IRISH FINANCIAL SERVICES APPEALS TRIBUNAL

APPEAL NO. 029/2022

IN THE MATTER OF PART VII (A) OF THE CENTRAL BANK ACT, 1942

BETWEEN:

AB

APPELLANT

AND

THE CENTRAL BANK OF IRELAND

RESPONDENT

TRIBUNAL

Mr Justice John MacMenamin, Chairperson

Conor Power S.C.

Eilis Brennan S.C.

DECISION

Summary of Findings and Conclusions

1. On the 5th December 2022, the Central Bank ("the Respondent") issued a decision ("the impugned decision") refusing applications brought on behalf of AB ("the Appellant") to be approved for the two positions of Non-Executive Director and Chairman of a financial service provider named Redhedge UCITS ICAV (hereafter "Redhedge"). Redhedge UCITS ICAV is an investment fund authorised by the Central Bank since December 2020.

2. The impugned decision referred to the Respondent's Code on Fitness and Probity, and also to various national and EU Regulations, concerning applicable standards. The Respondent concluded that, in its "*opinion*", the Appellant was "*unfit*" to hold the two positions in question. This opinion was formed on the basis of s.23(5)(a) of the Central

Bank Reform Act, 2010 (the 2010 Act). The question of fitness is the only issue before the Tribunal. No allegation is made that the Appellant lacked probity.

3. In technical terms, the position of a Non-Executive Director is described as a "PCF2" position. The position of a Chairman is described as a "PCF3" position. The impugned decision was a culmination of a process which commenced in June, 2021, but the background goes back earlier.

4. This decision of the Tribunal therefore describes the events which took place in the two years prior to the Respondent's impugned decision, which is now appealed. It sets out matters which occurred in 2019 when the Appellant, AB, was involved in what is called an "Alternative Investment Fund" named Ruvercap ICAV. It emerged that certain bond investments made by that fund became seriously impaired.

5. In 2020, applications on behalf of AB sought approval for a number of PCF positions. The Respondent Bank did not make any decision on these applications. In June 2021, Redhedge made a further PCF application on behalf of the Appellant.

6. The procedure which ensued followed three steps. The Central Bank called the Appellant to what is known as an "assessment interview" and then a "specific interview". These made adverse findings. There followed a "minded to refuse" letter to the ultimate decision-maker. She largely confirmed these adverse findings and held the Respondent entitled to refuse the applications.

7. For the reasons set out in the decision, the Tribunal finds that the Central Bank's decision-making process was flawed. The Appellant was denied fair procedures at each stage of the process. Ultimately this Tribunal must find that the decision was, in law, "*incorrect*" and remit the matter to the Central Bank for reconsideration. At the conclusion section of this decision, the Tribunal also makes a number of directions concerning future steps.

Introduction

8. Prior to dealing with the events in detail, it is appropriate at this stage to make a number of observations. In this decision the Tribunal considers the case and the legal principles as advanced by both sides in the case. The Tribunal has focused its decision on the issues as framed by the parties. While other issues or authorities might have had a bearing on the case, the Tribunal is content to resolve the matter on the basis of actually presented to it.

Format

9. This decision seeks to follow the format laid down in s.57AA(5) of the Central Bank Act, 1942, as amended. Therefore, this decision first sets out: Section I: The material on which the Tribunal's findings are based (paragraph 16 *et seq*.). Each of the witnesses are identified by a number. Section II: The Tribunal's understanding of the applicable law (paragraph 237 *et seq*.). Section III: The reasoning process leading to the Tribunal's conclusions (paragraph 259 *et seq*.). Section IV: Order (paragraph 324 *et seq*.).

10. The decision contains three appendices. These are *Appendix A*: Section 3 of the Central Bank Fitness and Probity Standards 2014; *Appendix B*: Regulations 68 and 69 of the European Communities (Undertakings for Collective Investment in Transferable Securities) Regulations 2011 (S.I. No. 352/2011); and *Appendix C*: Section 23 of the Central Bank Reform Act 2010.

Redaction

11. In light of the conclusions arrived at, the Tribunal has decided to partly redact this decision. Thus, the identity of the Appellant is anonymised. On this occasion, the identities of a number of bank officials who were involved in the decision-making process are redacted, although the Tribunal may not adopt this approach in future. For clarity, the names of other witnesses and entities are not redacted.

The Statutory Nature of the Appeal

12. This decision concerns the procedure whereby the Central Bank dealt with the applications made by the Appellant. Prior to the full hearing, there were several directions hearings. In these, counsel on both sides sought to address how the legislation should be interpreted and applied. The appeal hearing proper took up four days. The Tribunal had to consider some 1,500 documents. Many legal authorities were cited. The preparatory "Pleadings" on both sides can euphemistically be described as old-fashioned. No allegation went without rebuttal. The case itself was fought on an adversarial basis, similar to a proceeding in the Commercial Court.

13. The Tribunal would point out that, by contrast, under statute, it is required to act with as little formality as the circumstances of the case permit. Its decisions are to be reached according to "*equity, good conscience and the substantial merits of the case without regard to technicalities or legal forms*". (s.57V(4) Central Bank Act, 2010). While there was much controversy in relation to the scope of this appeal, much of this area of dispute had diminished by the time the full hearing proceeded. The area of dispute related largely to the type of order which the Tribunal might make on foot of this appeal. That will be apparent from Section III of this decision.

Zalewski

14. Ironically, the Central Bank proceeding in question took place when the decision in *Zalewski v Adjudication Officer* [2022] 1 IR 421 was before the Courts. There the Supreme Court considered bodies other than the Courts which may exercise limited functions and powers of a judicial nature in matters other than criminal matters (Article 37 of the Constitution of Ireland). The Supreme Court emphasised that such powers must be exercised by quasi-judicial bodies which are independent, impartial, dispassionate and which apply the law and the principles of fair procedures to a high standard. The question of the constitutionality of the procedures lies outside the remit of the Tribunal. But this decision does focus on the question of fair procedures.

Detail

15. Finally, this decision is admittedly detailed. This is unavoidable. What occurred does not lend itself to brief description. A full understanding of the events at times requires detailed quotation from the documentation.

SECTION I: MATERIALS ON WHICH THE TRIBUNAL'S FINDINGS ARE BASED

Legal Framework

16. The narrative of events cannot be understood without some early understanding of the legal framework involved. What follows is over-simplification. For the present it is sufficient to say that applications for PCF positions are brought by financial service providers, generally investment funds. As described briefly, the appeal concerns applications which were brought for the Appellant by Redhedge to perform what are known as "*controlled functions*". These are defined in Chapter 2 of the Central Bank Reform Act, 2010, ("the 2010 Act"). There, the Bank is empowered to make regulations which prescribe functions which are designated as being "*controlled*". Generally speaking, these relate to significant legal positions, such as Director or Chairperson of the Board in financial service providers, in this case investment funds.

17. The Bank has jurisdiction to prescribe a "*function*" as being "*controlled*", if the holder of such office is likely to have significant influence on the conduct of the affairs of a regulated financial service provider. Alternatively such person might have the duty of ensuring, controlling or monitoring compliance by such a provider with its obligations under the Act. Finally, such a person may be responsible for the performance by a financial service provider of its functions, giving advice or assistance to customers, or having control over the property of customers. (Section 20(1) and (2) of the 2010 Act).

Standards of Fitness and Probity

18. A wide range of financial service providers are subject to regulation. In investment funds, the onus of compliance lies on the financial service provider, that is, the fund, which shall not permit a person to perform a controlled function unless the provider itself is satisfied, on reasonable grounds, that the person proposed to perform the controlled function complies with standards of fitness and probity laid down in a code promulgated by the Central Bank under s.50 of the 2010 Act.

19. Strictly speaking therefore, it was Redhedge UCITS ICAV ("Redhedge") which, as an investment fund, was the applicant for approval by the Bank.

20. The acronym UCITS must be explained. In national law, a "UCITS" is governed by the European Communities (Undertakings for Collective Investment in Transferable Securities) Regulations 2011 (S.I. No. 352/2011). Its promoters gather funds from investors, and thereafter make investments on behalf of such investors. The term "UCITS" is therefore derived from the initials of such Regulations. The term "ICAV" denotes an entity operating under the Irish Collective Asset Management Vehicles Act, 2015. It is not subject to the Companies Acts. It may take a number of legal forms not confined to a unit trust. Thus, Redhedge UCITS operates under both rubrics.

21. As a UCITS, the aims and objects of Redhedge UCITS was to attract investors to engage in a portfolio of investments of a particular type, and subject to particular rules. Like all such bodies, Redhedge was to be governed by a Board of Management holding the ultimate responsibility for all aspects of the funds' activities. The Board is obviously to be responsible to the investors and shareholders. A board of a UCITS may delegate certain tasks and functions internally. In this State it is not unknown for such functions to be delegated externally to the fund.

22. A UCITS will also have a "depository" responsible for safe-keeping assets, oversight of the fund, and monitoring cash-flow. A depository is appointed by the board. Its function is to safekeep assets and to ensure investments are ring-fenced. A fund will have an administrator whose function it is to deal with subscriptions and redemptions to determine net asset value and prepare fund financial statements. The Board of a fund

receives reports from delegates on a quarterly basis. These include delegates named as custodians, administrators and a management company.

Refusal of an Application S.23(5)

23. Under s.23(1) of the 2010 Act (see *Appendix C* of this decision), a regulated financial service provider shall not appoint a person to perform a PCF unless the Bank has approved in writing the appointment of such a person to perform that function.

24. However, s.23(5) of the 2010 Act is central to this appeal (See also *Appendix C)*. It provides that the Central Bank may refuse to approve the appointment of a person to a controlled function where:

> *"1(a) the Bank is of the opinion that the person is not of such fitness and probity as is appropriate to perform the function for which he or she is proposed to be appointed, or*
> *(b) the Bank is unable to decide, on the basis of the information available to it, whether the person is of such fitness and probity."* [Emphasis added.]

Characteristics of a UCITS

25. Originally, a UCITS was defined by a number of EU Directives, the most significant of which was promulgated the year 2009, (Directive 2009/65/EC 13th July 2009). As indicated, the Directive was transposed into national law in 2011.

26. A UCITS must maintain a high degree of diversification in its investment portfolio. The fund management must be very flexible, as investors may, and are entitled to, liquidate their investments readily. Thus, a high "liquidity regime" is necessary in order to ensure that where investors wish to realise their investments on short notice, this can be done without significantly prejudicing the rights of other remaining investors, who might otherwise be left holding less liquid or immediately realisable investments.

Characteristics of an AIF

27. In the course of this decision, there will be consideration of another type of fund, known as an Alternative Investment Fund (here for brevity referred to as "AIF"). Confusingly, the Appellant was also chair and non-executive director of an Alternative Investment Fund named Redhedge ICAV. But the applicant company in this appeal is Redhedge UCITS ICAV. It is sufficient to say that alternative investment funds operate in a more flexible way, and are subject to somewhat less rigorous requirements concerning liquidity, diversification and the nature of the investments which may be undertaken. Later, this decision will also consider the activities of another alternative investment fund in more detail. It was called Ruvercap ICAV and is now known as Working Capital ICAV. An alternative investment fund is less often targeted at retail investors as redemption of investments may take place over a longer time period.

The Sector

28. The UCITS market has grown tenfold in this State since its inception. The value of the sector is now almost €4 trillion. The other main EU market is in Luxembourg. It is slightly larger than in this State. Between them, the markets in Ireland and Luxembourg command some 70% of the UCITS sector in the European Union.

29. Maintaining the integrity of this market must be seen as a high national priority. The duty of the Central Bank is to ensure that there is rigorous implementation of the regulations and codes. The operation of such funds must necessarily be closely supervised.

30. Under the myriad of legal instruments governing the operation of UCITS, the Bank is compelled to operate as the licensing authority. It also has the duty of carrying out inquiries and investigations in cases of alleged misconduct. The procedure for PCF applications differs from that applied for either investigations or enquiries. As will be seen, the Central Bank seeks to operate the Code of Fitness and Probity by an interview process, followed where necessary by what is to be an independent decision-making process. All these monitor the subject for fitness and probity.

Promoters

31. Investment funds are launched by promoters. Frequently, but not always, the fund promoter is also the investment manager. Investors are profoundly influenced by the skillset of the investment manager, who typically may come from other asset management companies or banks. Such managers will have a deep knowledge of one or more sectors of the market. By the time a fund is launched, a group of investors will already have expressed willingness to pool money and place it in an investment fund. Each fund will have policies and procedures as a framework for its operation. The function of the board and its delegates is to ensure the policies and procedures are adhered to.

Case Arising

32. This Tribunal's decision largely concerns the procedures adopted by the Central Bank in the application process. In view of the Tribunal's final order to remit the application to the Central Bank for reconsideration, this decision does not seek to pre-empt, comment upon or prejudice the manner in which the Central Bank carries out its reconsideration.

33. The Tribunal now turns to consider the evidence adduced.

EVIDENCE

(1.) The Appellant

34. The Appellant is now in his mid-fifties. He attended university in this State. He undertook an undergraduate degree. He then worked with various asset management companies outside the State. He acquired considerable experience in fund management during that time. He was promoted to senior positions in a number of international banking and securities firms. In 2012 he suffered a serious illness. He returned to Ireland, and decided to pursue a career as an independent non-executive director involved in fund management. He was successful in this aim. By the time of this enquiry, he was currently

authorised by the Central Bank to perform pre-approved controlled functions in a substantial number of funds, both in this State and outside it.

35. He is registered with the Cayman Island Monetary Authority. He acts as Non-Executive Director for a number of Cayman Island domiciled funds. He was a member of a professional institute engaged in fund direction. He testified that he undertook some six hours of training per annum. At the time of his application which led to the impugned decision, he was approved by the Central Bank to act as a Non-Executive Director or Chairman of seventeen regulated entities in this State, and one regulated fund administration company. Among other duties, fund managers must necessarily avoid conflicts of interests. For this reason, the regulations provide a series of protections and safeguards. Managers are expected to operate so as to carefully scrutinise those advising funds in relation to making investments.

Quayside Investment Fund Limited and Ruvercap ICAV

36. In 2014, the Appellant was appointed Chairman and Non-Executive Director of a financial service provider named Quayside Fund Management Limited. As Chairman he would receive reports on investments on a quarterly basis. Quayside was co-founded by Mr Kevin O'Doherty. He recruited the appellant to fulfil the roles of Non-Executive Director and Chair. Mr O'Doherty was Chief Risk Manager as well as founder of the company.

37. Quayside was appointed a delegate of the Board of Directors of a fund known as Ruvercap ICAV. Ruvercap was an Alternative Investment Fund. Ruvercap also had a "depository", which had the function of holding and managing the assets of the fund.

38. As emerged during Mr O'Doherty's evidence, Quayside was described in evidence as a "fund manager". Quayside held fund management approval from the Central Bank. The board of directors of Quayside retained the depository and the management company. The board, and specifically Mr O'Doherty, received advice from a Swiss entity named Ruvercap AG and then, subject to consideration, made investments. Mr O'Doherty testified, Ruvercap AG did not carry out any investment management function. In fact, a regulated entity of fund administrators in Waterford actually carried out the function of

administering Ruvercap ICAV. Such an arrangement is said to be not contrary to EU law or the Regulations applicable.

39. There were three directors of Ruvercap ICAV. These included the Appellant, another Irish national, and a gentleman from Switzerland who shall be identified as "Individual C". Individual C was a principal of Ruvercap AG. This Swiss entity proposed which investments the Irish Ruvercap ICAV should undertake.

40. As the evidence unfolded, it became clearer that the Appellant was, at the one time, a chairman and non-executive director of Quayside, and also chairman and non-executive board member of Ruvercap ICAV. This was a complex arrangement.

41. The evidence which was available to the Tribunal indicated that Ruvercap decided to advance substantial investments in a company called "Go Factoring". Go Factoring was, as its name suggests, a factoring undertaking. It lent money to other businesses on the European market.

42. It transpired that Go Factoring advanced funds to counter-parties on insufficient security. The paperwork was incomplete. Borrowers defaulted or used monies for purposes not set out in the loan agreements. As a consequence, the Ruvercap bonds invested in Go Factoring became substantially impaired in value.

43. The precise circumstances surrounding what occurred are unclear. Investigation is still continuing in Switzerland. What is clear, however, is that the information surrounding these defaults should have been made immediately known to the board of Ruvercap and of Quayside. But this did not happen. This information was apparently known at a significantly earlier time to the principals of Ruvercap AG, the Swiss entity. As well as being a promoter and director of the Swiss entity, individual C was also a director of Ruvercap ICAV. Individual C did not immediately inform the board members of Ruvercap ICAV. Neither Individual C, nor Ruvercap AG, the parent company, disclosed either the existence or emergence of these impaired loans for a significant period. At a minimum there was a breakdown in trust. The Appellant's evidence was that all this occurred without prior warning or "red flags" that there might be such an impairment.

44. There was evidence that Quayside did not have full access to information regarding the investments which Ruvercap ICAV undertook. Mr Kevin O'Doherty, Quayside's chief risk manager, said that Quayside never had full access to what "lay beneath" the bonds in which Ruvercap ICAV had invested. Rather, it was the Swiss entity, Ruvercap AG, which had such access and made decisions as to which entities should be lent money or funded.

