

THE HIGH COURT

DUBLIN

IN THE MATTER OF CUSTOM HOUSE CAPITAL
LIMITED

AND IN THE MATTER OF AN APPLICATION
PURSUANT TO REGULATION 166 OF THE
EUROPEAN COMMUNITIES (MARKETS IN
FINANCIAL INSTRUMENTS) Regulations 2007

ON THE APPLICATION OF THE CENTRAL BANK
OF IRELAND

ACTION HEARD BEFORE MR. JUSTICE HOGAN

ON FRIDAY, 21ST OCTOBER 2011

Gwen Malone Stenography
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above-named matter.

APPEARANCES

FOR THE CENTRAL BANK: MR. D. BARNIVILLE SC
MS. N. CAHILL BL

INSTRUCTED BY: MS. F. O BEIRNE
MCCANN FITZGERALD
SOLICITORS

FOR CUSTOM HOUSE CAPITAL LTD: MS. I. McGRATH BL

INSTRUCTED BY: DECHERTS SOLICITORS

FOR VARIOUS INVESTORS: MR. DELAHUNT BL

INSTRUCTED BY:

FOR MR. JOHN MULHOLLAND: MR. BOBBY EAGAR
SOLICITOR
SHEEHAN & PARTNERS
CUNNINGHAM HOUSE
130 FRANCIS STREET
DUBLIN 8

FOR MR. HARRY CASSIDY: MR. HOGAN SC

INSTRUCTED BY: MCCARTAN & BURKE
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1 THE HEARING COMMENCED AS FOLLOWS ON FRIDAY, 21ST
2 OCTOBER 2011

3
4 **REGISTRAR:** 2011/219 MCA in the matter of
5 Custom House Capital Limited. 11:03

6 **MR. JUSTICE HOGAN:** Good morning, ladies and
7 gentlemen.

8 **MR. BARNIVILLE:** I appear for the Inspectors with
9 Ms. Cahill, instructed by McCann Fitzgerald. It might
10 be appropriate in the first instance to the Court to 11:04
11 take appearances.

12 **MR. JUSTICE HOGAN:** I was just about to do that.
13 Thank you very much.

14 **REGISTRAR:** Are there any other appearances
15 in relation to Custom House Capital Limited. 11:04

16 **MS. McGRATH:** Judge, I appear on behalf of
17 Custom House Capital, instructed by Decherts
18 solicitors.

19 **MR. DELAHUNT:** May I please your Lordship. I
20 appear on behalf of what is now just over 120 11:04
21 investors. The Court may recall I had indicated a
22 lesser figure when the matter was last before the
23 Court. I am instructed by Messrs Lavelle Coleman.
24 Your Lordship is aware, insofar as my status is
25 concerned, liberty was granted. But the Court has been 11:04
26 most indulgent with me already and I would greatly
27 appreciate you being a little more indulgent this
28 morning.

29 **MR. JUSTICE HOGAN:** Yes, don't worry.

1 **MR. DELAHUNT:** Thank you, Judge.

2 **MR. JUSTICE HOGAN:** Let's put it this way, I have
3 not made any order yet in relation to the status of the
4 investors but that's something that will obviously
5 develop in the course of the morning. 11:04

6 **MR. DELAHUNT:** Thank you, Judge, I'm obliged.

7 **MR. JUSTICE HOGAN:** Are there any other appearances?

8 **MR. EAGAR:** I appear on behalf of John
9 Mulholland.

10 **MR. JUSTICE HOGAN:** Yes. 11:05

11 **MR. HOGAN:** Judge, I appear on behalf of
12 Mr. Harry Cassidy, instructed McCartan & Byrne
13 Solicitors.

14 **MR. JUSTICE HOGAN:** Mr. Eagar, do you want to sit,
15 maybe it might be convenient, do you want to sit in the 11:05
16 front row there. It might be convenient. As you wish.

17 **MR. EAGAR:** I'm happy. I am obliged.

18 **MR. JUSTICE HOGAN:** Sorry, Mr. Eagar, you are here
19 for?

20 **MR. EAGAR:** Mr. Mulholland. 11:05

21 **MR. JUSTICE HOGAN:** Mr. Mulholland, yes.

22 **MR. HOGAN:** I appear for Harry Cassidy
23 instructed by McCartan & Byrne Solicitors.

24 **REGISTRAR:** Are there any other appearances?

25 **MR. JUSTICE HOGAN:** Now, Mr. Barniville 11:05

26 **MR. BARNIVILLE:** May it please the Court. As the
27 Court knows, the Inspectors were appointed by this
28 Court on a temporary basis on the 15th of July and the
29 Court confirmed the appointment of the Inspectors on

1 the 20th of July, having given a ruling on the 18th of
2 July on the matter. The Inspectors were appointed, as
3 you know, to investigate the affairs of Custom House
4 Capital Ltd. and to report on the results of their
5 investigation to the Court under the 2007 Regulations. 11:06
6 The Inspectors have presented three interim reports to
7 the Court to date and they have been on foot of
8 directions made by this Court at various hearings in
9 the course of July and September.

10
11 The Court, on the 6th September, gave directions to the
12 Inspectors that it wished to receive the report by the
13 19th of October and to have a hearing in relation to
14 the report today, the 21st October. The Court also
15 gave directions that insofar as persons were to be the 11:06
16 subject of adverse criticism in the report a draft of
17 those relevant portions of the report should be
18 furnished to those people by particular dates in
19 September. I think they were pushed out slightly by
20 four days on foot of a further Order of the Court. 11:07
21 Those directions were complied with and a number of
22 parties, who were corresponded with, were given the
23 opportunity and availed of the opportunity to make
24 representations in relation to draft findings.

25
26 Those, as you will see from the affidavit before the
27 Court, those representations were, indeed for the most
28 part, taken on board by the Inspectors. They concluded
29 their final report and, as you know, in accordance with

1 the Court's direction, the final report was presented
2 to the Court on Wednesday evening. An application was
3 then made, yesterday, to this Court for an order
4 permitting the report to be provided to the Central
5 Bank. And that was then done. So the purpose of 11:07
6 today's hearing, Judge, is it is a hearing in relation
7 to the report and the Court has certain functions under
8 the Regulations that the Inspectors will be asking the
9 Court to perform in that regard.

10 **MR. JUSTICE HOGAN:** Yes. 11:08

11 **MR. BARNIVILLE:** Essentially, I will be asking
12 the Court in the first place to make certain directions
13 in relation to the provision of copies of the report
14 and for the immediate publication of the report in a
15 very slightly redacted form on the Central Bank 11:08
16 website. And I'm told, I'm instructed that once the
17 Court makes that direction, if it is disposed to doing
18 so, the mechanics of that are such that the report can
19 be on the website within an hour. I think it is less
20 than an hour in fact. 11:08

21
22 I am also seeking certain consequential orders, and
23 then further orders in relation to the company itself,
24 including an order for winding up of the company. And
25 I'm asking the Court to make that order of its own 11:08
26 motion under the relevant provision of the Regulations.
27 There is a grounding affidavit before the Court.

28 **MR. JUSTICE HOGAN:** Yes.

29 **MR. BARNIVILLE:** And it is probably appropriate

1 in the circumstances that I would open that grounding
2 affidavit to the Court.

3 **MR. JUSTICE HOGAN:** Certainly.

4 **MR. BARNIVILLE:** In that there are a large number
5 of people present who may not otherwise have the
6 opportunity of seeing the affidavit. So, subject to
7 the Court, I would propose opening that affidavit. 11:09

8 **MR. JUSTICE HOGAN:** Absolutely, Mr. Barniville.
9 Now, I have read it but I think in view of the fact
10 that there are a lot of people here who will not be 11:09
11 familiar with the terms of the affidavit it is probably
12 appropriate that you should open it.

13 **MR. BARNIVILLE:** I am entirely in the Court's
14 hands.

15 **MR. JUSTICE HOGAN:** Yes. 11:09

16 **MR. BARNIVILLE:** It is the 5th of the affidavits
17 that Mr. Thompson has sworn, one of the Inspectors has
18 sworn. You will see, Judge, he sets out the historical
19 background, which I have summarised earlier and it is,
20 perhaps, not necessary to go into that aspect of the 11:09
21 matter.

22 **MR. JUSTICE HOGAN:** Yes. And you set out the
23 various orders that were made and so on.

24 **MR. BARNIVILLE:** The various orders and the
25 various interim reports that were furnished to the 11:10
26 Court. And you will see, perhaps, at paragraph 5 I
27 should note that:

28
29 "On 6 September 2011 Mr Treacy and I
produced our third interim report to

1 the Court. The Third Interim Report was
2 a short report designed to update the
3 Court, however it did not contain any
4 new information of substance over and
5 above the First and Second Interim
6 Reports. The Third Interim Report was
7 exhibited to my Fourth Affidavit....It
8 was stated in the Third Interim Report
9 that in light of the issues uncovered
10 by the Inspectors up to that stage in
11 the investigation, and the statutory
12 powers and functions of the Central
13 Bank with respect to CHC, it was
14 considered appropriate to keep the
15 Central Bank informed of matters
16 relating to the progress of the
17 investigation and the financial
18 position of CHC."

11:10

11 He refers at paragraph 6 to Mr. Delahunt's position,
12 and indeed the position of Ms. Kirby, who also appeared
13 on behalf of another client of the firm. And, as the
14 Court is aware, the Court gave those parties liberty to
15 bring motions to be made notice parties but ultimately
16 those motions were not issued. Paragraph 7:

11:10

17
18 6. When the matter was before the Court on 6
19 September 2011, a number of clients of CI-IC attended
20 court. Counsel for 64 clients (instructed by Lavelle
21 Coleman solicitors) and another client of CI-IC
22 (represented by counsel instructed by Murphy McNamara
23 solicitors), appeared and made an application to be
24 made notice parties and to he provided with copies of
25 the interim reports. The Court gave them liberty to
26 bring motions grounded on affidavit in relation to
27 these applications hut ultimately no such motions were
28 issued.

29 "7. When this matter was before the
High Court on 6 September 2011, the

1 Court was informed that the final
2 report was at an advanced stage. At the
3 hearing on 6 September 2011 a number of
4 directions were sought and given in
5 relation to the provision of extracts
6 from the draft final report to persons
7 in respect of whom it was proposed to
8 make findings in the draft final report
9 and the making of representations by
10 such persons. These directions were
11 varied slightly by order of the Court
12 on 16 September...."

13
14
15
16 And you will see that:

17 "The Court directed that extracts of
18 the final report were to be furnished
19 to the relevant persons (including CHC)
20 itself by close of business on 20th
21 September, with any representations by
22 or on behalf of those persons to be
23 delivered to the Inspectors by 11th
24 October."

11:11

25
26 And then those are referred to. At paragraph 8 he
27 refers to the fact that the first and second interim
28 reports were provided to Mr. O'Dwyer, the chairman of
29 CHC.

11:11

30 "...subject to the condition that they
31 weren't to be disseminated, copied or
32 otherwise published, and not discussed
33 with any person or member of the staff
34 of CHC or any customer or investor in
35 CHC, subject to the proviso that the
36 report could be furnished to the legal
37 advisors...."

