

An Coimisiún Imscrúduitheacháin
(CORPARÁID na hÉIREANN UM
RÉITEACH BAINC)



Commission of Investigation
(IRISH BANK RESOLUTION
CORPORATION)

The Hon. Mr. Justice Brian Cregan
Sole Member

SECOND INTERIM REPORT

15th APRIL 2016

Submitted to the Taoiseach pursuant to a request dated 14th January 2016 from the Taoiseach made under sections 33(1) and 33(2) of the Commissions of Investigation Act 2004 and with a request for the revision of the time frame for submitting a final report under section 6(6) of the Commissions of Investigation Act 2004

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APPENDIX

1. DETERMINATION 3 OF 16 DECEMBER 2015

1. INTRODUCTION

- 1.1. On 16th June 2015 the Government made an Order under the Commissions of Investigation Act 2004 (the “2004 Act” or the “Act”) establishing the Commission of Investigation into Irish Bank Resolution Corporation (“IBRC”). This Order is set out in S.I. 253 of 2015 - Commission of Investigation (Irish Bank Resolution Corporation) Order 2015.
- 1.2. Under the Order of the Government which established the Commission, the Taoiseach was appointed as the Specified Minister pursuant to section 3(3)(b) of the Act.
- 1.3. The Statutory Instrument establishing the Commission provides that the Commission shall (subject to section 6(6) of the Act) submit to the Taoiseach the final report in relation to its investigation no later than 31st December 2015.
- 1.4. The Commission submitted its First Interim Report to the Taoiseach on 13th November 2015. The Report set out the work of the Commission to date, requested certain amendments to its Terms of Reference, informed the Government that certain legislative changes are required to overcome legal difficulties in respect of banker-customer confidentiality and legal professional privilege and also requested a revision of the time frame for submitting its final report under section 6(6) of the 2004 Act.
- 1.5. By letter dated 22nd December 2015, the Taoiseach agreed to extend the time within which the Commission had to submit a Report until the end of April 2016. This letter also noted that “...*there is ongoing work in relation to certain legislative and other issues raised in your Interim Report arising from the work of the Commission to date. The outcome of this work will facilitate a further decision in due course on the timeframe for the Commission’s final report. I understand that it will be possible for the Commission to continue certain preparatory work in the meantime.*”
- 1.6. The Commission notes that the work referred to in the Taoiseach’s letter remains ongoing pending the formation of a new Government following the recent general election.

- 1.7. On 14th January 2016, the Taoiseach wrote to the Commission formally requesting a further Interim Report when appropriate, on the work completed on all aspects of its Terms of Reference, including in relation to the Siteserv transaction.
- 1.8. This Second Interim Report is furnished pursuant to this request. It summarises the work which has been undertaken by the Commission since the submission of its First Interim Report on 13th November 2015 and also requests an extension of time for submitting a final report under section 6(6) of the 2004 Act.

2. SUMMARY OF PROGRESS IN RELATION TO MATTERS SET OUT IN THE FIRST INTERIM REPORT

- 2.1.** Under its Terms of Reference, the Commission is required to investigate all transactions which resulted in a capital loss to IBRC of at least €10 million during the Relevant Period. The Special Liquidators provided a schedule of transactions to the Commission. This schedule contained a list of 38 transactions.
- 2.2.** Of these 38 transactions, there were six transactions with write-offs greater than €100 million (with a combined value of €859 million); there were also six transactions where the write-offs were between €50 million and €100 million (with a combined value of €448 million). The total amount of write-offs of the first twelve transactions amounted to €1.3 billion. The total amount of write-offs in respect of all 38 transactions amounted to €1.881 billion.
- 2.3.** Section 22 of the First Interim Report outlined the Commission's conclusions and recommendations in relation to matters that had arisen up to the date of that report. Set out below is a summary of developments and progress made since then in relation to each of those matters.

(a) The Issue of Confidentiality

- 2.4.** As set out in the First Interim Report, the Special Liquidators of IBRC asserted a duty of confidentiality over all the documents submitted by them to the Commission which contained banker-customer information. The Department of Finance also asserted a duty of confidentiality in respect of documents provided by IBRC to the Department. (However, it did not assert confidentiality over any documents which were confidential to the Department). This is still the position. Accordingly, the Commission remains unable to receive into evidence the vast bulk of the documents furnished to it by both the Special Liquidators and the Department of Finance and is unable to proceed with its investigation into the Siteserv transaction, or any other transaction, without legislative change.

- 2.5. Although Siteserv Plc (the parent company) has waived its right to confidentiality over documents related to that company which have been provided to the Commission by the Special Liquidators (see section 3(c) below), this waiver does not extend to documents related to the former subsidiaries of Siteserv Plc.