45. The Tribunal was told that the board of Quayside and Ruvercap became aware of the situation in February or March of 2019. Even then, Mr O'Doherty testified, the information coming from Ruvercap AG was dilatory and evasive. According to Mr O'Doherty: "They delayed, procrastinated, deflected".

46. It is self-evident that an impairment in an investment bond is an extremely serious matter. Clearly, the Central Bank should be made aware at an early stage where there are impaired investments or risks to investors. In this case, the Central Bank officials took the view that there was a delay before they were fully informed of the reasons for the impairment in value. While the Quayside board became aware of the situation in February or March 2019, it appears the Central Bank officials only became fully aware of the reasons for the bond impairment in October, 2019. There was some correspondence from Quayside's lawyers in June and July 2019 indicating: first that the deadline for Quayside's audited accounts of 30 June 2019 could not be complied with; second, stating that due to difficulty in ascertaining the value of the assets in the portfolio, the directors had taken the decision to suspend dealings in the shares of the sub-funds and wind down the activities of the ICAV. There was, too, updating correspondence on the 2nd of September 2019. However, a period of six months elapsed between the board of Quayside becoming aware of the matter and the Bank being fully and officially informed of the underlying reasons for the valuation issues. This was obviously a matter of deep concern.

47. In evidence, the Appellant explained this delay on the basis that he, and the board of Quayside and Ruvercap ICAV, the legal advisors and others, had been seeking ways to remedy the position in the interim period. It was suggested that other members of the Quayside board may have been in touch with the Central Bank, but the Appellant did not engage in such direct contact. The Central Bank was properly concerned.

October 2019

48. From October 2019 onwards, the Central Bank sought to carry out an investigation into what had happened in Ruvercap. One of the persons involved in this investigation will be identified as "Official X". He worked in the Funds Supervision Division, Securities & Markets Directorate of the Central Bank. As a result of what the Central Bank found, it procured what is termed a Risk Management Review on Quayside. Such a review is intended to protect investors by giving recommendations to the fund management as to the steps it should take to reduce exposure.

49. Official X was later highly critical of what had occurred. He concluded that Quayside's level of due diligence, oversight and monitoring had not been sufficiently robust in relation to Ruvercap ICAV. The review, by a prominent firm of accountants, contained recommendations that any change in the policy and procedure manual be reflected in the fund's business plan. The Central Bank issued a Risk Management Programme requirement on 21st of February 2020.

50. During this time, the auditors had carried out a further in-depth investigation into what had transpired. It emerged that other Ruvercap ICAV bonds were also impaired. Individual C, the Swiss principal of Ruvercap AG, was expelled from the board of Ruvercap ICAV. Clearly, members of the Board and investors concluded that he had not fulfilled his fiduciary duties towards Ruvercap ICAV. Mr O'Doherty testified that an investigation is still proceeding in Switzerland as to what precisely occurred. But the Tribunal heard that the losses to all investors may amount to approximately €230 million. Many, but not all, of the investors were Swiss institutions. There is no indication that the Ruvercap investors at any stage challenged the Appellant's position as Chairman of the Board.

51. It is clear that these important events lay at the heart of what followed. The full picture regarding the Appellant's roles only emerged in Mr O'Doherty's evidence. This was not the Appellant's fault. However, he did appear to have difficulties in recounting certain events, giving a full or accurate narrative of what had occurred, and sticking to the point of questions asked.

(2.) Mr O'Doherty

52. Mr O'Doherty, who gave evidence on behalf of the Appellant, is highly experienced and skilled in the area of fund management. As well as being co-founder and Chief Risk Manager of Quayside, he is also highly experienced in the area of fund regulation and management. He holds a Masters degree in collective investment undertakings. He has served as a director of stock market operations, high frequency stockbrokers and aircraft leasing firms. His core competence is in funds. He previously ran a consultancy, where he and others gave courses to individuals in fund regulation and management. During this period, his consultancy gave training to the various administrators in the sector, including Central Bank officials. In the last twenty years, he acted as service provider, director or manager for in the region of 150 to 175 funds.

53. He testified that the appellant was "very inquisitive" of investment managers in funds in which they were both involved. He said the appellant could make decisions on incomplete information and under time pressure when other board members could "freeze" when hard calls had to be made. He had never seen the Appellant make a decision other than in the best interest of investors.

54. Since Ruvercap, Mr O'Doherty had made one PCF application for pre-approval to the Central Bank as non-executive director of a UCITS fund. It went through within the normal timescale. He did not encounter the same difficulties as the Appellant.. His evidence also touched on issues considered later as to the standards to be expected of a PCF board member or chair. Mr O'Doherty testified that it was desirable was to have board members with different backgrounds and different points of view (a) to avoid "groupthink" and (b) to bring their experience from their particular areas of the world to bear. Mr O'Doherty still sits on three boards with the Appellant, two of which are UCITS funds.

Appellant's Relationship with the Bank from 2019

55. The Appellant gave evidence that his subsequent dealings with the Central Bank differed from that of Mr O'Doherty. From October, 2019 onwards, the Appellant encountered

significant difficulties in obtaining approvals. Launching a fund must operate according to tight deadlines. If an individual nominated to a PCF position is not approved, then he or she will be compelled to drop out of consideration for such a function, because of their inability to obtain timely PCF approval for the fund.

Timescale

56. There was no evidence before the Tribunal as to the precise timescale which would normally elapse for PCF approvals in the years 2019 to 2021. However, the Bank did make available one official, Mr Des Ritchie, who although not involved in the events, testified that, in the year 2022, there were as many as 3,500 PCF applications. Of these, some 3,000 were approved quite speedily. The Central Bank's service standard is that 85% of such applications should be approved within 12-15 days. Up to 98% of such applications were dealt with within that timespan. The remaining 2% to 3% were subject to further scrutiny. There was no evidence that the position was different in 2019 or 2020.

Issues with Applications for Approval

57. Prior to 2019, the Appellant had not previously encountered any difficulty in receiving approvals. But, in 2020, he applied for approval for a fund named Gardena. He was informed by the Bank that he would have to undergo an interview. This took place during the Covid-19 outbreak. He was informed the interview would be carried out on Webex or Teams. In fact, it had to be carried out on a mobile phone. During the course of the interview, the Appellant's understanding, either directly or indirectly, was that the outcome of that application, and others, would depend on what emerged during the Gardena interview.

58. But in fact the Gardena application was never completed at all. The Appellant did not receive any response despite requests. He testified he had to withdraw other applications because fund promoters were ready to launch, and he was unable to receive any response from the Bank for applications for approval. He testified that this caused him embarrassment with such fund promoters. He said he was left in suspense for months in relation to Gardena and other funds, including one named Whitefleet UCITS ICAV.

59. In 2020, the Appellant applied in relation to Redhedge UCITS and there was delay and no response. He sought information in relation to the application. He was put in touch with a Ms J in the Central Bank, who was in charge of fitness and probity. She apologised for the delay. But, again, the application was never dealt with. The Tribunal, unfortunately, did not have any evidence from the Bank as to how, or why, this delay occurred. Nor did it have evidence in relation to what was happening in relation to the Ruvercap investigation, either in this State or elsewhere.

The PCF Application Procedure in More Detail

60. At this point it is necessary to describe the application process for a PCF position in detail. As described, the firm in question must carry out its own due diligence in order to be satisfied that the candidate complies with the fitness and probity standards issued by the Bank. These standards include the Fitness & Probity Standards (Code issued under Section 50 of the Central Bank Reform Act, 2010), 2014; Guidance on Fitness & Probity Standards, 2018, issued by the European Central Bank in May, 2018; Reform was also made to the Fitness & Probity Interview Guide issued by the Central Bank of Ireland in June 2021; and the European Central Bank Guide to Fit and Proper Assessments (December 2021).

National Requirements

61. As will be seen, some of these guides post-date the interviews which took place in relation to the Appellant. However, many principles governing such interviews are self-evident. In the 2014 Central Bank Code, there are general provisions regarding competence and capability, (Section 3). At s.3(1), it is said a "*person shall have the qualifications, experience, competence and capacity*" appropriate to the relevant function. (CF *Appendix A*)

62. At paragraph 3(2), he/she must show professional or other qualifications and capability; competence and skills appropriate to the relevant function, through training or experience gained in an employment context; competence and proficiency to undertake the relevant function through the performance of previous functions; sound knowledge of the business of the regulated financial service provider as a whole; a clear and

comprehensive understanding of the regulatory and legal environment appropriate; an understanding of the conflict of interest principles; and compliance with the Minimum Competency Code issued by the Central Bank.

EU Requirements

63. The European Central Bank Guide to Fit & Proper Assessments of 2018 also sets out, at principle 5, that fit and proper supervision is strongly procedurally driven. The supervised entity is in most cases the applicant in the supervisory procedure, and the supervisory relationship is between the European Central Bank, the national competent authority, and the supervised entity. However, it goes on:

> *"The rights of both the supervised entity and the appointee could be affected by a fit and proper decision. In those cases, both will enjoy all the procedural guarantees included in the SSM Regulations and the SSM Framework Regulation, such as the right to be heard."*

64. The "SSM Regulations" concern the European Union aim in devising a single rule book and to enhance convergence of supervisory practices across the whole Union. The European Central Bank is to carry out its tasks in accordance with European law.

65. The European Central Bank Guide also stipulates that a fit and proper assessment should be carried out in a balanced way, weighing up the factors that speak in favour of, and against, the appointee. (See Principle 5.) At s.5 (Interviews), the same guide states that the aim of an assessment interview is to assess (i) what processes and controls which can compliment or verify the documentation submitted by the appointee, and the supervised entity, or (ii) information that has come to the knowledge of the competent authority by another means. The guide provides that the appointee and supervised entity will be given adequate notice in writing of the date, time and place of the requested interview. In the case of what is termed a "specific interview", an outline of the issues to be discussed will be sent to the appointee and the supervised entity in advance.

Procedural Fairness

66. The same guide states that interviews are to be conducted in a transparent, open and objective manner, as the information collected is intended to be used for the fit and proper decision, interviews are conducted in accordance with the principles of procedural fairness, ensuring compliance with the relevant national law. (para. 6.4).
These are of course all normal standards of fair procedures as recognised by the Constitution and applicable to quasi-judicial decision-making bodies. The Central Bank 'Fitness and Probity Interview Guide, June 2021' also provides for
"adequate notice" of issues to be covered.

Questionnaire

67. In response to an application form, the Bank issues a questionnaire. This individual questionnaire (or "IQ") requests personal details, including curriculum vitae information, details of business interests, shareholdings, and character. Provision of false information will have serious consequences. In general, the process involves checking of the questionnaire and references, and addressing requests for further information.

Interview Statistics

68. Mr Ritchie of the Central Bank testified that the vast preponderance of applications proceeded without further scrutiny. Out of the many applications in 2022, just 140 individuals were called for an assessment interview. 75% of those called for such an interview were subsequently approved. Another 8 were called for a further "specific interview". Approximately 32 persons withdrew their applications following the assessment interview.

The PRISM System

69. More generally, where applications are made to the Bank for pre-approval of an appointment to a PCF, the Bank applies criteria and standards known as the "PRISM" system of risk-based supervision (Probability, Risk and Impact System). These standards reflect the impact rating, risk probability and nature, scale and complexity of the financial

service provider generally. A "high impact firm" is the Bank's highest rating. Examples would be large insurance companies, stockbrokers and banks. Were such institutions to fail, there would be a significant affect upon the economy at large. At an intermediary level, the Bank supervises firms or institutions such as funds, retail intermediaries and smaller insurance companies and investment firms. At the lowest level, the Bank assesses service providers such as payment institutions.

(3.)<u>The Evidence of Professor Dirk Zetzsche</u>

70. The evidence which follows on the Central Bank's interviews and decision-making can only be understood if placed in context at this point. For this reason, and for ease of reference and understanding, this decision sets out Professor Zetzsche's evidence out of sequence. As part of the Respondent's case, the Tribunal heard evidence from Professor Dirk Zetzsche, who was asked by the Central Bank to provide an expert report on matters relating to the expertise expected of PCF applicants in UCITS. It is not an exaggeration to say that he is a world authority in this field. He has co-authored a major textbook. He has lectured in many of the major universities. He is currently based in Luxembourg. It will assist the reader if this evidence is set out at this point. It may also be convenient to consult *Appendix A* and *Appendix B*, to which reference is made below.

71. What follows can only be a brief summary of remarkably detailed and rigorous expert testimony on this important subject. A number of references to learned textbooks have been omitted. The précis seeks to convey the main thrust of this witness's evidence as to his view on what knowledge, skill and experience is to be required of a non-executive director or chair of UCITS.

72. This outline is rather detailed, but it might be said that the testimony may have some value over and beyond this one case. It is certainly necessary to understand the questions raised by the Central Bank official who carried out the interviews now described presently.

73. The Tribunal notes that this evidence did not directly touch on the process which was deployed by the Central Bank in the Appellant's application.

74. Neither it is clear that this inheres in the Central Bank's standard practice. By way of example, the witness set out that holders of the two PCF positions in question should undergo 5 to 6 days training each year. There was no evidence that such a requirement is universally applied or followed in the case of every 'Irish' UCITS. Nor was there evidence that every UCITS board approved by the Central Bank actually included two or three qualified lawyers as the Professor suggested should be a norm. Whether this expert evidence on the expertise expected of a board member reflects that of Mr Des Ritchie of the Central Bank – who did testify – is considered later.

(i) <u>Evidence on UCITS Framework</u>

75. Professor Zetzsche testified that the UCITS framework assumes that retail investors rely on a UCITS (that is a fund) to diversify their exposure to financial assets, given that they tend to be "under-diversified" in light of typical over-investment in real property such as homes. The framework is predicated on the concept of investment in a diversified pool of liquid financial assets. Management capacity is invested exclusively in the ManCO, (management company), which, in turn, often outsources portfolio management to an external asset manager, potentially located in a different country than the UCITS, (i.e., the fund), and the ManCO.

76. Investors receive periodical information through annual and semi-annual reports, as well as a regularly published Nett Asset Value (NAV) to inform them on the performance of their investment. Each investor enjoys what is termed an "redemption right". This is the right to receive upon demand, the cash amount equivalent to the NAV out of the collective assets held by the fund, based on the units they hold.

<u>(ii) Distinctions between a UCITS and an AIF</u>

<u>A UCITS</u>

77. There are significant differences between a UCITS and an AIF. At risk of repetition, a UCITS must be, and remain, highly liquid. Such liquidity in its financial assets is a critical prerequisite of the investor's redemption right. In the absence of liquidity, the fund cannot sell assets on the investor's redemption request. In turn, investors would not

be able to redeem their shares, despite their right to do so. As a consequence, UCITS are required to hold very large liquid financial assets. This requirement is that such assets should be 90% liquid in cash or securities. This ensures that in the case of a redemption request, assets may be sold to satisfy the investor's request.

An AIF

78. Again, at risk of repetition, an Alternative Investment Fund ("AIF") is less flexible. It is not subject to the same high degree of regulation. The term AIF comprises all investment funds, other than a UCITS. These include venture capital and private equity, hedging, commodities, and also funds engaging in diversified retail investment activities, which do not meet the strict UCITS investment criteria. An AIF is an investment fund with a defined investment policy in all types of assets which may raise money from professional or private investors and which is not authorised under the UCITS directive.

79. The UCITS Regulations mandate the frequent calculation of net asset value. This is to facilitate the exercise of an investor's redemption right. By contrast, AIF management directive allows the AIF management to stipulate the frequency of such actions in the funds constituting documents.

80. As long as assets are publicly traded with market prices readily available, the NAV calculation is a mathematical exercise. The price of an asset is multiplied by the number of assets of this type held in the fund. If assets are illiquid however, NAV calculation may require a complex determination of valuation criteria. In either instance, the management of such funds will require skill in the identification of criteria for valuation in the event of request for redemption.

(iii) Representation of Investors

81. The witness testified that the board of a UCITS has broad responsibilities, and is the sole representative of the investors, vis a vis the Management Company. It determines the resources of the UCITS Management Company devoted to serving the UCITS, and the quality of services provided by the Management Company.

82. The main task of a UCITS board therefore is in the field of representation, *inter alia,* managing conflicts which may arise among the service providers.

(iv) Oversight

83. The Board of an externally managed UCITS is in charge of monitoring the service providers ("oversight"). Among the duties will be:

    a. to hire and scrutinise the service providers, including the Management Company, depository, asset manager, and distributors to ensure that competent staff are delivering diligent and timely services to the UCITS. This includes challenging the reports and risk assessments;
    b. to maintain an overview of potential impacts on the value of the fund;
    c. to ensure potential impacts are properly monitored. Delegated portfolio managers must be included in the monitoring process when an investment policy comes with increased valuation risks, such as in funds with partially or potentially illiquid assets;
    d. to adjust financial methods, tools and remedies where deficiencies become apparent; and
    e. to ensure the investors' interests are paramount at all times.

84. Professor Zetzsche testified that a lack of oversight may lead to insufficient risk management, inadequate liquidity management, poor regulatory oversight, and sub-optimal conflict management. In his view, non-executive directors must have sufficient knowledge to challenge the service provider's risk assessment and the quality of the services provided.

