

THE HIGH COURT

[2022] IEHC 319

[2022 No. 112 MCA]

**IN THE MATTER OF AN APPLICATION PURSUANT TO ORDER 84B OF THE RULES OF THE
SUPERIOR COURTS**

**AND IN THE MATTER OF AN APPLICATION PURSUANT TO REGULATION 44 OF THE
MARKET ABUSE (DIRECTIVE 2003/6/EC) REGULATIONS 2005 (AS AMENDED)**

BETWEEN

CENTRAL BANK OF IRELAND

APPLICANT

AND

PHILIP LYNCH

RESPONDENT

**JUDGMENT of Ms. Justice Irvine, President of the High Court, delivered on the 31st May,
2022**

Proceedings

- 1.** This is an application brought by the Central Bank pursuant to Regulation 44 of the Market Abuse (Directive 2003/6/EC) Regulations 2005 (“the Regulations”) seeking an order of the Court confirming the adverse assessment (including the specified sanctions) made as against the respondent, as assessee, pursuant to an assessment issued by the applicant on 10th January, 2022 (“the assessment”).
- 2.** The application is grounded upon the affidavit of Louise Gallagher, solicitor and Head of Division of the Enforcement Divisions of the Central Bank, sworn on 26th April, 2022.
- 3.** The respondent swore a replying affidavit on the 23rd May, 2022.

Background

- 4.** The assessment the subject matter of these proceedings, arises from a decision of the Deputy Governor (Financial Regulation) of the applicant dated 19th November, 2012. The Deputy Governor found reason to suspect that the respondent committed prescribed contraventions of Regulation 5(1) of the Regulations by engaging in the following “suspected contraventions”:

(a) on or about 11.12am on 21st October 2008, while in possession of inside information relating to C&C Group Plc, the Respondent used that information by acquiring 150,000 shares in C&C for the account of his approved retirement fund; and

(b) on or about 12.30pm on 21st October 2008, while in possession of inside information, used that information by acquiring 50,000 shares in C&C for the account of his approved retirement fund.

Regulation 5(1) provides as follows:

“... a person to whom this paragraph applies who possesses inside information shall not use that information by acquiring or disposing of, or by trying to acquire or

dispose of, for the person's own account or for the account of a third party, directly or indirectly, financial instruments to which that information relates.”

5. In April/May 2013, assessors were appointed by the applicant to investigate the alleged contraventions.
6. In September 2013, a preliminary hearing was held in respect of the following two issues:
 - (a) the standard of proof required in the assessment; and
 - (b) the mental ingredient, if any, required for proof of a suspected contravention.
7. On 6th November, 2013, the assessors decided that:
 - (a) the standard of proof was beyond a reasonable doubt; and
 - (b) if the applicant proved that the respondent acquired shares at C&C when he was in possession of “inside information”, it would be presumed that the respondent had used that information within the meaning of Regulation 5, but without prejudice to the respondent’s rights, particularly his right to rebut the presumption by establishing that the inside information did not play a role in his decision making.
8. The substantive hearing took place on 20th, 21st, 22nd and 24th September, 2021. The respondent did not give evidence. However, oral and written submissions were delivered by both parties.
9. By letter dated 15th November, 2021, the parties were informed of the assessors’ findings on the suspected contraventions. The assessors were satisfied that the applicant’s enforcement division had proved beyond a reasonable doubt that when the respondent purchased the C&C shares on 21st October, 2008 he was in possession of inside information. In circumstances where the assessors had earlier ruled that once it was established that the respondent was in possession of inside information at the time he acquired the shares, it was to be presumed that he had used that information in acquiring the shares and in circumstances where he had elected to give no evidence to rebut that presumption, it followed that the suspected contraventions had been proved.
10. The final assessment of the assessors setting out their adverse assessment was issued to the respondent on the 10th January, 2022. The sanctions the assessors found appropriate to impose were as follows:
 - (a) a public caution;
 - (b) a monetary penalty of €75,000;

(c) disqualification of the respondent for a period of 5 years from being concerned in the management of, or having a qualified holding in, any regulated financial service provider; and

(d) a direction to pay the Bank part of the costs it had incurred in holding the assessment in the amount of €37,500.

11. By letter dated 8th February, 2022, solicitors for the respondent indicated that he did not intend to appeal the assessors' adverse assessment or the specified sanctions as was his right under Regulation 40 (within 28 days of his notification of the assessment).

12. From the papers lodged in support of the present application, it appeared that the respondent intended arguing that the application should be rejected on the basis that it was unnecessary in circumstances where he had paid the penalties provided for in the specified sanction. However, that argument (which was to have been premised on the wording of Regulation 44 (1) which provides that following an adverse assessment where there is no appeal, the Bank "may" (as opposed to "shall") apply to the Court for an order confirming the adverse assessment) was not pursued. Instead, the respondent chose not to oppose the application, thereby clearing the way for the Court to deal with the application on an uncontested basis save for an application to have the matter heard in private which was refused.

Law

13. This application is brought under Regulation 44 of the Market Abuse Regulations 2005, (as amended) seeking to confirm the adverse assessment (including the specified sanctions). I will refer only to the Regulations relevant to the current application.