11:11

38
39 Subject to particular restrictions. The earlier
40 reports were also furnished to the Central Bank and it
41 is noted that the third interim report was in fact only
42 provided on the directions of the Court to the Central

11:11

1 Bank itself. Paragraph 9:

2 "In light of certain of the issues
3 addressed in the Final Report and in
4 particular issues such as the financial
5 position of CHC and the future
6 management of CHC, the Inspectors
7 considered it appropriate to keep the
8 Central Bank informed of the progress
9 of their investigation and the
10 conclusions they were minded to reach,
11 in relation in particular to the
12 financial position of CHC. In light of
13 the statutory functions and powers of
14 the Central Bank in relation to
15 investment firms, this was considered a
16 prudent and appropriate course to take.

17
18 And then reference is made to the final report.

19 "Since this matter was last before the
20 Court on 16 September 2011 Mr Treacy
21 and I have concluded work on the
22 investigation. I say that on 20
23 September 2011 extracts from the draft
24 Final Report were furnished to relevant
25 persons, including CHC, in accordance
26 with the directions of the Court."

27 He says that:

28 "...representations were received from
29 each of these persons (or solicitors
30 acting on their behalf) on or before 11
31 October. I do not propose to exhibit a
32 copy of the relevant correspondence and
33 representations in the interests of
34 fairness to those who made
35 representations which were to a
36 significant extent taken on board by
37 the inspectors."

38 However, he notes that if the Court requires to see the
39 representations a set can be made available to the
40 Court. He says that:

41 "...the Inspectors took time to
42 consider and take advice on the
43 representations that were made. On 14

1 October the Inspectors acknowledged to
2 the persons concerned or their
3 solicitors receipt of the
4 representations and indicated that they
5 were being reviewed and considered and
6 that the Inspectors would have due
7 regard to them in the course of
8 finalising their report. Having
9 considered the representations, the
10 Inspectors (or in one case solicitors
11 on their behalf) then wrote again by
12 letters dated 18 or 19 October to each
13 of these persons indicating that they
14 had had due regard to the
15 representations received in the
16 preparation of the Final Report and,
17 where applicable, indicating the
18 Inspectors' specific responses to
19 issues raised in the representations."

11

12 And again he notes that a copy of that correspondence
13 can be provided to the Court, but for the same reasons
14 it is not being exhibited.

15

16 "13. The outcome of our investigation
17 is set out in a final report together
18 with exhibits...."

17

18 And he refers to that report, which is exhibited in
19 this affidavit.

20

21 "He makes the affidavit for the purpose
22 of verifying the contents of the Final
23 Report."

22

23 And then he goes onto say he believes that:

24

25 "...the contents are true and accurate
26 and the conclusions....have been
27 reached by the Inspectors after careful
28 consideration of all matters which came
29 to our attention during the course of
30 the investigation, including the
31 representations made by persons to whom
32 extracts of the draft Final Report were
33 sent."

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He says that:

"...the Final Report, at paragraph 1.13, sets out the procedures adopted by the Inspectors for the purpose of conducting their investigation and complying with the directions of the Court given on 6 and 16 September 2011. The Inspectors are mindful of the gravity of certain of the issues addressed in the report and the potential for the report to have implications for CHC, its directors, officers and employees including implications beyond the scope of this investigation..."

And for that reason the Inspectors wish to draw to the attention of the Court that particular section of the Report, paragraph 1.13. And I will come to that, perhaps, at the end of the affidavit, Judge. At paragraph 16 he says:

11:14

"The Inspectors carried out their investigation by the appointment of KPMG to carry out a forensic investigation and by conducting examinations on oath of various individuals. KPMG's forensic investigation on behalf of the Inspectors involved retrieving, reviewing and analysing documents and correspondence of and relating to CHC. Based on the information and evidence gathered through these two processes, the Inspectors produced a draft of their final report.

17. The Inspectors were fully aware of the need to afford fair procedures. We also bore in mind the desirability of carrying out this investigation in as efficient and effective a manner as is practicable in the circumstances, and, having regard to the interests of clients of CHC, with a view to concluding the investigation and furnishing our report within a reasonable timeframe."

1
2 They were also conscious of the desire expressed by the
3 Court that the investigation would be brought to
4 finality with as much speed as possible consistent with
5 fair procedures. And then at 18:

6 "The procedures we adopted were
7 necessarily constrained by the
8 timeframe within which it was proposed
9 and we were directed to complete the
10 report. We carried out a number of
11 examinations on oath for the purpose of
12 obtaining relevant background
13 information. It is important to record
14 that the persons mentioned in the
15 information gathered by the Inspectors
16 were not afforded all of the rights
17 typical of an adversarial process. Such
18 as the right to cross examine
19 witnesses. While we do not consider
20 that this is something which was
21 required to have been done, whether by
22 reason of fair procedures or otherwise,
23 having regard to the nature and
24 statutory context of this
25 investigation...."

18 He says that:

19 "...the information that has been
20 gathered is subject to that
21 qualification and, as a result it was
22 not possible in some instances for the
23 Inspectors to resolve conflicts of
24 evidence. Consequently they did not
25 make findings about individuals but
26 they recorded evidence given about
27 individuals and made statements of fact
28 relating to individuals. The
29 limitations of the investigation
30 process as outlined above should be
31 borne in mind when reading the Final
32 Report."

27 The Inspectors considered that:

28 "...given the contents of the Final
29 Report it should be forwarded, in
30 unredacted form together with all of
31 its appendices and exhibits, to the

1 Central Bank...."

2
3 And that has already been done, Judge, on foot of the
4 Court's Order of yesterday.

5
6 "...and also to CHC by providing a
7 copy of same to its chairman, Mr John
8 Anthony O'Dwyer. In light of the number
9 of clients of CHC and given the clear
10 public interest issues which arise, the
11 Inspectors also consider that it would
12 be appropriate for them to arrange for
13 the Final Report to be published on the
14 website of the Central Bank but that
15 the version so published should have
16 the names of any clients of CHC and
17 related entities redacted from the body
18 of the Report."

19 I should say, Judge, that there is a redacted version
20 which I can provide to Court and I can just show the 11:17
21 Court by way of a couple of examples how it has been
22 redacted.

23 **MR. JUSTICE HOGAN:** Yes. I take it, Mr.
24 Barniville -- I mean, my principal anxiety in that
25 regard is that, and I presume it is shared by your 11:17
26 clients, that the names of individual investors should
27 not be contained.

28 **MR. BARNIVILLE:** Absolutely. And that is the
29 principle that was adopted in the redaction of the
30 report to ensure that either the names 11:17
31 or...(INTERJECTION)

32 **MR. JUSTICE HOGAN:** Well you can show me some
33 standard examples. I'm sure that has been done
34 appropriately. That would be any principle anxiety in

1 that regard.

2 **MR. BARNIVILLE:** And that's precisely what we had
3 in mind, Judge, when preparing the redactions. I think
4 it is names and account numbers which might enable
5 clients to be identified. 11:17

6 **MR. JUSTICE HOGAN:** Well anything that would
7 identify an individual investor.

8 **MR. BARNIVILLE:** Precisely.

9 "The Inspectors do not consider it
10 necessary or appropriate that the
11 appendices and exhibits to the Final
12 Report be published on the website of
13 the Central Bank. The appendices and
14 exhibits consist primarily of the
15 underlying documents which provide an
16 evidentiary basis for the findings in
17 the report and they contain a level of
18 detail that the Inspectors do not
19 believe is necessary or appropriate to
20 publish."

21 I should say also, Judge, that there are, I think,
22 copies of the redacted version of the report available
23 in court for those who have been corresponding, that
24 is, for example, Mr. Delahunt's solicitor and a couple
25 of others who are in that capacity, and equally those 11:18
26 who made representation to the Inspectors in that phase
27 of their investigation.

28 **MR. JUSTICE HOGAN:** Well, again, Mr. Barniville, we
29 can perhaps just hold off on that until you finish
30 making the application and then I will hear whether 11:18
31 there are in fact any objections to distribution and
32 dissemination.

33 **MR. BARNIVILLE:** May it please the Court. I just
34 wanted to -- it is not mentioned specifically in the

1 affidavit but I wanted to mention that point.

2 **MR. JUSTICE HOGAN:** Absolutely.

3 **MR. BARNIVILLE:**

4 "20. In light of the conclusions set
5 out in the Final Report the Inspectors
6 recommend and respectfully suggest that
7 the Final Report in unredacted form
8 together with all of its exhibits be
9 provided to the Minister for Justice
and Equality, the Director of Public
Prosecutions, the Director of Corporate
Enforcement and the Revenue
Commissioners..."

10 And I think what should be added, also, is An Garda
11 Síochána, for completeness.

11:19

12 **MR. JUSTICE HOGAN:** Yes.

13 **MR. BARNIVILLE:**

14 "The Inspectors also recommend and
15 respectfully suggest that a copy of the
16 communication, which is being made to
17 the Court pursuant to Regulation 171(1)
18 of the Regulations under cover of
19 letter dated 19 October 2011 from the
20 Inspectors' solicitors, should also be
21 provided to those bodies and that such
22 bodies maintain the contents of the
unredacted Final Report and its
exhibits and the Regulation 171(1)
Communication to the Court confidential
subject to any disclosure which may be
necessary or appropriate for the
performance by those bodies of their
statutory functions."

23
24 And the Court will see reference to this communication
25 provided for in Regulation 171 in respect of matters
26 which come to the attention of the Inspectors in the
27 course of their investigation which may tend to show
28 the commission of offences. And they are not matters
29 that are dealt with in the report but they are the

11:19

1 subject of the separate communication provided for
2 under the Regulations. Then the affidavit deals in
3 summary form with the financial position of CHC, and
4 clearly this is dealt with in far more detail in the
5 report itself. Paragraph 21:

11:20

6 "21. A detailed analysis of the current
7 financial position of CHC is contained
8 at section 22 of the Final Report. The
9 audited accounts for the year ending 31
10 March 2010 while outdated showed that
11 CHC had a number of financial concerns
12 at that time. The current management
13 accounts, annexed to the Final Report
14 show how these financial problems have
15 escalated and become more serious for
16 CHC. The Inspectors believe that CHC is
17 currently trading at a loss and
18 continuing to reduce its cash reserves.

19 22. I say and am advised that there are
20 two fundamental tests to determine if a
21 company is solvent or not, the cash
22 flow test and the balance sheet test."

23 In relation to the cash test he says:

24 "...as outlined at section 22.2(vii) of
25 the Final Report the Inspectors
26 consider that CHC fails the cash flow
27 test since it cannot pay its debts as
28 they fall due.

29 24. Balance Sheet test: As outlined at
30 section 22.2(viii) of the Final Report
31 the Inspectors consider that CHC fails
32 the balance sheet test since its
33 recoverable assets are less than its
34 liabilities.

35 And then he addresses in this section what the
36 Inspectors believe should now be done to the firm and
37 with the leave of the Court I should outline the
38 Inspector's position in that regard.

11:21

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It says:

"The Inspectors believe that CHC is insolvent as it fails both the basic solvency tests and the projected management accounts for the next number of months show no improvement in its trading position. CHC currently requires a loan from HBC..."

That is Horwath Bastow Charleton, who the Court will see referred to previously.

"....to fund its expenditure as set out at section 22.3 (vii) of the Final Report and it is operating without sufficient numbers of employees and a properly functioning board of directors as set out at Section 22.5 of the Final Report. CHC clients are currently being managed in the main by Horwath Bastow Charleton Wealth Management, as set out at section 21 of the Final Report.

26. In the Final Report, the Inspectors state that the actual cash position continues to worsen and while Horwath Bastow Charleton continue to provide working capital money, CHC is not in a position to meet its obligations as they fall due, including paying back the money provided by HBC. This is set out at Section 22.3 (vii) of the Final Report. In particular, a large part of the interest amount owing by CHC to Mezzanine Bond Fund clients and loan note holders was not paid as it fell due...."

