

THE HIGH COURT

Record No. 2011 No. 219MCA

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

FIFTH AFFIDAVIT OF NOEL THOMPSON

I, **NOEL THOMPSON**, Senior Regulator, of the Central Bank of Ireland, Block D, Iveagh Court, Harcourt Road, Dublin 2 aged 18 years and upwards **MAKE OATH AND SAY** as follows:

1. I am a Senior Regulator of the Central Bank of Ireland ("the Central Bank"). By Order made on 15 July 2011 on the application of the Central Bank in these proceedings, I was appointed as an Inspector (with Mr George Treacy of the Central Bank) to investigate the affairs of Custom House Capital Limited ("CHC") and to report the results of the investigation to this Honourable Court, subject to the provisions of paragraph 7 of the Order. According to paragraph 7 of the Order, the matter was made returnable to the Court on 20 July 2011 on the basis that, if CHC gave notice of their intention to contest the appointment, the Central Bank would be required to renew the application on that occasion. I beg to refer to the said Order when produced. I make this affidavit on my own behalf and on behalf of Mr Treacy. I make this affidavit from facts within my own knowledge, save where otherwise appears, and where so otherwise appears I believe the same to be true.

Background and Progress of Investigation

2. On 20 July 2011 CHC indicated that it was not opposing the appointment of the

Inspectors, without making any admission as to the matters set out in the affidavit sworn by me on 15 July 2011. Mr Treacy and I produced our first interim report dated 20 July 2011 ("First Interim Report") to the Court, setting out the progress of our investigation up to that date. The First Interim Report was exhibited to my Second Affidavit which was sworn on 20 July 2011 and to which I beg to refer when produced.

3. At the hearing on 20 July 2011 the Court made orders confirming its orders of 15 July 2011 in relation to the authorisation of the investigation and the appointment of Inspectors and directed that the Inspectors were free to tender a second interim report to the Court on 29 July 2011.
4. On 29 July 2011 Mr Treacy and I produced our second interim report dated 29 July 2011 ("Second Interim Report") to the Court, setting out the progress of our investigation between 20 July and 29 July. The Second Interim Report was exhibited to my Third Affidavit which was sworn on 29 July 2011 and to which I beg to refer when produced.

The Second Interim Report set out the Inspectors' understanding of the main issues based on:

- (i) the sworn evidence provided by witnesses who were required to attend before the Inspectors;
- (ii) the forensic work undertaken by KPMG who were retained to provide forensic, accounting and IT advice to the Inspectors;
- (iii) various meetings and correspondence with other firms and agencies including the Pensions Board, Appian Asset Management Limited ('Appian'), CHC and Horwath Bastow Charleton.

Upon reading the Second Interim Report the Court made an order that the Inspectors were free to tender a third interim report to the Court on 6 September 2011.

5. On 6 September 2011 Mr Treacy and I produced our third interim report ("Third Interim Report") to the Court. The Third Interim Report was a short report designed to update the Court, however it did not contain any new information of substance

over and above the First and Second Interim Reports. The Third Interim Report was exhibited to my Fourth Affidavit which was sworn on 6 September 2011 and to which I beg to refer when produced. It was stated in the Third Interim Report (at paragraph 4.3) that in light of the issues uncovered by the Inspectors up to that stage in the investigation, and the statutory powers and functions of the Central Bank with respect to CHC, it was considered appropriate to keep the Central Bank informed of matters relating to the progress of the investigation and the financial position of CHC.

6. When the matter was before the Court on 6 September 2011, a number of clients of CHC attended Court. Counsel for 64 clients (instructed by Lavelle Coleman solicitors) and another client of CHC (represented by counsel instructed by Murphy McNamara solicitors), appeared and made an application to be made notice parties and to be provided with copies of the interim reports. The Court gave them liberty to bring motions grounded on affidavit in relation to these applications but ultimately no such motions were issued.
7. When this matter was before the High Court on 6 September 2011, the Court was informed that the final report was at an advanced stage. At the hearing on 6 September 2011 a number of directions were sought and given in relation to the provision of extracts from the draft final report to persons in respect of whom it was proposed to make findings in the draft final report and the making of representations by such persons. These directions were varied slightly by Order of this Honourable Court dated 16 September 2011 on the application of the Inspectors and the Court directed that the extracts of the draft final report were to be furnished to the relevant persons (including CHC) by close of business on 20 September 2011, with any representations by or on behalf of those persons to be delivered to the Inspectors by 11 October 2011. I beg to refer to a copy of the said Orders when produced. I say that Mr Treacy and I have complied with the directions given as appears from the Final Report and as summarised below.
8. I say that the First and Second Interim Reports were provided to John A. O'Dwyer, chairman of CHC, subject to the condition that they were not to be disseminated, copied or otherwise published, and not discussed with any person or any member of

