THE HIGH COURT

COMMERCIAL

Record No. 2023/3493 P

[2024] IEHC 97

BETWEEN

AILMOUNT INVESTMENTS LIMITED

PLAINTIFF

AND

BANK OF IRELAND NOMINEE 1 LIMITED

AND

THE GOVERNOR AND COMPANY OF BANK OF IRELAND

DEFENDANTS

JUDGEMENT of Mr Justice Twomey delivered on 21st February, 2024.

1. A novel point was raised in this discovery application. It is the claim that because an issue was only pleaded by a plaintiff in the Reply to the Defence, rather than when the plaintiff issued the proceedings (in the Statement of Claim), that the said issue is *not* a factor for this Court to take into account in determining the issues in dispute (in order to determine whether a category of documents is relevant to the dispute and so should be discovered).

2. The background to this claim is that plaintiff ("**Ailmount**") is suing the defendants ('**Bank of Ireland**') for a sum which it estimates to be €20 million, which it claims it is owed as the balance of the purchase price for the Davy Group. The Davy Group was sold under the terms of a Share Purchase Agreement ('**SPA**') dated 22 July 2021 between Ailmount and the two defendants.

3. Based on the oral submissions of the parties, it seems that the question which will have to be determined by the trial court, to determine if Ailmount is owed this sum, will come down to a question of contractual interpretation of Clause 1.1 of the SPA.

4. In summary, the SPA provides for the possibility of an increase in the purchase price to be paid to Ailmount. This additional payment reflects the fact that around the time of the sale of the Davy Group, there was a change in the law regarding investment firms, which meant that there was likely to be a reduction in the capital requirements of the Davy Group (the "**Consolidated Capital Resources Requirement/CCRR**"), which was effective around the time of the sale. In very general terms, it was agreed that if those new regulations led to a *reduction* in the amount of capital (the "**2002 Capital Requirement Reduction Amount/CRRA**") which the Davy Group- had to hold, then the seller (Ailmount) would be paid an uplift on the purchase price.

5. This agreement was reflected in Clause 1.1 of the SPA, since it provided for the 2022 Capital Requirement Reduction Amount to be calculated as follows:

> ""2022 Capital Requirement Reduction Amount" means an amount equal to:
>
> (a) €74,430,000; minus
>
> (b) the Consolidated Capital Resources Requirement **as confirmed in writing by the CBI** on or before 31 December 2022, plus a management buffer of 15%" (Emphasis added)

Clause 3 provides for the payment by Bank or Ireland of this '*2022 Capital Requirement Reduction Amount (if any)*' to Ailmount. In particular, Clause 3 provides for this payment to be made 10 business days after 31 December, 2002. The failure of Bank of Ireland to make any payment on that date has led to these proceedings.

6. However, Bank of Ireland claims that the amount payable by it to Ailmount under this clause is zero. In particular, it claims that it never received any confirmation in writing, from the Central Bank on or before 31 December 2022, of the capital requirements/CCRR of the Davy Group, and so it does not have to pay Ailmount any money.

7. For its part, Ailmount understands that Davys *submitted* its capital requirements to the Central Bank in the sum of €47,572,466, and that applying the formula in Clause 3.3, it claims that this means that it is owed €19,721,655. Indeed, it also claims that if one accepts Bank of Ireland's argument that there was no confirmation in writing from the Central Bank, the effect of this is that under Clause 3 there would be no deduction from the headline figure of €74,430,000, and so Ailmount is owed €74,430,000 (and so even more than the €19,721,655, which Ailmount is claiming).

The discovery sought by Ailmount

8. Against this background Ailmount seeks the following two categories of discovery from Bank of Ireland

> '***Category 1***
>
> *(A) Copies of all regulatory capital returns filed by the Davy Group in respect of 2022.*
>
> *(B) Any other documents evidencing or recording the amount of, or the calculation of, or the means of calculation of the 2022 Capital Requirement Reduction Amount or the Consolidated Capital Resources Requirement (or any of their respective constituent elements).*

Timeframe: 22 July 2021 to the date discovery agreed/ordered.

Category 2

Any communications recording and/or evidencing and/or discussing the Davy Group's capital resource requirements or the Davy Group's regulatory capital returns.

Timeframe: 1 January 2021 to the date discovery agreed/ordered'.

The applicable law

9. The law relating to discovery is well established and was summarised succinctly in *O'Brien v Red Flag Consulting Limited* [2021] IECA 172 per Donnelly J. at [27] as follows:

> "A document is relevant if it may reasonably form the basis of a line of enquiry which may lead to the discovery of information that will **advance the case of the seeker and/or weaken that of the party against whom it is sought**. It is sufficient that a document may contain such information. It is not necessary to prove that it will. **Relevance is determined on the basis of the pleadings** and not the evidence".