And I think that was back in March 2011.

"....(as more particularly referred to at section 22.3 (vii) of the Inspectors' Final Report) and CHC is not in a position to meet these obligations.

27. The investigation of CHC by the Inspectors has raised significant concerns as to the manner in which the business of CHC had been conducted which has led to approximately €56 million of client holdings (largely

1 cash and equity holdings) being
2 improperly transferred without the
3 clients' knowledge, as referred to at
4 Section 1.9 of the Final Report. This
5 does not include funds owed to
6 Mezzanine Bond Fund Holders, which
7 amount to €10.4million, exclusive of
8 interest, as described at section 7 of
9 the Final Report.

10 28. The Inspectors are concerned that
11 current staffing arrangements at CHC
12 are insufficient in Order for it to
13 continue operating, as set out at
14 Section 14 of the Final Report.

15 29. I say and believe that significant
16 claims are likely to be made against
17 CHC by various clients and creditors
18 whose funds have been improperly
19 applied. It is likely that there will
20 be competing claims or classes of
21 claims against the assets of CHC. The
22 appointment of a liquidator will
23 safeguard the existing assets of CHC.
24 Further, I say and am advised that a
25 liquidator has extensive powers to
26 determine and adjudicate on claims,
27 subject to the supervision of the
28 Court.

29 30. CHC does not currently have and
30 cannot secure any professional
31 indemnity insurance cover. The previous
32 indemnity cover lapsed in July 2011.

33 31. On 15 July 2011, the Pensions Board
34 issued a suspension on the approval of
35 CHC's pension products.

36 32. In light of the foregoing, it
37 appears to the Inspectors that:

38 (a) CHC is insolvent;

39 (b) Given the scale of the misconduct
40 of CHC identified in the Final Report,
41 steps must be taken to protect the
42 interests of clients and creditors of
43 CHC and to protect and manage the
44 assets of CHC;

45 (c) There is an urgent need for winding
46 up orders to be made and for a
47 liquidator to be appointed to CHC.

48 (d) It would be just and equitable that
49 CHC be wound up.

1 33. Accordingly, I say and believe that
2 this is an appropriate case for the
3 exercise of the Court's discretion
4 under Regulation 172(1)(a) of the MIFID
5 Regulations to Order of its own motion
6 the winding up of CHC and Kieran
7 Wallace of KPMG has consented to act as
8 liquidator if so appointed by the
9 Court.

10 34. I further say that in the event
11 that for some reason the Court is not
12 minded to make an Order for the winding
13 up of CHC immediately upon the
14 presentation of the Final Report...."

15 And I should say that that is what the Inspectors are
16 asking the Court to do.

11:24

17 "There is a real risk that the assets
18 of CHC could be further depleted, due
19 to the matters set out in the Final
20 Report, including the lack of
21 professional indemnity insurance, the
22 lack of proper staffing levels, and the
23 likelihood of immediate claims against
24 CHC by clients and creditors. I say
25 that in that event the exercise of the
26 Court's discretion under Regulation
27 172(1) of the Regulations, a
28 provisional liquidator should be
29 appointed to ensure the protection of
30 CHC's assets pending a hearing as to
31 the winding up of CHC pursuant to the
32 Regulations."

33 And I just repeat that the Inspector's primary position
34 is that there should be an immediate Order winding up
35 the company, rather than merely a provisional
36 liquidator at this stage. But ultimately that may be a
37 matter for the Court to determine because we are asking
38 the Court of its own motion to make the Order.

11:25

39 **MR. JUSTICE HOGAN:** well, Mr. Barniville, that is
40 something, obviously, that will be given very anxious

1 consideration and that will be an issue that we will
2 address when I hear submissions, if any, by any party.

3 **MR. BARNIVILLE:** May it please the Court. At
4 Paragraph 35 he says:

5 "35. ...in the event that a liquidator
6 is appointed to CHC, the Inspectors
7 seek liberty to forward to such
8 liquidator the Final Report, together
9 with its exhibits subject to the
10 direction that the liquidator maintain
11 the contents of the unredacted Final
12 Report and its exhibits confidential
13 subject to any disclosure which may be
14 necessary or appropriate for the
15 performance of the functions as a
16 liquidator.

17 36. Given the issues addressed in the
18 Final Report, and in particular the
19 manner in which client holdings have
20 been dealt with by CHC, the exercise of
21 reconciling the financial records of
22 CHC with a view to ascertaining the
23 precise status of each client's
24 investment and the steps which will be
25 necessary to remedy issues which exist
26 in relation to client holdings will be
27 a complex and protracted one."

18
19 And can I say, Judge, that you will have seen from the
20 report that an estimate of approximately 6 months has 11:26
21 been provided to carry out such a reconciliation
22 exercise. And that would be with a full dedicated
23 team, whether it is by a liquidator or by anyone else.
24 But it is a major undertaking the Inspectors have
25 found. It says that the Inspectors... 11:26

26
27 ".... are not in a position to make any
28 recommendation to the Court regarding
29 any orders which might be made pursuant
to Regulation 172(1)...for the purpose
of remedying any disability suffered by
any person whose interests were

1 adversely affected by the conduct of
2 the affairs of CHC."

3 And then he deals with the Investor Compensation
4 Company Limited. He says that:

5 "The Inspectors have been in contact
6 with the Investor Compensation Company
7 Ltd. over the past weeks and it is
8 aware that the Inspectors are making
9 their Final Report to the Court this
10 day and that this matter will come
11 before the Court for hearing on 21
12 October 2011. ICCL is a company which
13 was established under the Investor
14 Compensation Act, 1998. The main
15 purpose of the scheme, as determined by
16 the Investor Compensation Act, 1998 (as
17 amended), is to provide adequate funds
18 out of which eligible investors of
19 failed investment firms are
20 compensated.

21 38. Both the Central Bank and the ICCL
22 have indicated that they have no
23 objection to Mr. Kieran Wallace, the
24 proposed Official Liquidator, acting as
25 administrator as well as liquidator."

26 and what the Investor Compensation Act provides, Judge,
27 at section 33.3(a) is that if a liquidator is appointed
28 to an investment business firm then an administrator
29 should also be appointed -- can also be appointed under
30 that section. 11:27

31 At paragraph 39:

32 "39. In light of the statutory
33 functions of the ICCL it would seem
34 appropriate that the Final Report and
35 its exhibits be forwarded to the ICCL
36 and that the Central Bank be at liberty
37 to give the ICCL access to the books
38 and records and other documents of the
39 Inspectors relating to the
40 investigation of CHC and the ICCL
41 maintain the contents of the unredacted

1 Final Report and its exhibits
2 confidential subject to any disclosure
3 which may be necessary or appropriate
4 for the performance of its statutory
5 functions."

5 And then a Draft Order is referred to. And then, 11:28
6 finally, the Inspectors seek an Order for the costs of
7 the application, for the appointment of Inspectors and
8 of these proceedings to be paid by CHC and,
9 also, that the expenses of and incidental to the
10 investigation and the fees incurred by the Inspectors
11 being defrayed by the Central Bank under the
12 Regulations, then be repaid to the Central Bank by the
13 firm itself, by CHC.

14
15 That's the affidavit, Judge, and there is a Draft Order 11:28
16 attached at exhibit "NT13" which sets out in sequential
17 form the matters which the affidavit says ought to be
18 done at this stage.

19
20 I'm in the Court's hands now as to whether it wishes me 11:28
21 to open any portion of the report. I can certainly
22 direct the Court to aspects of the report that are
23 referred to in Mr. Thompson's affidavit. But I am
24 equally in the Court's hands as to whether it wishes in
25 the first instance to consider whether it makes the 11:29
26 Orders concerning the production.

27 **MR. JUSTICE HOGAN:** Mr. Barniville, I have had an
28 opportunity of reading the report yesterday and can I
29 just say before I hear any further submissions or any

1 counsel/solicitors in relation to other parties that I
2 dare say it is not a pretty story and the report makes
3 it plain that the misuse of client funds was pervasive
4 and I regret to say, reading the report, that the very
5 clear impression is given to me that there are elements 11:29
6 of a Ponzi scheme here, albeit that there were real
7 investments. I suppose the most neutral thing I can
8 say is that it is not a pretty story. And I appreciate
9 that there are quite a lot of individuals will have a
10 great deal of interest in the report and their legal 11:30
11 rights and their legal position generally will be a
12 matter which they will, I'm doubtless, wish to attend.

13
14 I think it is also appropriate, Mr. Barniville, that I
15 should say just at this stage, and again without having 11:30
16 listened to any of your colleagues, that, speaking for
17 myself, that I think the thanks of the Court are due to
18 the Inspectors. I can quite see from reading the
19 report that they have made indefatigable efforts and
20 clearly have completed a very thorough and detailed 11:30
21 investigation with very, very impressive speed and,
22 speaking for myself, I am extremely grateful to them
23 for their thoroughness and dedication and, again, I
24 would like you to convey that to them personally.

25 11:31
26 Now, I take it that shall we deal first with the
27 question of publication, Mr. Barniville.

28 **MR. BARNIVILLE:** Yes.

29 **MR. JUSTICE HOGAN:** And then, perhaps sequentially,

1 we can deal then with the other issues that arise,
2 including the question of the appointment of a
3 liquidator.

4 **MR. BARNIVILLE:** Yes, Judge. If I could ask you
5 to turn then to the Draft Order. 11:31

6 **MR. JUSTICE HOGAN:** Sorry, Mr. Barniville, by all
7 means draw my attention to anything in the report that
8 you wish or that you think that should be read out in
9 open court.

10 **MR. BARNIVILLE:** well, I think I have 11:31
11 summarised -- I think the important aspects are
12 summarised in the affidavit. There is a lot of detail
13 in the report.

14 **MR. JUSTICE HOGAN:** Absolutely.

15 **MR. BARNIVILLE:** And if it is necessary, whether 11:31
16 for the purpose of persuading the Court that it should
17 of its own motion wind up the company or otherwise, I
18 will reserve the right to refer to aspects of the Court
19 for that purpose, if the Court feels it is necessary.
20 I certainly don't want unnecessarily to have to do it. 11:32
21 Unless the Court requires me to do so then, clearly, I
22 am perfectly prepared to do that.

23 **MR. JUSTICE HOGAN:** Yes.

24 **MR. BARNIVILLE:** I should just say, because the
25 Court is anxious to deal with the question of 11:32
26 publication of the report, and I know the Court will
27 want to hear other parties in that, could I just show
28 the Court what is being proposed. You will have seen
29 it, Judge, in any event as one of the exhibits. But

1 what is proposed is -- item 1, it has already been
2 given to the Central Bank on foot of yesterday's Order.
3 And then it is proposed that the final report will be
4 given to the company, in the manner that it has up to
5 now, and to the auditors of the company, who I think
6 are MKO Partners. But that can be confirmed. And that
7 the report would be published in redacted form.

11:32

8 **MR. JUSTICE HOGAN:** Just before we move from the
9 Draft Order 2, I think that, this is insofar as the
10 unredacted report is concerned, I was about to suggest
11 one small variation of the Order.

11:33

12 **MR. BARNIVILLE:** Yes.

13 **MR. JUSTICE HOGAN:** which is that there is
14 references to their legal advisors and I was going to
15 insert "and other appropriate professional advisors".
16 Because, for example, they may well wish to retain
17 accountants and other similar financial advisors.

