

Bill No: 2011 239 MCA

THE HIGH COURT
BEFORE THE HONOURABLE MR JUSTICE McGOVERN

26 July 2011

IRISH LIFE & PERMANENT GROUP HOLDINGS PLC
AND ANOTHER

v.

CREDIT INSTITUTIONS STABILISATION ACT 2010

Counsel for the Respondent:

Mr D Barniville, SC

Irish Life & Permanent Group Holdings plc & another v. Credit Institutions Stabilisation
Act 2010
26 July 2011

INDEX

<u>Proceedings</u>	<u>Pages</u>
Defence application	1 - 9
Ruling of Court	9 - 10

1 REGISTRAR: The matter of Irish Life & Permanent Group Holdings plc and
2 another v. The Credit Institutions Stabilisation Act 2010.

3 MR BARNIVILLE: May it please the Court. I appear for the Minister, Judge.

4 JUDGE: Yes, Mr Barniville.

5 MR BARNIVILLE: With Mr McCann, Mr Dunne and Mr McBride instructed by
6 Arthur Cox and the Chief State Solicitor.

7 JUDGE: Yes, Mr Barniville. Now, the reason I've sat later is I was at hearing until
8 lunchtime but I had an opportunity earlier this morning to read half the grounding
9 affidavit. I've now read the balance of it and I've also read the proposed direction
10 order and the draft order of the Court that's submitted for my consideration. So,
11 that's what I've done.

12 MR BARNIVILLE: May it please the Court. What I would propose doing, first of
13 all, could I ask the Court to make the order that is commonly made in these
14 applications, which is an order preventing publication of the fact of the application
15 until the application has been determined?

16 JUDGE: Yes. All right. Well, for the benefit of anybody present, I'm making an
17 order prohibiting the fact -- the announcement of the fact that this application is
18 taking place until after the matter is concluded and I have made any order that I deem
19 fit in the matter.

20 MR BARNIVILLE: May it please the Court. This is an application by the Minister
21 for a direction order, as the Court has seen, in relation to Irish Life & Permanent
22 under section 9 of the 2010 Act.

23 JUDGE: Yes.

24 MR BARNIVILLE: It's a hearing in open court but, as the Court will have seen,
25 there are a certain limited number of paragraphs which contain portions that are
26 redacted on the grounds of commercial sensibility.

27 JUDGE: Yes.

28 MR BARNIVILLE: And in respect of each of those redactions the Court will have
29 seen there is an explanation as to the basis of the redaction.

30 JUDGE: Yes.

31 MR BARNIVILLE: And they are all redacted -- all of the redactions are made on
32 the basis of matters of commercial sensibility. There will be available after the
33 hearing of the application a redacted version of the affidavit.

34 JUDGE: Yes.

1 MR BARNIVILLE: Because I know that's something that the Court has traditionally
2 regarded as being the appropriate course of action to take.

3 JUDGE: Yes and I'll make an order directing that none of the material that is
4 redacted is to be published in any way in case anybody should discover what's
5 underneath any of the delineated portions or obliterated portions.

6 MR BARNIVILLE: May it please the Court. The application, as I say, Judge, is for
7 a direction order in the terms of a proposed direction order that the Minister made
8 yesterday and the purpose of the direction order sought from the Court is to effect the
9 recapitalisation of Irish Life & Permanent in circumstances where, as the Court will
10 be aware from the papers, the Central Bank has imposed certain additional capital
11 requirements on Irish Life & Permanent. Those, or compliance with those additional
12 capital requirements, in the total sum of €4 billion has been -- is now a commitment
13 of the State under the programme for support with the EU, ECB and IMF and is also
14 a requirement of the Council implementing decisions under the European financial
15 stabilisation mechanism regulations, and you will have seen that the recapitalisation
16 of Irish Life & Permanent, which is required under those provisions I've just
17 mentioned to be in place by the 31st of July of this year, is €2.9 billion of the
18 €4 billion and the direction order sought covers that €2.9 billion plus a further
19 €1.1 billion, which may subsequently have to be provided by the State and
20 authorisation is sought for that if necessary. As I'll explain in a moment, it is hoped
21 that the additional €1.1 billion will be raised by Irish Life & Permanent itself in two
22 ways, firstly the disposal of the Irish Life business and secondly what's called a
23 liability management exercise, which as the Court will have seen is a process
24 provided for under the legislation as well under which institutions can buy back
25 some of their bonds at a discount from the nominal value, and it is anticipated or it is
26 at least hoped that the €1.1 billion or a large part of the additional €1.1 billion can be
27 raised on foot of those two capital-raising measures. However -- and you will have
28 seen from the affidavit, Judge, that the evidence before the Court is to the effect that
29 there is no alternative source for the €2.9 billion capital, which is the subject of this
30 direction order and which will be the subject of an application by me if the Court is
31 disposed to make the direction order that the -- that part of the direction order at least
32 will come into force immediately in order to ensure compliance with the 31st of July
33 deadline.

34

1 Of the €2.9 billion the direction order would provide, Judge, if the Court was
2 disposed to making it, that the State would provide some €2.7 billion and that would
3 be comprised of €2.3 billion by way of subscription to the ordinary shares in Irish
4 Life & Permanent Group Holdings plc and a further €0.4 billion in contingent capital
5 notes issued by Irish Life & Permanent plc, and the balance of the €0.2 billion of the
6 €2.9 billion is being provided by Irish Life & Permanent itself from its resources. I
7 should say the position of Irish Life & Permanent Group is that, having regard to
8 resolutions passed at the Extraordinary General Meeting last week, it's clearly not in
9 a position to consent to this application. So, it's not consenting to the application and
10 in those circumstances it has been served under the Act with written notice of the
11 Minister's intention to make the proposed direction order together with a summary of
12 the reasons for the direction order.