It is clear from the judgment of McCracken J in *Hannon v Commissioner for Public Works* [2001] IEHC 59, at p. 8) that the test of relevance is as follows:

> "The Court must decide as a **matter of probability as to whether any particular document is relevant** to the issues to be tried. It is not for the court to order discovery simply because there is a possibility that documents may be relevant." (Emphasis added)

Analysis of Category 1

10. Category 1 is agreed between the parties, save that Bank of Ireland claims that there should be a temporal limit of 17 July 2023, which is the date when the proceedings were issued by Ailmount, with no discovery of documents created after that date. For its part, Ailmount

claims that the discovery should apply to documents coming into existence up to the date of the court order, which is granted by this Court.

11. In support of its position, Ailmount referred to a letter dated 14 December 2023, which is therefore some months *after* the temporal limit suggested by Bank of Ireland. This letter is from the Central Bank to the Davy Group. This letter states, insofar as relevant, that:

> *"I refer to the regulatory direction letter issued to the Firm on 12 October 2020 (the "2020 Letter"), the email issued to the Firm on 25 June 2021 (the "June Email") and the letter issued to the Firm on 10 October 2022 (the "2022 Letter")* ***all of which related to the additional capital the Firm is required to hold.*** *Pursuant to the 2020 Letter, Davy was directed by the Central Bank of Ireland (the "Central Bank") to apply those conditions or requirements as specified below:*
>
> *In accordance with Regulation 9(2) of the European Union (Capital Requirements) Regulations 2014, the Firm shall hold an additional 4.5% Risk Weighted Assets ("RWA"), in excess of its minimum own funds requirement, which should consist entirely of CET1. (Additional details in Appendix I) […]In order for the Central Bank to consider removing the regulatory direction imposed via the 2020 Letter, the Firm was advised that, at a minimum, it would need to take the following steps:*
>
> *a) document the ICAAP calculation and methodology […]"*

12. It is clear that this letter is relevant to the issue of the amount of capital to be held by the Davy Group, which is at the heart of the dispute, and so is *prima facie* discoverable. Nonetheless, Bank of Ireland suggested that the cut-off date for discovery should be *prior to the date of this letter*, i.e. the 17 July, 2023. To support this claim, Mr. Tom Casey, solicitor, swore an affidavit on behalf of Bank of Ireland in which he avers that:

> ‘There is no reason to suppose that any documents relevant to this issue would come into existence any later than [Bank of Ireland’s] suggested temporal limit of 17 July 2023. This is a date more than seven calendar months from the end of relevant financial period. Furthermore, by 17 July 2023 [Ailmount] had already commenced legal proceedings and presumably [Ailmount] was of the view that the facts giving rise to its cause of action had by that date already occurred. As such the end date as proposed by [Bank of Ireland] would result in a disproportionate cost and effort on [Bank of Ireland] to collect and carry out searches for documents which there is no reason to believe will be responsive.”

13. However, it seems to this Court that the very existence of the letter dated 14 December 2023 (and Bank of Ireland did not seek to claim that this letter was *not* relevant) illustrates that there is in fact reason to suppose that documents relevant to the dispute would have come into existence after 17 July 2023, despite Mr. Casey’s averment.

14. This is because it seems to this Court that this letter is unlikely to exist in a vacuum and that it is probable, and not just possible, that there is correspondence, after 17 July, 2020, from the Davy Group to the Central Bank in relation to its capital requirements. Furthermore, it is also probable there is internal documentation in the Davy Group in relation to this issue.

15. It is also relevant to note that, at para 8(iv) of its Defence (set out below), Bank of Ireland has pleaded that as of the date upon which the Defence was filed (9th October, 2023), the Central Bank had not ‘*yet given’* confirmation regarding Davy’s capital requirements. This clearly indicates that Bank of Ireland believes that there may be documents after 9th October, 2003 (and so also after 17 July, 2023) which may be relevant to a key issue in the dispute.

16. For all these reasons, this Court concludes that if it were to apply the temporal limit suggested by Bank of Ireland, this is likely to exclude documents which are probably relevant to the issues at stake this case. Hence this court will not apply the temporal limit suggested by

Bank of Ireland and instead the relevant date for the discovery of this category shall be the date of this order.