11:33

18 **MR. BARNIVILLE:** I think that's fine. I know
19 Mr. O'Sullivan is the primary legal advisor and I'm
20 sure any expert or advisor he engages will be an
21 appropriate professional advisor. I don't see any
22 difficulty at all with that suggestion.

11:33

23 **MR. JUSTICE HOGAN:** All right.

24 **MR. BARNIVILLE:** Just in paragraph 3 is the
25 paragraph that asks for publication on the website of
26 the redacted version. And then paragraph 4 provides
27 for permission to make the redactions. And if I could,
28 maybe, just show the Court what is proposed in relation
29 to redactions.

11:33

1 MR. JUSTICE HOGAN: Yes.

2 MR. BARNIVILLE: I think the Court has, I think,
3 a draft...(INTERJECTION).

4 MR. JUSTICE HOGAN: I have just been handed the
5 draft redacted version and I have my own marked copy of 11:34
6 the other one.

7 MR. BARNIVILLE: If you could turn first of all,
8 Judge, to page 53 and you will see there is a reference
9 to an account number and the account number has been
10 redacted. 11:34

11 MR. JUSTICE HOGAN: Yes.

12 MR. BARNIVILLE: If you could turn to page 69.
13 I'm giving these by way of examples of the sort of
14 redactions.

15 MR. JUSTICE HOGAN: Absolutely. 11:34

16 MR. BARNIVILLE: At page 69 you will see client
17 names have been redacted there.

18 MR. JUSTICE HOGAN: Yes.

19 MR. BARNIVILLE: And account numbers. And
20 perhaps if you could turn to...(INTERJECTION). 11:35

21 MR. JUSTICE HOGAN: There are a number of places,
22 Mr. Barniville, that actual names.

23 MR. BARNIVILLE: Yes. And there is an example on
24 page 70, in fact, on the very left-hand column the
25 account names are all replaced by a designation there. 11:35

26 MR. JUSTICE HOGAN: All right.

27 MR. BARNIVILLE: And similar, for example, on
28 page 165. They are the sort of redactions that have
29 been made. And, in fact, the purpose, as you will see

1 from the cover sheet of the redacted version of the
2 report, is that client names and account numbers have
3 been redacted and no other redactions have been
4 effected.

5 **MR. JUSTICE HOGAN:** Yes, all right. 11:36

6 **MR. BARNIVILLE:** And the remaining provisions of
7 the Order are the -- paragraph 5 then of the Draft
8 Order is the provision of the report and the
9 communication to the statutory bodies referred to. And
10 I think I added as I was going through the affidavit 11:36
11 that An Garda Síochána should probably be included in
12 this.

13 **MR. JUSTICE HOGAN:** I was going to suggest the Garda
14 Commissioner.

15 **MR. BARNIVILLE:** Garda Commissioner. There is 11:36
16 then provision for what is to happen to the Inspector's
17 documents and records. And you will see it is
18 suggested that they be furnished to the Central Bank
19 and that the documents be available.

20 "..."be retained and maintained by the 11:36
21 Central Bank and made available for use
22 by the Central Bank in performance of
23 its statutory functions, including its
functions under the Central Bank Act."

24 Perhaps I should say at this stage, you may recall in
25 the course of the National Irish Bank investigation an 11:36
26 issue arose some time after the Inspectors had
27 presented their report to the Court and a State body, I
28 think it may have been the Director of Corporate
29 Enforcement, sought an Order for Discovery against the

1 Inspectors and Mr. Justice Kelly made it clear that the
2 Inspectors when they provided -- their function is to
3 carry out an investigation and to report to the Court
4 and there were not intended to be a sort of a rolling
5 or a roving inquiry, their function was terminated at 11:37
6 that point. And that's the purpose of the Order sought
7 in those terms.

8
9 And then you will see a specific Order is sought in
10 that regard at paragraph 7, where it says: 11:37

11 "Having made the report they are
12 discharged of their appointment once
13 the service of the documents provided
14 for and the Order is completed and that
15 any further matters then can be dealt
 with by the Central Bank, as the
 original applicant in the
 investigation." 11:37

16 And that would seem to follow. I will then leave over
17 the balance of the Order, which concerns the mechanics
18 and the making of the winding up Order, if the Court
19 felt that was appropriate.

20 **MR. JUSTICE HOGAN:** And you are applying for Orders, 11:37
21 in terms of publication, in these terms.

22 **MR. BARNIVILLE:** I am. And I did say in the
23 course of my opening the affidavit that there are a
24 limited number of redacted copies of the affidavit
25 physically available in Court, if the Court felt it 11:38
26 appropriate to provide those to the solicitors who have
27 been communicating with us then that, I think, can be
28 done, physically done here. But otherwise the report
29 will be published on the website. And I am told it

1 will go live within an hour of the Court's giving the
2 direction.

3 **MR. JUSTICE HOGAN:** Yes. Thank you, Mr. Barniville.
4 I will just hear from your colleagues now, just dealing
5 simply with the question of publication. Ms. McGrath? 11:38

6 **MS. MCGRATH:** Yes, Judge. Just on that
7 question of the publication. As was outlined by Mr.
8 Barniville, the company was furnished with a copy of
9 the draft report and given an opportunity to make
10 representations thereon and the company does not 11:38
11 contest the conclusions of the draft report.

12
13 As regards the publication, the company does not object
14 to the proposed manner of distribution and publication
15 of the draft report on the website and it does seem, 11:39
16 indeed, appropriate that the client's names and account
17 numbers be redacted in the manner suggested by Mr.
18 Barniville.

19 **MR. JUSTICE HOGAN:** Yes. And insofar as the service
20 of the unredacted version to the various statutory 11:39
21 bodies, such as the Minister, the Director of Corporate
22 Enforcement, the Garda Commissioner and so forth?

23 **MS. MCGRATH:** In the circumstances I don't
24 think we can object to that.

25 **MR. JUSTICE HOGAN:** Yes, all right. Thank you, 11:39
26 Ms. McGrath. Again, I'm just dealing solely with the
27 question of publication at the moment. Who is next in
28 time? Mr. Delahunt, is it?

29 **MR. DELAHUNT:** May it please you, Judge. I

1 would reiterate my colleague's sentiments. As I had
2 asked for a redacted version previously I can't really
3 object to that matter being published. And likewise,
4 insofar as the statutory bodies are concerned, again I
5 wouldn't have any objection to the matter proceeding to 11:39
6 those relevant bodies.

7 **MR. JUSTICE HOGAN:** I take it, Mr. Delahunt, just to
8 be aware and to confirm, that it is the publication of
9 the redacted version?

10 **MR. DELAHUNT:** Of the redacted version. 11:40

11 **MR. JUSTICE HOGAN:** In other words the clients'
12 names and account numbers would not appear in that.

13 **MR. DELAHUNT:** Yes, Judge.

14 **MR. JUSTICE HOGAN:** But that at the same time if I
15 make the Order in the terms Mr. Barniville has asked 11:40
16 for that would involve me -- or the Court directing the
17 service of the unredacted version to various State
18 agencies and you have no difficulty with that.

19 **MR. DELAHUNT:** I can't. If it is in the
20 interest of the various parties, their identification 11:40
21 and their financial details, I couldn't really object
22 to that, Judge, and the privacy that is attached to
23 that.

24 **MR. JUSTICE HOGAN:** Yes.

25 **MR. DELAHUNT:** Thank you, Judge. 11:40

26 **MR. JUSTICE HOGAN:** Who next wishes to make an
27 application?

28 **MR. HOGAN:** Judge, I have no objection. On
29 behalf of Mr. Cassidy I have no objection.

1 **MR. EAGAR:** And equally on behalf of Mr.
2 Mulholland...(INTERJECTION)

3 **MR. JUSTICE HOGAN:** I just want to take a note of
4 that, sorry. Just before I deal with you, Mr. Eagar.
5 I should say Mr. Cassidy's name does feature in the 11:40
6 report.

7 **MR. HOGAN:** Yes, Judge.

8 **MR. JUSTICE HOGAN:** Just so you are aware of that.

9 **MR. HOGAN:** Yes, Judge, I am aware of that.
10 I was provided with the draft final report. I made 11:41
11 representations. I am told that those representations
12 were taken into account, or may have been substantially
13 taken into account. I requested a copy of the final
14 report before it was presented to the Court. I wasn't
15 given a copy of the report. But be that as it may. I 11:41
16 have not seen the final report in those circumstances.
17 I have to take it on face value that my representations
18 were substantially taken into account in the final
19 report. But I have not seen the final report so I
20 don't know whether that's the case or not. 11:41

21 **MR. JUSTICE HOGAN:** But at all events you can
22 confirm that you have no objection to the Order that is
23 proposed by Mr. Barniville?

24 **MR. HOGAN:** No, Judge.

25 **MR. JUSTICE HOGAN:** Thank you very much. Now, Mr. 11:41
26 Eagar.

27 **MR. EAGAR:** I would like to also associate
28 myself with the sentiments expressed by Mr. Hogan
29 because, again, representations were made by

1 Mr. Mulholland. And again, I have not seen a copy of
2 the draft final report. But it is my submission that
3 Mr. Mulholland would be entitled to an unredacted copy
4 of the report.

5 **MR. JUSTICE HOGAN:** And why do you say that he's 11:42
6 entitled to an unredacted version?

7 **MR. EAGAR:** Well, that the names of the
8 investors would be known to him and it wouldn't come as
9 any news to him and in those circumstances I think it
10 would be appropriate that he is entitled to an 11:42
11 unredacted copy. He is a director.

12 **MR. JUSTICE HOGAN:** Yes. But he otherwise has no
13 objection to the Order?

14 **MR. EAGAR:** No, no, no objection to the
15 Order, other than that. 11:42

16 **MR. JUSTICE HOGAN:** Thank you. I will just have to
17 go around once again in the light of that. Mr.
18 Barniville, you have heard what Mr. Eagar has had to
19 say about Mr. Mulholland.

20 **MR. BARNIVILLE:** I'm just taking instructions on 11:43
21 that issue right now. The redactions are, as I have
22 indicated, redactions of client names and of account
23 numbers.

24 **MR. JUSTICE HOGAN:** Yes.

25 **MR. BARNIVILLE:** But I'm taking instructions from 11:43
26 the Inspectors, my solicitor is as we speak. Can I say
27 in relation to just a point raised about the -- I am
28 not sure whether it was intended as a criticism, I
29 don't think, in fairness to Mr. Hogan or Mr. Eagar, it

1 was intended as a criticism of the Inspectors that they
2 didn't, in fact, come back and give another version of
3 the final report before it was presented to the Court.
4 In fact they are not permitted to do that under the
5 Regulations, the final report must be presented to the 11:43
6 Court and then the Court gives orders as to who it
7 should go. But in any event even if it was suggested
8 that a further draft final report should be furnished,
9 Mr. Justice Kelly considered that issue in National
10 Irish Bank No. 3 and concluded that it was not 11:43
11 necessary for the Inspectors in that case to provide an
12 advance copy of the final report before publication.
13 **MR. JUSTICE HOGAN:** But so far as Mr. Hogan and
14 Mr. Eagar are concerned, their clients, you say, have
15 got the relevant portions of the report. 11:44
16 **MR. BARNIVILLE:** What they got was the draft,
17 extracts from the draft report. I think a substantial
18 amount of extracts from the draft report. Containing
19 draft findings in respect of -- relevant to them. They
20 made representations on certain matters of that and 11:44
21 they were taken into account in the report. And that
22 is explained. And you will see that there is a
23 specific explanation of that because of the procedural
24 limitations.
25 **MR. JUSTICE HOGAN:** That's noted in various 11:44
26 footnotes.
27 **MR. BARNIVILLE:** Specific individual findings are
28 not made against individuals. But the evidence given
29 is recited in the report.