13 JUDGE: Yes.

14 MR BARNIVILLE: And it has had an opportunity to and has made certain
15 submissions in that regard which have been considered by the Minister prior to
16 making the proposed direction order.

17 JUDGE: Yes.

18 MR BARNIVILLE: And that material is exhibited to the affidavits, Judge.

19 JUDGE: Well, what about notice parties and any further applications? If I make the
20 order, will there be any proposals with regard to who should be put on notice?

21 MR BARNIVILLE: Well, no. I think the Act doesn't in fact make provision for the
22 putting on notice of any party. As you know, and I can take the Court to the Act, the
23 structure of the legislation is that this application is made on an ex parte basis.

24 JUDGE: Yes. No, I'm aware of that. I'm talking about any applications to challenge
25 the order.

26 MR BARNIVILLE: Well, any application -- absolutely. I'll come to that in just a
27 moment. Any application -- and the statute provides a procedure under section 11 to
28 apply to set aside and/or vary a direction order made by the Court and that can be
29 made either by the institution itself or by a member of the institution, and such an
30 application must be made within five working days of the making of a direction
31 order. It's a matter for individual members or for the institution itself whether it
32 wishes to bring an application. If -- and you'll have seen reference in some of the
33 correspondence and indeed perhaps elsewhere of the possibility of proceedings being
34 issued, whether it's under this legislation or some other form of proceedings.

1 JUDGE: Yes.

2 MR BARNIVILLE: And if --

3 JUDGE: Well, does notice have to be served on -- in the same way as in some of the
4 other applications I've heard about?

5 MR BARNIVILLE: No. No. No. What has to be done, Judge, is under the
6 CIWUD Directive and under the implementing regulations in Ireland there must be
7 publication of the making of the order and of the right of appeal under the
8 legislation.

9 JUDGE: Yes.

10 MR BARNIVILLE: And I'll be asking the Court, and it's provided for in the draft
11 order, to make an order under I think it's regulation 9 of the 2011 Regulations
12 directing the Courts Service to effect the usual publication.

13 JUDGE: Yes. Well, that's what I was going to come to. So, it would be in the usual
14 form if I do make the order that the publication would be undertaken by the Courts
15 Service.

16 MR BARNIVILLE: Exactly. Exactly and in fact, for the assistance I think of the
17 Court and of the Courts Service, I think a draft extract has been prepared and it's
18 sought to be prepared I think in the form that the Court has in other matters
19 approved. So, it's --

20 JUDGE: Yes. Well, the -- an attempt has been made on other occasions in
21 applications under the Act to truncate the publications as much as possible.

22 MR BARNIVILLE: Yes.

23 JUDGE: Because apparently they involve very considerable expense.

24 MR BARNIVILLE: Yes. Absolutely and, with that in mind, the extract has been
25 prepared, if you like, with the house style in mind.

26 JUDGE: All right. Yes. All right.

27 MR BARNIVILLE: And I hope that will find -- ultimately the Court will find that
28 acceptable, because there are certain time limits and so on for the publication in the
29 official journal.

30 JUDGE: Yes.

31 MR BARNIVILLE: The reason therefore then why the direction order is necessary
32 is set out, and I'll bring the Court briefly to the relevant paragraphs in the affidavit,
33 but in the absence of any alternative source of capital and having regard to the
34 commitments under the programme for support and under the Council implementing

1 the decision re the Central Bank requirements, there is no alternative means by
2 which Irish Life & Permanent --

3 JUDGE: Yes. Well, it's not necessary to go through the affidavit. I've read it and
4 I'm satisfied that it is necessary.

5 MR BARNIVILLE: Yes.

6 JUDGE: I'm also satisfied that there has been consultation with the governor and
7 that correspondence is exhibited.

8 MR BARNIVILLE: Yes, it is. The affidavit does explain quite fully and I know the
9 Court has considered it but the purposes that are sought to be achieved by the
10 direction order and the necessity for the direction order, and it goes through in some
11 detail, as the Court will have seen, the consequences for the failing -- the absence of
12 the recapitalisation but there is a matter I should I suppose expressly bring to the
13 Court's attention, the fact that there has been correspondence from individual
14 shareholders and from two law firms that have at least for part of the time, it's not
15 clear whether they continue to act, if both of them continue to act, have been
16 representing some shareholders in Irish Life & Permanent and exhibit JM19 to the
17 papers contained a full set, bar one thing I'm just about to bring to the Court's
18 attention, of all of the correspondence that the Minister, the Department and entity,
19 may have received from those law firms and those individual shareholders and you
20 will see that where possible they have been responded to in correspondence by the
21 Department or by the solicitors, by Arthur Cox. In some cases it was felt where
22 shareholders were also represented by law firms it would be inappropriate to be
23 conducting parallel or triplicate correspondence because in some cases some people
24 appear to have been represented by two law firms at the one time, and it was sought
25 to try to rationalise the process by corresponding with the law firms. Various issues
26 were raised in the correspondence which were sought to be addressed and is
27 summarised and addressed I think in some detail in the affidavit. I felt it appropriate
28 to bring that expressly to the Court's attention lest there be some accusation in the
29 future that I didn't. I do want to bring to the Court's attention another e-mail, or I
30 think it's two e-mails, that were received last night after the affidavit was sworn from
31 one of the shareholders, a Mr Hemming, and I don't believe it advances the position
32 in any way whatsoever. At one stage Mr Hemming was represented by the firm of
33 Brown Rudnick but you may have seen from the exhibits that Brown Rudnick ceased
34 to act for Mr Hemming and he then -- is now corresponding it appears on his own

1 behalf, but I don't believe it advances in any way the arguments that were made up to
2 now in relation to the issues, the legal issues, raised in the correspondence. Judge,
3 having regard to what you've said about the procedures and so on --

4 JUDGE: Yes.

5 MR BARNIVILLE: -- what the Court obviously has to be satisfied on are that the
6 procedures are being complied with and I think the Court's satisfied that they have.