(v) Crisis Management

85. The Board of an externally managed UCITS also assumes important functions with regard to crisis management, such as complaints from investors; where two service providers disagree on service charges; where there are investment improprieties, errors in valuation, or where part of a portfolio becomes illiquid due to unforeseen events.

(vi) Knowledge Expected of Non-Executive Directors and Chair

86. The witness told the Tribunal that directors are asked to update their regulatory knowledge regularly, depending on development in financial regulation. Courses and certificates are said to be frequently available for this purpose.

87. He testified that non-lawyer directors should invest at least three to five days annually in continuing legal and regulatory education. More time should be invested when important legal frameworks are introduced or revised, such later instruments such as the UCITS V Frameworks from 2015 to 2017, and reviews of UCITS liquidity risk management in 2019 to 2021. Market participants should critically review their liquidity risk management frameworks, and sustainable finance disclosure regulation.

88. Before returning to the evidence of Professor Zetzsche, a few other matters need to be set out.

UCITS Investment Restrictions

89. The topic of UCITS investment restrictions is central and requires description in some detail, even at the risk of simplification.

90. As will be described later in this decision, the Appellant was subject to interviews by the Central Bank on his skill set as an investment manager. Ultimately, the Bank's findings contained criticisms of the Appellant's knowledge because of his apparent unfamiliarity with a number of terms which are said to be part of the common parlance in the world of UCITS investment funds.

Trash Ratio

91. These two terms include "trash ratio"; and "the 50/10/40 Rule". These were described in evidence as "*very basic legal pillars*". In essence, the underlying notions can be conveyed in two words, that is liquidity and diversification. The first of these is liquidity.

92. The important term of 'trash ratio' requires some explanation. The Appellant was asked at the specific interview about his understanding of the term. He stated he was unfamiliar with it. Trash ratio "liquidity" lies at the heart of this form of fund management.

93. The general rule is that the investment portfolio should be composed of highly liquid assets. This is set out in Regulation 68(1) of the Irish UCITS Regulations (S.I. 352/2011) (See *Appendix B* to this decision). It is designed to ensure that the financial assets held by a UCITS can be sold on any given day, save designated weekdays and holidays.

94. Liquidity is, therefore, achieved by investment in readily realisable assets such as shares, bonds or other categories of bond as designated in the rules. (Regulation 68(1)(a) – (d)). Such "eligible assets" are identified by reference to a list contained in Article 4(1)(2) of the Market in Financial Instruments Directive 2014/65/EC (MiFID II). Essentially, the assets are available in regulated and transparent markets within the European Union, although some exceptions are permitted.

95. But to this general rule there is an exception. Regulation 68(2)(a) of the Irish UCITS Regulations allows for derogation from the formal liquidity requirement in limited circumstances. It allows a fund to hold ancillary liquid assets other than those designated as "highly liquid assets" which are deemed eligible under Regulation 68(1). These may be transferrable securities or money market investments other than those referred to in Regulation 68(1). However, no more than 10% of the assets can be held in such securities. This is the "trash ratio." The net asset value of the UCITS is calculated by way of the published price of the asset.

96. The UCITS rules do not require a constant supply and demand flow for compliance with Regulation 68(1). Instead, by way of exception, the rules deem a listing on a regulated recognised market as being a sufficient proof of liquidity in certain carefully defined circumstances. Fund investment in an EU market, other than a defined market under MiFID, will require very close investigation and supervision of liquidity and regulatory compliance, however.

97. The existence of this "trash ratio" allows for the flexibility in circumstances where:

(a) A transferrable security is delisted; or

(b) When such a security may be expected to be listed in the future; or

(c) In unqualified markets under MiFID or equivalent national, or third country frameworks. This, however, is all subject to close investigation and confirmation in compliance with the general procedures laid down.

98. Thus, the trash ratio addresses a permitted limit of somewhat less liquid assets which may be acquired by a UCITS, as described earlier, (See Article 50 EC UCITS Directive 2009/65/EC, and Regulation 68 of the Irish 2011 Regulations, S.I. 352/2011; and Article 1(2)(a) of the EC UCITS Directive 2009/65/EC, as transposed by Article 68 of the Irish UCITS Regulations, S.I. 352/2011.

The 5/10/40 Rule

99. By contrast to liquidity, the "5/10/40 Rule" addresses diversification of risk in the investments portfolio. The thinking behind this is to spread risk exposure amongst a wide variety of investments. The intention is to avoid what are termed "idiosyncratic risks". The minimum diversification of a UCITS portfolio is based on Article 52(1) and (2) UCITS (2009/65/EC), as transposed by Regulation 70(1)(a) of the Irish UCITS Regulations. (S.I. 352/2011).

"5"

100. The number "5" refers to the rule that a UCITS shall invest no more than 5% of its assets in transferrable securities of money or market instruments issued by the same body. Dividing 100% by 5% will result in a minimum of 20 different financial assets in which a UCITS will generally invest. (See Article 52(1) UCITS Directive; transposed in Regulation 70 of the Irish Regulations, S.I. 352/2011).

"10/40"

101. As in the case of the trash ratio, however, there is a limited exception to this general rule. This is identified in Article 52(2) UCITS Directive 2009/65/EC, and

Regulation 70 of the Irish Regulation S.I. 352/2011. These provide that a member state may raise the 5% ceiling to that of 10%. However, the total value of the transferrable security and money market instrument held by a UCITS in the issuing bodies in each of which it invests more than 5% of its assets, shall not exceed 40% of the assets of the UCITS.

102. Irish fund regulators have implemented the 10/40 rule. The effect of this is that the minimum diversification of a UCITS will be calculated by the following calculation.

First: 10% of 40% which equals 4;
Second: 5% of the remaining 60% which equals 12.

103. Thus, adding 4 plus 12 together there will be a minimum total of 16 different assets. Usually, a UCITS portfolio will actually comprise 20 or more transferrable securities.

104. The UCITS framework does, however, allow some further deviation from the 5/10/40 rule for certain categories of funds, such as UCITS investing in State backed securities. This may allow for what are termed "country focused" UCITS strategies, for example, in States with a high market concentration in certain financial products.

105. For present purposes, it is unnecessary to go into further detail, other than to point out that Regulation 71 of the EC UCITS Regulations entitled Member States to raise the 5/10% limit in other instances, limited to ancillary liquid assets, such as bank deposits; the acquisition of moveable or immoveable property by investment companies (including an ICAV); and in the case of what are termed "feeder funds" which may invest 85% in units issued by a "master UCITS" which may be unlisted, and 15% in ordinary liquid assets.

106. A "feeder fund" is an investment vehicle which pools capital commitments of investors, and invests or "feeds" such capital into a collective or "umbrella" master fund. This master fund is charged with placing and supervising investments held in the portfolio.

"130/30"

107. Certain structured UCITS also engage in investment strategies such as the one known as "130/30". These are perceived as reducing market risk by virtue of investment in financial derivatives, predicated on the idea of generating a steady return based on investment in "long positions" (130) and "short positions" (30) on the market. A financial derivative is a financial instrument which is linked to a specific financial instrument, indicator, or commodity, through which financial risks can be traded in financial markets in their own right.

(vii) The Importance of these Rules

108. Returning to the evidence of Professor Zetzsche, he testified that he would expect a non-executive director of UCITS to be familiar with what he described as "*these basic protection principles*", and the potential serious consequences which might arise from a breach of these rules. He considered the "trash ratio" and the 5/10/40 requirements to be "basic" and would expect board members to be aware of whether or not there were exceptions to these principles. He would expect a Chair of an externally managed UCITS to be familiar with the extent of permitted derogations from the general rules, for example, in the case of high concentration in the case of country- focused strategies. Whether these terms are universally recognised in the Irish sector is unclear.

(viii) The Range of Legislation and Codes: A Question

109. Underlying this case there lies a question. Precisely what knowledge of the regulatory environment is expected of an applicant for a PCF position? Among the myriad of instruments governing the operation and functioning of UCITS Professor Zetzsche referred to the following pieces of EU legislation, and national codes. Full descriptions are given of the most relevant:

- Commission Directive 2007/16/EC, 17th March, 2007, implementing Council Directive 86/611/EC, on the co-ordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferrable securities, (UCITS);

- Directive 2007/16/EC;
- The fundamental Directive 2009/65/EC, on the co-ordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) (Recast);
- Directive 2010/43/EU;
- Regulation No. 583/2010;
- Directive 2010/42/EU;
- Regulation No. 584/2010;
- The basic European Communities Undertakings for Collective Investment in Transferrable Securities Regulations 2011 (S.I. 352/2011);
- Regulation 20016/1212;
- The Market & Financial Instruments Directive 2014/65/EC ("MiFID II);
- The UCITS V Framework 2015 to 2017;
- Review of UCITS' Risk Management 2019 to 2021 (ESMA) European Securities & Market Authority Sustainable Finance Disclosure Regulation & Taxonomy Regulations 2020 – 2022;
- Additionally, it will be noted that, in June, 2021, the Bank issued a Fitness and Probity Interview Guide, to which reference will made. Behind these it will be also noted that the fundamental Irish regulatory regime is contained in European Communities (Undertakings for Collective Investment in Transferable Securities) Regulations 2011, S.I. 352/2011, which transposes and implements various Articles of EC Directive 2009/65/EC.

110. The process upon which the Appellant had embarked was the rigorous but ordinarily routine application for approval for the post of PCF-2 and PCF-3. As mentioned earlier, Professor Zetzsche testified as his personal experience that two out of three directors on the board of an externally managed UCITS would usually be lawyers, or have in-depth regulatory experience as trustees, former members of National Competent Authorities, or former compliance and/or risk managers. Such board members should be familiar with such regulatory and financial matters as members of the Board of a Management Company. The Tribunal did not have any evidence regarding how or whether this experience is reflected in all or most Irish UCITS funds. In short, there was insufficient evidence before this Tribunal on standards and expertise to be

expected in every Irish regulated UCITS. This is not to say that there is any actual deficit in those standards or expertise as applied in practice.

111. Professor Zetzsche himself testified that regulation in this field is a "moving target", rendering it important to stay up to date with regulation changes, such as liquidity, sustainable finance, and liquidity management. He testified that, while it is not the case that board members of externally managed UCITS require more knowledge than board members of both entities, they would be expected to meet the same high standard as to regulatory knowledge.

112. The Tribunal poses the rhetorical question, whether all persons performing controlled functions regulated by the Central Bank have this familiarity? There was no evidence that this would be so. The Tribunal also notes that the Appellant's other controlled functions were unaffected by the impugned decision.

(ix) "Connected Party" Transactions

113. Returning again to the evidence, Professor Zetzsche referred to "connected party" transactions. Under the UCITS framework, Management Companies are obliged to identify, prevent, manage or disclose conflicts of interests and to establish appropriate criteria for determining the types of conflict of interest whose existence may damage the interests of the UCITS or its investors. This will necessitate the identification and prevention of conflicts whilst also ensuring that such disclosure are listed and identifiable so as to remedy a conflict.

114. From a regulatory point of view, a UCITS is a retail investment product. Disclosing that a disadvantageous decision has been taken does not change the fact that once money has been invested, the disadvantage takes effect in the investor's portfolio value. The framework however recognises there are limits to disclosure. A Management Company must nevertheless try to avoid conflicts of interest and when they cannot be avoided, must ensure that the UCITS it manages is fairly treated.

115. Additionally, "fair treatment" means that in the case of a conflict of interest, the UCITS will receive what is fair, considering the value of its assets. The obligation is to ensure that the respective transactions take place on fair terms as if they had taken place among independent third parties, that is, "*at arm's length*".

116. However, Professor Zetzsche acknowledged that the role of the board of an externally managed UCITS with regard to connected party transactions is not explicitly defined by EU UCITS rules. In order to fulfil its role, such a board, generally, take the views of three to four different service providers including: the fund sponsor, i.e. the person who is effectively the promoter; the Management Company, the portfolio manager and also the depository, all by way of written reports. At all stages the interests of investors must be seen as paramount.

(x) Competency in Share Valuations

117. Accurate valuation of assets and liabilities is an essential requirement. This is necessary to ensure that fair, correct and transparent pricing models and valuations. Various systems are used in order to comply with the duty to act in the best interests of the unit holders. In line with Article 85 UCITS Directive, jurisdiction over the valuation of assets is to be carried out according to national law.

118. A "responsible person" is to value the assets of a UCITS in accordance with criteria set out in a Schedule to the UCITS framework unless an alternative method of valuation has been agreed in advance with the Central Bank, or the Bank has, in advance of a valuation, required the responsible person to adopt an alternative method. (See Regulation 108 of S.I. 352/2011, Value of Assets); Central Banks (Supervision and Enforcement) Act, 2013; Section 48(1) (Undertakings for Collective Investment in Transferrable Securities Regulations 2019, Chapter 8) (cf. Regulation 36). We pause to make the observation that, as an example of the witness's meticulous detail he referred, on this one topic alone, to, inter alia; 6 legal instruments.

119. The UCITS framework allocates responsibility for valuations to the Management Company. This duty may be delegated to an external service provider. The delegation of

valuation to the depository and/or an external service provider as competent person is often the case in an Irish UCITS.

(xi) Delegation of Function

120. Professor Zetzsche testified that he was informed by the Central Bank the delegation of valuation to the depository and/or an external service provider as Competent Person is "often" the case in an Irish UCITS. He testified that, for this purpose, the division of functions between a Management Company and an externally managed UCITS is relevant to understanding the role of board members.

121. The appointment of a "Competent Person" is at the core of the relationship between the UCITS and the management company. The board of the externally managed UCITS must ask to be informed if the Competent Person in charge of valuations is about to change. It should ask for evidence that the person is competent to perform his/her function of relevance for the UCITS including being made aware of the investment strategies, as well as the trash ratio, and interest in transferable securities traded at markets other than regulated markets under MiFID which may potentially be less liquid.

122. To ensure this work is carried out effectively, the board member must ensure consistency of presentation and disclosures to the board, and he/she must ensure there are explanations for changed assumptions. They must ensure that other communications outside the boardroom are made known, and also make known the views of the depository in reports. Board members must understand reliance on insurance coverage, comment on the remarks of auditors, have regard to investor complaints, and look to regulatory enquiries. In case of doubt, the board of an externally managed UCITS will err on the side of caution, and perform the same checks and controls which the Management Company is to exercise. The Professor provided a series of helpful illustrations, in the sense of varying investment strategies. It is not necessary to explain these in detail.

(xii) Liquidity Management

123. Liquidity management is the process of ensuring that a fund has the cash on hand to meets its financial obligations as they become due. Such management is essential to ensure that the investor's redemption right may be exercised effectively, and to avoid a closing of the fund upon the investor's redemption request, which may impact on the stability of other UCITS, and might also prompt a run of such funds.

124. For the purposes of "*ordinary liquidity management*", the average liquidity needs of the previous 200 days is considered necessary for projecting daily liquidity in the fund; with special emphasis on factors such as particular days of distribution/dividend events; fees being paid to service providers; and days where a large investor, such as a pension fund may typically redeem shares to meet their own liquidity needs.

(xiii) Extraordinary Liquidity Management

125. "Extraordinary liquidity management" may arise when a fund faces "*extraordinary liquidity situations*" generally in relation to assets. By way of illustration, such situations arose as a result of the imposition of sanctions arising from the Ukraine War, or insolvency as in the case of the Banks.

126. Liquidity management is seen as being a separate agenda item and a person who does not understand the basics of liquidity management as well as the pitfalls of projections will not be able to follow the discussions in the boardroom. A board member of an externally managed UCITS should have knowledge of daily liquidity management and a basic knowledge of extraordinary liquidity management and also a knowledge of risk management, regarding liquidity.

(xiv) Risk Management

127. Risk management comprises the process of identifying risks which may affect a value of the investment fund, and where possible, mitigating the effect of such issues. The board of directors must scrutinise risk management reports, and should challenge

their content to ensure that they reflect all matters relevant and which should be known to the board. (See *Appendix B*)

128. The UCITS framework addresses risk management. A chief risk manager is to advise the board of a Management Company as regards the identification of the risk profile of each managed UCITS. The risk management reports should be furnished at a frequency determined in the "Risk Management Policy", usually quarterly. The board of directors must have regard to the consistency between the current levels of risk, and the risk profile agreed for that UCITS; compliance with each managed UCITS, with relevant risk limit systems; and the adequacy and effect of the risk management process.

129. However, the role of a board of an externally managed UCITS such as an ICAV in risk management is not explicitly defined by EU UCITS rules. Professor Zetzsche testified that, in his assessment, the regulatory knowledge of non-executive board managers of externally managed UCITS should be on the same level as that of non-executive directors of UCITS Management Company. It would be expected that board members would have knowledge of the checks and balances that should take place, but only that the perspective is "*more granular*".

130. Risk management does not require the UCITS to avoid all risks, but rather foreseeable risks which should be identified, assessed and managed. The main purpose of this is, obviously, to prevent unnecessary potential future losses of investors. If risks can be avoided at low cost, for instance by selling decision, the board may resolve that avoidance is in order by selling, and instruct the portfolio and risk managers accordingly. Alternatively, the risk cannot be avoided in which case the board may seek to minimise its impact on fund performance and investors, by measures such as hedging, diversification or enhancing cash positions temporarily.

131. Professor Zetzsche expressed the view that *each* board member including non-executive directors and the chair of an externally managed UCITS must have sufficient knowledge to read and understand the reports; discuss the risk profile of each managed UCITS; and take responsible decisions to mitigate the impact of risks on investors. The word "*each*" is italicised.

