and so on. Mr Bailey explained that, notwithstanding particular arrangements in respect of various groupings of directors, officers and employees, to the extent that they hold shares, they are treated under the scheme in the same way as all other shareholders. On that basis, it was explained that it was appropriate for the court to have convened a single meeting of all of the holders of the scheme shares to consider and vote on the scheme and that the meeting properly proceeded on that basis.
30. As discussed by me in *UBS* and in *SCISYS*, the leading statement on the question of the class composition of meetings is that made by Bowen's LJ. in the English Court of Appeal in *Sovereign Life Assurance Company v Dodd* [1892] 1 QB 405, where he stated:

*"It seems plain that we must give such meaning to the term 'class' as will prevent the section being so worked as to result in confiscation and injustice, and that it must be confined to those persons whose rights are not so dissimilar as to make it*

*impossible for them to consult together with a view to their common interest.*"  
(page 583)

31. The test has been considered and applied in numerous subsequent cases. The relevant principles were very helpfully summarised by Lord Millett in the Court of Final Appeal of Hong Kong in *Re UDL Argos Engineering Ltd* [2001] HKCFA 54, by the English Court of Appeal in *Re BTR plc* [2000] 1 BCLC 740 and *Hawk Insurance* and by Lloyd J. in the English High Court in *Re Equitable Life Assurance Society* [2002] EWHC 140. In that case the court noted that it was necessary to balance the power of the majority and that of the minority and stated that:

*"... whereas unnecessary subdivision of a class may thwart a proper scheme altogether because of a veto thereby afforded to a small minority, on the other hand if it is said that there has been a unfairness or oppression on the part of the majority in a larger undivided class, the control mechanism is the court's scrutiny at the sanction stage: see Re Hawk insurance Co Ltd... and Nordic Bank plc v International Harvester Australia Ltd..."* (para. 46)

32. The test was approved in this jurisdiction by Laffoy J. in the High Court in *In Re Millstream Recycling Ltd* [2009] IEHC 571. It was also approved and applied by me in *UBS* and *SCISYS*. The proper focus is on the legal rights possessed by the members of the company. If those rights are not so dissimilar as to make it impossible for the members to consult together with a view to their common interest, then it is appropriate to treat the members as a single class. There is no suggestion in the present case there has been any unfairness or oppression on the part of the majority in the single class of members.
33. Kelly J. in *Depfa* had to consider whether directors who also beneficially owned shares, and who had given an undertaking to vote in favour of the relevant scheme, had to be treated as a separate class. He held that the giving of undertakings did not constitute the directors as a separate class and that the only basis on which it might be necessary to treat those directors as a separate class was where they obtained a benefit which was not available to other members of the wider class in consideration of the undertaking. That did not arise on the facts of that case and does not arise here.
34. As regards the groups referred to in Mr Bailey's affidavit which might be regarded as requiring separate classes of members to consider the scheme, I am satisfied that the Company is correct in its contention that separate classes were not required. Each of those groups is treated in the same way as other members or interest holders under the scheme and will receive precisely the same consideration. Members of the Company are, therefore, being treated in the same way by the scheme. There is not merely a similarity, but an identity of rights involved. In my view, that indicates clearly that all of the members (and those whose interests are represented by the members) can consult together with a view to their common interest. There was, therefore, no need to call meetings of separate classes of members. To do so would unnecessarily have created a multiplicity of classes. I am satisfied that it was entirely proper for the Company to have proceeded with the scheme meeting on the basis that all members constituted a single

class. There was, in my view, no necessity to convene separate meetings for the purpose of considering and voting on the scheme.

35. It is unnecessary for me to express any view in this judgment as to whether a failure to convene separate meetings where that was required might only be fatal to an application to sanction a scheme of arrangement, where the failure in effect tipped the balance of whether the requisite majorities were reached. There is a suggestion in the judgment of the High Court (Costello J.) in *Re Pye (Ireland) Ltd* (No. 2) [1985] 3 JIC 1101 (at page 4), that unless that was the consequence of the failure to convene separate meetings, it would not be fatal to the application to sanction the scheme. The judgment of the High Court in that case was overturned on appeal by the Supreme Court on other grounds (and there appears to be no record of the Supreme Court decision: see *Irish Company Law Reports 1963 – 1993*, page 328). The issue does not arise on the facts of this case since I have concluded that the meeting was convened and proceeded properly on the basis of a single class of members. I would prefer to leave to a case in which the issue actually presents itself to express a view as to whether the suggestion made by Costello J. at page 4 of his judgment in *Pye* is correct.