7 JUDGE: Yes, well, I just want you to briefly go through the checklist that's required.
8 It seems to me on reading the affidavit that everything that requires to be done has
9 been done and I just want to be sure that all the relevant requirements of the Act have
10 been complied with.

11 MR BARNIVILLE: Yes.

12 JUDGE: Section 61 will apply in this case. There'll be a switch-off in the event that
13 I make the order.

14 MR BARNIVILLE: There'll be a switch-off, absolutely.

15 JUDGE: So that there'll be no question of a default arising. Yes.

16 MR BARNIVILLE: Yes and the Minister has made -- absolutely and the Minister
17 has made the appropriate declaration under section 7(3) in the draft -- in the
18 proposed direction order. So, that would bring into play the provisions of the
19 CIWUD Directive also.

20 JUDGE: Yes. All right.

21 MR BARNIVILLE: And that's what --

22 JUDGE: Well, he has made a directive that it is a reorganisation measure and that
23 seems to be correct.

24 MR BARNIVILLE: Yes, he has. So, you firstly have to be satisfied obviously with
25 the statutory requirements and he's, as you say, conducted the consultation. He's
26 given notice to the institutions. They have made submissions. He's considered the
27 submissions and he's now made the proposed direction order. What you also have to
28 be satisfied are that the opinion of the Minister is reasonable -- that the proposed
29 direction order is necessary for one of the purposes in the Act, and you will have
30 seen in the section of the affidavit dealing with the purposes of the proposed
31 direction order, he goes through all of the relevant statutory purposes and explains by
32 reference to each of those why he has formed the opinion that the direction order in
33 those terms is necessary.

34 JUDGE: Well, I note he's been advised by the NTMA, among others, that a

1 direction order is vital in this case to preserve or restore the financial position of the
2 group and the company.

3 MR BARNIVILLE: Yes.

4 JUDGE: And I think the governor appears to be of the same view that it's --

5 MR BARNIVILLE: The governor is of the same view. Precisely.

6 JUDGE: Yes.

7 MR BARNIVILLE: And so there's ample material that the Court will be satisfied.

8 JUDGE: Yes. No, I'm satisfied. I'm satisfied about that.

9 MR BARNIVILLE: May it please the Court. And the other issue is whether the
10 opinion is in any way vitiated by error of law and I don't think there's any material
11 before the Court from which the Court could conclude that the opinion is in any way
12 vitiated by error of law.

13 JUDGE: Yes.

14 MR BARNIVILLE: There's ample material to support the opinion with regard to
15 this application. There is one additional matter I think I need to raise with you,
16 Judge, if the Court is disposed to making the direction order sought and that is in
17 respect of the €2.7 billion of the €2.9 billion which the Minister will be paying on
18 foot of a direction order, that is the part that has to be in by the 31st of July and
19 therefore there are certain parts of the direction order which I will have to ask the
20 Court to direct have immediate effect under section 9(8) of the Act.

21 JUDGE: Yes.

22 MR BARNIVILLE: And there's a section in the affidavit towards the end, I think it's
23 paragraph 1.77.

24 JUDGE: 1.77 I think.

25 MR BARNIVILLE: 1.77 -- sorry, 1.76, 1.77 and 1.78 in which Mr Moran, the
26 deponent, identifies the relevant paragraphs.

27 JUDGE: Yes.

28 MR BARNIVILLE: There's just a typographical error on the third line. It's
29 paragraph 8.3(a) and 8.3(b) and they are reproduced in the proposed direction order
30 and in the draft order prepared for the assistance of the Court. Do you see that,
31 Judge, at 1.76, line 3?

32 JUDGE: Yes.

33 MR BARNIVILLE: And it's 8.3(a) and the statutory test is then set out and it's then
34 explained in 1.77 why the immediate injection is necessary to ensure compliance

1 with the Central Bank's regulatory requirements and equally why the failure to direct
2 immediate effect will have threat -- imminent threat, to the financial stability of the
3 institutions.

4 JUDGE: Wait now. As I understand it, what you're asking for is an order that the
5 direction order take immediate effect, not a part of the order. Is that right?

6 MR BARNIVILLE: Yes. Yes, a part. Just a part of the order.

7 JUDGE: Just a part? All right.

8 MR BARNIVILLE: Just a part of the order.

9 JUDGE: Well, then you'd better ... yes.

10 MR BARNIVILLE: And that's why they are identified and maybe the easiest thing
11 if I bring you to the draft order that's been prepared for the assistance of the Court.

12 JUDGE: Yes.

13 MR BARNIVILLE: There is a draft order exhibited but there was a -- it felt that it
14 might just be too unwieldy. So, a revised draft has been prepared, which I'm just
15 handing up to the Court now.

16 JUDGE: Well, will I take out the one that's already in my papers?

17 MR BARNIVILLE: You could. You could, Judge, and --

18 JUDGE: I'll hand back the other one that's here. I think, yes.

19 MR BARNIVILLE: And the relevant parts of the order that's --

20 JUDGE: Actually -- sorry. Would your solicitor have a hole puncher for this. It
21 doesn't matter. It doesn't matter. Look, carry on. I'll just -- I'll be handing back the
22 papers in any event. So, just note that I've taken out the other draft order.

23 MR BARNIVILLE: Well, we might actually get one for you.

24 JUDGE: No, it really doesn't matter.

25 MR BARNIVILLE: Judge, we indicate in the draft order the paragraphs which are
26 the terms we seek immediate effect for at paragraph D of the order, I think five pages
27 into the order.

28 JUDGE: Yes.

29 MR BARNIVILLE: You'll see at paragraph D where it refers back to 1.1, 1.2,
30 1.3(a), 1.3(b), 1.9 of section B of the order.

31 JUDGE: Yes.

32 MR BARNIVILLE: And also paragraph C of the order.

33 JUDGE: Yes.

34 MR BARNIVILLE: And they are all the steps necessary to implement the

1 immediately required injection of the €2.7 billion by the State.