1 **MR. JUSTICE HOGAN:** Yes.

2 **MR. BARNIVILLE:** And if it is to become an issue
3 then I can certainly argue that issue out. But I don't
4 understand either Mr. Eagar, indeed, or Mr. Hogan to be
5 pursuing that issue or making a criticism against the 11:45
6 Inspectors in that regard.

7

8 On the issue as to whether unredacted versions should
9 be provided. The Inspector's position is they have not
10 heard a convincing case for unredacted versions of the 11:45
11 report to go to Mr. Mulholland. But the report is the
12 Court's report now and it is ultimately, I would
13 suggest, a matter for the Court. They don't see a
14 convincing case being made for the unredacted version
15 of the report. And Mr. Eagar's position, I think, was 11:45
16 just that because he was a person featuring in the
17 report he should receive an unredacted version of the
18 report, and I don't think that's appropriate. The only
19 entity getting the unredacted version of the report is
20 the company itself. No one else is, other than the 11:45
21 statutory bodies which are referred to in the
22 affidavit.

23 **MR. JUSTICE HOGAN:** Thanks, Mr. Barniville.
24 Anything arising out of that? Mr. Hogan? Mr. Eagar?

25 **MR. HOGAN:** No. 11:45

26 **MR. JUSTICE HOGAN:** Very well. I will make the
27 ruling now in relation to the question of publication.
28
29

1 RULING OF THE COURT IN RELATION TO THE QUESTION OF
2 PUBLICATION OF THE REPORT

3
4 MR. JUSTICE HOGAN: This is an application brought
5 on behalf of the Central Bank for a direction pursuant 11:46
6 to article 171(2)(b) and (c) of the European
7 communities (Markets In Financial Instruments)
8 Regulations, 2007, Statutory Instrument 60 of 2007,
9 that I make an Order directing the publication of the
10 report that has been provided by the Inspectors. 11:46

11
12 Now, a Draft Order has been supplied to me by Mr.
13 Barniville on behalf of his clients and the publication
14 envisaged can really be divided into the two parts. So
15 far as the unredacted version is concerned, that 11:47
16 contains the names of various individual investors and
17 their bank accounts and it is not considered
18 appropriate that that should be, for obvious reasons of
19 client confidentiality, that that should be put into
20 the public domain. So what I'm going to do is to Order 11:47
21 that a redacted version of the report be published by
22 the Central Bank on its website and as this Court
23 presently adjourns copies of the unredacted version can
24 be given to any interested party, insofar as they are
25 available. I will leave that to the good sense and 11:47
26 discretion of the solicitors for the Central Bank. So
27 I will make an Order in those terms.

28
29 So far as the unredacted version is concerned. That is

1 something that ought to be supplied to Custom House
2 Capital itself and to the auditors of Custom House
3 Capital, with the restrictions that have already been
4 imposed by the Court in respect of interim reports.
5 And that's contained in paragraph 2 of the Draft Order. 11:48
6

7 I will then make an Order in terms of paragraph 3,
8 which, as I have just indicated, allows for the final
9 report of the Inspectors to be published forthwith, in
10 the manner provided for, on the website of the Central 11:48
11 Bank of Ireland. And that is, of course, without
12 appendices or exhibits. And, also, that the clients
13 and their details be redacted from that copy.
14

15 And then turning to the question of the unredacted 11:49
16 final report so far as other parties are concerned. I
17 am making an Order, pursuant to Article 171(1), that
18 the unredacted final report, including all exhibits
19 thereto, be sent to the Minister for Justice and
20 Equality, to the Director of Public Prosecution, to the 11:49
21 Director of Corporate Enforcement, to the Garda
22 Commissioner and to the Revenue Commissioners, with the
23 direction that such bodies maintain the contents of the
24 unredacted final report and exhibits and that the
25 Article 171(1) communication to the Court is 11:49
26 confidential, subject to any disclosure which may be
27 necessary or appropriate for the performance by those
28 persons or bodies of their statutory functions.
29

1 I should add in that regard that a document has been
2 supplied by the Inspectors directly to me which
3 contains details, not otherwise contained in the
4 report, of material which tends to show the commission,
5 or may tend to show the commission of criminal offences 11:50
6 and I will be directing that that particular document
7 will be sent to the Minister, to the DPP, to the
8 Director of Corporate Enforcement, to the Garda
9 Commissioners and to the Revenue Commissioners.

10
11 I will further make a direction that the Inspectors
12 provide all their appropriate documentation in the
13 manner envisaged by paragraph 6 of the draft Order to
14 be maintained by the Central Bank and that such
15 documents and records be available for use by the 11:50
16 Central Bank in the performance of its statutory
17 functions (including the functions in relation to the
18 holding of an inquiry under part 3(c) of the Central
19 Bank Act, 1942 (as amended)

20
21 And with the repeated thanks of the Court, I will
22 discharge the inspectors, having made their final
23 report, once the appropriate service of the documents
24 provided for this order is complete.

25
26 There remains one further matter, which is that an
27 application has been made to the Court by or on behalf
28 of a director of the company, Mr. Mulholland, for an
29 unredacted version of the report. Now, I think that I

1 am simply not in a position to adjudicate on this at
2 this juncture. And, therefore, what I will direct is
3 this: In the event that Mr. Mulholland wishes to have
4 access to an unredacted version of the report he can
5 apply by motion to this Court, on notice to the Central 11:51
6 Bank, for liberty to obtain an unredacted version of
7 the report and I would hear that application on Friday
8 three weeks. That will give Mr. Mulholland time,
9 should he so wish, to file an affidavit and apply by
10 motion to the Court. 11:52

11 **MR. EAGAR:** May it please the Court.

12
13 **END OF RULING IN RELATION TO PUBLICATION**

14
15 **MR. JUSTICE HOGAN:** So that deals with -- is there 11:52
16 anything arising out of that in terms of publication?

17 **MR. BARNIVILLE:** No. Just one thing. There are,
18 obviously, a limited number of hard copies of the
19 report available, and I know you said to leave it to
20 the good sense of Ms. O'Beirne and we can rely on that, 11:52
21 but there are a number of solicitors who have
22 corresponded, I gave the example of Mr. Delahunt's
23 solicitor.

24 **MR. JUSTICE HOGAN:** Yes.

25 **MR. BARNIVILLE:** And the various parties who have 11:52
26 made representations, I think it should certainly go
27 them first. If there are any left over then,
28 obviously, Ms. O'Beirne's good sense can click in at
29 that point. But if it is given to those people first

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and then.

MR. JUSTICE HOGAN: Quite obviously. I think it would be appropriate that the solicitors for parties who have communicated with Messrs McCann FitzGerald and Ms. O'Beirne in that regard, that they should get those copies first. So that's the question of publication now. Mr. Barniville, so far as I am concerned your clients now are at liberty to take immediate steps to secure the publication of the report.

11:53

MR. BARNIVILLE: May it please the Court. Thank you.

11:53

MR. JUSTICE HOGAN: Mr. Barniville, shall we next deal with the question of the appointment of a liquidator.

MR. BARNIVILLE: Yes. Judge, you will have seen what Mr. Thompson says in his affidavit concerning both the matters found in the report and the financial position of the company.

11:53

MR. JUSTICE HOGAN: Yes.

MR. BARNIVILLE: I don't need to repeat those, I think they are very succinctly summarised there. The Court has a power under Regulation 172(1):

11:53

"Having considered the report, it may make such Order as it thinks fit, including an Order of its own motion for the winding up or dissolution of the firm."

11:54

And it is the Inspector's firm position to the Court that the Court should of its own motion make such an Order for all of the reasons listed in the affidavit.

1 But if the Court requires me to go into any further
2 detail in relation to that there is a long section in
3 the report which discloses in some detail.

4 **MR. JUSTICE HOGAN:** Yes. In a sense the report
5 speaks for itself, Mr. Barniville, but I just want to 11:54
6 hear from your colleagues in the first instance, having
7 heard you, as to whether there is any submissions in
8 relation to whether I should make such an order.

9 **MR. BARNIVILLE:** I just want to refer one
10 authority to the Court (same handed) 11:54

11 **MR. JUSTICE HOGAN:** Certainly.

12 **MR. BARNIVILLE:** It is relevant to the issue
13 because, again, it is a judgment arising out of the
14 National Irish Bank investigation. When the report in
15 that case was presented to the Court the Court had a 11:55
16 hearing on the issues of publication and on the issue
17 of winding up and nobody, in fact, before the Court
18 sought to have the bank wound up but Mr. Justice Kelly
19 considered that in that case the provisions of the
20 Companies Act required him of his own motion to 11:55
21 consider whether or not a winding up order should be
22 made. And if I could just ask the Court to look at the
23 headnote and paragraph 5 of the headnote where it says:

24 "That a decision whether or not to make
25 a winding up order under section 12 of 11:55
26 the 1990 Act..."

27 And that's in identical terms to Paragraph (1)(a) of
28 Regulation 172.

29 "...was one exclusively for the Court

1 and the only basis upon which the Court
2 should of its own motion make an Order
3 for the winding up of a body corporate
4 was in circumstances where it was
satisfied that the public interest
required it."

5 And then he considers and applies the English decisions 11:55
6 of Re Walter L. Jacob & Co.

7 MR. JUSTICE HOGAN: Yes.

8 MR. BARNIVILLE: And he ultimately concluded that
9 in that case it would not be in the public interest to
10 wind up the Bank. And you will see various reasons are 11:56
11 set out in paragraph 6:

12 "...because the Bank had committed
13 itself to addressing the issues not
14 merely by word but also by deed and any
15 winding up would adversely effect the
16 measures taken to address the issues. 11:56
winding up would have consequences to
17 the Bank's customers, the banking
18 system and having due regard to the
views of the Inspectors and the
Director of Corporate Enforcement it
was not in the public interest."

19 In that case the Inspectors and the Director of
20 Corporate Enforcement were saying do not wind up the 11:56
21 Bank in this case, having regard to the findings in the
22 report and the financial position of the company. In
23 this case the Inspectors are reaching the opposite
24 conclusion and are saying to the Court that in their
25 view the Court should of its own motion make the Order 11:56
26 sought.

27 MR. JUSTICE HOGAN: There are really two
28 considerations here, Mr. Barniville, I suggest. One is
29 this, is that I think it is implicit in the submissions

1 that you have made and in the report by the Inspectors
2 in relation to Custom House Capital that Custom House
3 Capital could not be said to have systemic importance
4 in terms of the Irish financial banking system, in
5 contrast to National Irish Bank. 11:57

6 **MR. BARNIVILLE:** Absolutely.

7 **MR. JUSTICE HOGAN:** Such as the consequences might
8 have been very serious at the time for the financial
9 and banking system. And I take it it's implicit in
10 what you say that there are no such -- you can tender 11:57
11 no such consequences here.

12 **MR. BARNIVILLE:** The Inspectors don't see such
13 consequences by an Order. In fact, they see it very
14 much in the interests of the clients that this be done,
15 in order to preserve and protect the assets of the 11:57
16 company at this stage.