132. This knowledge could be achieved by awareness of the various risk categories of relevance to the UCITS, e.g., market liquidity and operational risks; the various steps to be taken in order to assess risk, the handling of "risk buckets", (i.e. for parts involving low, medium and high risk), potential screening of methods for certain risk categories, and potential remedies with regard to risks that have materialised.

133. The basic principles are contained in the Irish European Communities (Undertakings for Collective Investment in Transferable Securities) Regulations 2011 (SI No. 352/2011), in particular, Regulation 68 (permitted investments), and Regulation 69, (risk management) (See *Appendix B*). In total, the Regulations comprise some 269 pages of highly technical material. These include the matters upon which Professor Zetzsche has furnished his expert opinion and, as will be seen, were the subject of detailed questioning in the Appellant's assessment process which has been described. We return now to the narrative of the Appellant's evidence.

PCF Application in June 2021

134. In June, 2021, the Appellant submitted further applications for the two PCF positions in Redhedge. He again provided the relevant documentation. It was only on the 30th August, 2021 that he received a notice of request to attend a standard Assessment Interview, pursuant to s.23(2) of the 2010 Act. He was informed the interview would take place via WebEx video call on 8th September 2021.

Invitation to Assessment Interview

135. The invitation letter stated that the interview would examine, *inter alia*, the following:

i. Your responsibilities to perform the controlled function;
ii. Knowledge, skill and experience that you will bring to the role;
iii. Your understanding of the regulated financial service provider's business model, and the sector in which it operates;
iv. Your awareness and understanding of the wider business, economic and market environment in which the regulated 10 financial service provider operates. (Central Bank of Ireland – Restricted)

v. Your view of the main risks facing the regulated financial service provider, and the role they play in managing them;

vi. Your ability to interpret the regulated financial service provider's financial information, identify key issues based on this information, and put in place appropriate controls and measures;

vii. Your ability to assess the effectiveness of the regulated financial service provider's arrangements to deliver effective governance, oversight and controls in the business, and, if necessary, to oversee changes in these areas;

viii. Your awareness and understanding of the regulatory framework in which the regulated financial service provider operates, and the regulatory requirements and expectations relevant to the PCF role;

ix. The Central Bank's expectations of you in performing the PCF role;

x. Concurrent responsibilities potentially impact on your ability to carry out a role.

136. Self-evidently, the Assessment Interview is an important administrative adjudicative process. An applicant is entitled to be made aware of the matters to be raised. Such applicant is also entitled to a neutral and objective assessment. These decisions can affect a person's professional reputation and livelihood. Two issues must now be considered. First, did the Central Bank actually give the Appellant a fair notice of what was to be discussed at the Assessment Interview? Second, was that Assessment Interview fair?

137. Prior to the interview, the Appellant requested in writing whether he could have a notetaker. He was informed this would not be permitted. This would appear to reflect the rules of such interviews. Why such a rule should exist is not clear from the Fitness & Probity Guide. But the Guide does set out that "minutes" of such an assessment meeting *will* be taken on behalf of the Bank. These minutes are said to be for "internal purposes".

The Assessment Interview

138. The Appellant's case is that what actually transpired at the assessment interview on 8th September 2021 was far at variance from what was set out at the invitation. He said that he had insufficient and inappropriate notice of the material which the Central Bank actually intended to cover. He testified that he objected to the fact that he was asked

a series of extremely detailed questions on Ruvercap without prior notice, and in circumstances where, if he had had such notice, he would have been in a better position to respond.

139. One of the interviewers was Official X, who had been involved in the Quayside/Ruvercap investigation on behalf of the Central Bank, and the criticism of Quayside's management.

140. The interview went on for two hours on WebEx. On the screen the Appellant could see two officials. But he could not see Official X, a supervisor in the Fund Supervision Division, Securities & Markets Directorate. Official X's screen remained blank. This was never explained.

141. The Appellant's contention was that, while he was being asked to carry out an assessment interview with regard to Redhedge, it was more an investigation or critique.

142. Much later, the Appellant received what were said to be the "interview minutes". He was not given these in a timely way, in order to correct any errors. The minutes recorded that the interview took approximately 2 hours. The minutes are a highly unusual document. Some sections were divided into three columns, one setting out "Questions", the second "Responses" and the third an "Expected Response" from the Appellant.

143. The first section of the interview, as recorded, consisted of general questions and answers generally in relation to an applicant in performing a PCF role. But the second section was apparently conducted by Official X. This part of the interview referred to what are called "MSD questions". Presumably the Management Supervision Directorate. The Appellant was then asked a series of extremely detailed questions relating to the relationship between Quayside and Ruvercap ICAV. These included:

i. Why the Ruvercap investment advisors had been appointed?
ii. Whether it had always been understood that the investment advisors in Ruvercap AG would be running the fund?
iii. What due diligence had been carried out on each investment advisor?
iv. The identity of the investor advisor's representative director on the ICAV board?

v. How the Appellant had satisfied himself that this due diligence was sufficient and satisfactory?
vi. Whether he had learned any lessons since that time?
vii. Why representatives of an investment advisor had been appointed to the ICAV board?

144. The Appellant's testimony was that he was extremely surprised that, on more than one occasion, Official X referred to Redhedge potentially selling either listed or *unlisted* bonds. He testified that, on numerous occasions, he tried to make it clear that the fund would be highly liquid. In order for such a UCITS fund to operate, it had to be. He denied that he had ever mentioned the question of unlisted securities. In fact, he stated that the portfolio would only consist of listed bonds. Ultimately, he found out that there were never any unlisted bonds in the fund portfolio.

Questions and Answers

145. A number of other questions reflected what can only be seen as a particular line of inquiry by the official which had not been notified to the Appellant, and which could not be said to naturally flow from the notified issues. At Question 4 of the SMSD questions, the Appellant was asked:

> *"Does the appointment of investment advisors, who are in many cases unauthorised, undermine good governance of the ICAV? Furthermore, can such entities, if unauthorised, escape regulatory responsibility if matters go wrong – for investment advisors is this a way of avoiding regulatory oversight and responsibility?"*.

146. His recorded response was recorded as:

> *"The applicant advised that such arrangements were allowable under the regulations. However, he would be wary of being involved with such arrangements again. When asked how he would ensure such arrangements would stay in compliance if he was in such a fund in the future he re-confirmed that he would chose to avoid such funds in the future. He did not provide any lessons learned"*.

147. At Question 9, the recorded question was:

"I re-call that you considered yourself and [sic] independent director of the Ruvercap ICAV when you were the Chair of the Investment Manager/AIFM. How did you consider yourself independent given your position with the Investment Manager/AIFM?"

148. The Appellant's response was recorded as:

"The applicant stated he had no controlling interest in the AIFM. He considered himself independent on the fund ICAV board, as he was a non-executive director on the board of the AIFM that the ICAV had appointed. Hence, he saw no conflict of interest with being on the board of the ICAV and on the board of a delegate of the ICAV. He is no longer a director of the AIFM (Quayside). He stated that all his positions are now independent and non-executive."

149. At Question 10, the Appellant was asked:

"How was this conflict of interest managed while also ensuring the necessary controls and reporting was in place for you to act as a full director on both the ICAV and AIFM Boards?".

By reply he stated that there was no conflict.

150. Some of the later questions were similarly extremely detailed. One of them had a ten-line preface, and then involved sub-questions from (a) to (f). Implicitly, these questions again touched on issues which had arisen in Ruvercap.

151. At Question 16, the Appellant was asked whether, from the supplement to Redhedge's prospectus, the questioner knew that the fund invested in unlisted corporate bonds, "higher yielding" debt securities. The question purportedly quoted the prospectus as stating that the fund might invest up to 45% of its net assets in "higher yielding" debt securities. A series of supplementary questions were then recorded. These included queries as to how the price of these unlisted and high yielding bonds was to be obtained; what processes and controls were involved to ensure the securities in question would be up-to-date, and are provided by or obtained from a source that the responsible person considers to be reputable and reliable, and kept the reliability under check. The appellant

was also asked whether there were any independent assessments of competent persons' provided prices, e.g. an evaluation committee.

152. Beneath, a further recorded question records *"UCITS Regulations 37.1 in relation to the role of responsible persons"*. This is evidently a highly detailed and technical matter.

153. A further question, Question 17, consisted of almost entirely one page predicated on liquidity risk for high yield bonds.

154. At Question 22, the Appellant was asked:

> "*Reporting significant or potentially significant matters to the CBI [Central Bank of Ireland] is part of a PCF remit? In relation to Ruvercap, it appears that the CBI were only informed of the issues that were first known in February (potential fraud at GoFactoring) exposure to fixed assets and not short-term factoring invoices) when we requested a meeting in October.*
> *Given that you were on the board of both the ICAV and the AIFM, why were we not informed of these issues before this meeting that the CBI requested? (ii) Do you feel you met the fitness and probity standards in this regard?*
> *(iii) How will you ensure that your delegate in MANCO will meet the following UCITS regulation with respect to Redhedge?*
> *The management company shall notify the Bank in writing immediately that the management company becomes aware of ... any situation or event that impacts, or potentially impacts, to a significant extent on the relevant UCITS, or on the management company"*.

155. The Appellant's recorded response was to the effect that he did not make decisions on his own but, rather, decisions were made collectively as a board, not for him as an individual PCF, and that they relied on information from their legal advisors. He stated that they (the board) did not inform the CBI because they could not come to a conclusion. The appellant is recorded as saying that *"yes maybe he could have done things differently – he did not specify how* [sic] …".

156. At the final question, Question 22 (although the numbering was incorrect, it ought to be question 23, but in any case was the last question asked) the Appellant was asked how he would ensure there was engagement and follow-up between the Ruvercap ICAV board and the management company, and between the management company and the investment manager? The "question" then continued:

> *"With Ruvercap it appeared that a lack of a proactive role in the oversight of the investments, and over-reliance on the delegate, Ruvercap itself allowed the investment exposure to drift what was envisaged* [sic] *to a position where 50% looks to be unrecoverable. Therefore this leads to a general shortfall in governance. Having completed your due diligence, what resourcing, reporting controls and skill sets would you have in place to ensure that this does not re-occur, especially in relation to unlisted and less liquid assets?"*

157. The Appellant's recorded response was that he received information directly. He took no responsibility for the issues that arose with those funds, and questioned the CBI if they thought that reporting and information being received by Quayside did not meet the CBI's requirements; and what would the CBI expect? (The CBI stated that they would expect that governance firms would have policies and procedures in place to ensure that they received complete and accurate information). The recorded response ends *"The applicant had no lessons to learn in terms of Ruvercap".*

158. In evidence, the Appellant stated that during the entire course of the interview Official X spoke to him from a blank screen. He found this an uncomfortable experience. In his view, he had not received sufficient notice of these very detailed questions regarding Ruvercap, and would have responded in more detail had he had notice. He testified that the answers that were recorded in the minutes did not accurately reflect what he had said. For example, he had repeatedly made clear that the fund portfolio would not deal in high yield non-listed bonds. Finally, the Appellant considered that it was unfair that he did not have a stenographer.

159. It bears repetition that the Appellant did not receive a copy of these minutes until a much later stage in the assessment process, and at a time when he did not have the opportunity to correct or supplement what had been recorded as his views.

Invitation to Specific Interview

160. Two weeks later, on the 13th September 2021, the Central Bank sent the Appellant an invitation to attend a Specific Interview, pursuant to s.23(2)(e) of the Act. He was informed regarding the composition of the interviewing board. The notice he received would be that the interview would cover:

- Your previous employment history;
- The knowledge, skill and experience that you would bring to the roles of Non-Executive Director (PCF-2) and the Office of the Chairman of the Board (PCF-3);
- The competency requirements for the proposed roles of Non-Executive Director (PCF-2) and the Office of Chairman of the Board (PCF-3), at the proposing RFSP;
- The Regulatory requirements and expectations relevant to the proposed roles of PCF-2, (Non-Executive Director) and PCF-3 (Chair of the Board of Directors) at the proposing RFSP;
- Your understanding of the role's responsibilities and expectations of a Non-Executive Director (PCF-2) and the Office of Chairman of the Board (PCF-3);
- The responses you provided in your individual questionnaire;
- Your view of the main risks facing the proposing RFSP;
- Your roles as Non-Executive Director and Chairman at Quayside Fund Management Limited;
- Your understanding of the Fitness and Probity regime and the obligations thereunder; and
- Any other matters.

161. The Appellant was informed that this interview would be recorded by a stenographer, and that he would be entitled to have a representative present.

162. Under the heading "possible outcomes", a Central Bank official wrote that the following may occur:

- The Central Bank may request further information from you or from other entities, including conducting another interview if necessary, and/or then;
- The Central Bank may approve the Application; or
- The Central Bank may issue a "Minded to Refuse" letter to you, and the proposing RFSP (i.e. Redhedge). If this occurs, you and the proposing RFSP will be given an opportunity to respond to this letter, *and to provide submissions in writing to the Central Bank*. (Emphasis added) The application will then be decided upon by a decisionmaker who has had no prior involvement in the matter. There is also a full right of appeal of this decision to the Irish Financial Services Tribunal under section 27.

163. The Tribunal pauses to emphasise the reference in the latter to the opportunity to provide submissions.

The Specific Interview – The White Folder

164. The Specific Interview was scheduled for the 28th September, 2021. The previous afternoon, the Appellant received a book which was later called a "white folder". Apparently, he received this by email. In evidence, he had no recollection of what was in the book. Notwithstanding that, by that time, his solicitor was on record as representing him, the solicitor did not receive a copy of this email. Clearly, it contained material to which reference was intended to be made during the course of the interview.

165. 165. The Tribunal finds it surprising that the Appellant's solicitor was not sent a copy of this email, or provided with a copy of the folder. The Appellant's recollection was that, during the interview which took place on the following day, Official X made a series of references to the regulations governing UCITS, which the appellant inferred were contained in the white folder, but which he was not allowed to refer to.

Procedure

166. The interview began with another official, Official Y, reading out a prepared statement as to the procedure. Thereafter, questions were put to the Appellant in a

structured way. During the Tribunal hearing, the Central Bank was asked whether it had a template for this interview. It should be said that, during the course of the interview, Official Y referred to various sections. The Tribunal did not receive such a template.

167. The interview was very lengthy. With breaks it lasted the entire day. The Appellant's main concern, expressed to the Tribunal, was that, yet again, the focus of the interview was in relation to what had occurred at Ruvercap.

168. The Tribunal notes that the transcript of the actual interview amounts to 224 pages. While Ruvercap and Quayside were mentioned early in the interview on one or two occasions, in fact, almost one-half of the whole interview consisted of questions and answers regarding Quayside, Ruvercap, and what was said to have occurred there.

169. The Appellant was also asked a series of detailed questions in relation to the UCITS Regulations. But as will be seen later, the Regulations are very detailed indeed. They run to some hundreds of pages.

170. At various stages, the Appellant was again asked questions regarding "high yield unlisted bonds". The Appellant told the Tribunal that these questions were confusing. The issue was mentioned on a number of occasions, despite the fact that he had repeatedly told Official X that the fund would invest in listed bonds, but despite that, Official X kept referring to unlisted bonds. In fact, the Appellant testified that Official X referred to high yield bonds, as if these bonds were also unlisted.

171. The Appellant told the Tribunal that, because a high yield bond in the portfolio might mean that there was a better return, this did not mean that the bond was unlisted. In fact, he testified, the Redhedge prospectus specifically indicated that the fund would only invest up to 10% in unlisted securities, and no more than 45% in high yielding debt securities, which would be listed.

172. In his evidence to the Tribunal, the Appellant sought to emphasise that these were serious misapprehensions on the part of the interviewers indicating a lack of knowledge or awareness about how UCITS funds should be administered and the depth of knowledge expected. He also was deeply concerned when, during the interview, one of

the officials referred to what had happened in relation to Ruvercap involved fraud. Had he been involved in fraud, this would have had a cataclysmic effect on his career as a fund manager. The effect would not only have been confined to one fund, but it would have undermined his entire livelihood.

173. Referring to the UCITS Regulations, the Tribunal notes that there were certain questions which are fundamental. These, in particular, relate to the liquidity requirements, risk diversification and risk management and mitigation. The Appellant testified that, if the Bank wanted to ask questions about these in such detail, he should have been given appropriate notice regarding what was proposed. Had he had such notice, he would have brought appropriate documentation with him.

174. But the Appellant complained in evidence that terms such as "trash ratio", or "trash buckets" were unfamiliar to him as terms of art. He was asked questions in relation to the 5/10/40 rule, which he implied were over-detailed and again, unfamiliar to him. He was asked what he had learned from the Quayside/Ruvercap experience and whether he had learned to have "red lines". He was asked to give examples of when he had "challenged" investment managers in the past. He was also asked if there was an apparent conflict of interest in his being both on the boards of Quayside and Ruvercap. He did not consider this to be so. The Appellant testified as to how the Ruvercap investments had performed poorly and, ultimately, that the board had decided to liquidate the entity.

175. The Appellant sought to emphasise that it was Quayside which instituted an investigation and went through every single invoice querying every one of them. A due diligence was carried out on the investment advisor. Invoices which were seen as "potentially fraudulent" were referred to and, ultimately, the Central Bank and the Gardai were informed.