36. I conclude therefore that the third requirement of the test to be met has been fulfilled by the Company.

(4) *Coercion*

37. The court must also be satisfied that there has been no coercion of the members in respect of the approval of the scheme. As has been pointed out in a number of the cases mentioned (including *Ballantyne*, *UBS* and *SCISYS*), every scheme in a sense involves an element of coercion where a dissenting member may be bound by the scheme, notwithstanding its opposition to it. However, what this requirement is focused on is improper coercion or pressure by one group or section of members on another, similar perhaps to the oppression of a minority interest in a company. In any event there is no question of coercion in the present case and so this requirement has clearly also been fulfilled by the Company.

(5) *Approval by intelligent and honest person*

38. The final requirement which must be fulfilled is that the court must be satisfied that the scheme is such that an intelligent and honest person, being a member of the class concerned, acting in respect of his or her own interests, might reasonably approve of it. This requirement has been widely considered and discussed in several Irish, and other, cases, a number of which were discussed by me in *Ballantyne*. It is unnecessary to consider the cases in any detail in this judgment. The test was most succinctly put by Kelly J. in *Depfa* in the terms just summarised. In considering whether the test is satisfied, it is important to bear in mind, as stated by Kelly J. in *Colonia* and in *Depfa*, and by me in *Ballantyne*, *UBS* and *SCISYS*, that the court does not act as a rubber stamp in considering whether to sanction a scheme which has been approved by the members. That said, however, the court will be slow to reach a different view in respect of the

scheme to that reached by experienced persons involved in the relevant market or industry, relevant to the company who voted in favour of it. As noted by Parker J. in *Re Ocean Rig UDW Inc.* (18 September 2017, Grand Court of the Cayman Islands, Parker J), in the case of a creditor scheme:

*"The court should be slow to differ from the vote, recognising that it is the creditors who are clearly the best judges of what is in their commercial interest. However, the court is not a rubber stamp in this regard even where the scheme has the support of an overwhelming majority of the creditors who are to be subject to it. The court can differ from the vote, but only if it is satisfied that an honest, intelligent and reasonable member of the class could not have voted for the scheme, and in that regard the court's own view as to whether the scheme is reasonable or even the best scheme is not relevant."* (para. 89)

39. I adopted and endorsed those views in my judgment in *Ballantyne* and I do so again here.
40. The Company understandably places much reliance on the overwhelming level of support given to the scheme by the members who voted at the scheme meeting. The Company further relies on various other facts. It relies on the unanimous determination of the Board of the Company at its meeting on 23 June 2019, that the various transactions referable to the acquisition, including the scheme, were in the best interests of the Company and its shareholders and that the terms of the scheme were fair and reasonable. The Board unanimously recommended that the Company's shareholders vote in favour of the scheme. Before doing so, the Board had consulted with management as well as the Company's internal and outside legal counsel and its financial adviser, JP Morgan, and considered various factors in weighing up the perceived benefits and potential risks of the transaction. The Board concluded that the uncertainties, risks and potentially negative factors were outweighed by the potential benefits that it expected that the Company and its shareholders would receive. In its written opinion for the benefit of the Company's Board, JP Morgan advised that the consideration to be paid to holders of the Company's ordinary shares in the proposed transaction was fair, from a financial point of view, to those shareholders. The opinion formed part of the material furnished to the shareholders and underlying interest holders in compliance with the order of the court of 10 September 2019.
41. It is extremely rare for a court to refuse to sanction a scheme where it has been approved by an overwhelming majority of members and where the class, or classes, of members have been correctly constituted. It is clear from the affidavit evidence before the court that the overwhelming majority of members (and underlying interest holders) have supported the scheme. I am satisfied that the scheme was carefully considered by the Board of the Company, which recommended it to the members. The evidence also establishes that there are good, sound and practical reasons for the objectives being sought by the scheme and that the scheme is fair and equitable. In those circumstances, I have no hesitation in concluding that the scheme is one which an intelligent and honest

person, being a member of the class voting at the meeting, acting in his or her own interest, might reasonably approve.