17 **MR. JUSTICE HOGAN:** I suppose this brings me to the
18 very next point I was going to put to you Mr.
19 Barniville, which is this, is that as I read the report
20 the Inspectors take the view that the best way to seek 11:57
21 to preserve the assets of the company and to ensure
22 that all creditors are dealt with appropriately is
23 through the immediate appointment of a liquidator.

24 **MR. BARNIVILLE:** Emphatically so. They are very
25 strongly of that view, Judge, and it is sworn to the 11:58
26 Court.

27 **MR. JUSTICE HOGAN:** Yes, alright. Thank you,
28 Mr. Barniville. Ms. McGrath?

29 **MS. MCGRATH:** Yes, Judge. On behalf of the

1 company, on the basis of the financial situation as has
2 been averred to in the 5th affidavit of Noel Thompson
3 it does seem to the company that the only viable option
4 at this juncture is that the company be wound up. And
5 we would consent to an Order being made in accordance 11:58
6 with Regulation 172(1)(a), which is that the Court may
7 of its own motion wind up the company.

8
9 The Court has alluded to the very thorough and
10 efficient investigation that was carried out by the 11:58
11 Inspectors. As the Court is aware, the company and its
12 chairman cooperated fully with that investigation and
13 we would be anxious that the client's assets are
14 reserved by the appointment of a liquidator.

15 **MR. JUSTICE HOGAN:** Again for the sake of the 11:59
16 record, Ms. McGrath, you are consenting to the
17 appointment?

18 **MS. MCGRATH:** That is correct.

19 **MR. JUSTICE HOGAN:** Consenting to the appointment.

20 **MS. MCGRATH:** Yes. 11:59

21 **MR. JUSTICE HOGAN:** And I take it the administrator
22 as well?

23 **MS. MCGRATH:** Yes, Judge.

24 **MR. JUSTICE HOGAN:** Thank you, Ms. McGrath. Now Mr.
25 Delahunt. 11:59

26 **MR. DELAHUNT:** May it please you, Judge. I am
27 not privy to the same information which Mr. Barniville
28 and Ms. McGrath are in relation to the report and/or
29 the grounding affidavits so any submissions I make to

1 the court in that regard obviously have to be tempered
2 by my lack of knowledge or lack of sight of that
3 documentation and, more importantly, lack of sight of
4 the report, which we are now receiving this morning.

11:59

5
6 In the short terms, my clients are not consenting to
7 the appointment of a liquidator. We would first,
8 Judge, like to have an opportunity to consider the
9 contents of the report. I am mindful of what the
10 Inspectors have said and they are to be commended on
11 the work that they have done in such a relatively short
12 space of time, and that their recommendation is that
13 the liquidator be appointed. I wasn't aware, nor were
14 my clients aware that that application would be made to
15 your Lordship this morning. I briefly spoke to Mr.
16 Barniville in advance and he indicated that to me. But
17 before that rather serious and nuclear option is
18 ventured down I would like an opportunity to consider
19 the report with my clients and get their specific
20 instructions so I can't consent to the appointment, be
21 it provisional or otherwise, of a liquidator by your
22 Lordship this morning. And it may well be if your
23 Lordship exceeds to that application, or doesn't exceed
24 to Mr. Barniville's application, that I would be given
25 an opportunity to address the court in relation to
26 that. I'm not meaning to be obstructive, my Lord, it
27 is just that I wasn't aware that this application was
28 being made.

11:59

12:00

12:00

12:00

1 It is quite a serious step to taken in relation to the
2 life of any company. I can see there is, from what I
3 have been told and from what your Lordship has been
4 told this morning in Court, there is a large degree of
5 logic to that, and it may well be that having had an 12:01
6 opportunity to consider the contents of the report our
7 position may well be different in relation to that.
8 But at the moment, Judge, I can't in the absence of
9 having an opportunity to consider the report with my
10 clients. 12:01

11 **MR. JUSTICE HOGAN:** Yes. I hear what you say, Mr.
12 Delahunt, but you possibly have heard, and I appreciate
13 you have not got a copy of it.

14 **MR. DELAHUNT:** Yes, Judge.

15 **MR. JUSTICE HOGAN:** But you may possibly have heard 12:01
16 Mr. Barniville drawing attention to paragraphs 22, 23,
17 24 of the affidavit of Mr. Thompson, where he says that
18 Custom House Capital clearly fails any cash flow test
19 and clearly fails any balance sheet test. Those are
20 the obviously the classic tests in terms of solvency. 12:01

21 **MR. DELAHUNT:** Yes, Judge.

22 **MR. JUSTICE HOGAN:** And that's one consideration. I
23 will hear from Mr. Barniville before I do anything, Mr.
24 Delahunt. But just if I may, and this is something you
25 may wish to reflect on. That's one consideration. 12:02

26 Secondly, it is plain that very substantive -- I have
27 to pay regard to the fact that quite independently of
28 what is acknowledged is the very thorough and
29 commendably efficient job of the Inspectors, for which

1 I cannot thank them enough sufficiently, but quite
2 independently of that Ms. McGrath, for the company,
3 accepts this and does not seek to contest it in anyway.
4 And it is plain that there has been -- I will give you
5 a fuller opportunity in a moment, Mr. Delahunt, but can 12:02
6 I just mention these considerations and you may wish to
7 reflect on them. It is plain that there has been
8 pervasive misuse of client funds running to
9 ... (INTERJECTION).

10 MR. DELAHUNT: The figures are staggering. 12:03

11 MR. JUSTICE HOGAN: Running to tens of millions of
12 Euro.

13 MR. DELAHUNT: Yes.

14 MR. JUSTICE HOGAN: And I have said earlier it has
15 in significant part many of the classic indicia of a 12:03
16 Ponzi scheme.

17 MR. DELAHUNT: Yes.

18 MR. JUSTICE HOGAN: Yet a further consideration is
19 that the company at the moment is bleeding its cash
20 balances. So I have to be very mindful to ensure that 12:03
21 all investors are treated appropriately and fairly.
22 And now that the matter is crystallised by the report
23 today -- well, the report furnished to me on Wednesday
24 night -- but by its publication today that really it is
25 incumbent on me, in a sense the Court is placed almost 12:03
26 as the guardian of the public interest and the guardian
27 of the investor's interest.

28 MR. DELAHUNT: Yes, Judge.

29 MR. JUSTICE HOGAN: And while I will give you an

1 opportunity to reflect on that, this is a step which
2 has not been taken lightly by the Inspectors. So I
3 appreciate your dilemma and I appreciate your concern.

4 **MR. DELAHUNT:** Yes.

5 **MR. JUSTICE HOGAN:** But perhaps you may wish to
6 reflect on that. 12:04

7 **MR. DELAHUNT:** I don't anticipate, Judge, my
8 position changing in the very, very short term because
9 I can't do so without an evaluation of the contents of
10 the report. And I appreciate the Court has indicated, 12:04
11 firstly, the amounts that have been involved here and
12 that there is nobody going to be more effected by all
13 of this than my clients at the end of the day. And
14 they are the parties whose interests are to be
15 protected, and the Inspectors have to be commended for 12:04
16 doing so in relation to it, as is this Court for the
17 manner in which this matter has moved at some speed to
18 have it disposed of. But I can't anticipate, Judge,
19 even this morning, getting an instruction to come back
20 to you and to say that I consent. The contents of the 12:05
21 report, even from just listening to submissions made to
22 your Lordship this morning, will take a little time.
23 And that's all I'm asking for, effectively, Judge.

24 **MR. JUSTICE HOGAN:** Mr. Delahunt, I hear what you
25 say and in the ordinary way -- I mean, I will come back 12:05
26 to you about this and I want to hear from Mr.
27 Barniville, and indeed from your colleagues -- but the
28 problem is that this is a matter which requires, in my
29 judgment, imperative action by this Court. I wish I

1 had the luxury of time.

2 MR. DELAHUNT: Yes, Judge. I don't want to be
3 obstructive, Judge.

4 MR. JUSTICE HOGAN: No, I know you are not.

5 MR. DELAHUNT: And I hope the Court has not 12:05
6 formed that impression of my submissions to you.

7 MR. JUSTICE HOGAN: There is no suggestion that you
8 are, not in the least.

9 MR. DELAHUNT: Thank you.

10 MR. JUSTICE HOGAN: I note your submission and I 12:05
11 will hear from your colleagues and I will hear from Mr.
12 Barniville again. Before I make any other Order in
13 this regard I will come back to you.

14 MR. DELAHUNT: There is just one very small
15 issue, Judge, if I could address you on. 12:06

16 MR. JUSTICE HOGAN: Yes.

17 MR. DELAHUNT: And I note Mr. Barniville has
18 indicated that Mr. Wallace is the gentleman who has
19 agreed to act as a provisional and/or official
20 liquidator should that Order be granted, I just note 12:06
21 that Mr. Wallace is a member of Messrs KPMG, who are
22 identified in the grounding affidavit of Mr. Thompson
23 at paragraph 24 as being parties who investigated this
24 matter originally, in 2009, in April of 2009, and I
25 don't know whether there would be a conflict there or 12:06
26 not. Again, I'm making that point, Judge. This may
27 become crystal clear to me and to my clients when we
28 get an opportunity to read the report but I just noted
29 that point.

1 **MR. JUSTICE HOGAN:** I think in perfect fairness to
2 KPMG and to Mr. Wallace, so far as I can see, and, as I
3 have said so often, maths and accountancy are certainly
4 not my fortes or strong points, but so far as I can see
5 KPMG have performed a valiant task in a very short 12:07
6 space of time.

7 **MR. DELAHUNT:** And again, Judge, I'm not in the
8 advantageous position which everybody else is, I don't
9 have all of the information available to me and I'm a
10 little hamstrung by that. But I just make that note in 12:07
11 passing, Judge, that they were the body who initially
12 went in and raised somewhat similar questions in 2009
13 that were raised in July of 2011. And that's all I
14 say. That's the point that I wish to make. I know
15 nothing about Mr. Wallace and I don't wish to cast any 12:07
16 aspersions upon on him, it is just he was involved in
17 that company when they went in, in 2009. Thank you,
18 Judge.

19 **MR. JUSTICE HOGAN:** Mr. Hogan?

20 **MR. HOGAN:** I have no submissions. 12:07

21 **MR. JUSTICE HOGAN:** Mr. Eagar?

22 **MR. EAGAR:** I have no submissions.

23 **MR. JUSTICE HOGAN:** Now Mr. Barniville.

24 **MR. BARNIVILLE:** Judge, I will deal with the last
25 point first, KPMG. Mr. Wallace is absolutely satisfied 12:07
26 he has no conflict of interest. He has obviously
27 considered that issue and he has no conflict and is
28 perfectly happy to act in the role. And in fact,
29 indeed, the experience generated during the course of

1 the investigation I think will be of great assistance
2 in the winding up of the company.

3 **MR. JUSTICE HOGAN:** I think it would be of
4 considerable assistance.

5 **MR. BARNIVILLE:** There are four reasons I think 12:08
6 the Court really must make the Order of winding up now.
7 I should say I fully appreciate Mr. Delahunt's
8 position. It is a difficult position for an advocate
9 to be in, where you don't actually have the material
10 about which everybody else is talking, and in almost 12:08
11 any other circumstance you would have to say, of
12 course, why would you not give him a little time to go
13 and look at the report.