(b) The Issue of Privilege

- 2.6. The Special Liquidators initially claimed legal professional privilege over many of the documents which they furnished to the Commission. The Commission concluded in November 2015 that the general legal professional privilege claimed by the Special Liquidators did apply to the relevant documents. As a result (subject to the developments referred to below in relation to the Siteserv transaction) the Commission remains unable to proceed with its investigation until this issue is resolved.
- 2.7. On 17th November 2015, the Commission wrote to the Special Liquidators requesting that they review all documents over which legal professional privilege had been claimed in respect of the Siteserv transaction and asking them to waive this privilege.
- 2.8. On 15th December 2015, the Special Liquidators wrote to the Commission to indicate that, having reviewed the documents relating to the Siteserv transaction, the Special Liquidators were satisfied to waive legal professional privilege over these documents. The Special Liquidators emphasised, however, that they continued to maintain their claim of confidentiality over all documents, including privileged documents.
- 2.9. The Commission is satisfied that the issue of privilege in respect of the Siteserv transaction has now been resolved between the Commission and the Special Liquidators and all such documents may be admitted into evidence by the Commission if the issue of confidentiality is resolved. However, the issue of privilege in respect of the other transactions under investigation remains unresolved.

(c) The Central Bank of Ireland

- 2.10.** As the Commission set out in its First Interim Report, the Central Bank is unable to provide certain documents to the Commission because of legal restrictions on confidentiality. As some of these legal restrictions exist in Irish law pursuant to EU legal requirements, a change to the Central Bank's duty of confidentiality would require a legal amendment not only to Irish law but also to EU law. This would be impractical.
- 2.11.** In the circumstances, the Commission decided to ask the Special Liquidators to provide all correspondence between IBRC and the Central Bank relevant to the Commission's Terms of Reference. On 23rd December 2015, the Special Liquidators delivered 35 lever arch folders of documents to the Commission. On 21st January 2016, the Special Liquidators delivered a further 17 lever arch files.
- 2.12.** Following a review of these 52 lever arch files and following further correspondence and meetings between the Commission and the Special Liquidators, the Commission issued a further Direction to the Special Liquidators of IBRC requiring specific documents relating to dealings between IBRC and the Central Bank concerning the Siteserv transaction and limited to a specific time period.
- 2.13.** The Commission further directed that these documents be furnished by 21st April 2016. The Commission awaits the provision of these documents by the Special Liquidators.

(d) The Irish Stock Exchange

- 2.14.** The Commission received certain documents from the Irish Stock Exchange over which the Stock Exchange asserted a statutory duty of confidentiality. On 16th December 2015 the Commission made a Determination that the statutory duty of confidentiality did apply to the documents furnished by the Irish Stock Exchange. As a result, these documents cannot be admitted into evidence without legislative change. The Commission awaits a response to its recommendation for appropriate legislative

change in this area as set out in the First Interim Report. A copy of Determination 3 of the Commission is in Appendix 1 of this Interim Report.

(e) Terms of Reference

2.15. Section 14 of the First Interim Report concerned a number of issues which the Commission had identified with its Terms of Reference. Under cover of a letter dated 13th November 2015 the Commission wrote to the Taoiseach pursuant to the provisions of section 6(1) of the Commissions of Investigation Act 2004 requesting certain amendments to its Terms of Reference in light of the issues highlighted in its First Interim Report.

2.16. By letter of 14th January 2016 the Taoiseach notified the Commission that he had written to various members of the Opposition and had furnished to them a discussion paper arising out of the Commission's First Interim Report. The Taoiseach requested the views of the Opposition Leaders in response to his discussion paper. The Commission understands that formal responses from the Opposition Leaders were furnished to the Taoiseach in January 2016 and that the Government is considering those responses.

(f) Meaning of Capital Loss

2.17. Section 15 of the Commission's First Interim Report dealt with the meaning of the term "Capital Loss" as used in the Commission's Terms of Reference. It was pointed out that the term "Capital Loss", although used in the Terms of Reference, is not defined. The Commission was concerned that, in the absence of a clear definition, there might be uncertainty as to the transactions that are required to be investigated under the Terms of Reference.

2.18. In the First Interim Report, the Commission stated its intention to arrive at a concluded view as to the meaning of the term "Capital Loss" and stated that it would welcome clarification of the intended meaning of that term. Since the First Interim Report was issued, the Commission has engaged further with the Special Liquidators in relation to this issue. The Commission has also obtained expert advice on the

meaning of the term “Capital Loss” as understood in the banking industry at the relevant time.

- 2.19.** As stated in the First Interim Report, the Commission would welcome clarification of the intended meaning of the term “Capital Loss”.

(g) Siteserv Plc

- 2.20.** As was stated in the First Interim Report, Siteserv Plc was dissolved by operation of law with effect from 6th August 2015. The Commission first became aware of the dissolution of Siteserv on 22nd September 2015.