14. Regulation 35 details the approach to be taken by the assessor/assessors appointed by the Bank to carry out an assessment. In particular, the assessor, having decided that a prescribed contravention has taken place must deliver an assessment that includes:

(a) a statement of the grounds upon which the assessor made the assessment that the assessee is committing or has committed;

(b) a statement in summary form of the evidence upon which the assessment is based; and

(c) a statement of the sanction or sanctions, if any, which the assessor considers would be appropriate to be imposed on the assessee in respect of the contravention.

15. Regulation 44(1) provides that where no appeal against the adverse assessment has been made, "...the Bank may apply to the Court for an order confirming the adverse assessment (including the specified sanctions)."

16. Regulation 44(2) provides that the Court shall determine an application under (1) by making:

(a) an order confirming, varying or setting aside the adverse assessment, whether in whole or in part; or

(b) an order remitting the case to be decided again by the Bank in accordance with the directions of the Court.

17. Regulation 44(3) provides:

“The Court shall not hear an application under paragraph (1) unless –

(a) the assessee appears at the hearing as respondent to the application, or

(b) if the assessee does not so appear, the Court is satisfied that a copy of the application has been served on the assessee.”

18. Regulation 43(1) provides that where no appeal against the adverse assessment has been lodged with the Court:

“...then the specified sanctions, as confirmed or varied in the order, if any, obtained under Regulation 44(2)(a), shall take effect on the date of that order or such other date as the Court may specify in that order”.

19. It is somewhat surprising that the Regulations do not give any guidance as to the role or jurisdiction of the Court on hearing a confirmation application in circumstances where the assessee does not lodge an appeal. I would observe that in almost all of the statutory schemes in which the High Court is given the power to confirm sanctions imposed by professional regulatory bodies on their members for acts of stated misconduct, the legislation specifically identifies the jurisdiction of the Court. In most instances the statute provides that “the Court *shall* confirm” the sanction decided upon by the relevant body unless it can find good reason not to do so (see for example s. 71 (2) of the Property Services (Regulation) Act 2011, s.74 (1) of the Nurses and Midwives Act 2011 and s.76 of the Medical Practitioners Act 2007).

20. Given that the Court is entitled, on hearing a confirmation application where no appeal has been lodged, not only to confirm the adverse assessment (including the specified sanction), but to vary it, set it aside or remit the case for a rehearing, suggests to me that the Court has an obligation on the confirmation hearing to satisfy itself that there was adherence to the prescribed procedures and also adherence to the requirements of natural and constitutional justice in the manner in which the respondent was found to have committed the suspected contraventions and in the manner in which the sanction was decided upon. I say this because it would only be in circumstances where there had not been compliance with these norms that a court would set aside an assessment or remit the matter back to be decided again by the Bank.

21. Furthermore, in light of the fact that a court on an application such as this has the power to vary the sanction imposed, it seems to me that the Court must also satisfy itself that the sanction was one which might reasonably be considered proportionate in light of the contraventions that led to the imposition of that sanction. That said, I believe that the Court's jurisdiction is probably quite limited in this regard and unless it considers that no other reasonable decision maker could have imposed the sanction concerned, it should confirm it (see *Associated Provincial Picture Houses Limited v. Wednesbury Corporation* (1948) 1 KB 223).

22. In the present case, it is clear that the applicant, in inquiring into the respondent's Suspected Contraventions, followed the appropriate procedures and that these fully complied with the requirements of natural and constitutional justice and the same can be said about the manner in which the sanction was decided upon. In particular, I note that the assessment fully complies with the requirements of Regulation 35. Relevant also is the fact that at all stages of the process the respondent was represented and afforded the opportunity to make submissions. There is accordingly no basis upon which the Court might set aside the adverse assessment concerning the respondent's contraventions.

23. The approach taken by the assessors to the imposition of sanction is set out commencing at p. 23 of their assessment. Having considered the approach taken to sanction in a number of enforcement cases in other Member States, the assessors said the following about sanctions in cases of insider trading:

"The sanctions should be such as to dissuade the assessee and all other market actors from engaging in the infringing conduct. The sanction should be proportionate to the gravity of the infringement and to the gains made or losses avoided. The sanction should be disclosed unless disclosure would seriously jeopardise the financial markets or would cause disproportionate damage to the individual."

24. Having so stated, the assessors first considered the gravity of the respondent's offence, as was appropriate, and in doing so considered whether or not the respondent's conduct had any effect on the integrity of the market and investor confidence. They also considered the importance of ensuring that the sanction would be sufficient to dissuade the assessee and other market actors from engaging in such conduct. They also considered the importance of any aggravating or mitigating factors. In particular, the assessors noted that the respondent had cooperated with the inquiry and, in agreeing a statement of facts, had reduced the number of witnesses that were required to be called at the hearing. Finally, they took account of the fact that the respondent was 75 years of age, had retired from activity in the market and had health issues of anxiety and depression.

25. Having reviewed the approach of the assessors to the issue of sanction, it can safely be stated that regard was had to all relevant factors. Furthermore, in light of the respondent's contraventions and all of the considerations identified by the assessors relevant to sanction,

I am content to conclude that the sanctions decided upon are proportionate in all of the circumstances whilst also meeting the objectives of the Regulations.

- 26.** In all of the aforementioned circumstances, I will make an order confirming both the adverse assessment and the specified sanctions made against the respondent pursuant to the assessment issued by the Central Bank on 10th January, 2022.
- 27.** Finally, I will direct that in accordance with Regulation 43(1)(a) the specified sanctions shall take effect on the date upon which the Court's order is perfected.