14 **MR. JUSTICE HOGAN:** My sentiments entirely, Mr.
15 Barniville. 12:08

16 **MR. BARNIVILLE:** But we don't have the luxury in
17 the case, and there are four reasons. Firstly, the
18 Inspectors, having had the opportunity of carrying out
19 their investigation, are very strongly of the view that
20 the Court has no option but to take this course. 12:08

21
22 Secondly, and perhaps even more significantly,
23 Ms. McGrath, on behalf of the company, has told you
24 that it sees no alternative and is consenting to the
25 Order. That is extremely significant and it is, with 12:09
26 respect, very difficult to see how you need to go any
27 further than that.

28
29 Thirdly, the financial position has been very fully set

1 out and the Court has adverted to it. In light of that
2 financial position, no time that Mr. Delahunt might
3 need to talk to his clients or consult with his clients
4 is going to alter that position, and indeed the
5 position will get worse.

12:09

6
7 And finally, the power that the Court exercises here is
8 power in the public interest. And when you look at
9 what the Inspectors have found in their substantive
10 findings and when you look at the current position
11 within the company, insufficient amount of staff and
12 not a functioning board and all of those matters that
13 are identified, leaving aside the actual substantive
14 findings themselves, there is again no alternative.

12:09

15
16 And finally, we don't have the luxury of delay here.
17 The uncertainty that is created by virtue of the fact
18 that these matters are now to be published and have
19 been spoken about in open Court is sufficient to create
20 an imperative for the Order to be made right now,
21 Judge, in my respectful submission.

12:09

22 **MR. JUSTICE HOGAN:** Thank you Mr. Barniville.
23 Mr. Delahunt.

12:10

24 **MR. DELAHUNT:** I don't wish to repeat, your
25 Lordship has heard my points and, in fairness to Mr.
26 Barniville, he has indicated the difficulty which I
27 have. I don't have the information available to me so
28 I can't consent.

12:10

29 **MR. JUSTICE HOGAN:** Yes. I will make a ruling now.

1 RULING IN RELATION TO THE LIQUIDATOR

2
3 **MR. JUSTICE HOGAN:** I'm going to make an Order now
4 pursuant to the provisions of Article 172 (1)(a)
5 appointing an official liquidator to Custom House 12:10
6 Capital and make a provision for the winding up of
7 Custom House Capital. That will also, I take it,
8 entail as a necessary consequence, pursuant to section
9 33(a) of the Investor Compensation Act,
10 1998...(INTERJECTION) 12:11

11 **MR. BARNIVILLE:** In fact, I may have suggested
12 that there was some option, in fact there is an
13 obligation, "unless the supervisory authority
14 requests". So there is an obligation to make the
15 Order, in fact, under section 33(a) of that Act. 12:11

16 **MR. JUSTICE HOGAN:** I'm going to make an Order
17 pursuant to section 33(a) of the Investor Compensation
18 Act, 1998 (as amended) appointing Mr. Kieran Wallace of
19 KPMG as official liquidator and administrator, with
20 immediate effect. 12:11

21
22 I propose to give the reasons for that decision in
23 writing, which will be released within a few days and I
24 will make arrangements and fix a time for that at the
25 conclusion of this hearing. But may I just say this: 12:11
26 I have enormous sympathy for the, indeed Mr. Barniville
27 was the first to recognise it, for the position of Mr.
28 Delahunt on behalf of the various investors who might
29 obviously wish to see the final report, consider their

1 position and so on. But, unfortunately, as Mr.
2 Barniville has explained, we do not have the luxury of
3 time. The very fact that this report is now to be
4 published, the very fact that Custom House Capital is
5 in such a precarious position and fails, and clearly 12:12
6 fails the two elements and two indicia of solvency,
7 namely cash flow and balance sheet tests, makes it
8 imperative that this company be wound up with immediate
9 effect.

10
11 I'm doing this in order to protect and conserve the 12:12
12 assets of the company and to ensure that the company
13 does not continue to haemorrhage cash in an
14 unrestricted and in an unregulated fashion. It is, I
15 think, vital in the interests of the investors and 12:13
16 vital in the public interest that I make an Order
17 immediately to this effect because otherwise there is a
18 very serious risk that the assets of the company will
19 be dissipated in an unregulated fashion over the next
20 few days, maybe even judgments entered against the 12:13
21 company and so forth. And, therefore, I have to take
22 steps to ensure that an independent outside person
23 takes control of the company and ensure, most of all,
24 that the investors are fairly dealt with.

25
26 And therefore, for that reason, while, as Mr. 12:13
27 Barniville pointed out, in any other circumstances I
28 would be minded to allow persons in the position of Mr.
29 Delahunt's clients a fair and full opportunity to take

1 a look at the final report, I am afraid time is not on
2 our side and I have to take that decision. The
3 decision rests with me and I have to guard and protect
4 the public interest as best I can. No amount of
5 adjournments can, unfortunately, wish away the 12:14
6 unpleasant and miserable fact that this company is
7 insolvent, and insolvent by any standards, and
8 therefore I have to take this step immediately. And it
9 is in these circumstances that I'm making an Order
10 appointing Mr. Wallace as official liquidator and 12:14
11 administrator of the company, with immediate effect.
12 And I am also making an Order for the winding up of the
13 company pursuant to article 172(1)(a) of the MiFID
14 Regulations.

15
16 **END OF RULING** 12:15

17
18 **MR. BARNIVILLE:** I think there are a couple of
19 housekeeping matters that I need to address. Firstly,
20 there is a consent to act by Mr. Wallace which should 12:15
21 be provided to the Court and there is an affidavit of
22 suitability sworn by Brendan Cooney in respect of
23 Mr. Wallace, who would in any event be known to the
24 Court.

25
26 The second thing is that there are a number of 12:15
27 consequential orders which would follow from the order
28 that the Court has made and they are all set out in
29 pretty much standard terms in the draft order, which

1 would involve this matter ultimately on the winding
2 upside going to the Examiners List.

3 **MR. JUSTICE HOGAN:** Just one moment. Sorry,
4 Mr. Barniville, yes.

5 **MR. BARNIVILLE:** Just following on from the Order 12:15
6 that you have just made there are various consequential
7 Orders that follow, all of which are in standard terms,
8 leading on from 8, 9 and 10, down as far as at the very
9 end, Judge, where you are asked at paragraph 18 to
10 "adjourn the matter to the Examiner's Court motion 12:16
11 list". And I'm not sure whether Mr. Murphy might
12 suggest a date for that. Yes, if the Court would say
13 in five weeks time.

14 **MR. JUSTICE HOGAN:** Yes, this day five weeks.

15 **MR. BARNIVILLE:** Probably Monday five weeks. We 12:16
16 will supply that date to Ms. O'Neill.

17 **REGISTRAR:** 28th of November.

18 **MR. JUSTICE HOGAN:** 28th November I'm told.

19 **MR. BARNIVILLE:** 28th November, thank you. And
20 it is also "that the official liquidator report back to 12:16
21 Court within a period of three months from the date of
22 the Order". I say that should be three months as well.
23 Three months should be there.

24 **MR. JUSTICE HOGAN:** Now, is that reported back to me
25 or to Ms. Justice Finlay Geoghegan? 12:16

26 **MR. BARNIVILLE:** No, that would be reporting on
27 the examiner side.

28 **MR. JUSTICE HOGAN:** On the examiner side, yes.

29 **MR. BARNIVILLE:** And then you will recall I

1 sought the costs of the application for the appointment
2 and of the proceedings against the company and,
3 equally, an Order in terms of Regulation 171, "that the
4 expenses which have been defrayed by the Central Bank
5 would be paid by the company". And they will obviously 12:17
6 have to take their course as we go forward. I think
7 they follow from the Orders that the Court have already
8 made.

9 **MR. JUSTICE HOGAN:** Yes. So apart from those.

10 **MR. BARNIVILLE:** Sorry, excuse me, Judge. Mr. 12:17
11 Delahunt makes point that he would be not consenting to
12 an Order for costs, obviously.

13 **MR. JUSTICE HOGAN:** Yes.

14 **MR. BARNIVILLE:** And I think it can be taken that 12:17
15 he is not consenting. In fact, he is opposing any
16 Order for costs but I don't think he wants to advance
17 any substantial submissions at this point.

18 **MR. DELAHUNT:** Yes, Judge, I'm formally
19 opposing, bearing in mind my earlier submissions to the
20 Court in relation to the matter. I just wanted to flag 12:17
21 that to Mr. Barniville.

22 **MR. JUSTICE HOGAN:** I will just hear you in a
23 moment, Mr. Delahunt.

24 **MR. BARNIVILLE:** I think it follows from what he 12:17
25 said in any event that he would be opposing. But I
26 think they seem to follow in any event from the Orders
27 that the Court has made.

28 **MR. DELAHUNT:** That's correct, Judge.

29 **MR. BARNIVILLE:** Can I finally say that the

1 Investor Compensation Company is in fact present in
2 court through Mr. Cahir of William Fry and I think he
3 may want to just briefly address the Court on an issue.
4 **MR. JUSTICE HOGAN:** Yes. Could I just deal with the
5 costs first and then I will hear from Mr. Cahir. 12:18
6 ms. McGrath?
7 **MS. MCGRATH:** Judge, I think from the
8 company's perspective, on the basis of what has
9 transpired, the company cannot object to an Order for
10 costs being made against it. Obviously, Mr. Delahunt 12:18
11 and the investors have a separate interest there. But
12 the company is consenting to the Order for costs.
13 **MR. JUSTICE HOGAN:** Now Mr. Delahunt.
14 **MR. DELAHUNT:** May it please you Judge. It
15 follows as a consequence of my objection to the 12:18
16 appointment of either a provisional or full liquidator
17 that I cannot consent to the costs of the application
18 being visited upon the company where your Lordship has
19 clearly seen that the company is hopelessly insolvent.
20 The figures involved are quite large. My apprehension 12:18
21 is that at some stage that could be visited upon my
22 clients, as investors, in relation to the company. It
23 may well be that nothing comes to pass in that regard,
24 bearing in mind the financial situation of CHC.
25 **MR. JUSTICE HOGAN:** I think the Central Bank would 12:19
26 be an unsecured creditor.
27 **MR. DELAHUNT:** It would have to be. It would
28 have to be, in relation to that. And it is just from
29 my client's perspective, through no fault of theirs,

1 there is now a Costs Order being made in relation to
2 this and, again, I think I can't consent to the costs
3 being levelled against them or potentially hanging over
4 my clients, in relation to that Order, Judge, I can't
5 simply consent to that, through no fault of theirs. 12:19

6 **MR. JUSTICE HOGAN:** Yes. Thank you, Mr. Delahunt.
7 I will just hear the other parties. Mr. Hogan?

8 **MR. HOGAN:** No submission.

9 **MR. JUSTICE HOGAN:** Mr. Eagar?

10 **MR. EAGAR:** I have no submissions. 12:19

11 **MR. JUSTICE HOGAN:** And Mr. Barniville.

12 **MR. BARNIVILLE:** The taxpayer shouldn't bear the
13 burden of these proceedings. The Central Bank is
14 acting in the interests of the public in this. It may
15 be a debate for another day as to the status of any 12:19
16 Order for Costs and where they might rank in the
17 winding up of the company. That is certainly a debate
18 for another day. But here the Central Bank, acting in
19 the public interest, made the application to the Court.
20 The Inspectors, again acting in the public interest, 12:19
21 proceeded to do their job, carry out their
22 investigation, publish a very detailed and extensive
23 report to the Court. The Court has acted on foot of
24 the report and has now made an Order winding up the
25 company. It is hard to see why the Court wouldn't make 12:20
26 the Orders sought, both in relation to the costs and in
27 relation to the expenses of the investigation. They
28 shouldn't be visited on the taxpayer.