176. It bears repeating that the absence of any direct contact between the Appellant and the Central Bank between February/March and October, 2019 takes up some 15 pages of the transcript.

177. At the conclusion of the hearing, the Appellant's solicitor, Mr Hegarty, made a pithy and succinct submission, urging the interview board to take an understanding view of what had occurred, having regard to the Appellant's past experience.

3rd December, 2021: The Minded to Refuse Letter

178. On the 3rd December 2021, the Bank issued a "Minded to Refuse" letter. The Bank gave written notice that it had formed a preliminary opinion, that it was minded to refuse the PCF applications regarding Redhedge, pursuant to ss. 23(5)(a) and 23(6)(b) of the Act of 2010.

Invitation for Submissions

179. It is important to emphasise that the Appellant was again invited to provide written submissions regarding this preliminary opinion. The Central Bank wrote that the views expressed in the letter were provisional and of a preliminary nature. The final decision was to be made by a separate decision-maker who would not have had any previous involvement in the matter. The letter was signed by an Official L, the Head of Funds, Supervision Division.

180. The letter contained a number of appendices. Summary reasons were given for the preliminary opinion. These included a statement to the effect that the Central Bank officials had considered that the Appellant's prior experience in the fund sector and previous experience of performing PCF2 and PCF3 roles at several UCITS investment funds and a UCITS management company. But the Central Bank nonetheless had taken the preliminary view that the Appellant had not demonstrated a clear and comprehensive understanding of the regulatory and legal environment appropriate to the roles in question in the proposed entity, and that he had not demonstrated the competence and skills appropriate to the roles of PCF2 and PCF3 of the proposing entity.

Submissions Furnished by 7th January, 2022

181. The Central Bank gave the Appellant's solicitor until the 7th January 2022 to put in further submissions. These were mainly a series of statements. The solicitor did furnish

the Central Bank with a very substantial quantity of materials subsequent to the Minded to Refuse letter. From the following paragraph, headed "Dr Margaret Cullen" this decision describes the submissions that were furnished to the Central Bank.

Dr Margaret Cullen

182. These included a precis of evidence from Dr Margaret Cullen, who holds a PhD in Governance from University College Dublin, and who had extensive experience in the areas of corporate, bank and investment fund governance, both as an academic and practitioner. She is a governance advisor to the Institute of Directors in Ireland, and an experienced assessor with the Institute's Board Evaluation Service. She is an Assistant Professor in the UCD Smurfit Business School, and lectures there on the Professional Diploma in Corporate Governance and the Roles and Responsibilities of the Board, Stewardship and Behavioural Aspects of Boards. She was the Founding Chief Executive and Academic Director of the Certified Investment Fund Director Institute, a specialist institute of the Institute of Professional Banking, which focuses on raising professional standards. This statement was available to the decision-maker, Official Z.

183. In her precis, Dr Cullen stated that, if requested, she would give evidence of her interactions with the Appellant over some ten years; that she had known him since he approached her about participating in the first cohort of the Certified Investment Fund Director Programme, where she was Academic Director. She considered he demonstrated excellent operational fund knowledge and was keen to utilise the knowledge as a fund independent director. His objective in undertaking the course was to enhance his knowledge of how best to serve investors' interests in a non-executive director capacity. She stated that his experience in funds was demonstrable in class and the learnings and skills and philosophical approach to exercising his fiduciary duties garnered during the programme was reflected through the learning journal assessment process. She considered that the Appellant had provided valuable insights to other programme attendees relevant to his extensive experience of the funds industry.

184. She stated the Appellant had been invited to apply to the Institute of Bankers for the professional designation of certified investment fund director in September 2013.

Recipients of this professional designation commit to life-long learning and the highest standards of integrity in executing their professional duties. She regarded the Appellant as being an advocate for the promotion of "best in class governance", transparency and professional training in the fund's industry.

Mr Benjamin Singh

185. The decision-maker, "Official Z", also had before her a statement from Mr Benjamin Singh, who had considerable experience of interactions with the Appellant in relation to investment fund work.

Mr Kevin O'Doherty

186. Official Z had a precis of evidence of Mr Kevin O'Doherty, mentioned earlier. He holds a master's degree in finance, trained as a chartered accountant and is a chartered director. He had been a Board Director in a regulated financial services firm since 1998. Before setting up Quayside in 2014, he co-founded a regulatory affairs consultancy. He would have testified, if necessary, that following research into finding an appropriate person to act as an independent Non-Executive Director, he contacted the Appellant and engaged him as Chairman of Quayside. He considered that the Appellant was well-known and well regarded and experienced within the funds industry. He served as Chairman of Quayside until 2021 and remained on the Board of a number of investment funds managed by it.

187. Mr O'Doherty added that he had served as a Non-Executive Director of a number of ICAVs where the Appellant acted as an independent Non-Executive Director and Chairman. Some of these entities had no connection to Quayside. He regarded the Appellant as being one of the most experienced Non-Executive Fund Directors in the industry; that he had clearly demonstrated his understanding of key difficult issues that would have arisen at that time. He stated he provided evidence regarding the Appellant's performance in a commercially difficult situation where decisions had to be made by a Board with incomplete information without delay.

188. Mr O'Doherty opined that the Appellant had actively engaged in situations involving liquidity management tool solutions including the potential "gating of a fund", "side pocketing", and the possible suspension and winding down of a fund. In that case, the decision which was taken avoided an uncontrolled run of redemptions, so avoiding a "last man standing problem". This decision was subsequently endorsed by the investors. He said the Appellant showed remarkable composure when dealing with these issues, and demonstrated his fiduciary duty to act in the interest of the investors at all times.

189. Mr O'Doherty added that, following the suspension of the fund, Quayside received a Risk Mitigation Programme from the Central Bank. The Appellant as Non-Executive Chairman and Organisation Effectiveness Director was given the task of having an independent review carried out on the company. The submission was completed within the deadline with only minor recommendations suggested and the risk management programme was closed by The Central Bank without secondary queries. Mr O'Doherty stated that he had first hand experience of the appellant dealing with key decisions in his role as Chairman to close down funds, due to perceived nonviability and costs to be borne by investors. The Appellant had always been vocal in ensuring that the ICAVs and Super ManCos had the appropriate governance framework and policies and procedures in place. These included conflicts of interest connected and related transactions and valuations.

Mr Stefano Georgetti

190. Mr Stefano Georgetti, a partner in Redhedge Asset Management LLP, was the proposing entity. Official Z had a statement which set out that Redhedge was fully supportive of the Appellant and had full confidence in his ability to carry out the roles of an independent Non-Executive Director and Chairman of the Board.

Noel Forde

191. Noel Forde, a Certified Investment Fund Director and Certified Management Consultant, furnished a statement also. Mr Forde had a long-established career in the international financial services industry and was a director of Governance Ireland, a consultancy specialising in the assessment of governance, compliance and risk systems.

Previously, he was Chief Executive Officer and also Global Head of Operations for a very significant investment company.

192. The Appellant was involved with Mr Forde as an independent director in a newly launched Central Bank authorised ICAV and subsequent master feeder ICAV structure. Mr Forde was in a position to testify that the appellant had consistently carried out his responsibilities in a highly professional manner, both as Chairman and independent Director. He stated that the appellant would meet with him in advance of all Board meetings to review the Board pack and discuss key points, including topics for challenge.

193. Mr Forde wrote that the Appellant had consistently pointed to current and forthcoming applicable developments in the regulatory control area. He described the Appellant's activity in understanding and challenging the portfolio evaluation. He also stated that as Chairman, the Appellant had consistently provided and sought from others, full transparency in relation to up to date maintenance of the conflict of interest register. He found that the Appellant was fully prepared for every meeting and never missed one. He conducted the business of the Board with a full and informed regard to the legal and regulatory obligations of the structure. He had demonstrated a full understanding of the investment product and strategy.

Appellant's Rebuttal

194. But, additionally, the Central Bank was provided with a lengthy and detailed witness statement from the Appellant himself. This statement consisted of some 11 pages, together with very lengthy appendices. It contained a detailed description and rebuttal of the procedures adopted at the specific interview. The Appellant pointed out that he had received an email at 3.27 p.m., on the 27th September from the Central Bank containing a link to certain documentation, that is, the white book. He was not aware that this had been sent until the Central Bank officials referred to it on the following day during the interview.

195. In his statement, the Appellant wrote that, when he had been asked about the folder and had had the opportunity to consider it, he erroneously answered in the affirmative. He had not done so. He testified to the Tribunal that this had been an error. He noted that,

during the course of the interview, Official X was making reference to the *"RMP that was issued to Quayside Fund Management Limited, the AIFM that was given to them in February 2020*". The Appellant told the Tribunal that he had had the opportunity to consider that document at *that time,* but had not had the opportunity to consider the RMD documents in the folder prior to the meeting. He told the Tribunal that he had subsequently become aware that one of the documents had never been in the white folder referred to earlier in evidence. He was aware of this because one of the documents was only sent to one of the interview officials 20.02 on the night before the specific interview.

196. The Appellant stated that to the best of his knowledge, the request from the Central Bank of a job description for an independent Non-Executive Director is more normally sought for Executive Directors. He pointed out that the "Minded to Refuse" letter identified 12 documents described as "relevant level provisions", guidance and codes. He said the Central Bank had not drawn his attention to any of these enactments, measures or documents or to any part or area of them as areas for special focus. Given its length and detail, the material ran to approximately 600 pages, much of it dense technical material. He asserted that it was evident from the transcript of the Specific Interview that the Central Bank intended to cover this material at the interview, but did not give notice to him of this intention. He also testified that the interview commenced at 10.14 a.m. and concluded at 18.06, albeit with a number of breaks but never with adequate time to consult with his solicitor.

197. The Appellant included material in relation to how the Risk Management Programme in Quayside had been applied. The Appellant asserted in the statement that he had always been rigorous, professional and appropriately sceptical as a fund director. He had not been given notice that the Central Bank intended to interrogate him in relation to the concept of "challenge". If he had been so aware, he would have brought documentation with him including Board Minutes to demonstrate his capacity to challenge. He rebutted that he had been guilty of any conflict of interest.

Appellant's Supplementary Statement of 4th of May 2022

198. The Appellant put in a supplementary statement dated 4th May, 2022. This, again, criticised the fact that the specific interview had focused deeply on Ruvercap without him being given due notice that this would be the case.

199. The Appellant stated, in terms, that the Central Bank panel had made several observations, suggesting a concluded view in relation to his engagement with Ruvercap. The Central Bank had prepared questions and whole areas of examination in relation to that topic. He again added that one official had sought to criticise his performance by alleging fraud in relation to the fund. Such an allegation had never been raised by the Central Bank with him.

200. The Appellant wrote that there had been regular calls between the executive in Quayside and the Central Bank as issues were worked through. He recollected one telephone call which took place in January 2020. He criticised the fact that the Central Bank officials had concluded that he was unfamiliar with the regulations around liquidity risk management, with respect to a UCITS portfolio and the concept of "liquidity buckets".

201. He wrote that he was unfamiliar with that specific term which, he stated, was not to be found in the regulations around liquidity risk management. He contended that it was disproportionate for the Central Bank to propose to refuse the application on the grounds that he was supposedly unfamiliar with the concept of liquidity buckets, or failed to refer to reports between two specialist European Regulators. In his opinion, that represented an unrealistic view as to what was required to be demonstrated in the performance of regulatory and legal duties. This completes the description of the material submitted.

202. The Central Bank complained as to the quantity of material with which it had been furnished. The Central Bank asked the Appellant to send more focused material. A delay of some months occurred before a decision-maker, Official Z, was appointed in the Regulatory Disputes Unit. Ultimately, she was appointed on the 3rd October, 2022. The

decision-maker issued the decision, now the subject matter of an Appeal, on the 5th December, 2022. All told this PCT process took from June 2021 to 5th of December 2022.

The Impugned Decision of 5th December, 2022 by Official Z

203. The impugned decision issued on the 5th December, 2022, is contained in 14 pages, together with 15 pages of appendices, setting out some of the relevant legislative and regulatory material. It was written by Official Z, who holds a highly responsible position in the Central Bank. The Tribuanl did not have the opportunity of ascertaining from those Officials how familiar they were with the requirements of fair procedures.

204. The impugned decision contained many references to Regulation 68(2)(a) of the 2011 Regulations. This can be found in Appendix B to this decision. Section 3.2(d) of the Central Bank's Fitness & Probity Standards can be found at Appendix A.

205. Official Z's finding was that the Appellant did not demonstrate an understanding of Regulation 68(2)(a) of the 2011 UCITS Regulations, (S.I. 352/2011). This deals with "trash ratio", a type of security UCITS may hold. She found he did not meet the requirement of having a clear and comprehensive understanding of the regulatory and legal environment. She held that while the Appellant had some understanding of issues around connected party transactions, he had not demonstrated a clear and comprehensive level of knowledge of this key regulation appropriate for the role of PCF-2 and PCF-3 in the proposed entity.

206. Official Z stated that liquidity risk management was a central and key feature of the effective management and regulation of a UCITS. In order to be approved for the roles of PCF-2 and PCF-3 in the proposing entity, the Appellant needed to, "demonstrate a very clear and comprehensive", understanding of the regulatory and legal environment surrounding liquidity risk management. Having not demonstrated such an understanding, the Appellant did not meet the requirements of Section 3.2(d) of the Fitness and Probity Standards and therefore should not be approved in the roles of PCF-2 and PCD-3 of the proposing entity "at this time".

207. In the light of those findings and in relation to the first requirement, the decision maker refused the Appellant's application. She was not satisfied *"at this time"* that the Appellant had demonstrated the competence of skills appropriate to the rules of PCF-2 and PCF-3 at the proposing entity. She therefore refused to approve the Appellant to perform the preapproved control functions of Non-Executive Director and Chair of the Board in Redhedge UCITS ICAV, pursuant to Section 23 of the Act. This refusal was stated to be pursuant to s.23(5) of the 2010 Act. (Section 23 can be found at Appendix 3 of this decision.)

208. She observed that the Fitness & Probity Standards required an applicant to demonstrate a *"clear and comprehensive understanding of the regulatory and legal environment"*, (s.3.2(d)). She stated that the applicant needed to demonstrate a *"very clear and comprehensive understanding of the Regulatory and legal environment".* She noted that the Appellant had initially referred to the *"40/5/10 rule as being more commonly referred to as the 5/10/40 rule"*. She accepted that, as set out in the Appellant's submissions, the transcript of the specific interview duly showed that there had been, *"some conflation by the interview panel of the terms unlisted bonds"*, and *"high yield bonds"*, during the interview. However, Official Z's view was that the Appellant had demonstrated that he was aware of the distinction and had done so in the answer. She concluded that the Appellant had not conflated or confused the terms unlisted or high yield.

Terminology

209. As indicated above, the decision-maker referred to s.3.2(d) of the Fitness & Practice Standards (See *Appendix A*). The reference to a *"clear and comprehensive understanding of the regulatory and legal environment appropriate to the roles",* is stated to be contained therein. In fact, this was a simple slip-up. The correct paragraph was s.3.2(e). This would not, in itself, be in any way significant. But, later in the same section, Official Z referred to the need for an applicant to demonstrate a *"very clear and comprehensive understanding of the regulatory and legal environment".* While the difference between a "clear" understanding, and a "very clear" understanding, may appear small, it does raise the question as to precisely what level of expertise or

knowledge would be required for compliance with the Fitness & Probity Standards and the Regulations. [Emphasis added.]

210. To be legally compliant, an "opinion" of the nature referred to in s.23(5) of the Act must necessarily require it to be based on some objective set of criteria. The Appellant's case, made in written submissions, included the contention that the Central Bank set the bar inordinately high in his case, and that the questions were excessively "granular".

Connected Party Transactions

211. With regard to *"connected party transactions",* Official Z held that the Appellant had demonstrated, *"some general understanding of the issues that can arise from connected party transactions, in terms of conflict support level and disclosure requirements, but that he had not demonstrated an understanding of the conditions around the conduct of connected party transactions and was unable to provide any detail of the mechanics of such a transaction in accordance with Chapter 10 of the 2019 UCITS Regulations".*

212. She rejected a submission made by the Appellant in his written submissions that he was giving a response that would have been developed on connected party transactions. The decision-maker stated: *"it is my view at the point of interjection by the interview panel, the (Applicant's) points related solely to disclosure of connected party transactions and the Applicant seemed to be repeating this point without providing any further substance that would indicate he was going to develop the response".* This was of course an inference.

213. The decision-maker held that the Appellant did not demonstrate a sufficient level of knowledge of competent personal evaluations. The decision-maker was satisfied that the Appellant did have a clear and comprehensive understanding of the conflict of interest provisions. These are contained in Schedule 5 of the 2011 UCITS Regulations.

214. Official Z expressed concern that the Appellant was unfamiliar with *"the concept of liquidity buckets".* This was one of a number of examples given to show that he did

not demonstrate an appropriate level of understanding of the regulatory environment. She criticised the Appellant for being unable to articulate the means by which he evaluated the liquidity fund beyond stating that it was, *"highly liquid"*, for the fact that rather than demonstrating his own understanding of the regulatory requirements set out under the UCITS Regulations, he instead indicated reliance on the risk manager which she regarded as unfitting for a PCF2 or PCF3.