42. I am satisfied, therefore, that all of the five requirements summarised by Kelly J. in *Colonia* and applied and considered in the other cases discussed above, have been fulfilled by the Company. In those circumstances, I will sanction the proposed scheme under s. 453(2) of the 2014 Act and make the consequential orders sought in respect of the scheme.

### **Capital Reduction**

43. The Company also seeks an order under s. 85(1) of the 2014 Act confirming the special resolution, approving the reduction of the capital of the Company by the reduction of the issued capital of the Company, by cancelling and extinguishing all of the “cancellation shares” but without thereby reducing the authorised share capital of the Company. It is common in schemes such as this one, that a reduction of capital is also sought in addition to the sanctioning of the scheme (see for example: *Readymix* and *SCISYS*). The relevant special resolution was passed by the members at the EGM on 14 October 2019.
44. Mr Bailey explained at paragraph 64 of his affidavit, that on the reduction of capital taking effect (if confirmed by the court), the issued share capital of the Company will be increased to its former amount by the allotment and issue to Venice, or its nominee, of new shares, equal to the number of cancellation shares with the same rights as those shares and that the reserve arising in the books of account of the Company as a result of the reduction of capital, will be capitalised and applied in paying up in full at par the new shares to be allotted. Therefore, the scheme and the reduction of capital will not affect the Company’s issued share capital and other non-distributable reserves. Neither the scheme, nor the reduction of capital is, therefore, in any way prejudicial to the rights or interests of the Company’s creditors. The Company has put up to date financial information before the court from which it is clear that the reduction of capital will not adversely affect the Company’s financial position in any way. Nor does it conflict with, or breach, any term of any indebtedness incurred by the Company or any of its subsidiaries or involve the diminution of liability in respect of unpaid company capital or the repayment to any shareholder of any paid-up company capital. The capital reduction will not affect the share premium of US\$457.9 million. The company capital of the Company is, and will be, in excess of the authorised minimum (as defined by s. 1000 of the 2014 Act) and the reduction will not infringe s. 1084 of that Act.
45. The approach to be taken by the court in considering an application by a company for an order confirming a capital reduction resolution has been addressed by the High Court and by the Court of Appeal in a number of recent cases. The cases were very recently considered by me in *Re Hibernia Reit plc* [2020] IEHC 144. The approach to be adopted was helpfully set out by Barrett J. in the High Court in *Re Permanent TSB Group Holdings plc* [2015] IEHC 500. Having referred, with approval, to a number of English cases, Barrett J. set out six matters or factors with which the court would have to be satisfied before it could confirm a capital reduction (at paragraph 42). They may be summarised as follows:

- (1) In a case to which the Companies Act, 1963 applies, the company must be authorised by its articles of association to resolve to reduce its capital;
  - (2) The company must have duly resolved by special resolution to reduce its share capital;
  - (3) The reduction proposals must have been properly explained to the shareholders so that they could exercise an informed judgment;
  - (4) The reduction of capital must be for a discernible purpose;
  - (5) All shareholders must be treated equitably; and
  - (6) The creditors of the company must be safeguarded.
46. Those factors were cited with approval in the judgment I delivered in *SCISYS* and in *Hibernia Reit* and have been recently approved by the Court of Appeal in *Re Permanent TSB Group Holdings plc* [2020] IECA 1. In his judgment for the Court of Appeal in that case, Collins J. stressed that evidence was required that the reduction had a discernible and for a *bona fide* purpose. None of that is in dispute in the present case.
47. These are the principles which I must apply in deciding whether to confirm the proposed capital reduction in the present case. I will deal with them in turn.
48. As regards (1), the Companies Act, 1963 does not apply in the present case. The 2014 Act applies. Under s. 84 of that Act, a company may reduce its company capital save to the extent that its constitution otherwise provides. There is nothing in the constitution of the Company which precludes the Company from reducing its company capital. On the contrary, article 48 of the Articles of Association of the Company provides that it may do so by special resolution.
49. As regards (2), the Company resolved by special resolution to reduce its share capital by the resolution (resolution 2) passed at the EGM on 14 October 2019.
50. As regards (3), I am satisfied that the notice set out in the proxy statement issued by the Company dated 16 September 2019, and the circular explaining the effect of the scheme sent with the notice, fully set out and properly explained to the shareholders the scheme and the proposed capital reduction in such a way that they could exercise an informed judgment.
51. As regards (4), the reduction of capital which forms an integral part of the scheme is clearly for a discernible and *bona fide* purpose, namely, to give effect to and implement the acquisition of the Company by means of the scheme.
52. As regards (5), the evidence establishes that all of the scheme shareholders have been treated equally and equitably in terms of the proposed capital reduction and under the