29 **MR. JUSTICE HOGAN:** Just that Mr. Delahunt makes the

1 point that his clients are the innocent victims of this
2 and that in a sense they should not have -- an order
3 for costs would further dilute the pot that is
4 available.

5 **MR. BARNIVILLE:** So be it. If that is the case. 12:20
6 And it is premature, I think, even to reach that
7 conclusion at this stage because the company is now
8 being wound up and those matters can all be addressed
9 in the context of the winding up. But the fact of the
10 matter is the responsibility for the events that are 12:20
11 dealt with in the report rests with the company and for
12 that reason the company should bear the cost. Now, we
13 accept that we are in a winding up process now and we
14 will deal with the matter in the winding up process, if
15 necessary, but Mr. Delahunt has not advanced any good 12:21
16 reason as to why the taxpayer should in the first
17 instance bear the cost of these events.

18 **MR. DELAHUNT:** Perhaps then, Judge, in relation
19 to the issue of costs you might hold over that order so
20 that I can make submissions to the Court. Again, I 12:21
21 have come hamstrung. I know I'm repeating myself. I'm
22 not privy to all of the information which the Court had
23 this morning, which was opened and which my friend had,
24 and I think it is a double whammy on my clients which
25 cannot be justified, that they would have to 12:21
26 potentially face that order as well. I think that's
27 grossly unfair to my clients. It is inequitable. They
28 are the ones who are ultimately suffering the largest,
29 Judge, out of all of this; it is their monies which

1 have been invested, which now seem to have gone. And
2 now there is the potential to have this other Sword of
3 Damocles hanging over them should there be anything in
4 pot, depending on what the assets are. I don't know
5 because I don't have the report available to me, Judge. 12:22
6 And I say it is inequitable that that be visited or
7 potentially be visited upon them. I hear what Mr.
8 Barniville is saying but I am asking that the Court's
9 Order not be made in the first instance so I don't have
10 to raise that argument again. Or in the alternative, 12:22
11 if your Lordship wishes to adjourn the costs aspect of
12 it so that it would give me an opportunity to address
13 the Court formally.

14 **MR. JUSTICE HOGAN:** Yes. Mr. Barniville.

15 **MR. BARNIVILLE:** Judge, I don't think it is 12:22
16 necessary to bring everybody back again to argue in
17 relation to the issue of costs. The Costs Order would
18 seem to follow. And the Central Bank made the
19 appropriate and take a position in relation to those
20 costs in the winding up. But I think it is far too 12:22
21 premature at this stage to advance the case that Mr.
22 Delahunt has.

23 **MR. JUSTICE HOGAN:** The only thing is this, is that
24 it cannot be said -- I mean, I don't want to bring
25 people back, Mr. Barniville, if I can avoid it. 12:22

26 **MR. BARNIVILLE:** Yes.

27 **MR. JUSTICE HOGAN:** And I take on board everything
28 that you have said. The only thing is this, is that
29 perforce I have had to make an Order appointing a

1 liquidator a few moments ago, as we know, in
2 circumstances of very considerable urgency where I just
3 simply had to do it.

4
5 I would like to give Mr. Delahunt and his clients an 12:23
6 opportunity of considering the report before I made any
7 further order for costs. I take on board what you say
8 but in matters of fairness I think I would give that
9 option.

10 **MR. BARNIVILLE:** I hear what the Court is saying. 12:23
11 And, obviously, if that's what the court wishes to do
12 then that's a matter for the Court.

13 **MR. JUSTICE HOGAN:** Yes. What I'm going to suggest,
14 counsel, is this -- well, firstly, I take it both
15 Mr. Eagar and Mr. Hogan have no submissions to make and 12:23
16 can be excused. And Ms. McGrath, I mean your client
17 can be excused as well. I mean, you have already made
18 the submissions. But I will hear -- I will sit this
19 day week, if you wish. Is that too early, Mr.
20 Delahunt, is it? 12:23

21 **MR. DELAHUNT:** No, I don't believe so.

22 **MR. JUSTICE HOGAN:** Is that convenient for you?

23 **MR. DELAHUNT:** Yes, I can certainly deal with
24 it. That would be the 28th, this day week, the Friday.
25 I don't know whether that suits Mr. Barniville. 12:24

26 **MR. JUSTICE HOGAN:** If it doesn't suit you, Mr.
27 Barniville.

28 **MR. BARNIVILLE:** No, no, that's fine.

29 **MR. JUSTICE HOGAN:** If I said 10:30 next Friday and,

1 as I say, it will only be a short matter but I want to
2 give Mr. Delahunt an opportunity of making this.

3 **MR. DELAHUNT:** I'm obliged to your Lordship.

4 **MR. JUSTICE HOGAN:** Now, Mr. Cahir wants to address
5 me I understand, Mr. Barniville; is that correct? 12:24

6 **MR. CAHIR:** Judge, very briefly if I may.
7 As Mr. Barniville said, I represent the Investor
8 Compensation Company Ltd., Judge, and Mr. Barniville
9 has set out on affidavit...(INTERJECTION)

10 **MR. JUSTICE HOGAN:** Mr. Cahir, do you want to come 12:24
11 up into the front seat?

12 **MR. CAHIR:** Thank you, Judge. Mr.
13 Barniville has set out what the Inspectors have said
14 about the contact with the Investor Compensation
15 Company Ltd. so I won't go into that, Judge. I think 12:24
16 his Draft Order suggests a number of consequential
17 Orders, namely the appointment of Mr. wallace as
18 administrator. I think you have exceeded to that,
19 Judge. And I think there are also two further
20 consequential Orders on that, namely the provision of 12:25

21 the report in an unredacted form to the Investor
22 Compensation Company Ltd. and the permission for the
23 Investor Compensation Company Ltd. to have access to
24 the books and records of the firm for the purposes of
25 its statutory functions. And I think that is provided 12:25
26 for in Mr. Barniville's draft, Judge.

27
28 And I would make one further addition, if I may, Judge.
29 I would ask you to make an Order that the Investor

1 Compensation Company Ltd. would be put on notice of any
2 applications in the liquidation. And that would
3 extend, for example, to the application to be made by
4 Mr. Delahunt in respect of the costs.

5 **MR. JUSTICE HOGAN:** Yes, Mr. Cahir. I will hear 12:25
6 from Mr. Barniville and Mr. Delahunt in relation to
7 that. Is there anything that arises?

8 **MR. CAHIR:** No.

9 **MR. JUSTICE HOGAN:** Mr. Barniville?

10 **MR. BARNIVILLE:** I have no problem with anything 12:26
11 that Mr. Cahir has suggested.

12 **MR. JUSTICE HOGAN:** Mr. Cahir, you were just looking
13 for, did I hear correctly, redacted or unredacted
14 version?

15 **MR. CAHIR:** I'm easy, Judge. I think Mr. 12:26
16 Barniville's draft suggests unredacted.

17 **MR. JUSTICE HOGAN:** Yes.

18 **MR. CAHIR:** I think, given our function, we
19 do need it.

20 **MR. JUSTICE HOGAN:** I think it would be appropriate 12:26
21 that you got an unredacted version.

22 **MR. CAHIR:** I think that is right, Judge.

23 **MR. JUSTICE HOGAN:** But I will hear submissions from
24 counsel in that regard. Mr. Barniville, you are happy
25 with an unredacted version. 12:26

26 **MR. BARNIVILLE:** Absolutely. It would seem
27 appropriate. We have sought it in the Order, in fact.
28 And the only thing we have not been sought is that he
29 would also be put on notice of any applications. That

1 would also seem to follow, having regard that their
2 role.

3 **MR. JUSTICE HOGAN:** And would also extend to the
4 various books and records of the Inspectors.

5 **MR. BARNIVILLE:** Yes. That's there in paragraph 12:26
6 11 of the draft, in fact, as it is.

7 **MR. JUSTICE HOGAN:** Yes. Ms. McGrath.

8 **MS. McGRATH:** Yes, Judge, the company has no
9 objection to what is proposed by Mr. Cahir.

10 **MR. DELAHUNT:** No, Judge, I have no objection 12:27
11 to Mr. Cahir's application.

12 **MR. JUSTICE HOGAN:** Mr. Hogan?

13 **MR. HOGAN:** No.

14 **MR. JUSTICE HOGAN:** Mr. Eagar?

15 **MR. EAGAR:** No. 12:27

16 **MR. JUSTICE HOGAN:** In those circumstances I will
17 make an Order pursuant to Article 172(1), providing
18 that an unredacted final report of the Inspectors,
19 including all exhibits, be forwarded -- well, in fact,
20 I will have to make an Order in favour of Mr. Wallace, 12:27
21 as official liquidator, anyway, and I am going to do
22 that, but also to the Investor Compensation Company
23 Ltd.. And I will also make an Order giving you access
24 to all books and records and other documents of the
25 Inspectors in relation to the investigation of Custom 12:27
26 House Capital. And I will also provide that you are to
27 be a notice party in any relevant matter in the
28 liquidation.

29

1 Now, Mr. Cahir, I take it is next Friday at 10:30
2 convenient for you in terms of the costs application?
3 **MR. CAHIR:** Yes, Judge.
4 **MR. JUSTICE HOGAN:** All right. Do you want to be
5 made a Notice Party beyond, in the Examiners List? 12:27
6 **MR. CAHIR:** Yes, Judge, I would like a
7 general order that we would be on notice of any
8 application in the liquidation.
9 **MR. JUSTICE HOGAN:** Yes.
10 **MR. CAHIR:** And the approach tends to be we 12:28
11 pick and choose the issues, if you like, Judge.
12 **MR. JUSTICE HOGAN:** Yes. All that you need is
13 notice. Mr. Barniville?
14 **MR. BARNIVILLE:** That would seem to follow,
15 Judge. 12:28
16 **MR. JUSTICE HOGAN:** Yes. And is there any other?
17 Well, I will make an Order that you will be a Notice
18 Party both to the costs and to any matters that arise
19 in relation to the liquidation, In any applications in
20 relation to the Examiners List. 12:28
21 **MR. CAHIR:** I'm obliged, Judge.
22 **MR. JUSTICE HOGAN:** All right. Mr. Barniville,
23 anything else that arises?
24 **MR. BARNIVILLE:** No, I think that deals with
25 everything, Judge. Thank you very much for dealing 12:28
26 with it.
27 **MR. JUSTICE HOGAN:** Yes, all right. Well, I
28 conclude again by saying it is not a pretty picture and
29 I would like to once again extend this very sincere

1 thanks of the Court to the Inspectors for their
2 commendably thorough and efficient work, for which they
3 deserve a great deal of thanks. I hope that, so far as
4 the investors are concerned, that they will -- I know
5 that they will look to their legal advisors in this 12:29
6 regard.

7
8 May I thank you once again, Mr. Barniville. And may I
9 thank counsel and solicitors for their very helpful
10 presentation of matters. 12:29
11

12 I will tell you what, Mr. Barniville, I will give
13 judgment next, give the reasons for the appointment
14 next Friday morning.

15 **MR. BARNIVILLE:** Thank you, Judge. 12:29

16 **MR. JUSTICE HOGAN:** which is the 28th. At 10:30.
17 And then I will deal with the costs then.

18
19 **THE HEARING WAS THEN ADJOURNED TO FRIDAY, 28TH OCTOBER**
20 **2011 AT 10:30** 12:30
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