2 JUDGE: All right. So, they're to have immediate effect from the making of the
3 order and then the --

4 MR BARNIVILLE: The order also makes provision, Judge, then for the relevant
5 declaration at E and identifies the particular paragraphs which have been redacted in
6 a limited form.

7 JUDGE: Well, I'll make that order that the declaration order is a reorganisation
8 measure for the purposes of the directive and the CIWUD Directive and the other
9 regulation referred to.

10 MR BARNIVILLE: Yes.

11 JUDGE: Yes, I'm happy to make that.

12 MR BARNIVILLE: I'm obliged to the Court and then at paragraph G of the order
13 then you'll see is the normal order or direction that the Court gives pursuant to
14 regulation 9, which is the publication of an extract of the order as required.

15 JUDGE: Yes. Yes. What's the variation between this draft that you've handed in
16 and the one I read earlier?

17 MR BARNIVILLE: It's this. On the way -- the original draft was prepared and it
18 was arguable that you might have to put all of the documents, the draft agreements
19 and so on, to the back of the perfected order and that was felt to be unduly unwieldy.

20 JUDGE: Yes.

21 MR BARNIVILLE: So, reference was simply made to those documents as they're
22 referred to in the proposed direction order so they don't have to be in the complete.

23 JUDGE: All right.

24 MR BARNIVILLE: It seemed like the sensible thing to do. So, that's the only
25 change effectively.

26 JUDGE: All right. Well, Mr Barniville, as I say, I've read the affidavit and some of
27 the relevant exhibits and I'm happy that I should make the order in this case and I'm
28 happy to make it in the terms of the draft order that has been provided and I will
29 make an order that the direction order referred to in paragraph D, that those portions
30 of it shall have immediate effect. They'll take immediate effect.

31 MR BARNIVILLE: Yes, Judge.

32 JUDGE: And I'll make the declaration order that this is a reorganisation -- sorry, I
33 will declare that the declaration order is a reorganisation measure for the purpose of
34 the regulation, the CIWUD Directive and other regulations referred to paragraph E of

1 the order and then the publication also as per the order. I am happy with the text of
2 the draft order. So, the order will be in those terms and the -- is there anything else
3 that's required then?

4 MR BARNIVILLE: No, Judge. Thank you.

5 JUDGE: All right. Now, obviously the prohibition on publication --

6 MR BARNIVILLE: I've got a hole punch.

7 JUDGE: Thank you. The prohibition on publication of the fact of the making of the
8 application is lifted now that I've made the order.

9 MR BARNIVILLE: Yes.

10 JUDGE: And again I would just reiterate that in the event that any of the matters
11 which have been redacted in documents are in any way visible to any parties that get
12 hold of those documents they're not to publish anything that has been redacted.

13 MR BARNIVILLE: May it please the Court.

14 JUDGE: Now, would you note in the event that there are any applications arising
15 out of this that it would probably be better if I don't hear them because I know a
16 number of parties who are connected with or are or have been connected with the
17 organisations?

18 MR BARNIVILLE: Yes, Judge.

19 JUDGE: And who may have shareholdings and other interests. So, I think I would
20 be conflicted if there are any subsequent applications.

21 MR BARNIVILLE: That's been the form in any event in the only other order under
22 the Act that --

23 JUDGE: All right. Well, I'd just like the parties to note that.

24 MR BARNIVILLE: Yes.

25 JUDGE: That it wouldn't be appropriate for me to hear any applications that might
26 arise out of a challenge to this order because insofar as it might affect people's
27 shareholdings or matters of that kind I could be conflicted. All right.

28 MR BARNIVILLE: May it please the Court. Thank you, Judge.

29 JUDGE: Very good. I'll leave these papers on the bench and you can take them
30 back in due course. Thank you.

31 MR BARNIVILLE: Thank you, Judge.

32

33

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14 speaker names being omitted or unconfirmed.)

A

about 3:19,24 4:4
5:17 6:3 7:8
absence 4:33 5:11
11:13
absolutely 3:26 4:24
6:14,16
acceptable 4:28
accusation 5:28
achieved 5:9
action 2:2
actually 8:20,23
additional
2:10,11,21,26
7:15
addressed 5:26,27
advances 5:31 6:1
advised 6:34
affect 10:26
affidavit 1:9,33 2:28
4:32 5:3,8,27,30
6:8,30 7:22 9:26
affidavits 3:18
after 1:18,32 5:30
again 10:10
agreements 9:18
already 8:16
also 1:9 2:13 5:6,22
6:19,27 8:32 9:4
10:1
alternative 2:29 4:33
5:1
among 6:34
ample 7:7,14
and
1:1,5,6,9,10,18,28
,31
2:3,8,13,15,18,19,
22,25,27,30
3:2,4,5,9,14,18,19
22,27,28,29,32,3
3
4:2,6,7,10,16,17,2
4,27,28,32,33,34
5:3,6,8,10,14,16,1
8,19,24,26,27,31,
34
6:3,6,9,16,21,22,2
5,27,29,31
7:2,4,7,9,10,16,18
,22,25,29,30,33
8:1,10,17,19,32,3
4 9:3,5,8
announcement 1:17
another 1:2 5:29
anticipated 2:25
any 1:18 2:4,5
3:19,20,22,24,26,
27 4:33 5:32 6:1
7:10,11 8:22
10:10,11,14,20,21
,25
anybody 1:16 2:4
anything 10:2,12
apparently 4:23
appeal 4:7
appear 1:3 5:24
appears 5:34 7:4
application
1:14,15,17,20,33
2:6,30
3:9,23,26,27,30,3
2 7:15 10:8
applications 1:14
3:19,24 4:4,21
10:14,20,25
apply 3:28 6:12
appropriate 2:2 5:27
6:17 10:25
approved 4:19
are 1:25,31 4:28 5:9
6:5,6,28 7:19,29
8:10,25,34
10:11,14,16,20
arguable 9:18
arguments 6:1