- 2.21.** On 17th November 2015, the Commission wrote to the Liquidator of Siteserv Plc (Mr Kieran Wallace) stating that it was of the view that Siteserv Plc should be restored to the Register of Companies immediately and that Mr Wallace should make an application to the High Court to have the company restored as soon as possible.

- 2.22.** On 7th December 2015, the High Court made an Order declaring the dissolution of Siteserv Plc void pursuant to section 708 of the Companies Act 2014 and under Orders 74 and 83 of the Rules of Superior Courts. The effect of this Order was to restore Siteserv Plc to the Register of Companies as a company in liquidation.

(h) Management of Workload and Resources

- 2.23.** As pointed out in the First Interim Report, the eventual duration, resource requirements and cost of the Commission’s investigations will be determined by the scope and extent of its work, which will, in turn, result from the number and scale of transactions to be investigated and the extent of the Commission’s Terms of Reference. The Commission awaits a response to the issues raised in the First Interim Report in relation to, *inter alia*, the need for legislative change, the scope of its inquiries and its Terms of Reference. When the Commission has received these responses it will be in a position to comment further on likely resource needs, duration and cost.

(i) Other Matters of Public Concern

2.24. The position on this aspect of the Commission's investigation remains unchanged since the First Interim Report was issued.

3. OTHER WORK COMPLETED SINCE THE FIRST INTERIM REPORT

3.1. In addition to the work described in Section 2 above, the Commission has continued to undertake preliminary and preparatory work in anticipation of a resolution of the issues which have prevented it from investigating the transactions covered by its Terms of Reference. This section summarises the additional preliminary and preparatory work carried out since the First Interim Report.

(a) Discovery by the Special Liquidators of IBRC of documents relating to Siteserv

3.2. The Siteserv transaction has been the focus of significant public concern. Moreover, the write-off of IBRC loans in respect of Siteserv is greater than €100 million and it is therefore one of the six largest write-offs within the schedule of write-offs provided by the Special Liquidators to the Commission. The Commission had also directed the Special Liquidators to furnish to the Commission all documents which were in their possession relevant to this transaction. Therefore, the Commission was and remains of the view that, despite the obstacles with respect to confidentiality and privilege, it is appropriate to continue with the preliminary and preparatory work on the Siteserv transaction.

3.3. On 28th September 2015 the Commission issued a Direction to the Special Liquidators to furnish to the Commission all documents in their possession relating to Siteserv. Pursuant to this Direction, the Special Liquidators furnished to the Commission 276 lever arch files of documents (running to approximately 186,000 pages). These documents were provided on a phased basis between 1st October 2015 and 16th October 2015. The Special Liquidators asserted a duty of confidentiality over all of these documents on the grounds of banker-customer confidentiality. They also claimed legal professional privilege over many of them.

3.4. The Commission also issued a Direction on 28th September 2015 to the Special Liquidators which required the Special Liquidators to furnish certain other categories of documents, some of which are also relevant to the Siteserv transaction.

- 3.5. In mid-November 2015 the legal team of the Commission commenced its review of these documents with a view to preparing booklets of core documents which were relevant to the Siteserv transaction. This relevance review by the Commission's legal team of these 276 lever arch folders took approximately four weeks to complete. This review process reduced the number of lever arch files from 276 to 20.
- 3.6. The Commission noted that certain documentation which it would have expected to be included in the discovery had not been furnished to it. For example, there were virtually no documents, emails or correspondence to or from certain officers and staff of IBRC. In January 2016, the Commission wrote to the Special Liquidators in this regard and in February 2016 it held a meeting with the Special Liquidators and their legal advisors to review the discovery process. It was agreed that the Special Liquidators would review the situation. Following further meetings and correspondence which revealed further issues, the Special Liquidators agreed to undertake a further and revised discovery exercise.
- 3.7. The Commission understands, from its recent communications with the Special Liquidators, that it will shortly receive a further 50,000 pages of documents as a result of this second discovery process.

(b) Discovery of Documents by Siteserv Plc (in liquidation)

- 3.8. Following the company's restoration to the Register of Companies, the Commission wrote to the Liquidator of Siteserv Plc on 11th December 2015. On 22nd December 2015, the Commission issued its first Direction to Siteserv Plc requiring specified documents be furnished to the Commission.
- 3.9. On 13th January 2016, the Liquidator of Siteserv Plc furnished to the Commission all documents which were in his possession relating to Siteserv Plc. These documents comprised 46 folders. Further documents were furnished to the Commission on 5th April 2016 by Siteserv Plc's solicitors.

3.10. On 13th January 2016 Siteserv Plc furnished to the Commission a copy of the executed Share Sale Agreement, dated 15th March 2012, between Siteserv Plc and Millington Limited.