215. Official Z made no finding in relation to the Appellant arising from his evidence that he believed a risk management programme had been requested by the risk manager of another entity in which he had held the roles of PCF-2 and PCD-3. It was, "of concern", that he did not demonstrate his understanding of the underlying reasons for a risk management programme having to be put in place and therefore, had not shown a comprehensive understanding of risk management.

216. Under the heading, "Requirement to Demonstrate Competence of Skills appropriate to the Roles of PCF-2 and PCF-3" under s.3.2(b), the decision-maker noted that the Appellant had not demonstrated *"sufficient insight into detail of, or learnings from, issues related to another entity in respect of which he performed PCF-2 and PCF-3 at a time when the Central Bank intervention was required in the form of an RMP …":* This is clearly a reference to the Ruvercap issues.

217. This decision now returns to the evidence adduced before it.

(4.) <u>Dr Margaret Cullen</u>

218. Dr Margaret Cullen has already been identified. She was one of the persons who furnished the Central Bank with a statement concerning knowledge of the Appellant, which went back to 2012. She provided the Tribunal with valuable background information regarding the initiation, formation and operation of a UCITS. Her credentials for this came, not only from academic experience, but also her personal involvement in UCITS funds. Her evidence in relation to the architecture of a UCITS fund did not differ significantly from Professor Zetzsche. Thus it is not necessary to repeat that testimony.

219. She considered that what was necessary of any director of a fund would be integrity, independence of mind and intelligence. One of the most important attributes of a director would be an understanding of the infrastructure of the fund. Boards must have a knowledge of how the fund operates, who are the parties to a transaction and where things can go wrong. A board must have the competence to be able to ask an investment manager whether an intended investment complies with the investment restrictions applicable and what pre- and post-trade checks would be carried out. This is in order to ensure that the defences which must operate when investments are made are sufficiently robust and protected in the interests of investors. Thus a board member will almost be a "jack of all trades", who has to have an understanding of how each part of the architecture interacts and operates together, so as to protect the interests of the investor. She opined that frequently an investment manager would be represented on the board of a fund. However, at all stages it was necessary for the board to maintain the perspective of protecting the interests of investors. She testified that an investment manager had to be "so hands on".

220. In the course of her testimony, Dr Cullen expressed views regarding the extent of the duty of a non-executive director or chair to closely interrogate the granularity of the investments. Counsel on behalf of the Central Bank objected to this testimony. Dr Cullen herself stated she was not expert on that precise issue. The Tribunal held that this testimony would go to the question of weight rather than admissibility. As it happens, it is unnecessary for the Tribunal to act on Dr Cullen's evidence on this issue in order to resolve this appeal. Dr Cullen testified that University College Dublin operated a certified investor fund director programme which she had administered for eight years. This programme operated a programme of self-directed learning, class- based learning, arising from which participants were required to write a reflective learning journal, upon which they were graded. The successful participant had to earn 70% or above in order to be invited to apply for the professional designation. These were open-book examinations.

221. Dr Cullen also testified that the year 2016 the Central Bank issued a consultation on fund guidelines (CP86). In that guideline the Central Bank implied that while it might be industry practice generally to have lawyers on the board of a fund, it would not be expected lawyers should necessarily be on a fund board, especially when a fund had access to legal counsel.

222. Dr Cullen's evidence as to her knowledge of the Appellant is reflected in the précis statement which she furnished to the Central Bank.

THE RESPONDENT'S CASE

223. The decision now sets out other parts of the Respondent's case. Professor Zetzsche's evidence has already been outlined.

224. The Central Bank determined not to call any of the persons directly involved in the decision-making process. The Tribunal would have been considerably assisted by such testimony. Mr Ritchie, already mentioned, did testify, but he had absolutely no direct involvement with the process being considered. While the Tribunal has the power to call witnesses itself, it decided not to do so on this occasion. This is not to say that a Tribunal panel would make the same decision in every future case.

(5.) Ms Elizabeth McCaul

225. The Central Bank also called evidence from Ms Elizabeth McCaul. She is a member of the Supervisory Board of the European Central Bank. Her expertise includes supervisory strategy, risk, capital, internal governance and consistency and quality across European banking supervision. She has extensive prior experience in the fund world.

226. Some of her evidence tended to overlap that of Professor Zetzsche, and will not be repeated. However, the witness gave useful evidence regarding the high relevance of fitness and probity regimes as an EU and National level, addressing the importance and rationale between fitness and probity regimes.

227. To some extent, this principle should be self-explanatory. The existence of *"a gatekeeper"*, is of fundamental importance to the protection of a fitness and probity regime and in turn, the protection of investors. Ms McCaul confirmed the necessity for

a fitness and probity regime involving a pre-approval system which in turn requires competence and knowledge as elements of such assessments. She emphasised the importance of a chair having such knowledge and competence, a fitness and probity regime is not to be seen in isolation as a simply National requirement. It is to be seen, rather, as part of an international effort to ensure that persons in positions of responsibility have sufficient technical knowledge in order to be able to, *"steer the institution",* and detect whether something is, *"not right",* or should be implemented in *"a different way".*

228. The witness made a number of references to the International Organisation of Security Commissions, (IOSCO) Report of December 2009. Her testimony was that the Report requires that persons engaging in PCF roles should be in a position to demonstrate competence and understanding of the class of regulated activities in question. The IOSCO Report contains a number of provisions which are very similar to those promulgated by the Central Bank Fitness and Probity Standards.

(6.) Mr Des Ritchie

229. Finally, the Central Bank called Mr Des Ritchie. He was the Acting Head of the relevant division between September 2021 and the 13th December 2021, that is at the time the Appellant's interviews were taking place, although not the time of the impugned decision.

230. As mentioned, Mr Ritchie had no involvement whatever in the Appellant's application process. He did however give evidence as to the normal expected timescale for PCF-2 and PCF-3 applications. Some of this evidence stood in some contrast to what happened to the Appellant's applications described earlier. The case made was that he was met with non-response.

231. Additionally, in reply to questions on cross-examination, Mr Ritchie gave answers which are to be compared with Professor Zetzsche's expert evidence outlined earlier. Mr Ritchie testified that the preapproval process should be assessed to be seen as examination of the collective, that is to say, the Board of a UCITS fund. He went on to state that the Bank will look at the collective Board and assess each of the individuals to

make sure that *the Board collectively has skills*. But, he then stated, "*when there's an individual fitness and probity, whether it's for an existing fund and there's a new Board member coming on board, the individual is looked at as an individual on their own"*. He testified that a chief executive officer is a different role to a non-executive. Again, in cross-examination, he laid some emphasis on the proposition that in a "*fitness assessment, the experience and background of the individual would also matter, by contrast to a person who has never been on a Board before*". At a minimum there seems to be a tension between whether on the facts of this case the Bank was to consider the Appellant's individual skill-set, or in the context of the board's as a whole and collectively. The interviews were focused entirely on this one individual.

232. Mr Ritchie was unable to assist the Tribunal as to who had taken the decision to escalate the process from an assessment to a specific interview. He testified such a decision would not necessarily go to the Head of Division, and would most likely occur at the Head of Function level. His testimony was that a Ms L was the Head of Function at the time.

233. He accepted that Ms L had been present for the hearing before the Tribunal but was not called as a witness. Mr Ritchie was unable to identify who would have decided to call the Appellant for an interview. In fact, he said he no longer worked in the fund area by the time he testified before the Tribunal.

234. He accepted that nobody from the relevant supervisory area who had been involved in this process was giving evidence, or was going to give evidence. The decision to escalate the Appellant's case further, after the specific interview, was taken after he had changed roles.

235. Mr Ritchie's evidence was that after a specific interview, there was a process which involves legal advisers in the Central Bank in order to ensure that refusal or approval is dealt with appropriately. He accepted that the briefing document which would have been furnished to the specific interview panel was not available.

236. The witness further expressed the view that character references and other such submissions were not considered in the process.

SECTION II: THE LAW

237. In the various directions hearings prior to the full hearing, considerable time was devoted to submissions on the nature of an appeal, and the form of order which the Tribunal might make. Ultimately, there was less controversy at the hearing on these issues. It must be said there were misconceptions on both sides.

The Nature of a Tribunal Hearing

238. There were also detailed submissions on the nature of the appeal. It cannot be said that the matter was simply a *"de novo* appeal". Nor can it accurately be described as an "appeal on the record" or "against error" or "on a point of law". In fact, the Act of 2010 is very flexible indeed (see the Judgement of Clarke J., in *Fitzgibbon v. Law Society of Ireland* [2014] I.R.).

239. In this *sui generis* appeal what happened at the Central Bank interviews was centrally important. But, the Tribunal is limited in the form of order it can make (see below). It can either affirm the impugned decision or remit the matter back to the Bank for reconsideration. It was surely not the intention of the Oireachtas that, in this category of appeal, the Tribunal should act as a surrogate decision-making body, entirely supplanting the role of the Central Bank. In this category of appeal, these are issues which should remain with the Central Bank, subject to the observation of fair procedures.

240. It cannot precisely be said either that this was an Appeal *"on the record."* The Tribunal considers the record of the evidence and materials which were before the first instance body but comes to its own independent conclusion as to the proper answer to the issues which are before it; (see *Fitzgibbon*, para. 112.) The statute governing the role of this Tribunal contains specific rules that are not necessarily applicable to other bodies.

241. In *Fitzgibbon*, Clarke J., observed that the rules of constitutional justice required that, where a decision on contested facts is necessary to enable a decision maker to adjudicate on the rights and obligations which require to be determined, or potentially affected, by a finding of fact on such contested matters, a party is, amongst other things,

entitled to test (both by cross-examination and by the presentation of competing evidence), the evidence which might lead to such adverse finding.

242. It might also be said that the statutory jurisdiction of the Tribunal resembles an *"appeal against error."* The Tribunal will have regard to the decision of the Central Bank and must be satisfied whether the decision-making process was itself in error. No question was raised at the hearing as to the format or fairness of the procedure actually applied by this Tribunal at the hearing.

Fitness and Probity

243. The Tribunal was furnished with three lever-arch files of legal authorities, many touching on the various issues including the central question of fitness. The issues of Fitness and Probity were succinctly dealt with by McKechnie J., in the Supreme Court in *Carroll v. The Law Society of Ireland* [2016] 1IR 676 where he stated that the phrase, "fit and proper", although composed of two words, appeared synonymous with one another and with associated concepts such as "suitability" and "appropriateness".

244. McKechnie J. held that *"fitness essentially relates to academic/professional qualifications, knowledge, skills, experience and the like where properness is concentrated on human attributes, honesty, integrity, probity, trustworthiness etc, as well as issues such as prior criminal convictions or unlawful conduct".* He held that these considerations could not be exhaustive in respect of either category, but rather provided an illustration of the factors arising in each element. (See *Law Society of Ireland v. Kathleen Doocey* [2022] IECA2, judgement of Collins J., in the Court of Appeal, and *X v. The Financial Services Regulatory Authority,* Record No. 003/2009, Mr Justice Francis D. Murphy, Ms Geraldine Clarke and Ms Paulyn Marrinan Quinn.)

245. It hardly needs re-emphasis that the only issue in this case was that of fitness. There is no question regarding the Appellant's probity.

Fair Procedures

246. As will appear below, a central question to be addressed will be whether the process was conducted in accordance with the established jurisprudence on fair procedures. This question is best addressed in the context of an assessment of the evidence on the procedure actually adopted below.

Duty to Give Reasons

247. Similarly, the duty of decision-makers to give clear reasons for their decisions is very well established and will be further considered in context below.

Some Observations on the Case as Presented

248. The Tribunal thanks counsel and solicitors on both sides for the helpful submissions and the way in which the extensive documentation in this case was prepared. The documentation amounted to some 1,500 pages, set out in 8 lever arch files. The stenographer's transcript of the evidence in this appeal comes to some 800 pages. Some of the material, as can be seen, was technical and intricate. The Tribunal has already commented on the way in which the matter proceeded. Perhaps, in fairness, this was unavoidable in view of the nature of the case itself.

Anonymity: Order of the Tribunal

249. As can be seen from the Title of this decision, the Tribunal considers that the decision should be anonymised. This is a matter of fairness to both sides, especially having regard to the order which will ultimately be made.

250. The Tribunal will make a limited order under s.57W(2)(b) of the Act, prohibiting the disclosure of the name, address, picture, or any other material that identifies or may lead to the identification of the Appellant and the officials directly involved in the interviews and the decision-making process. But this must be a limited order. However, the decision of this Tribunal would be unclear without identification of the name, nature

and qualifications of the other witnesses. The funds must be identified for clarity. (See s.57W(3)).

The Form of the Order

251. In light of the fact that the parties achieved a relative degree of convergence, if not consensus, as to the Order which can be made, it is unnecessary to engage in a lengthy excursus on the law. Suffice it to say that s.57 of the Act contains some lack of clarity which must be resolved.

252. Section 57Z provides:

> *"(1) In determining an appeal against an appealable decision, the Appeals Tribunal shall decide what the correct and preferable decision is having regard to the material then before it, including -*
>
> *(a) any relevant factual material, and*
>
> *(b) any applicable enactment or other law.*
>
> *(2) As soon as possible after finishing the hearing of an appeal against an appealable decision, the Appeals Tribunal shall do one of the following:*
>
> *(a) affirm the decision, or*
>
> *(b) vary the decision, or*
>
> *(c) substitute for the decision any appropriate decision that the [Bank] could have lawfully made in relation to the matter concerned, or*
>
> *(d) remit the matter concerned for reconsideration by the [Bank], together with any recommendation or direction of the Appeals Tribunal as to what aspects of the matter should be reconsidered and, in the case of an appealable decision made under Part IIIC, set aside the decision."*

253. However, s.57Z(2)(a) provides that paras. (b) and (c) of sub-section (2) (above) apply only to a decision which is an "appealable decision" under s.33AW(2) of this Act, or s.29(7) of the Central Bank Reform Act, 2010. This is not such an appeal.

254. The Tribunal is, therefore, satisfied that, the true meaning of the Act as applied here, is that the Tribunal may only affirm the decision, or alternatively remit it back to

the Central Bank for reconsideration with any directions or recommendations as to what aspects of the matter should be reconsidered, as set out in the statute above

Rules of Evidence and Powers of the Tribunal

255. During the appeal, issues arose concerning the admissibility of evidence. It stands repetition that, under s.57AF(1), the Tribunal is entitled to call witnesses on its own initiative, and examine such witnesses on oath, and to allow them to be examined or cross examined.

256. But the Tribunal is not bound by the rules of evidence and may enquire into and inform itself on any matter in such manner as it thinks fit, subject to the rules of natural justice; See section 57V(2).

257. At the hearing, counsel for the Bank objected to one Dr Cullen giving evidence of an expert nature, having regard to the fact that she had previously known the appellant. He submitted this rendered her opinion evidence on the duty of a chair and director inadmissible. The Tribunal ruled this went to the weight of her evidence.

258. In fact, Dr Cullen did not hold herself out as giving expert evidence on the particular issue which arose. This was the extent to which a non-executive director or a chairman should "drill down" and challenge evidence so as to be assured regarding the security and financing of bonds in the portfolio. As it transpired, the evidence of Mr O'Doherty was to the effect that the amount of information available to Quayside was quite limited. Professor Zetzsche made no comment on this precise point, as it did not fall within his remit. In speaking generally he expressed the view that the duty of a chair or director is to rigorously explore and interrogate advisors on their advice and seek all relevant information. However, it was not established to the Tribunal's satisfaction that the risk to the Ruvercap bonds would actually have been detected at an earlier stage even if the Appellant had been extremely pro-active.

SECTION III (a): REASONS

Observations on the Testimony of Some Witnesses

The Appellant

259. The Tribunal emphasises that its function is to decide whether the impugned decision is correct or preferable. Subject to what is said below, while the Tribunal makes a direction to the Central Bank to reconsider its decision, the manner in which it will do so is for the Central Bank itself to determine.

260. While no issue arose with regard to probity, there were points at which the Appellant did not do himself justice as a witness. It was surprising that he was unable to recollect either the name of the bonds in question, or the name of the entity where the impairment occurred, (GoFactoring). He seemed unclear as to the extent of the losses. He testified that the losses ran into millions. In cross-examination, and in evidence from Mr O'Doherty, it emerged that the total losses suffered by investors may well be in the region of some €230 million in the entire affair.

261. More generally, the Appellant sometimes found it hard to give direct answers to direct questions. He sometimes had to be assisted to address the actual question which was put to him.

262. There was evidence that the Appellant was an effective Chair and non-executive director, both when addressing the Quayside/Ruvercap imbroglio, and in other situations in undertakings prior to that time. Despite the serious situation that arose, there was no suggestion from the investors that he should be removed from the board of Quayside or Ruvercap, as they sought to navigate their way out of the situation in which they found themselves.

Professor Zetzsche

263. Professor Zetzsche's evidence was illuminating. But what was not clear was how the standards he described were generally applied to every UCITS which is regulated by the Respondent. Of course, the Tribunal emphasises that this is not to say that these standards are not generally observed. There was a general lack of clarity as to what precise standard was to be expected of a person in the Appellant's position and experience.