arise 10:26
arising 6:15 10:14
aside 3:28
ask 1:13 7:19
asking 4:10 8:4
assistance 4:16 7:30
8:11
attempt 4:20
attention
5:13,18,28,29
authorisation 2:20
available 1:32
aware 2:10 3:24
Act 1:2,22 3:10,21,22
4:21 5:15,34
6:9,29 7:20 10:22
All 1:13,16,31 4:26
5:18 6:9,20,31
8:7,34
9:2,18,23,26
10:5,23,27
Arthur 1:6 5:21
B
back 2:24 8:18,21,29
9:19 10:30
balance 1:9 3:5
bar 5:17
basis 1:29,32 3:23
because 2:1 4:23,28
5:23 10:15,26
been 1:15 2:12
3:10,15
4:17,20,24
5:6,13,15,20,24
6:9,10,34 8:11,14
9:5,28
10:11,12,16,21
before 2:28 7:11
behalf 6:1
being 2:2 3:6,33 6:6
11:14
believe 5:31 6:1
bench 10:29
benefit 1:16
better 8:9 10:15
between 9:15
billion
2:12,17,18,19,21,
26,29
3:1,2,3,4,5,6 7:17
9:1
bonds 2:25
both 5:15
briefly 4:32 6:7
bring 3:32 4:32
5:12,17,28,29
6:18 8:11
business 2:22
but 1:8,24 4:33
5:9,12,33 6:1 8:13
buy 2:24
Bank's 8:1
Bank 2:10 5:1
BARNIVILLE
1:3,4,5,7,12,20,24
,28,31 2:1,6
3:14,21,26
4:2,5,10,16,22,24,
27,31 5:5,8
6:5,11,14,16,21,2
4
7:3,5,7,9,14,22,25
,28,33
8:6,8,10,13,17,19,
23,25,29,32,34
9:4,10,12,17,21,2
4,26,31
10:4,6,9,13,18,21,
24,28,31
BARNIVILLE 3:18
Brown 5:33
C
called 2:22
can 2:24,26 3:22,28
10:29

capital 2:10,12,27,29
3:4 4:33
carry 8:21
case 2:4 6:12 7:1 9:27
cases 5:21,23
ceased 5:33
certain 1:25 2:10 3:14
4:28 7:19
challenge 3:24 10:26
change 9:25
checklist 6:7
circumstances 2:9
3:10
clear 5:15
clearly 3:8
come 2:32 3:26 4:13
commercial 1:26,32
commitment 2:12
commitments 4:34
commonly 1:13
company 7:2
complete 9:22 11:1
compliance 2:11,32
7:34
complied 6:6,10
comprised 3:3
conclude 7:11
concluded 1:18
conducted 6:25
conducting 5:23
conflicted 10:20,27
connected 10:16
consent 3:9
consenting 3:9
consequences 5:11
considerable 4:23
consideration 1:10
considered 3:15 5:9
6:26
consultation 5:6 6:25
contain 1:25
contained 5:17
contingent 3:4
continue 5:15
correct 6:23 11:1
correspondence 3:33
5:7,13,18,20,23,2
6 6:2
corresponding
5:25,34
could 1:13 7:11 8:17
10:27
course 2:2 10:30
court
1:3,10,12,13,20,2
1,24,28
2:1,6,8,9,23,28,30
3:1,22,28
4:10,17,18,27,32
5:9,11 6:5
7:7,9,11,16,20,30
8:11,15 9:12,13
10:13,28 11:13
covers 2:18
Central 2:10 5:1 8:1
Certified 11:1
Chief 1:6
CIWUD 4:6 6:19
9:8,34
Council 2:14 4:34
Court's 5:13,17,28,29
6:6
Courts 4:12,14,17
Cox 1:6 5:21
Credit 1:2
D
days 3:30
deadline 2:33
dealing 6:30
decision 5:1
decisions 2:14
declaration 6:17
9:5,7,32,33
declare 9:33
dedicated 11:13
deem 1:18

default 6:15
delineated 2:5
deponent 7:26
detail 5:11,27
detailed 11:13
determined 1:15
didn't 5:29
direct 7:20 8:1
directing 2:3 4:12
direction 1:9,21
2:7,8,18,30,31
3:1,11,12,16,28,3
0 4:31 5:10
6:18,27,29,31,32
7:1,16,18,19,29
8:5 9:13,22,29
discount 2:25
discover 2:4
disposal 2:22
disposed 2:31 3:2
7:16
documents 9:18,21
10:11,12
does 4:3 5:8
doesn't 3:21 8:21,24
doing 1:12
don't 5:31 6:1 7:10
9:22 10:15
done 1:11 4:5 6:8,9
draft 1:10 4:10,17
6:17 7:30
8:11,13,14,22,25
9:15,17,18,28
10:2
due 10:30
Department 5:18,21
Directive 4:6 6:19,22
9:8,34
Dunne 1:5
E
each 1:28 6:32
earlier 1:8 9:16
easiest 8:10
effect 2:8,28 4:12
7:20 8:2,5,26
9:2,30
effectively 9:25
either 3:29
else 10:2
elsewhere 3:33
end 7:22
ensure 2:32 7:34
entity 5:18
equally 8:1
error 7:10,12,28
event 6:12 8:22
10:10,14,21
everything 6:8
evidence 2:28
exercise 2:23
exhibit 5:16
exhibited 3:18 5:7
8:13
exhibits 5:33 9:27
expense 4:23
explain 2:20 5:8
explained 7:34
explains 6:31
explanation 1:29
expressly 5:12,28
extract 4:17,24 9:14
ECB 2:13
European 2:14
Exactly 4:16
Extraordinary 3:8
F
fact 1:14,17 3:21 4:16
5:13 10:7
failing 5:11
failure 8:1
felt 5:21,27 8:13 9:19
financial 2:14 7:1 8:2
find 4:27
firm 5:32
firms
5:14,19,22,24,25