(c) Siteserv Plc – Waiver of confidentiality

3.11. After the company's restoration to the Register of Companies, the Commission wrote to the Liquidator of Siteserv Plc stating that the Special Liquidators had claimed confidentiality over documents relating to Siteserv Plc which had been furnished to the Commission. The Commission requested Siteserv Plc to waive any claim to confidentiality over the documents.

3.12. By letter dated 17th December 2015, the Liquidator of Siteserv Plc (through his legal advisors), replied to the Commission stating, *inter alia*, “We are instructed by our client that Siteserv Plc (the “Company”) waives any claim to confidentiality over the documents provided to the Commission of Investigation by the Special Liquidators relating to the Company.”

3.13. Following correspondence between the Special Liquidators of IBRC, the Liquidator of Siteserv Plc and the Commission, on 4th February 2016 the Liquidator of Siteserv Plc wrote to the Special Liquidators of IBRC stating that he was prepared to waive the company's right of confidentiality. However, this letter also stated “For the avoidance of doubt, however, this waiver does not extend to documents in respect of which IBRC's duty of confidentiality is to a subsidiary of Siteserv Plc or documents in respect of which Siteserv plc has a duty of confidentiality to any third party (including any subsidiary of Siteserv Plc) which precludes Siteserv Plc from agreeing to their disclosure to another party.”

3.14. Accordingly, because the parent company, Siteserv Plc, and all of its subsidiaries, had been borrowers of IBRC, the duty of confidentiality which IBRC owed to its customers was a duty of confidentiality to the parent company and each of the subsidiaries. As Siteserv Plc sold all of its operating subsidiaries to Millington, and then went into liquidation, the Liquidator of Siteserv Plc could only waive

confidentiality in respect of information which related to Siteserv Plc as the parent company. The right to banking confidentiality of the subsidiaries remained with them. Thus the appropriate persons to waive that right of confidentiality are the subsidiaries of Siteserv Plc which are now owned by Millington Limited.

3.15. As a result, the Commission has written to Millington Limited and the former subsidiaries of Siteserv Plc to request that they waive their right to confidentiality over all of the relevant documents and information which the Special Liquidators have furnished to the Commission. Arthur Cox, on behalf of Millington, replied seeking a list of the documents over which a waiver of confidentiality is being sought. The Commission is in the process of finalising this list and will send it to Millington once it is complete. However, this process has been delayed because the Commission is now expecting a further 50,000 pages of documentation from the Special Liquidators in relation to Siteserv and these will have to be included in the list of documents to be furnished to Millington/the former subsidiaries of Siteserv Plc.

3.16. The potential duty of confidentiality to third parties other than the former subsidiaries of Siteserv Plc also remains unresolved.

(d) Update on other transactions

3.17. Pending the resolution of the legal problems identified in the First Interim Report and in order to minimise the cost to the taxpayer, the Commission has not progressed its investigation into any other transaction apart from Siteserv.

4. COSTS OF THE COMMISSION TO DATE

- 4.1. The Commission's costs up to 7th April 2016 amount to approximately €631,000. This expenditure includes salaries, legal costs, rent, building overheads & services and administration costs.
- 4.2. The Special Liquidators have informed the Commission that the costs incurred by them in assisting the Commission with its investigation are €2,786,998. This comprises the costs incurred by the Special Liquidators, up to 31st January 2016, of €2,333,750 (exclusive of VAT) and legal costs, up to 15th March 2016, of €453,248 (inclusive of VAT).
- 4.3. The Department of Finance has informed the Commission that its external legal costs to date are approximately €246,000 (inclusive of VAT).
- 4.4. The legal representatives of the Directors of IBRC informed the Commission that they are not in a position to provide an estimate of their legal costs to date at this stage.
- 4.5. The Commission has made no determination with regard to the recovery of the aforementioned costs pursuant to the provisions of section 24 of the 2004 Act.
- 4.6. Third parties with whom the Commission has been in communication, such as the Liquidator of Siteserv Plc and Millington Limited, may also seek to recover their legal costs from the Commission.
- 4.7. Given the uncertainty which remains in respect of the Commission's Terms of Reference and the scale and scope of the Commission's investigation, it is not possible to provide an estimate of the Commission's future costs. As explained in the First Interim Report, should the Commission be required to investigate all 38 transactions which have been identified to date, then the Commission's costs and third party costs will be very significant.