the staff of CHC, or any customer or investor in CHC subject to the proviso that he may furnish a copy of the Reports to CHC's legal advisors (such advisors in turn being subject to the same stipulations and restrictions). The First and Second Interim Reports were also forwarded to the Central Bank. However, in light of certain of the contents of the Third Interim Report, the Inspectors were only directed to provide the Third Interim Report to the Central Bank.

9. In light of certain of the issues addressed in the Final Report and in particular issues such as the financial position of CHC and the future management of CHC, the Inspectors considered it appropriate to keep the Central Bank informed of the progress of their investigation and the conclusions they were minded to reach, in relation in particular to the financial position of CHC. In light of the statutory functions and powers of the Central Bank in relation to investment firms, this was considered a prudent and appropriate course to take.

The Inspectors' Final Report

10. Since this matter was last before this Honourable Court on 16 September 2011 Mr Treacy and I have concluded work on the investigation. I say that on 20 September 2011, extracts from the draft Final Report were furnished to relevant persons, including CHC, in accordance with the directions of the Court.
11. I say that representations were received from each of these persons (or solicitors acting on their behalf) on or before 11 October. I do not propose to exhibit a copy of the relevant correspondence and representations in the interests of fairness to those who made representations which were to a significant extent taken on board by the Inspectors. However, our solicitors will have in Court a complete set of the correspondence and representations if the Court should wish to see them.
12. I say that the Inspectors took time to consider and take advice on the representations that were made. On 14 October the Inspectors acknowledged to the persons concerned or their solicitors receipt of the representations and indicated that they were being reviewed and considered and that the Inspectors would have due regard to them in the course of finalising their report. Having considered the representations, the Inspectors (or in one case solicitors on their behalf) then wrote

again by letters dated 18 or 19 October to each of these persons indicating that they had had due regard to the representations received in the preparation of the Final Report and, where applicable, indicating the Inspectors' specific responses to issues raised in the representations. Our solicitors will have in Court a complete set of the correspondence, representations and responses if the Court should wish to see them.

13. The outcome of our investigation is set out in a final report together with exhibits dated today (19 October 2011) ("Final Report"). I beg to refer to a copy of the Final Report and exhibits upon which marked "NT12" I have signed my name prior to the swearing of this affidavit.
14. I make this affidavit for the purpose of verifying the contents of the Final Report. I say that to the best of my knowledge, information and belief at the time of completion of the Final Report the statements contained in the Final Report are true and accurate and the conclusions set out in the report have been reached by the Inspectors after careful consideration of all matters which came to our attention during the course of the investigation including the representations made by persons to whom extracts of the draft Final Report were sent.
15. I say 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 this Honourable 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 this reason Mr Treacy and I would like to draw this section of the Report to the particular attention of this Honourable Court.
16. In this regard 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. We were also conscious of the desire expressed by the Court that the investigation would be brought to finality with as much speed as possible consistent with fair procedures.
18. The procedures we adopted were necessarily constrained by the timeframe within which it was proposed and we were directed to complete the report. We carried out a number of Examinations on oath for the purpose of obtaining relevant background information. It is important to record that the persons mentioned in the information gathered by the Inspectors were not afforded all of the rights typical of an adversarial process, such as the right to cross examine witnesses. While we do not consider that this is something which was required to have been done, whether by reason of fair procedures or otherwise, having regard to the nature and statutory context of this investigation, I should say that the information that has been gathered is subject to this qualification and, as a result, it was not possible in some instances for the Inspectors to resolve conflicts of evidence. Consequently we did not make findings about individuals but we recorded evidence given about individuals and made statements of fact relating to individuals. The limitations of the investigation process as outlined above should be borne in mind when reading the Final Report.
19. Mr Treacy and I consider that given the contents of the Final Report it should be forwarded, in unredacted form together with all of its appendices and exhibits, to the Central Bank and also to CHC by providing a copy of same to its chairman, Mr John Anthony O'Dwyer. In light of the number of clients of CHC and given the clear public interest issues which arise, the Inspectors also consider that it would be appropriate for them to arrange for the Final Report to be published on the website of the Central Bank but that the version so published should have the names of any clients of CHC and related entities redacted from the body of the Report. The Inspectors do not consider it necessary or appropriate that the appendices and exhibits to the Final Report be published on the website of the Central Bank. The appendices and exhibits consist primarily of the underlying documents which