first 1:12
firstly 2:22 6:24
fit 1:19
five 3:30 8:26
foot 2:27 7:18
for 1:3,10,16,21
2:6,13,20,24,29
3:12,21,31
4:10,16,28,34
5:10,11,14,34
6:29 7:30
8:4,11,20,23,26
9:4,8,33 10:25
force 2:32
form 3:34 4:14,18 9:6
10:21
formed 6:32
from 2:8,10,25,28 3:6
5:13,14,19,30,33
7:11 9:2
full 5:17
fully 5:8
further 2:18 3:4,19
future 5:29
G
get 8:23 10:11
given 6:26
gives 9:13
goes 5:10 6:31
going 4:13
good 10:29
got 10:6
governor 5:6 7:4,5
grounding 1:8
grounds 1:26
group 1:1 3:4,7 7:2
General 3:8
H
had 1:8 3:14
half 1:8
hand 8:18
handed 9:15
handing 8:15,21
happy 9:11,27,28
10:1
has 1:15,21 2:1,10,12
3:10,14
4:5,17,18,20,24
5:6,9,13
6:5,8,16,17,22,24,
32 7:18 8:14 9:28
10:12
have 1:18,24,28
2:15,19,23,27
3:15,32 4:3
5:11,14,15,19,20,
24,33
6:6,9,24,26,27,29
7:19,20 8:2,20
9:2,5,18,22,30
10:11,16,19
having 3:7 4:33 6:3
he's 6:25,26,27,34
hear 10:15,25
heard 4:4
hearing 1:7,24,33
here 8:18
herein 11:2
his 5:34
hold 10:12
hole 8:20 10:6
hope 4:27
hoped 2:20,26
house 4:25
Hemming 5:31,32,34
Holdings 1:1 3:4
However 2:27
I
identified 8:10
identifies 7:26 9:5
immediate 7:20,34
8:2,5,26 9:2,30
immediately 2:32 9:1
imminent 8:2
implement 8:34

implementing 2:14
4:6,34
imposed 2:10
inappropriate 5:22
indeed 3:33
indicate 8:25
individual 3:31
5:13,19
injection 7:34 9:1
inssofar 10:26
institution 3:29,31
institutions 1:2 2:24
6:26 8:3
instructed 1:5
intention 3:11
interests 10:19
into 2:32 6:18 8:27
involve 4:23
issue 7:9
issued 3:5,34
issues 5:25 6:2
its 3:6
itself 2:21 3:6,29,31
I'd 10:23
I'll 2:3,20 3:26
4:10,32 8:18,21
9:7,32 10:29
I'm 1:16 3:24 5:4,6,17
7:8 8:14
9:11,12,27
I've 1:7,9,11 2:16 4:4
5:3 8:22 9:26
10:6,8
IMF 2:13
International 11:11
Ireland 4:6
Irish 1:1,21
2:9,11,16,21,22
3:3,5,6,7 5:2,16
It's 1:24 3:8,9,31,34
4:10,11,17,19
5:3,14,30
7:4,22,28,33 9:17
J
journal 4:29
just 2:16 3:26 5:17
6:7,9 7:28
8:6,7,8,14,21,22
10:10,23
JM19 5:16
Judge
1:3,4,7,16,23,27,3
0,34 2:3,6,28
3:1,13,17,18,19,2
4
4:1,3,5,9,13,20,23
,26,30 5:3,6
6:2,4,7,12,15,20,2
2,34
7:4,6,8,13,16,21,2
4,27,31,32
8:4,7,9,12,16,17,1
8,20,24,25,28,31,
33
9:2,4,7,11,15,20,2
3,26,31,32
10:4,5,7,10,14,18,
19,23,25,28,29,31
July 2:17,32 7:18
K
kind 10:27
know 2:1 3:22 5:8
10:15
L
large 2:26
last 3:8 5:30
later 1:7
law 5:14,19,22,24,25
7:10,12
least 2:26,31 5:14
leave 10:29
legal 6:2
legislation 2:24
3:23,34 4:8
lest 5:28