5. CONCLUSIONS

- 5.1. The Commission notes that many of the issues raised in its First Interim Report remain unresolved. These include the Commission's requests for appropriate legislative change and for amendments to its Terms of Reference. In this regard, the Commission notes that in January 2016 the Taoiseach wrote to the Leaders of the Opposition enclosing a discussion paper in relation to possible approaches to resolve the issues which have arisen in relation to the work of the Commission. The discussion paper, a copy of which was furnished to the Commission by the Taoiseach under cover of letter dated 14th January 2016, sets out a possible approach to legislative change and a possible approach to revised Terms of Reference, including the possibility that the Commission might be requested to initially report on the Siteserv transaction alone.
- 5.2. Notwithstanding these issues, the Commission is of the view that it should continue its preliminary and preparatory work (principally in relation to the Siteserv transaction) but should not embark on any new work in relation to other transactions until these matters are resolved.
- 5.3. However, in order to allow the current preliminary and preparatory work to continue, and to enable the Commission to be properly prepared to undertake its investigation when it is appropriate to do so, an extension of the current timeframe for the submission of the Commission's final report is now requested pursuant section 6(6) of the Commissions of Investigation Act 2004.

Signed: 

The Hon. Mr. Justice Brian Cregan
Sole Member

Appendix 1

An Coimisiún Imscrúdúcháin
(CORPARÁID na hÉIREANN UM
RÉITEACH BAINC)



Commission of Investigation
(IRISH BANK RESOLUTION
CORPORATION)

The Hon. Mr. Justice Brian Cregan
Sole Member

**In the matter of the
Commissions of Investigation Act 2004**

and

**In the matter of the
Commission of Investigation into
Irish Bank Resolution Corporation**

and

**In the matter of
Documents over which a duty of confidentiality and privacy
have been asserted by the Irish Stock Exchange Plc.**

Determination 3 of the Commission (Pursuant to Section 21(2) of the Commissions of Investigation Act 2004) on assertions of confidentiality over certain documents.

Dated the 16th day of December 2015.

1. Introduction.

- 1.1. The Commission of Investigation into the Irish Bank Resolution Corporation (“The Commission”) issued a Direction pursuant to Section 16 of the Commissions of Investigation Act 2004 directing the Irish Stock Exchange Plc (“The Stock Exchange”) to disclose to the Commission documents which the Stock Exchange may have obtained by virtue of the exercise of its functions under Part V of the Companies Act 1990 in relation to Siteserv Plc for the purpose of gathering evidence for use in the conduct of its investigation.
- 1.2. In response, and in compliance with the said direction, Daryl Byrne, Head of Regulation at the Stock Exchange, swore an affidavit to verify the list of documents in the possession of the Stock Exchange obtained by virtue of the exercise of its functions under Part V of the Companies Act 1990. In his affidavit, Mr Daryl Byrne objected to producing certain documents on the basis that they comprised information obtained by relevant persons within the meaning of Section 118 of the Companies Act 1990 by virtue of the exercise by the Stock Exchange of its functions under Part V of the Companies Act 1990 on the ground that such information could not be disclosed without contravening the provisions of Section 118 (1) of the Companies Act 1990 and thereby committing an offence.
- 1.3. Mr Daryl Byrne in his affidavit further objected to producing the same documents on the grounds that they contain information which itself, or together with other information, is confidential and/or private, and is accordingly subject to duties of non-disclosure and the maintenance of privacy and confidentiality by virtue of statute, including the Data Protection Acts 1998-2003, and otherwise by law.
- 1.4. This decision is the determination of the Commission pursuant to Section 21(2) of the Commissions of Investigation Act 2004. This determination considers whether the claim to confidentiality under Section 118 of the Companies Act 1990 applies. In the light of the Commission’s decision in relation to this matter, it is not considered necessary for the Commission to go on to decide whether the Stock Exchange is entitled to refuse to disclose the same information on the grounds set out in Paragraph 1.3 above.

2. The Direction.

2.1. By direction in writing dated the 4th day of November 2015 made pursuant to the powers conferred upon it under Section 16 of the Commissions of Investigation Act 2004, the Commission directed the Irish Stock Exchange on or before Tuesday 17th November 2015 to:

- (a) provide the Commission with a list, verified by affidavit, disclosing all documents in the possession or power of Irish Stock Exchange Plc that the Irish Stock Exchange may have obtained by virtue of the exercise of its functions under Part V of the Companies Act 1990 in relation to Siteserv Plc between 21st January 2009 and 7th February 2013;
- (b) specify in the affidavit any of the listed documents which the Irish Stock Exchange objects to producing to the Commission, setting out the basis for any such objection; and to
- (c) furnish all such information and documentation (including any report prepared by the Irish Stock Exchange) in relation to the matter to the Commission. The direction further stated that references therein to the Irish Stock Exchange include any relevant authority, authorised person, employee or former employee of the Exchange.

2.2. The said direction was addressed and delivered to Mr Daryl Byrne, Head of Regulation of the Stock Exchange.

2.3. By letter dated 4th November 2015 enclosing the above direction, the Commission made it clear that the direction required Mr Byrne to provide the documentation to the Commission so that the Commission could decide whether such documentation is confidential under the provisions of Section 118 of the Companies Act 1990.