scheme, each shareholder will receive the same consideration for his or her shares under the scheme. The shareholders are therefore being treated equitably.

53. As regards (6), since the Company will be immediately recapitalised in the manner indicated upon the cancellation and extinguishment of the cancellation shares, there will be no impact on the creditors of the Company.
54. In addition to satisfactorily addressing these factors, the Company must also establish that the requirements of s. 85 (2) (as amended) have been complied with. Under that provision, a company which proposes to apply to the court for an order confirming the resolution reducing its capital, must cause notice of the passing of the resolution to be advertised once, at least, in one daily newspaper circulating in the district where the registered office or principal place of business of the company is situated and notice must be given by electronic means to all creditors of the company who are resident, or have their principal place of business, outside the state and must provide certain details in relation to the hearing.
55. The Company provided evidence demonstrating compliance with those requirements in Mr. Breatnach's affidavit of 16 March 2020 (paragraphs 4 and 5). The required notices were published in the Irish Times and in the Irish Independent on 11 March 2020. The Company sent notices to non-resident creditors by email on 13 March 2020. In addition, as the Company is party to a number of proceedings in the United States, and as claimants of those proceedings might be considered to be contingent creditors of the Company having regard to s. 85(2) of the 2014 Act, the Company sent notices to the counsel acting for the claimants in those proceedings and requested that the notices be brought to the claimants' attention. The company is guarantor for a limited proportion of the long-term debt issued by entities within the Allergan group. The holders of such notes could also potentially be considered to be contingent creditors of the Company having regard to s. 85(2). However, the Company does not have information in relation to the holders of such notes and did not send notices to them. It appears, however, that such holders would have access to, and would generally be aware of, the Company's publicly available SEC filings. Consequently, in addition to placing notices in various Irish and international newspapers, the Company also published an announcement in relation to the date of the hearing which it filed with the SEC on 21 April 2020. In my view, the evidence clearly establishes compliance by the Company with the requirements of s. 85(2) (as amended).
56. I am also satisfied on the evidence that the proposed reduction of capital does not involve either, the diminution of liability in respect of unpaid company capital or the payment to any shareholder of any paid-up company capital (for the purposes of s. 85(4) of the 2014 Act). As in *SCISYS*, the reduction of capital in respect of which confirmation is sought is momentary. As noted earlier, contingently upon the share cancellation resolution taking effect, the issued capital will be brought back to its former amount by the issue of an equivalent number of new shares from the reserve arising on the cancellation. The evidence clearly establishes, therefore, that the capital reduction is one which does not in

any way impact on the affairs of the Company's creditors. The Company will immediately be recapitalised following the cancellation. I am satisfied, therefore, that there is no need to direct the settlement of a list of creditors under s. 85 (4) of the 2014 Act.

57. For these reasons, I am satisfied that it is appropriate to confirm the special resolution approving the reduction of capital sought by the Company and to make the other orders sought, consequential upon that confirmation.

**Conclusions**

58. In conclusion, for the reasons set out in this judgment, I am satisfied that it was appropriate for me to (a) sanction the scheme of arrangement between the Company and the relevant shareholders pursuant to s. 453(2) of the 2014 Act, having found that the requirements for such sanction been fulfilled by the Company and that the scheme is fair and equitable, (b) confirm the special resolution approving the reduction of capital passed at the extraordinary general meeting of the Company on 14 October 2019, (c) order that the provisions of s. 85(4) of the 2014 Act shall not apply and (d) make the further orders and directions set out in the draft order provided by the Company. I will also give liberty to apply to the Company.