liability 2:23	Now 1:7,9 2:12 5:34	prepared 4:17,18,25	reorganisation 6:22	sum 2:12	Thank
lifted 10:8	6:2,27 8:4,15	7:30 8:11,14 9:17	9:7,32,33	summarised 5:27	10:4,7,28,30,31
like 4:25 9:24 10:23	10:5,8,14	present 1:16	represented	summary 3:11	That's 1:10,11 2:1
limited 1:25 9:6	NTMA 6:34	preserve 7:1	5:22,24,32	support 2:13 4:34	4:13 6:7,21
limits 4:28	O	preventing 1:14	representing 5:16	7:14	8:10,11,16,18,19
line 7:28,31	obliged 9:12	prior 3:15	reproduced 7:29	suppose 5:12	9:24 10:3,21
log 11:13	obliterated 2:5	probably 10:15	required 2:16 6:7	sure 6:9	The
logger 11:13	obviously 6:5,24 10:5	procedure 3:27	9:1,14 10:3	switch 6:12,14	1:1,2,3,6,7,8,9,10,
lunchtime 1:8	occasions 4:20	procedures 6:3,6	requirement 2:14	sworn 5:30	12,13,14,15,16,17
Life 1:1,21	off 6:12,14	proceedings 3:33,34	requirements 2:11,12	Service 4:12,15,17	,18,19,20,21,22,2
2:9,11,16,21,22	official 4:29	11:1	5:1 6:9,25 8:1	State 1:6 2:13,19 3:2	4,26,28,29,31,32,
3:4,5,6,7 5:2,16	omitted 11:14	process 2:23 5:25	requires 6:8	9:1	33
Look 8:21	one 5:17,24,31,32	programme 2:13	resolutions 3:8	T	2:1,2,3,5,6,7,8,9,1
Ltd 11:11	6:29 7:15	4:34	resources 3:6	take 2:2 3:22 8:5,16	0,12,13,14,15,17,
M	8:16,18,23 9:16	prohibiting 1:17	respect 1:28 7:17	9:30 10:29	18,19,21,22,23,24
made 1:13,18,31 2:7	only 9:24 10:21	prohibition 10:5,7	responded 5:20	taken 8:22	,25,26,28,29,30,3
3:14,23,28,29,30	open 1:24	proposals 3:20	restore 7:1	taking 1:18	1,32
4:20	opinion 6:28,32	propose 1:12	result 11:13	talking 3:24	3:1,2,3,5,7,8,9,10,
6:1,16,17,22,26,2	7:10,11,14	proposed 1:9 2:7	revised 8:14	terms 2:7 6:33 8:26	11,12,15,16,18,19
7 9:21 10:8	opportunity 1:8 3:14	3:11,16	right 1:16 4:7,26 6:20	9:28 10:2	,21,22,23,25,27,2
mail 5:29	order	6:18,27,28,30	8:5,7 9:2,23,26	test 7:33	8,29,30,31,32,33
mails 5:30	1:10,13,14,17,18,	7:29 9:22	10:5,23,27	text 10:1	4:3,5,6,7,10,11,12
make 1:13 2:3,31	21	provide 3:1,2 11:13	REGISTRAR 1:1	that 1:13,17,18,25	,13,14,16,17,18
3:11,19,21	2:3,7,8,18,30,31,3	provided 2:19,24 3:6	Rudnick 5:33	2:1,3,7,15,18,20,2	There's
4:11,14 6:13	2	4:10 9:28	S	1,26,28,31	7:7,10,14,22,28
9:7,11,27,28,29,3	3:1,11,12,16,20,2	provides 3:27	said 6:3	3:2,7,15,18,23,24,	They'll 9:30
2	5,28,31	provision 3:21 9:4	same 4:3 7:4,5	26,28	U
makes 9:4	4:7,11,14,31 5:10	provisions 2:16 6:18	sat 1:7	4:14,18,24,27	ultimately 4:27
making 1:16	6:13,18,27,29,31,	publication 1:14	satisfied 5:4,6	5:4,6,7,9,13,14,18	unconfirmed 11:14
3:2,16,30 4:7 7:16	32	4:7,12,14,28 9:14	6:5,6,24,28 7:7,8	,20,28,29,30,33	under 1:22
9:2 10:7	7:1,16,18,19,29,3	10:1,5,7	say 2:6 3:7 6:25 9:26	6:1,5,6,8,9,12,15,	2:13,14,16,24
management 2:23	0	publications 4:21	secondly 2:22	18,22,28,32,34	3:10,27,34
material 2:3 3:18	8:4,5,6,8,11,13,19	publish 10:12	section 1:22 3:27	7:4,7,8,11,16,18,3	4:5,6,7,11,21,34
7:7,10,14	,22,25,26,27,30,3	published 2:4	6:12,17,30	0 8:4,5,13,22	6:17 7:20 10:21
matter 1:1,18,19 3:31	2	punch 10:6	7:20,22 8:30	9:7,11,13,15,18,1	underneath 2:5
5:12 7:15 8:21,24	9:3,4,7,12,13,14,1	puncher 8:20	see 5:20 7:30 8:29	9:27,28,29,32,33	understand 8:4
matters 1:32 4:18	9,22,27,28,29,32,	purpose 2:8 9:33	9:13	10:8,10,11,12,14,	undertaken 4:14
10:10,27	33 10:1,2,8,21,26	purposes 5:9	seek 8:26	15,22,23,25,27	unduly 9:19
may 1:3,12,20 2:6,19	ordinary 3:3	6:29,30,31 9:8	seemed 9:24	their 2:25	until 1:7,15,18
5:19,33 7:9	organisations 10:17	pursuant 9:13	seems 6:8,23	them 5:15 10:15,29	unwieldy 8:14 9:19
10:13,19,28 11:13	original 9:17	put 3:20 9:18	seen 1:21,24,29	then 4:31 5:34 7:33	usual 4:12,13
maybe 8:10	other 3:34 4:4,18,20	putting 3:22	2:15,23,28 3:32	8:9 9:3,4,12,13	V
means 5:1	7:9 8:18,22 9:8,34	Permanent 1:1,21	5:11,33 6:30	10:1,3	value 2:25
measure 6:22 9:8,33	10:19,21	2:9,11,16,21	sensibility 1:26,32	there'll 6:12,14,15	variation 9:15
measures 2:27	others 6:34	3:4,5,6,7 5:2,16	sensible 9:24	there 1:25,29,32 2:29	vary 3:28
mechanism 2:15	out 4:32 7:33 8:16,22	Precisely 7:5	set 3:28 4:32 5:17	3:20 4:6,28	version 1:33
member 3:29	10:15,26	Q	7:33	5:1,6,12,13,28	view 7:4,5
members 3:31	own 5:34	question 6:15	shall 9:30	7:15,19 8:13	visible 10:11
mentioned 2:17	Office 11:10	quite 5:8	shareholders	10:2,14,20	vital 7:1
might 8:14,23 9:18	P	R	5:14,16,19,22,31	therefore 4:31 7:19	vitiated 7:10,12
10:25,26	pages 8:26	raise 7:15	shareholdings	these 1:13 10:29	Various 5:25
mind 4:24,25	papers 2:10 5:17	raised 2:21,27 5:26	10:19,27	they're 9:2,21 10:12	Very 4:23 10:29
moment 2:20 3:27	8:16,22 10:29	6:2	shares 3:3	1:31 4:23	W
morning 1:8	paragraph 7:23,29	raising 2:27	should 2:4 3:7,20	5:15,20 6:6,26	want 5:29 6:7,9
much 4:21	8:26,29,32	rationalise 5:25	5:12 9:27	7:29 8:10,34 9:22	was 1:7 3:1 4:13
must 3:30 4:6	9:12,29,34	read 1:8,9 5:3 9:16,26	simply 9:21	thing 5:17 8:10 9:24	5:21,24,30,32
Manager 11:10	paragraphs 1:25 4:32	reading 6:8	solicitor 1:6 8:20	think 3:21	8:13
McBride 1:5	7:26 8:25 9:5	really 8:24	solicitors 5:21	4:11,16,17,18	9:17,18,19,21
McCann 1:5	parallel 5:23	reason 1:7 4:31	some 2:25 3:2,32,34	5:27,30 6:6	way 2:4 3:3 4:3 5:32
Meeting 3:8	part 2:26,31 5:14	reasonable 6:28	4:3	7:4,10,15,22,24	6:1 7:10,11 9:17
Minister's 3:11	7:18 8:5,6,7,8	reasons 3:12	5:10,16,21,23,27,	8:18,26 10:19	10:11
Minister 1:3,20 2:7	parte 3:23	recapitalisation	28 9:26	third 7:28	ways 2:22
3:15 5:18 6:16,28	particular 9:5	2:9,15 5:12	something 2:1	this 1:8,17,20 2:17,29	week 3:8
7:17	parties 3:19	received 5:19,30	sorry 7:25 8:20 9:32	3:9,23,34 6:12	were 5:22,26,30 6:1
Moran 7:25	10:11,16,23	record 11:1	sought 2:8,18,20 4:18	7:1,15 8:20	what 1:11,12 3:19
N	parts 7:19 8:19	redacted 1:26,31,33	5:9,24,26 7:16	9:15,17,27,32	4:5,13 6:3,5,21,27
names 11:14	party 3:22	2:4 9:5 10:11,12	source 2:29 4:33	10:15,26	8:4
necessary 2:20 4:31	passed 3:8	redaction 1:29	speaker 11:14	those 1:28 2:11,16,27	whatsoever 5:32
5:3,4 6:29,33 7:34	paying 7:17	redactions 1:28,31	stabilisation 1:2 2:15	3:10 5:19 6:32,33	where 2:9 5:20,21
8:34	people's 10:26	reference 3:32 6:32	9:21,29 10:2,12	9:21,29 10:2,12	8:29
necessity 5:10	people 5:23	9:21	threat 8:2	through 5:3,10 6:7,31	whether 3:31,34 5:15
need 7:15	per 10:1	referred 9:9,22,29,34	through 5:3,10 6:7,31	4:28 5:14,24	7:9
night 5:30	perfected 9:19	refers 8:29	time 4:28 5:14,24	together 3:11	which 1:14,25
nominal 2:25	perhaps 3:33	regard 3:7,15,20 4:33	too 8:14	7:33	2:16,19,23,24,29,
none 2:3	place 1:18 2:17	6:3 7:14	total 2:12	9:15,17,27,32	30 3:15 5:2,26
normal 9:13	play 6:18	regarded 2:2	towards 7:22	10:15,26	7:11,17,19,25
not 3:8,9 5:3,14 8:5	plc 1:1 3:4,5	regulation 4:11	traditionally 2:1	9:15,17,27,32	8:14,25 9:5,14
10:12	please 1:3,12,20 2:6	9:9,14,34	transcript 11:1	10:11,27,32	10:11
note 6:34 8:22	7:9 10:13,28	regulations 2:15	triplicate 5:23	9:21,29 10:2,12	who 3:20 10:16,19
10:14,23	plus 2:18	4:6,11 9:34	truncate 4:21	9:21,29 10:2,12	why 4:31 6:32 7:34
notes 3:5	portions 1:25 2:5	regulatory 8:1	try 5:25	9:21,29 10:2,12	8:1,10
notice 3:10,19,20,22	9:29	reiterate 10:10	two 2:21,27	9:21,29 10:2,12	will 1:24,28,32
4:3 6:26	position 3:7,9 5:31	relation 1:21 6:2	5:14,24,30	9:21,29 10:2,12	2:9,15,21,23,27,3
number 1:25 10:16	7:1	relevant 4:32 6:9,31	typographical 7:28	9:21,29 10:2,12	0,32 3:20 4:27
	possibility 3:33	7:26 8:19 9:4,27			5:11,20 6:12,29
	possible 4:21 5:20				