3. Response of the Stock Exchange.

3.1 The Stock Exchange, in compliance with the provisions of the direction dated 4th November 2015:

- 1. enclosed an affidavit sworn by Mr Daryl Byrne disclosing, and verifying a list of, all documents in the possession or power of the Stock Exchange that it may have obtained by virtue of the exercise of its functions under Part V of the Companies

Act 1990, in relation to Siteserv Plc between 21st January 2009 and 7th February 2013;

2. Mr Byrne specified in the affidavit that the Irish Stock Exchange objected to producing all of the documents concerned, setting out the basis for such objections; and
 3. Mr Byrne furnished with the said letter copies of the documents concerned, in order that the Commission might make a determination under Section 21 of the 2004 Act as to whether, and/or to what extent, the duties of confidentiality relied up on by the Stock Exchange as grounds for refusing to produce the documents, apply to the documents, or to any information contained in them.
- 3.2 Further, Mr Byrne on behalf of the Stock Exchange provided other documents identified by it as being of relevance to the Commission's Terms of Reference and which the Stock Exchange did not consider to be subject to any prohibition or disclosure or duty of confidentiality.
- 3.3 In his affidavit dated 17th November 2015, Mr Daryl Byrne specified the grounds upon which the Stock Exchange objected to producing to the Commission the documents set out in the second part of the first schedule to his affidavit in the following terms:

"9. The Irish Stock Exchange objects to producing the documents set forth in the second part of the first schedule hereto because the said documents comprise and/or contain information obtained by relevant persons within the meaning of Section 118 of the 1990 Act, by virtue of the exercise by the Irish Stock Exchange of its functions under Part V of the 1990 Act, or as the case may be, by virtue of the exercise of these functions as well as other functions, and which, accordingly, may not be disclosed without contravening Section 118 (1) of the 1990 Act, and committing an offence.

10. The Irish Stock Exchange further objects to producing these documents because they contain information which itself, or together with other information, is confidential and/or private, and is accordingly subject to duties of non-disclosure and the maintenance of privacy and confidentiality by virtue of statute, including the Data Protection Acts 1988 to 2003, and otherwise by law".

4. The Claim under Section 118, Companies Act 1990.

4.1 Section 118 of the Companies Act 1990 provides as follows:

“(1) Information obtained by any of the following persons by virtue of the exercise by a recognised Stock Exchange of its functions under this Part shall not be disclosed except in accordance with law, namely –

(a) a relevant authority of the Exchange,

(b) an authorised person, or

(c) any person employed or formerly employed by the Exchange.

(2) Subsection (1) shall not prevent the relevant authority of a recognised Stock Exchange from disclosing any information to the Minister, whether pursuant to a request under 115 (5) or otherwise, or to a similar authority in another member State of the European Communities.

(3) Any person who contravenes subsection (1) shall be guilty of an offence.”

4.2 “*Relevant Authority*” is defined by Section 107, Companies Act 1990 as meaning, in relation to a recognised Stock Exchange –

“i. its board of directors, committee of management or other management body, or

ii. its manager, however described;”

4.3 “*Authorised Person*” is defined in Section 117(1) as meaning a person approved by the Minister to be an authorised person for the purposes of Part V being –

(a) the manager, however described, of a recognised stock exchange, or

(b) a person nominated by a relevant authority of a recognised stock exchange.

4.4 Part V of the Companies Act creates several criminal offences in relation to so-called insider dealing. In addition, Part V provides for a civil liability from lawful dealing in certain circumstances.

4.5 Section 115 of the Companies Act 1990 obliges a relevant authority of a recognised stock exchange to report forthwith to the Direction of Public Prosecutions, if it appears to the relevant authority that any person has committed an offence under Part V.

- 4.6 Section 117 of the Companies Act 1990 confers on authorised persons certain powers of investigation. Subsection (3) specifically provides that an authorised person may require that a person whom he or such relevant authority has a reasonable cause to believe to have dealt in securities, or to have any information about such dealings, to give to the authorised person any information that he may reasonably require in regard to the securities concerned; the company who issued the securities; his dealings in such securities; or any other information the authorised person reasonably requires in relation to such securities or such dealings; and to give him such access to and facilities for inspecting and taking copies of any documents relating to the matter as he reasonably requires, subject to the power of the High Court to declare that the exigencies of the common good do not warrant the exercise by the authorised person of the powers conferred on him by Section 117.
- 4.7 In order for the relevant authority and any authorised person to carry out their functions under Part V, it is necessary for the Stock Exchange to monitor share trades in order to detect circumstances giving rise to suspicion of possible contraventions of the provision of Part V of the 1990 Act.