provide an evidentiary basis for the findings in the report and they contain a level of detail that the Inspectors do not believe is necessary or appropriate to publish.

20. In light of the conclusions set out in the Final Report, Mr. Treacy and I recommend and respectfully suggest that the Final Report in unredacted form together with all of its exhibits be provided to the Minister for Justice and Equality, the Director of Public Prosecutions, the Director of Corporate Enforcement and the Revenue Commissioners. Mr. Treacy and I also recommend and respectfully suggest that a copy of the communication, which is being made to the Court pursuant to Regulation 171(1) of the MiFID Regulations, under cover of letter dated 19 October 2011 from the Inspectors' solicitors, should also be provided to these bodies and that such 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.

Financial Position of CHC

21. A detailed analysis of the current financial position of CHC is contained at section 22 of the Final Report. The audited accounts for the year ending 31 March 2010 while outdated showed that CHC had a number of financial concerns at that time. The current management accounts, annexed to the Final Report show how these financial problems have escalated and become more serious for CHC. The Inspectors believe that CHC is currently trading at a loss and continuing to reduce its cash reserves.
22. I say and am advised that there are two fundamental tests to determine if a company is solvent or not, the cash flow test and the balance sheet test.
23. Cash test: As outlined at section 22.2 (vii) of the Final Report, the Inspectors consider that CHC fails the cash flow test since it cannot pay its debts as they fall due.
24. Balance Sheet test: As outlined at section 22.2 (viii) of the Final Report, the Inspectors consider that CHC fails the balance sheet test since its recoverable assets are less than its liabilities.

Winding Up of CHC

25. 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 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 ("HBC") 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 (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 cash and equity holdings) being improperly transferred without the clients' knowledge as referred to at Section 1.9 of the Final Report. This does not include funds owed to Mezzanine Bond Fund Holders, which amount to €10.4million, exclusive of interest, as described at Section 7 of the Final Report.
28. The Inspectors are concerned that current staffing arrangements at CHC are insufficient in order for it to continue operating, as set out at Section 14 of the Final Report.
29. I say and believe that significant claims are likely to be made against CHC by various clients and creditors whose funds have been improperly applied. It is likely that there will be competing claims or classes of claims against the assets of CHC. The

- appointment of a liquidator will safeguard the existing assets of CHC. Further, I say and am advised that a liquidator has extensive powers to determine and adjudicate on claims, subject to the supervision of this Honourable Court.
30. CHC does not currently have and cannot secure any professional indemnity insurance cover. The previous indemnity cover lapsed in July 2011.
 31. On 15 July 2011, the Pensions Board issued a suspension on the approval of CHC's pension products.
 32. In light of the foregoing, it appears to the Inspectors that
 - (a) CHC is insolvent;
 - (b) Given the scale of the misconduct of CHC identified in the Final Report, steps must be taken to protect the interests of clients and creditors of CHC and to protect and manage the assets of CHC;
 - (c) There is an urgent need for winding up orders to be made and for a liquidator to be appointed to CHC.
 - (d) It would be just and equitable that CHC be wound up.
 33. Accordingly, I say and believe that this is an appropriate case for the exercise of the Court's discretion under Regulation 172(1)(a) of the MIFID Regulations to order of its own motion the winding up of CHC and Kieran Wallace of KPMG has consented to act as liquidator if so appointed by this Honourable Court.
 34. I further say that in the event that for some reason the Court is not minded to make an order for the winding up of CHC immediately upon the presentation of the Final Report, there is a real risk that the assets of CHC could be further depleted, due to the matters set out in the Final Report, including the lack of professional indemnity insurance, the lack of proper staffing levels, and the likelihood of immediate claims against CHC by clients and creditors. I say that in that event the exercise of the Court's discretion under Regulation 172(1) of the MiFID Regulations, a provisional liquidator should be appointed to ensure the protection of CHC's assets pending a hearing as to the winding up of CHC pursuant to Regulation 172(1)(a).