7:7,17,19 8:2,16 9:28,33 10:2 wishes 3:32 with 1:5 2:11,13,32 3:10,11,20 4:24,25 5:6,25 6:6,10,24,30 7:14,15 8:1 10:1,16 within 3:30 working 3:30	would 1:12 3:1,2 4:13,14 5:22 6:18 8:20 10:10,14,15,19 wouldn't 10:25 written 3:10 Wait 8:4 Well 1:16 2:24 3:19,21,26 4:3,13,20 5:3 6:7,22,34	8:9,16,23 9:7,26 10:23 What's 2:4,22 9:15 WordWave 11:11 X Y year 2:17 yesterday 2:8 you'd 8:9 you'll 3:32 8:29 9:13	you're 8:4 you've 6:3 9:15 you 2:15,27 3:22 4:25 5:19,33 6:7,24,25,27,29 7:15,30 8:11,17,23 9:18 10:4,7,14,28,29,3 0,31 your 8:20	Yes 1:4,7,16,23,27,30, 34 2:3 3:13,17,24 4:1,9,13,20,22,24, 26,30 5:3,5,8 6:4,7,11,15,16,20, 24 7:3,6,8,13,21,27,3 2 8:6,9,12,18,28,31, 33	9:10,11,15,20,31 10:9,18,24 Z 2010 1:2,22 2011 4:11 31st 2:17,32 7:18
-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	------------------------------------------------------------------------------------------------------------------