5 Section 21 of the Commissions of Investigation Act 2004

5.1 Section 21

(1) *Subject to subsection (4), nothing in this Act compels—*

- (a) *the disclosure by any person of any information that the person would be entitled under any rule of law or enactment to refuse to disclose on the grounds of any privilege or any duty of confidentiality, or*
- (b) *the production of any document in the person's possession or power containing such information.*

(2) *Where a person claims to be entitled under any rule of law or enactment to refuse, on the grounds of any privilege or any duty of confidentiality—*

- (a) *to disclose any information required in the course of an investigation by a commission (including information required in response to a request made under section 14 (5) or to a question put under section 16 and information in a statement or answer that is the subject to a direction under section 16 (1)(h), or*

(b) to produce any document in the person's possession or power that the person is directed under this Act to produce,
the commission may, subject to subsection (4) of this section, determine whether the privilege or the duty of confidentiality applies to that information or document.

(3) Where the commission determines that the privilege or the duty of confidentiality relied on by a person as grounds for refusing to disclose information referred to in subsection (2)(a) does not apply to the information, the person shall disclose that information to the commission unless the determination is overturned under section 22.

(4) A determination may only be made under subsection (2)(b) in relation to a document if the commission has—

- (a) examined the document, and
- (b) considered a written statement provided by the person concerned specifying the grounds for the claim, including the privilege or duty of confidentiality relied on.

(5) For the purposes of subsection (4), the person concerned shall, at the commission's request—

- (a) submit the document to the commission within the period specified in the request, and
- (b) unless exempted under subsection (6), provide the commission, within that period, with the written statement referred to in subsection (4)(b).

(6) A person who has already provided the commission with an affidavit under section 16 (1)(f) specifying the basis for objecting to the production of a document need not provide a written statement under subsection (5)(b) of this section concerning the same document.

(7) If a person does not, within the specified period, comply with a request of a commission to submit a document for a determination under this section or to provide a written statement under subsection (5)(b)—

- (a) the chairperson of the commission or, if the commission consists of only one member, the sole member may apply to the Court for an order directing the person to comply with the request, and

(b) on the hearing of the application, the Court may make or refuse to make the order.

(8) Where the commission determines that the privilege or the duty of confidentiality relied on as grounds for refusing to produce a document applies to any of the information in the document, the document is not considered to be evidence received by the commission, except to the extent authorised under subsection (10).

(9) Where the commission determines that the privilege or duty of confidentiality relied on as grounds for refusing to produce a document applies to any of the information in the document, the commission may cause to be prepared a summary version of the document that excludes that information, but only if—

(a) the document so allows, and

(b) in the commission's opinion, it is in the interests of both the investigation and fair procedures to do so.

(10) Where a commission causes a summary version of a document to be prepared in accordance with this section, the summary version forms part of the evidence received by the commission.

(11) Where the commission determines that the privilege or the duty of confidentiality relied on as grounds for refusing to produce a document does not apply to any of the information in the document, the document is considered for the purposes of this Act to have been received as evidence by the commission unless the determination is overturned under section 22. [Emphasis added]

5.2 Analysis of section 21

5.3 In broad terms, section 21(1) provides that nothing in the Act compels the disclosure by any person of any information or document that a person would be entitled under any rule of law to refuse to disclose on the grounds of any privilege or any duty of confidentiality.

5.4 Section 21(2) of the 2004 Act provides that where a person claims to be entitled under any rule of law to refuse to disclose any information or to produce any

document on the grounds of any duty of confidentiality or on the grounds of any privilege, then the Commission may determine whether the privilege or duty of confidentiality applies to that information or document.

- 5.5 Section 21(3) deals with the issue of confidential information whereas sections 21(4)-(11) deal with the issue of confidential documents.
- 5.6 Section 21(3) provides that where the Commission determines that the duty of confidentiality relied upon (as grounds for refusing to disclose information) does not apply to the information then the person shall disclose that information to the Commission unless the determination is overturned by the High Court under section 22.
- 5.7 Subsection (4) provides that the Commission may only make a determination under section 21(2)(b) in relation to a document if the Commission has examined the document and considered a written statement provided by the person concerned specifying the grounds for the claim including the privilege or duty of confidentiality relied upon.
- 5.8 Subsection (5) requires a person to submit the documentation concerned. This has already been complied with by the Stock Exchange.
- 5.9 Subsection (6) provides that there is no need to provide a written statement under Subsection (5) (b) where an affidavit has already been sworn specifying the basis for objecting to the production of the document concerned. That is the case here.
- 5.10 Subsection (7) is of no application, as the Stock Exchange has already provided the documentation and affidavit specifying the grounds for refusal to produce.
- 5.11 Critically, Subsection 21(8) provides that where the Commission determines that the duty of confidentiality relied upon as a ground for refusing to produce to a document applies to any of the information then the document is not considered to be evidence received by the Commission.
- 5.12 Subsection 21(9) provides that where the Commission determines that the duty of confidentiality applies to any of the information contained in a document, the

Commission may cause to be prepared a summary version of the document that excludes that information but only if:

- i. The documents so allow.
- ii. In the Commission's opinion it is in the interests of both the investigation and fair procedures to do so.