35. I say that in the event that a liquidator is appointed to CHC, the Inspectors seek liberty to forward to such liquidator the Final Report, together with its exhibits subject to the direction that the liquidator maintain the contents of the unredacted Final Report and its exhibits confidential subject to any disclosure which may be necessary or appropriate for the performance of the functions as a liquidator.
36. Given the issues addressed in the Final Report and in particular the manner in which client holdings have been dealt with by CHC, the exercise of reconciling the financial records of CHC with a view to ascertaining the precise status of each client's investment and the steps which will be necessary to remedy issues which exist in relation to client holdings will be a complex and protracted one. In the circumstances Mr Treacy and I are not in a position to make any recommendation to the Court regarding any orders which might be made pursuant to Regulation 172(1) of the MiFID Regulations for the purpose of remedying any disability suffered by any person whose interests were adversely affected by the conduct of the affairs of CHC.

The Investor Compensation Company Limited

37. I say that Mr Treacy and I have been in contact with the ICCL over the past weeks and it is aware that the Inspectors are making their Final Report to the Court this day and that this matter will come before the Court for hearing on 21 October 2011. ICCL is a company which was established under the Investor Compensation Act, 1998 (the Act). The main purpose of the scheme, as determined by the Investor Compensation Act 1998 as amended, is to provide adequate funds out of which eligible investors of failed investment firms are compensated.
38. Both the Central Bank and the ICCL have indicated that they have no objection to Mr Kieran Wallace, the proposed Official Liquidator, acting as administrator as well as liquidator.
39. In light of the statutory functions of the ICCL it would seem appropriate that the Final Report and its exhibits be forwarded to the ICCL and that the Central Bank be at liberty to give the ICCL access to the books and records and other documents of the Inspectors relating to the investigation of CHC and the ICCL maintain the contents of the unredacted Final Report and its exhibits confidential subject to any

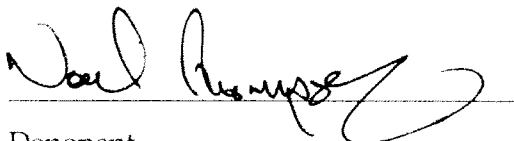
disclosure which may be necessary or appropriate for the performance of its statutory functions.

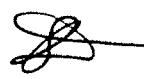
40. I beg to refer to a draft order which the Inspectors' solicitors have prepared for the assistance and for the consideration of the Court, upon which marked "NT13" I have signed my name prior to the swearing hereof.

Costs

41. I respectfully request this Honourable Court for an order directing:
- (a) that the costs of the application for the appointment of Inspectors and of these proceedings (including all reserved costs) be paid by CHC and
- (b) that the expenses of and incidental to the investigation and the fees incurred by the Inspectors, being defrayed by the Central Bank pursuant to Regulation 170 (1) of the MiFID Regulations, be repaid to the Central Bank by CHC.

SWORN by the said NOEL THOMPSON this
19th day of October 2011 at Sir John
Rogersons Quay in the City of Dublin
before me a ~~Commissioner for Oaths~~ /
Practising Solicitor, ^{and} ~~I know the Deponent~~
~~OR~~ the Deponent has been identified to me by
Helen O'Connor who is personally known to me
and who has certified that ~~he~~/she knows the
Deponent.


Deponent


Practising Solicitor / ~~Commissioner for Oaths~~

I HELEN O'CONNOR hereby certify that the
Deponent is personally known to me

Helen O'Connor

This Affidavit is filed this day of October 2011 by McCann FitzGerald, solicitors,
Riverside One, Sir John Rogerson's Quay, Dublin 2 (Ref: RCB/FOB)