Mr Ritchie

264. Mr Ritchie's evidence was that, in general, the Central Bank will look to the Board as a whole to consider the various skill sets of board *members* (plural). There is no doubt that Mr O'Doherty had very considerable skill, knowledge and experience in this area. He believed the Appellant was an excellent chair who had, in fact, asked hard questions of those providing services to funds. The evidence of the other "potential witnesses" was to the same effect.

265. It was unclear to the Tribunal the extent to which the Appellant's skill set was to be seen "individually" as opposed to that of a member of a board which had various skill sets.

266. The reason for the non-response to the Appellant's other applications was not clear, nor was the reason why he specifically was chosen for the interview entirely explained.

267. The fact that the Tribunal did not receive assistance from those who were involved in the decision-making process, meant that much of the Appellant's case went unchallenged by any controverting *evidence* as opposed to matters put in cross-examination.

Central Bank's Submissions on the Law and the Facts

268. Counsel for the Central Bank pointed out that the PCF approval process is not one initiated by the Bank, or which the Central Bank can decide to discontinue. The Central Bank is simply the recipient of a PCF application and has a single statutory role to discharge in relation to the application; either to grant or to refuse approval for appointment to the position in question.

269. Counsel set out that s.23(2) of the Central Bank Reform Act lists the steps that are to be taken by the Bank upon receipt of the application before forming the opinion as to whether a person is of the appropriate fitness and probity to perform the PCF in question. Those available steps include requesting information, documentation and carrying out interviews. His case is that the Bank complied with each step.

270. In a sense, the Central Bank's case is starkly simple. It is that the process that was followed by the Central Bank was clearly and transparently described to the appellant at various stages throughout the application, as well as being described in the Fitness and Probity Interview Guide issued in 2021. It is said the Appellant was made fully aware at the specific interview on the 28th September, 2021, and in correspondence prior to that, that if it was proposed to refuse the application, a "minded to refuse" notice would issue to him and to Redhedge, and both would then be given an opportunity to respond and make submissions in writing before the matter would be decided by an independent decision-maker. The case was put quite pithily in written submissions:
"*this is precisely what happened*".

271. The Central Bank's case is that it discharged its statutory functions. This includes conducting the interviews, and that this was done in accordance with the requirements of fair procedures. However, at the end of that process, and following extensive engagement, the interviewers formed the provisional view that the Appellant had not demonstrated a clear and comprehensive understanding of the legal and regulatory environment, or the competency and skills appropriate to the PCF roles applied for. The minded to refuse notice was forwarded to the independent decision- maker, together with

the relevant documentation and the submissions received. The Central Bank was satisfied that it had been fully transparent in this. The decision-maker issued her decision to refuse the application on some, but not all, of the grounds cited in the "minded to refuse" notice.

272. Thus, Counsel submits the issue in this case is very net. It was for the Appellant to bear the burden of proving to the satisfaction of the Tribunal that the decision of the decision-maker not to approve appointment to these PCF's in Redhedge was not "correct". The issue was not the appellant's appointment to any other role or office. It was not about his livelihood, but rather about the application for appointment to these specific PCF's. There is no relevant factual dispute.

273. The Central Bank's case is that there was a fair assessment of the information and knowledge disclosed by the Appellant during the process. This was fundamental to discharging its statutory role, to oversee management of the fund in question, and to protect investors. The decision on the application, therefore, is said to be 'correct', and, therefore, *ipso facto* 'preferrable'.

274. In response to the Appellant's complaints at the preliminary directions hearings, regarding the absence of evidence by decision-makers, the Bank responds that this was a matter which lay within the appellant's own hands. He could have called the witnesses when he was specifically invited so to do during directions hearing stage.

275. Counsel defended the process as being one laid down by statute. He asserted that the decision-making was independent. He contended that many of the alleged "errors of fact and law" made by the Bank were insubstantial, for example, the mis- stating of the standard applicable under the fitness and probity regulations by the decision-maker.

276. It is said the Appellant was furnished with adequate notice at all stages, that the Bank applied the appropriate standards, and that any alleged errors by interviewers which occurred during the course of the specific interview regarding the term "trash ratio" and "high yield bonds" are *nihil ad rem*.

277. In concluding written submissions, Counsel for the Central Bank went through the specific interview and decision-making process in detail, defending the Bank's questioning and its decision-making process.

278. It can only be said that, given the Central Bank's own decision regarding not calling the decision-makers, the legal advisors did a remarkably skilful job in the circumstances. The Tribunal repeats that under law it is vested with the power to call and, if necessary, summon witnesses.

Appellant's Submissions on the Law and the Facts

279. In response, Counsel for the Appellant drew attention to a number of areas where it was contended there were fundamental procedural flaws. The Appellant was unfairly selected to be subject to this process. The Appellant made a number of applications to the Bank after 2019 without response.

280. Counsel submitted that what commenced as a PCF application process, which is "face to face" in nature, evolved into an investigation of the Appellant's role in two entities, Quayside and Ruvercap, which were not the subject matter of the application. Counsel submitted that, if what was needed was truly an investigation under the Act, the Appellant would, at all stages, been entitled to full *Re Haughey* rights, including full and fair notice of the case against him, notice of the evidence, and the right to cross- examine.

281. The point was made that, while the Appellant was found unfit in relation to Redhedge, no measures were taken against him in relation to any of the other PCF positions which he holds. Counsel questioned as to how it could be that the Appellant was simply "unfit" in relation to this single entity, where the Bank apparently had no difficulty in relation to his holding similar positions elsewhere. Finally, he contended that there was an overwhelming emphasis at all stages on the Quayside/Ruvercap issue, reflected in the involvement of one interviewer from the investigation into Ruvercap, the earlier 2020 applications, the assessment interview, and the specific interview.

SECTION III (b): CONCLUSIONS

282. Towards the beginning of this decision there were a number of observations which can now be viewed together.

The Role of the Bank as Regulator

283. First, the Central Bank has a fundamentally important role as regulator. All the experience of the last two decades demonstrates this simple fact. The sums of money invested in this one sector are very large. As counsel for the Central Bank put matters, the question of financial regulation here could be said to have an existential importance to the finances of the State itself. The Central Bank clearly had justifiable concerns as to the very serious situation which emerged in relation to Ruvercap and the delays in giving information. The question is not whether its concerns were legitimate, but whether it adopted the appropriate procedure.

The Other Roles Performed by the Bank

284. This leads to a second observation. The Central Bank and its officials have to fulfil the difficult statutory functions of investigator, regulator, and decision-maker. In this regard, it, and its officials, had to be neutral, objective and independent. These roles are not always easy to reconcile. There is a risk of overlap or even conflict between these functions. Quasi-judicial bodies exercising limited powers, or extensive powers, must be independent, impartial, dispassionate, apply the law and observe fair procedures.

285. Whether, when carrying out their role, PCF or other interviewers and decision-makers have a duty of fairness and compliance with the standards laid down in the Constitution itself and the case law as enunciated by the Courts established under that Constitution. Thus, persons who are to be the subject matter of decisions which potentially have an effect on livelihood are entitled to fair procedures, including fair notice, decision-making by an independent decision maker, and observance of the principle of *audi alterem partem*. The Tribunal emphasises that in this decision it addresses the case as framed by the Appellant.

286. In this case it is simply not possible to divorce one element of the decision- making from the others. Official Z's decision which is impugned, to a large degree hinged on matters which emerged at the assessment interview and the specific interview. It cannot be seen as entirely freestanding in circumstances where it followed a "minded to refuse" opinion without properly taking into account the submissions made on behalf of the Appellant before January 7th, 2022.

287. *Constitutional* statutory compliance requires more than apparent adherence to statutory procedures. Actual compliance requires those procedures be *applied fairly.* Frequently this process is carried out by people with legal knowledge and experience.

Unexplained Questions

288. A number of unexplained questions hang over the process, including the absence of any response in evidence by the Central Bank to the Appellant's earlier applications from 2019 onwards; the elapse of time in dealing with the Redhedge application; and the fact that the Appellant continues to hold other PCF roles.

289. The precise case made by the Central Bank regarding the standard to be met by this Appellant was never made clear.

290. This is to be seen in contrast to the significant evidence regarding average times. The expert evidence also begs the question of precisely what standard is expected of an applicant such as the Appellant in practice.

291. A statutory "opinion" derived from s.23(5) of the 2010 Act must be based on discernible, objective and fair criteria.

292. These are not the only difficulties as will be explained presently. As will be clear this is not a situation where minor deviations from procedure can be ignored or where, in reply, the Central Bank can simply point to the substance of the interviews.

293. The Appellant did not make the case that there was objective bias.

Livelihood

294. The Tribunal is satisfied that what is in issue here is more than simply the right to the Appellant's good name. Rather, what is in question was a binding decision in relation to his right or interest to earn a living. The Appellant's evidence of his inability to obtain other approvals or authorisations in relation to other PCF applications went uncontroverted. What occurred must be seen within the context of what would be a relatively confined segment in a market where reputation and standing with the Central Bank would truly matter. So, too, would the ability to comply with deadlines for the launch of a fund.

The Distinction Between an Application and an Investigation

295. Throughout everything which follows it is useful to bear in mind that under the Act the Central Bank has broad powers to carry out an 'investigation' into the activities of an individual or an entity subject to regulation. A person subject to an *investigation* would undoubtedly be entitled to the range of procedural rights set out in the case law. These would include the right to fair notice of the issues to be covered or the allegations made; notice of the evidence to be relied on; the right to examine and cross-examine accusers; the right to legal representation; and the right to an independent decision maker, free from bias or prior involvement.

296. A person making a PCF *application* may not enjoy the same range of rights. He or she is nonetheless entitled to fair notice of the issues to be covered at interview(s) and interviewers who consider all relevant matters in a fair and impartial manner. This is not to set an artificial standard. An interviewer is entitled to ask important questions; but there must be fair notice of them.

The Assessment Interview

Fair Notice

297. Turning then to the assessment interview, the Tribunal must first ask itself did the interviewer fall below the standards of fair procedures which should apply in giving fair

notice of the issues to be covered at the assessment interview? This was the first step in a highly important regulatory process touching on the Appellant's right to earn a living.

298. It is abundantly clear that the notification the Appellant received did not cover the type and depth of issue which was so graphically – if not fully accurately- set out in the "minutes" thereafter. A simple comparison between one document and the other demonstrates this.

299. Even the *issues* as recorded in the minutes were at variance from the generic description of what was purported to be the subjects covered at the interview. This is to be seen in light of the Appellant's case that, if he had been placed on prior notice, his uncontroverted evidence was that he would have had the opportunity of presenting other material in response to the detailed questions put to him at that stage.

300. While it is true to say that the Appellant was informed that he was to be examined regarding his knowledge of the regulatory environment, some of the questions asked of him were unnecessarily granular and sometimes unclear.

Fair Questioning

301. Added to this, a person subject to an interview is entitled to be questioned fairly. Some of the questions recorded were extraordinarily complex, with many sub-clauses.

302. At a minimum, there was confusion in relation to the nature of the bonds in which Redhedge was going to trade. This was not merely a misapprehension on the Central Bank official's part. It might have raised potential issues as to the very legality of the fund's intended operation. Whether or not the confusion made a difference is not material.

303. The confusion was not resolved during the assessment interview.

304. All these issues, in themselves, are sufficient for a finding that, at the assessment interview, there was an absence of fair notice sufficient to conclude that this part of the process fell below the standard of constitutional fairness. (See *Davitt v. Minister for*

Justice, High Court, Unreported 8 February 1989; *Atlantean v. Minister for Communications & Natural Resources* [2007] IEHC 233; *TV3 v. Independent Radio & Television Commission* [1994] 2 I.R. 439).

305. The questions clearly demonstrated an intense preoccupation with the Ruvercap/ Quayside events. These specific motivations and concerns should have been made evident and clear in advance, as McCarthy J. observed in *International Fishing Vessels v. Minister for the Marine* (No. 2) [1991] 2 I.R. It is clear that the decision- makers had 'matters on their mind' which were not set out in the invitation, and should have been.

306. The fact that Official X used a blank screen throughout the interview, without explanation either then or later, is very striking.

307. The Tribunal finally notes that it was not provided with any evidence as to who took the decision to escalate matters to a specific interview.

The Specific Interview

308. Many of the same criticisms can be made of the specific interview. The flaws from the Assessment interview fed into and were reflected in this interview. While there was the appearance of fair procedure, there was an absence of its substance. The invitation to the specific interview was broad and unspecific in its terms, The Appellant was not given full notice of the issues which were going to be explored. The absence of notice regarding the white folder requires little repetition.

309. The Appellant testified he was not given any opportunity to refer to the white folder, even though he was being asked detailed questions regarding the regulations, which may or may not have been contained in the folder. This was not controverted. Some of the questions were exceedingly granular and detailed and would require considerable expertise. The folder was taken back at the end of the interview. The Appellant was not given full or fair notice of the issues which were intended to be explored. (See, for example, *International Fishing Vessels* cited earlier). By illustration, the "Ruvercap section" of the day-long interview takes up some 90 to 100 pages of the

transcript of that interview. The absence of an early phone call in February/March 2019 occupied some 15 pages of the transcript.

310. Official X was involved in the 2019 investigation which made serious criticisms of Quayside's management. He carried out the main questioning at the assessment interview. He played a major role in the specific interview, albeit, on this occasion, visible on the screen. He again explored many of the same issues as at the assessment. The absence of clarity in relation to the "high yield unlisted bonds" itself was an unsatisfactory aspect of the interview.

311. While the Central Bank had received some documentation in relation to the Appellant's background and experience, it received little attention in the "minded to refuse" letter.

The Impugned Decision

The Material

312. It is true that the decision-maker was not directly involved in the interview process. She had no prior involvement with the Appellant, Quayside or Ruvercap. The decision-maker acted on foot of the "minded to refuse" opinion. She was reliant on the information which emerged from a previously flawed interview process. The procedural flaws identified in the first two stages of the process fed into the impugned decision.

313. Here the principle of fair notice continues to apply. Official Z reached conclusions on the inadequacy of the Appellant's answers. But those answers came in response to questions raised at the Assessment Interview and the Specific Interview where the Appellant had not been given fair notice of the issues to be raised. The effect of these procedural flaws cannot be readily expunged. But additionally, a further legal issue arises, namely, the principle of *audi alteram partem* (hear the other side) and the duty to give reasons.

Audi Alterem Partem

314. By the time she had to assess the evidence, Official Z, the decision-maker, had before her not only the internal material, but a substantial body of material from the Appellant, which addressed in considerable detail the conclusions reached in the assessment, and particularly in the specific interview. This was highly significant material. It not only went to whether the specific interview had been carried out in a satisfactory way, but as to the substantive question as to whether, in fact, the Appellant did have the experience, skill and competence necessary to render him a fit person.

315. It was not sufficient for the decision maker simply to recite the fact that the Appellant had held and continued to hold similar roles to those which he was applying for in Redhedge and other regulated entities in the same sector. In fact, that begged the question as to whether his unfitness was seen as confined only to the Redhedge PCF application. Official Z merely observed that his experience spanned at least ten years and had relevant career experience in relevant sectors for over 30 years. The decision then stated: "*I further note the applicant has submitted witness statements from colleagues in the sector in support of these applications.*"

316. First, this was not a full or accurate description. The use of the word "colleague" in relation to Dr Cullen does not adequately describe her considerable knowledge of the area. She had very relevant experience in the areas of company governance and the duties of company directors working in the funds sector. She was not merely a 'colleague in the sector'. What she had to say, and could have said if asked, was significantly more than something to be "noted.' The material she submitted not only deserved, but required to be weighed in the balance as to whether the Appellant did have experience, skill and competence. The decision-maker did not adequately consider this relevant statement from Dr Cullen.

317. Mr O'Doherty was also a person who had very considerable experience and expertise in the sector, including interactions with the Central Bank itself. What Mr. Giorgetti and particularly Mr Forde had written was by no means insignificant. This was all relevant material, not adequately engaged with by the decision-maker.

318. The Appellant himself had put before the decision-maker, a significant amount of material which Official Z merely touches on, sometimes in footnotes. But, in fact, what she had before her was a point-by-point critique and rebuttal of the interview process as a whole. He challenged the fairness of the procedure. He contended he was not given fair notice. He criticised the questioners, the questioning, and their competence and familiarity with the sector. He said that the officials had been unfair from the outset. He contended that the terms they had used were unfamiliar to him.

319. The decision-maker did not adequately engage with this material. Instead, the decision was unduly focused on the Appellant's knowledge of the regulations and his performance at the two interviews.

320. The impugned decision was one which had serious legal consequences, where fundamental legal and constitutional principles had to be applied in the course of performing the statutory functions.

Fair Consideration

321. It is a basic principle that a decision-maker must be made aware of, and really entertain, an applicant's arguments, so that they are fully and fairly considered. (See *Stefan v. Minister for Justice, Equality & Law Reform* [2011] 4 I.R. 203).

322. The absence of a determination in relation to this significant, countervailing and rebuttal evidence is more significant in light of the fact that there was, for that reason, a failure on the part of the decision-maker to give reasons for her decision. (See *Mallak v. Minister for Justice* [2012] 3 I.R. 297; *Keegan v. The Stardust Victims Compensation Tribunal* [1986] 1 I.R. 642; *East Donegal Co-operative Livestock Market Limited v. Attorney General* [1970] I.R. 317, and more recently, *NECI v. The Labour Court, Minister for Business Enterprise & Innovation*, *Ireland & Attorney General* [2021] IESC 36; [2022] 3 IR 515.