5.13 Section 21(11) provides that where the Commission determines that the duty of confidentiality relied upon as grounds for refusing to produce the document do not apply to any of the information in the document then the document is considered to have been received as evidence unless the determination is overturned by the High Court under Section 22.

6 Assessment of the claim of confidentiality under Section 118 Companies Act 1990.

6.1 The Commission has had the opportunity to examine all the documentation and/or information provided by the Stock Exchange and set out in the second part of the first schedule of the affidavit of Daryl Byrne dated 17th December 2015. Mr Daryl Byrne has averred in of Paragraph 9 of his said affidavit that the said documents comprise and/or contain information obtained by relevant persons within the meaning of the Section 118 of the 1990 Act, by virtue of the exercise by the stock exchange of its functions under Part V of the 1990 Act. Having inspected the documents and the information contained therein, the Commission is in no position to dispute the veracity of that averment.

6.2 In the circumstances, all of the documentation set out in the second part of the first schedule to the affidavit of Daryl Byrne is covered by the provisions of Section 118 (1) of the Companies Act 1990 and therefore cannot be disclosed (except in accordance with law).

6.3 Accordingly, the next issue that arises is whether the persons referred to in Section 118 (1) of the Companies Act 1990 may lawfully disclose the information contained therein on the basis that they will be acting in accordance with law by producing the same pursuant to a direction made by the Commission under Section 16 of the Commissions of Investigation Act 2004.

- 6.4 Undoubtedly, Section 16 (1) of the Commissions of Investigation Act 2004 gives a Commission power, for the purposes of an investigation, among other things, to direct in writing any person to send the Commission any document that is in the person's possession or power and is specified in the direction (Section 16(1)(g)). In addition, the Commission has extensive powers to direct witnesses to answer questions, examine witnesses on oath, direct witness to produce documentation, etc. On the fact of it, and without more, Section 16 would, in the view of the Commission, permit relevant persons in the stock exchange to disclose to the Commission information obtained by virtue of the exercise by the stock exchange of its functions under Part V of the Companies Act 1990.
- 6.5 However, in the Commission's view, Section 16 cannot be read alone. In particular, Section 21(1) of the Commissions of Investigation Act 2004 states that (subject to subsection (4)) nothing in this Act compels –
- (a) the disclosure by any person of any information that the person would be entitled under any rule of law or enactment to refuse to disclose on the grounds of any privilege or any duty of confidentiality, or
 - (b) the production of any document in the person's possession or power containing such information.
- 6.6 In the view of the Commission, the wording “nothing in this Act compels” makes it quite clear the powers contained in Section 16 are subject to provisions of Section 21. Accordingly, the Commission must now determine whether Mr Daryl Byrne is entitled under any rule of law or enactment to refuse to disclose the information on the grounds of any duty of confidentiality.
- 6.7 In the view of the Commission, the provisions of Section 118 of the Companies Act 1990 impose a clear statutory duty of confidentiality of the persons set out in subsection (1) thereof.
- 6.8 Accordingly, the Commission hereby determines that Mr Daryl Byrne is entitled by virtue of the provisions of Section 118(1) of the Companies Act 1990 to refuse to disclose the information contained in the documentation set out in the second part of the first schedule of the affidavit of Mr Daryl Byrne dated 17th November 2015.


6.9 As it appears to the Commission that all of the information contained in the documentation set out in the second part of the first schedule of the affidavit of Mr Daryl Byrne dated 17th November 2015 is confidential pursuant to Section 118 of the Companies Act 1990, there is no evidence contained therein of which the Commission could usefully cause a summary version to be prepared in accordance with the provisions of Section 21(9) of the Commissions of Investigation Act 2004.

7. Related matters.

7.1 As stated above, Mr Daryl Byrne also objected to producing the documents referred to in the second part of the first schedule on the basis that they contain information which itself, or together with other information, is confidential and/or private, and is accordingly subject to duties of non-disclosure and maintenance of privacy and confidentiality by virtue of statute, including the Data Protection Acts 1988 to 2003, and otherwise by law.

7.2 Having regard to the Commission's determination in relation to the claim for confidentiality based on the provisions of Section 118, Companies Act 1990, as a result of which, by virtue of the provisions of Section 21(8) of the Commissions of Investigation Act 2004, such documentation and the evidence contained therein cannot be considered to be evidence received by the Commission, it does not appear to the Commission that there is any purpose to be served by the Commission entering upon a determination of the additional claims to confidentiality of Mr Daryl Byrne.

Dated: the 16th day of December 2015.

Signed: 
The Honourable Mr Justice Brian Cregan
Sole Member