Analysis of Category 2

17. As already noted, the caselaw makes clear that relevance, for the purposes of deciding whether to permit a category of discovery, is determined by reference to the pleadings. It is necessary therefore to refer, in some detail, to the pleadings.

18. Para 13 and 14 of Ailmount's Statement of Claim dated 17 July, 2023 states:

> "13. The **regulatory capital return for the year ended 2022 was made to the Central Bank**. Accordingly, on the basis of the regulatory returns the **amount provided for in clause 3.1(v) of the SPA is known to the Defendants who are bound by their regulatory returns**. Notwithstanding the foregoing the **defendants have refused to inform the Plaintiff of the amount** or to make the payment required under the SPA.
>
> 14. The Defendants have wrongfully and unlawfully and in breach of their obligations failed to pay the amount due under clause 3.3 of the SPA. They have further wrongfully and unlawfully sought to advance various changing and contradictory reasons for non-payment, none of which constitute a valid justification, and **have failed to provide confirmation of the CCRR in circumstances where no issue has been, or could be raised by the Defendants about the CCRR determined in accordance with their regulatory obligations**. In circumstances where both Defendants are regulated entities they are **estopped from denying to the Plaintiff the amount provided for in the said returns**. Further the Defendants have wrongfully and unlawfully sought to renegotiate the SPA." (Emphasis added)

19. Particulars were raised by Bank of Ireland on 11 September, 2023 and answered by Ailmount on 25 September, 2023 as follows:

1.1 Please set out all material facts relied upon in support of the plea that the amount provided for in clause 3.1(v) of the SPA is known to the Defendants "on the basis of the regulatory returns". In particular, please identify (by reference to specific line items in the Group's regulatory return) how the Defendants contend that the amount set out in clause 3.1(v) is to be ascertained from the regulatory return.

The 2022 Capital Requirement Reduction Amount ("2022 CRRA"), which is provided for in clause 3.1(v) is calculated according to a formula set out in clause 1.1 of the SPA as follows:

a) €74,430,000; minus

b) The Consolidated Capital Resources Requirement as confirmed in writing by the CBI on or before 31 December 2022, plus a management buffer of 15%; minus

c) the impact (if any) on the Consolidated Capital Resources Requirement, plus a management buffer of 15%, directly as a consequence of any potential one-off transfer of client funds under management from the Purchaser's Group (excluding the Group) to the Group during the time period between Completion and 31 December 2022.

[Reply from Ailmount] The Consolidated Capital Resources Requirement ("CCRR") as defined in the SPA is "at any given time, an amount equal to the net Group applicable consolidated regulatory capital resource requirement" which was required to be calculated and reported to the CBI [Central Bank of Ireland]. The 2022 CRRA may be ascertained by the **application of the formula set out in clause 1.1 of the SPA taking**

into account the CCRR recorded in the 2022 capital resource requirement returns submitted to the CBI. The Plaintiff is unaware of how the 2022 CCRR was calculated. However, the Defendants are bound by the figure recorded in the returns which is a matter for evidence".

1.2 Please clarify the meaning of the plea that the Defendants "are bound by their regulatory returns."

[Reply from Ailmount] The capital resource requirement regulatory capital returns for the year ended 2022 were made to the CBI, containing the CCRR, by reference to which the 2022 CRRA is calculated under clause 1.1 of the SPA. **The filing of accurate and complete capital returns is a binding legal obligation and the Defendants are liable for the 2022 CRRA calculated on the basis of those returns**. The Plaintiff is a stranger to the returns, a copy of which has not yet been furnished, and discovery of same will be sought in due course. However, the Plaintiff is not aware that the CBI has identified any inaccuracy in the returns or been notified of any inaccuracy by the Defendants and accordingly the Defendants are bound by the returns. (Emphasis added)

[…]

2.1 Please identify precisely what is the amount the Plaintiff claims to be due under Clause 3.3 of the SPA.

[Reply from Ailmount] The 2022 Capital Requirement Reduction Amount is due. On the basis of the excerpt from the J & E Davy Holdings Capital returns furnished by the Defendants this can be calculated as follows:

a) €74,430,000; minus

b) €47,572,466 in respect of the CCRR plus €7,135,869.90 in respect of a management buffer of 15%.

According to the excerpt from the J&E Davy Holdings Capital returns, the sum of €19,721,665 (plus interest) is due under Clause 3.3 of the SPA. However, the Plaintiff is a stranger to the returns, a copy of which has not yet been furnished, and discovery of same will be sought in due course." (Emphasis added)

In its Defence dated 9th October, 2023, Bank of Ireland states:

"7 (ii). **[I]t is admitted that returns were filed with the Central Bank during 2022** in accordance with the Davy Group entities' legal and regulatory obligations. No further admission is made regarding the returns that were filed pending clarification of which specific regulatory returns the Plaintiff's pleadings are relying on.