323. In *NECI*, the Supreme Court held that what was missing in the decision of the Labour Court was any fair or adequate description as to the reasons as to how or why the Labour Court (which was the respondent) had reached its conclusions. The Supreme

Court held it was not sufficient to recite that certain matters advanced by an opposing party would be 'considered'. Nor was it sufficient to say that important submissions had been "made" or "noted". What is required rather is for a decision-makers to *engage with an objector's submissions and give reasons on which those submissions were rejected.* This would not require a lengthy discursive description of every point raised, but rather a sufficient analysis of the main arguments and submissions and a clear statement of why these were rejected There is a fundamental difference between mentioning issues which were "raised", or submissions put in by colleagues, and actually addressing the matters contained there substantively by a response, giving reasons why they are rejected. The impugned decision was flawed as it was based on a flawed preliminary process, because it did not observe the principle of *audi alterem partem*, and because it did not give reasons, so as to comply with what was required in law. (See also *Connolly v An Bord Pleanála* [2021] 2 IR 31 and *Balz v An Bord Pleanála* [2020] 1 ILRM 367.)

IV: ORDER

324. For the reasons outlined, therefore, the Tribunal is satisfied that the Respondent fell into errors of law, which are such as to vitiate the conclusion reached.

325. We are unable to conclude that the decision reached was the correct and preferable decision. There were fundamental procedural flaws which were to be found at all three stages of the process. The Tribunal is satisfied that taken cumulatively – or even individually – the various procedures adopted by the Central Bank did not comply with the requirements of Constitutional and natural justice; including the necessity for fair notice; the duty to give reasons; and the observance of the principle of *audi alterem partem*.

326. As the Tribunal has concluded that the decision was not the correct or preferable one, it has no option but to order that the matter be remitted to the Central Bank for reconsideration (see Section 57Z(2)(d) of the Act of 2010). Under the same subsection, the Tribunal is permitted to either make recommendations or directions as to what aspects of the matter should be reconsidered.

Directions

327. In the light of the inordinate time-elapse in this case, the Tribunal directs that within 21 days of this decision, the Central Bank will notify the Appellant of the procedures it will apply in reconsidering the applications.

328. This process should be carried out by persons who were not directly involved with the matters considered in this decision.

329. The Tribunal directs that this reassessment process should be completed within 90 days of the date of issue of this decision.

Costs – Preliminary View

330. In the light of the foregoing, under Section 57AH(1), the Tribunal may award costs in relation to proceedings before it and may determine by whom and to what extent costs are to be paid. Under Subsection (2), the term "costs", includes not only costs of or incidental to the hearing and determination of an Appeal, but also the costs of or incidental to the proceedings giving rise to the Appeal.

331. Historically, in the courts, the principle applicable in relation to costs was that costs should follow the event, (see Order 99, Rules of the Superior Courts). This principle has of course now been rendered subject to Sections 168 and 169 of the Legal Services Regulation Act, 2015 and has been the subject matter of a number of judgements by the Superior Courts. It is hard to see why a different principle should apply in this instance.

332. The preliminary view of the Tribunal (subject to any written submission made within 7 days of this decision), is that the Appellant should be entitled to his costs; such costs including each of the days of the hearing, for the submissions, pleadings and correspondence subsequent to the impugned decision and any legal costs of the proceedings which gave rise to this Appeal, (see Section 57AH(2)).

333. For the reasons outlined earlier, the Tribunal takes a rather different view regarding costs of the directions hearings. It cannot be said the Appellant was wholly

successful. Some submissions as to the scope and powers of the Tribunal were misconceived. Against that, it cannot be said the Central Bank's submissions were fully correct either, on the powers of the Tribunal and the Bank's obligations thereunder. On balance, the Appellant will be awarded one half of the costs of the directions hearings.

Date: 31st January 2024

Signed:

Mr Justice John MacMenamin

Chairperson

ADDENDUM

On the 9th day of February 2024 the Tribunal made the following order on the issue of costs:

i. The Appellant is entitled to the costs incurred in the process leading to the appeal from the date of instructing his solicitors in the matter in September 2021, up to and including the date of the impugned decision on 5th December 2022. The Appellant is further entitled to the costs of the appeal to the Tribunal, to include correspondence pleadings and submissions.

ii. The Appellant is entitled to one half of the costs incurred in each directions hearing.

iii. All costs are awarded on a party and party basis, to be adjudicated in default of agreement in the normal way.

iv. Liberty to apply.

Signed:

Mr Justice John MacMenamin
Chairperson

ADDENDUM II

As per paragraph 250 of the Decision, the Tribunal has made an Order under s.57W(2)(b) of the Act, prohibiting the disclosure of the name, address, picture, or any other material that identifies or may lead to the identification of the Appellant and the officials directly involved in the interviews and the decision-making process.

NOTE

Following consideration of correspondence, including from third parties, alterations were made to paragraphs 38, 39, 40, 46 48 and 49 after the making of this decision, pursuant to section 57AG of the Central Bank Act 1942, as amended.

APPENDIX A

Section 3 of the Fitness and Probity Standards 2014, a code issued pursuant to Section 50 of the Central Bank Reform Act 2010

"3. CONDUCT TO BE COMPETENT AND CAPABLE

3.1 A person shall have the qualifications, experience, competence and capacity appropriate to the relevant function.

3.2 Without limiting the generality of paragraph 3.1, the person must be able to demonstrate that he or she:

(a) has professional or other qualifications and capability appropriate to the relevant function;

(b) has obtained the competence and skills appropriate to the relevant function, whether through training or experience gained in an employment context;

(c) has shown the competence and proficiency to undertake the relevant function through the performance of previous functions which if carried out at present would be subject to this Code, or current controlled functions, or performance by the person of any role similar or equivalent to the functions that are covered by this Code. If the person performed a function in a regulated financial service provider, which if performed at present would be subject to this Code, and that regulated financial service provider received State financial support, consideration shall be given to the competence and skills demonstrated by that person in that function and to the extent, if any, to which the performance of his or her function may have contributed to the necessity for such State financial support;

(d) has a sound knowledge of the business of the regulated financial service provider as a whole, and the specific responsibilities that are to be undertaken in the relevant function;

(e) has a clear and comprehensive understanding of the regulatory and legal environment appropriate to the relevant function;

(f) shall not allow the conduct of concurrent responsibilities to impair his or her ability to discharge the duties of the relevant function or otherwise allow personal conflicts of interest to arise in carrying out his or her pre-approval controlled functions or controlled functions; and

(g) is compliant with the applicable Minimum Competency Code issued by the Central Bank."

APPENDIX B

S.I. No. 352/2011 - European Communities (Undertakings for Collective Investment in Transferable Securities) Regulations 2011

Regulation 68: Permitted investments

"68. (1) The investments of a UCITS shall comprise only one or more of the following:

(a) transferable securities and money market instruments admitted to or dealt in on a regulated market within the meaning of Regulation 3(1) of the MIFID Regulations;

(b) transferable securities and money market instruments dealt in on another regulated market in a Member State, which operates regularly and is recognised and open to the public;

(c) transferable securities and money market instruments admitted to official listing on a stock exchange in a third country or dealt in on another regulated market in a third country which operates regularly and is recognised and open to the public provided that the choice of stock exchange or market has been approved by the competent authorities or is provided for in law or the fund rules or the instruments of incorporation of the investment company;

(d) recently issued transferable securities, provided that—

(i) the terms of issue include an undertaking that an application will be made for admission to official listing on a stock exchange or to another regulated market which operates regularly and is recognised and open to the public, provided that the choice of stock exchange or market has been approved by the competent authorities or is provided for in law or the fund rules or the instruments of incorporation of the investment company, and

(ii) the admission referred to in clause (i) is secured within a year of issue;

(e) units of UCITS authorised according to the Directive or other collective investment undertakings within the meaning of Regulation 4(3), whether or not established in a Member State, provided that—

(i) such other collective investment undertakings are authorised under laws which provide that they are subject to supervision considered by the Bank to be equivalent to that laid down in Community law, and that cooperation between authorities is sufficiently ensured,

(ii) the level of protection for unit-holders in the other collective investment undertakings is equivalent to that provided for unit-holders in a UCITS, and in particular that the rules on asset segregation, borrowing, lending, and uncovered sales of transferable securities and money market instruments are equivalent to the requirements of the Directive,

(iii) the business of the other collective investment undertakings is reported in half-yearly and annual reports to enable an assessment to be made of the assets and liabilities, income and operations over the reporting period, and

(iv) not more than 10 % of the assets of the UCITS or of the other collective investment undertakings, whose acquisition is contemplated, can, according to their trust deed, deed of constitution or articles, be invested in aggregate in units of other UCITS or other collective investment undertakings;

(f) deposits with credit institutions which are repayable on demand or have the right to be withdrawn, and maturing in not more than 12 months, provided that the credit institution has its registered office in a Member State or, if the credit institution has its registered office in a third country, provided that it is subject to prudential rules considered by the Bank as equivalent to those laid down in Community law;

(g) financial derivative instruments, including equivalent cash-settled instruments, dealt in on a regulated market referred to in sub-paragraph (*a*), (*b*) or (*c*) or financial derivative instruments dealt in OTC derivatives, provided that—

(i) the underlying of the derivative consists of instruments covered by this paragraph, financial indices, interest rates, foreign exchange rates or currencies, in which the UCITS may invest according to its investment objectives as stated in its trust deed, deed of constitution or articles,

(ii) the counterparties to OTC derivative transactions are institutions subject to prudential supervision, and belonging to the categories approved by the Bank, and

(iii) the OTC derivatives are subject to reliable and verifiable valuation on a daily basis and can be sold, liquidated or closed by an offsetting transaction at any time at their fair value at the UCITS' initiative;

or

(h) money market instruments (other than those dealt in on a regulated market) where the issue or issuer of such instruments is itself regulated for the purpose of protecting investors and savings, provided that they are—

(i) issued or guaranteed by a central, regional or local authority or central bank of a Member State, the European Central Bank, the Community or the European Investment Bank, a third country or, in the case of a Federal State, by one of the members making up the federation, or by a public international body to which one or more Member States belong,

(ii) issued by an undertaking any securities of which are dealt in on a regulated market referred to in subparagraph (*a*), (*b*) or (*c*),

(iii) issued or guaranteed by an establishment subject to prudential supervision, in accordance with criteria defined by Community law, or by an establishment which is subject to and complies with prudential rules considered by the Bank to be at least as stringent as those laid down by Community law, or

(iv) issued by other bodies belonging to the categories approved by the Bank provided that investments in such instruments are subject to investor protection equivalent to that laid down in clause (i), (ii) or (iii) and provided that the issuer is a company the capital and reserves of which amount to at least €10,000,000 and which

presents and publishes its annual accounts in accordance with the Fourth Council Directive 78/660/EEC of 25 July 1978[13] based on Article 54(3)(*g*) of the Treaty on the annual accounts of certain types of companies, is an entity which, within a group of companies which includes one or several listed companies, is dedicated to the financing of the group or is an entity which is dedicated to the financing of securitisation vehicles which benefit from a banking liquidity line.

(2) A UCITS may hold ancillary liquid assets but shall not—

(a) invest more than 10 % of its assets in transferable securities or money market instruments other than those referred to in paragraph (1), or

(b) acquire either precious metals or certificates representing them.

(3) An investment company may acquire movable or immovable property which is essential for the direct pursuit of its business."

Regulation 69: Risk-management

"69. (1)(*a*) A management company or an investment company shall employ a risk-management process which enables it to monitor and measure at any time the risk of the UCITS' positions and their contribution to the overall risk profile of the portfolio of assets of the UCITS.

(b) A management company or an investment company shall employ a process for accurate and independent assessment of the value of OTC derivatives.

(c) A management company or an investment company shall communicate to the Bank regularly and in accordance with particular requirements the Bank shall specify for that purpose the types of derivative instruments, the underlying risks, the quantitative limits and the methods which are chosen in order to estimate the risks associated with transactions in derivative instruments regarding each managed UCITS.

(2)(*a*) A UCITS may employ techniques and instruments relating to transferable securities and money market instruments under and in accordance with conditions or requirements imposed by the Bank for the purpose of this Regulation (whether generally or in relation to the particular UCITS) provided that such techniques and instruments are used for the purpose of efficient portfolio management. When those operations concern the use of derivative instruments, those conditions and requirements shall comply with these Regulations.

(*b*) Those operations shall not, in any case, cause the UCITS to diverge from its investment objectives as laid down in the trust deed, deed of constitution, memorandum and articles of incorporation or prospectus.

(3) The reference in paragraph (2)(*a*) to techniques and instruments which relate to transferable securities or money market instruments and which are used for the purpose of efficient portfolio management shall be understood as a reference to techniques and instruments which fulfil the following criteria:

(a) they are economically appropriate in that they are realised in a cost-effective way;

(b) they are entered into for one or more of the following specific aims:

(i) reduction of risk;

(ii) reduction of costs;

(iii) generation of additional capital or income for the UCITS with a level of risk which is consistent with the risk profile of the UCITS and the risk diversification rules set out in Regulations 70 and 71;

and

(c) their risks are adequately captured by the risk management process of the UCITS.

(4)(*a*) A UCITS shall ensure that its global exposure relating to derivative instruments does not exceed the total net asset value of its portfolio.

(b) A UCITS may invest, as a part of its investment policy and within the limit specified in Regulation 70(6), in financial derivative instruments provided that the exposure to the underlying assets does not exceed in aggregate the investment limits specified in Regulation 70. Where a UCITS invests in index-based financial derivative instruments, these investments do not have to be combined with the limits specified in Regulation 70.

(c) When a transferable security or money market instrument contains an embedded derivative, the latter shall be taken into account when complying with the requirements of this Regulation.

(5)(*a*) A transferable security or money market instrument embedding a derivative shall be understood as a reference to financial instruments which fulfil the criteria for transferable securities or money market instruments set out in Schedule 3 and which contain a component which fulfils the following criteria:

(i) by virtue of that component some or all of the cash flows that otherwise would be required by the transferable security or money market instrument which functions as host contract can be modified according to a specified interest rate, financial instrument price, foreign exchange rate, index of prices or rates, credit rating or credit index, or other variable, and therefore vary in a way similar to a stand-alone derivative;

(ii) its economic characteristics and risks are not closely related to the economic characteristics and risks of the host contract; and

(iii) it has a significant impact on the risk profile and pricing of the transferable security or money market instrument.

(*b*) A transferable security or a money market instrument shall not be regarded as embedding a derivative where it contains a component which is contractually transferable independently of the transferable security or the money market instrument. Such a component shall be deemed to be a separate financial instrument.

(6) For the purposes of paragraph (2), exposure is calculated taking into account the current value of the underlying assets, the counterparty risk, future market movements and the time available to liquidate the positions.

(7) The requirements specified in Schedule 9—

(a) shall have effect for the purposes of this Regulation, and

(b) shall, in addition to applying to management companies, also apply to investment companies that have not designated a management company pursuant to these Regulations.

(8) Any reference in Schedule 9 to a management company or management companies shall, for the purposes of subparagraph (*b*) of paragraph (7), be construed to include a reference to investment company or investment companies respectively."

APPENDIX C

Section 23 of the Central Bank Reform Act 2010
Appointment of persons to perform pre-approval controlled functions.

"23.—(1) Subject to section 23A, a regulated financial service provider or holding company shall not appoint a person to perform a pre-approval controlled function in relation to it unless the Bank has approved in writing the appointment of the person to perform the function.

(2) For the purposes of considering whether or not to approve the appointment of a person under subsection (1), the Bank may request the person, or a specified officer or employee of the regulated financial service provider or holding company that proposes to appoint the person to perform a pre-approval controlled function, by notice in writing to do any one or more of the following:

(a) produce a specified document or documents to the Bank;

(b) provide specified information to the Bank;

(c) produce to the Bank documents of a kind described in the notice;

(d) answer a question or questions set out in the notice;

(e) attend before a specified officer or employee of the Bank for interview.

(3) A notice under subsection (2) shall specify a date and time by which, and a place at which, the person shall provide the document or documents or information, provide answers to the question or questions, or attend for interview, as the case may be.

(4) Nothing in subsection (2) or any notice given by the Bank under that subsection requires a person—

(a) to produce to the Bank a document that the person could not have been compelled to produce to a court,

(b) to give the Bank information that the person could not have been compelled to give a court, or

(c) to answer a question (either in writing or at interview) that the person could not have been compelled to answer in a court.

(5) The Bank may refuse to approve the appointment of a person for the purposes of subsection (1) where—

(a) the Bank is of the opinion that the person is not of such fitness and probity as is appropriate to perform the function for which he or she is proposed to be appointed, or

(b) the Bank is unable to decide, on the basis of the information available to it, whether the person is of such fitness and probity.

(6) Without prejudice to the generality of subsection (5), the Bank may refuse to approve the appointment of a person under subsection (1) if—

(a) the person, or an officer or employee of the regulated financial service provider or holding company concerned, has failed to comply with a request under subsection (2), or

(b) any of the grounds set out in paragraphs(a) to (h) of section 25(3) apply. (7) A refusal pursuant to subsection (5) is an appealable decision for the purposes of Part VIIA of the Act of 1942."