[…]

8. Without prejudice to the foregoing, the Defendants plead as follows:

i. The relevant part of the definition of 2022 Capital Reduction Amount in Clause 1.1 of the Agreement, relied on by the Plaintiff, refers to *"the Consolidated Capital Resources Requirement as confirmed in writing by the CBI on or before 31 December 2022, plus a management buffer of 15%"*.

ii. The Central Bank of Ireland did not confirm (whether in writing or otherwise) any Consolidated Capital Resources Requirement for 2022, either on or before 31 December 2022 or subsequently.

iii. In particular, up until June 2021 the Davy Group's capital requirements were set under the CRD IV / CRR framework (*i.e.*, the Capital Requirements Directive 2013/36/EU and the EU Capital Requirements Regulation

2013/575/EU, together with implementing legislation and guidance). Thereafter the Davy Group's capital requirements were set under the IFD / IFR framework (*i.e.*, the Investment Firms Directive EU/2019/2034 and the Investment Firms Regulation EU/2019/2033, together with implementing legislation and guidance).

iv. **The Central Bank has not yet given any confirmation regarding certain elements of the Davy Group's capital requirements** under the IFD / IFR framework, in particular the 'additional own funds' guidance (also referred to as Pillar 2 guidance) that applies to the Davy Group or the entities in the Davy Group in accordance with Article 41 of the Investment Firms Directive and which replaces 'buffer' requirements that applied under the CRD IV / CRR framework.

9. In light of the foregoing, the Defendants plead as follows:

i. It is pleaded that on the proper construction of the Agreement or alternatively by way of an implied term:

a. The 2022 Capital Reduction Amount was intended to be a measure of any reduction in the Consolidated Capital Resources Requirement (plus a management buffer of 15%) that was confirmed in writing by the Central Bank during 2022.

b. No change in the Consolidated Capital Resources Requirement (plus a management buffer of 15%) was confirmed in writing by the Central Bank during 2022.

c. Accordingly, the 2022 Capital Reduction Amount is nil.

ii. The Agreement does not mention any regulatory returns to be filed by the Defendants and does not provide that the 2022 Capital Reduction Amount falls to be determined by the content of any such regulatory returns. **The Plaintiff's claim rests on the premise that the 2022 Capital Reduction Amount must be calculated by reference to some (unidentified) regulatory return filed by the Defendants. This is incorrect.** The Agreement expressly provides that the 2022 Capital Reduction Amount must be calculated based on '*the Consolidated Capital Resources Requirement as confirmed in writing by the CBI on or before 31 December 2022 …'."* (Emphasis added)

20. Ailmount then raised particulars on Bank of Ireland's defence on 16 October, 2023, which were answered on 31 October, 2023, as follows:

"3. With reference to the plea at paragraph 8(ii) of the Defence that the Central Bank of Ireland did not confirm any Consolidated Capital Resources Requirement for 2022, please indicate whether confirmation of the Consolidated Capital Resources Requirement for 2022 has been sought by the Defendants or any subsidiary of the Defendants from the Central Bank. If confirmation of the Consolidated Capital Resources Requirement for 2022 was sought from the Central Bank, please specify when it was sought and the manner in which it was sought.

[Bank or Ireland reply] **The Defendants' plea at paragraph 8(ii) of the Defence is clear. The questions raised do not arise from any matters pleaded.** (Emphasis added)

21. In its Reply to the Defence dated 13 November, 2023, Ailmount then pleaded:

"2. By way of special reply to the plea at paragraph 8 (ii) of the Defence, that the Central Bank of Ireland ("CBI") did not confirm in writing or otherwise any Consolidated

Capital Resources Requirement for 2022, either on or before 31 December 2022 or subsequently, the Plaintiff pleads as follows:

(i) **The CBI would have had jurisdiction to impose additional capital requirements on investment firms** in accordance with its powers under the Investment Firms Directive and the European Union (Investment Firms) Regulations 2021

(ii) The CBI did not impose additional capital requirements, to those recorded in that return, on the Davy Group for that period.

Consequently, the Consolidated Capital Resources Requirement for 2022, as recorded in the return filed by the Defendants stands, and the Defendants are obliged to calculate the 2022 Capital Requirement Reduction Amount, due to the Plaintiff under the SPA, by reference to the figure included in the return.

3. By way of special reply to the plea at paragraph 8 (iii) of the Defence that the Davy Group's capital requirements were set under the IFD/IFR framework and the plea at 8 (iv) that the Central Bank has not yet given any confirmation regarding certain elements of the Davy Group's capital requirements under IFD/IFR framework, the Plaintiff pleads as follows:

(i) The IFR came into effect on 26 June 2021 with the IFD being transposed into Irish law on 24 September 2021

(ii) under the SPA, the 2022 Capital Requirement Reduction Amount is to be calculated according to the Davy Group Capital Requirement as of 31 December 2022

(iii) the CBI has not sought to impose additional capital requirements, to those recorded in the return filed by the Defendants, or to otherwise adjust the Davy

Group Capital Requirement as of 31 December 2022 under the IFD/IFR framework.

(iv) Any additional capital requirements imposed on the Davy Group in future will be prospective only and will not affect the Consolidated Capital Resources Requirement for 2022.

4. By way of special reply to the plea at paragraph 9 (i) (b)-(c) of the Defence, that no change in the Consolidated Capital Resources Requirement (plus a management buffer of 15%) was confirmed in writing by the Central Bank during 2022 and accordingly the 2022 Capital Reduction Amount is nil, the Plaintiff pleads that the Consolidated Capital Resources Requirement as at 31 December 2022, as **recorded in the return filed by the Defendants, has been accepted either expressly or by implication by the CBI and the 2022 Capital Requirement Reduction Amount remains due and owning.**

5. Further and in the alternative and strictly without prejudice to the foregoing, the Defendants **failed to engage with the CBI to obtain its approval of the Consolidated Capital Resources Requirement in breach of clause 9.7 of the SPA, which required the First Defendant to act in good faith and to use and to procure that the Group used reasonable endeavours to reduce the Group's consolidated Capital Resources Requirement**, including engaging with the CBI to approve the reduction in writing on or by 31 December 2022". (Emphasis added)

Analysis of Category 2

22. Having set out the pleadings, it is necessary now to consider whether the category of documents sought is relevant to the issues in dispute (as apparent from those pleadings). In this regard, it is relevant to note that Bank of Ireland's position on the pleadings is that it is not

liable to make any payment to Ailmount because the Central Bank did not confirm Davy's CCRR for 2022 in writing.

23. It is also relevant to note that despite the obligation upon Bank of Ireland, under Clause 9.7 of the SPA, to act in good faith and use reasonable endeavours to reduce the CCRR, Bank of Ireland has refused to confirm whether or not it had sought confirmation of the CCRR from the Central Bank and the manner of any such confirmation. (It is however important to note that Clause 9.7 was only pleaded by Ailmount *after* Bank of Ireland refused to provide the details of any confirmation, it sought from the Central Bank regarding CCRR for 2022).

24. The issue of the relevance, or otherwise, of the Category 2 documents, such that they are discoverable, is determined by reference to, in particular, these pleadings. This discovery request (of documents in Category 2 *regarding Davy's capital requirements and returns*) therefore must be viewed against the *current position*, being that Ailmount has pleaded a breach of Clause 9.7 (i.e. that Bank of Ireland did not act in good faith and use its best endeavours to reduce Davys' CCRR) on the one hand, and on the other hand, Bank of Ireland has not provided Ailmount with the details of any confirmation it sought from the Central Bank *regarding the CCRR*.

25. The key question for this Court under this category is whether the category sought is broader than necessary. This is because Bank of Ireland claims that the category should be restricted to:

> "Any communications between (i) the Defendants or the Davy Group, and (ii) the Central Bank of Ireland, about the Davy Group's capital resource requirements or the Davy Group's regulatory capital returns".

The relevance to discovery of a plaintiff's plea which is not in the Statement of Claim?

26. Counsel on behalf of Bank of Ireland has claimed that because Ailmount did not plead Clause 9.7 in the Statement of Claim, and only pleaded it in its Reply to Defence, that this is *not* a factor in determining the relevance of documents which are sought to be discovered (or that it is a factor of lesser importance than if it had been pleaded in the Statement of Claim).

27. This is Court does not agree. This is because the statement in *Red Flag* that relevance, in the context of a discovery request, *'is determined on the basis of the pleadings'* is clear and unqualified. In addition, there was no authority opened to the Court to suggest that an issue that arises in a Reply to Defence, rather than in a Statement of Claim, is not part of the pleadings for the purpose of determining relevance in the context of a discovery request.

28. It follows therefore that Bank of Ireland's alleged non-compliance with Clause 9.7 is part of the pleadings in this case and is an issue between the parties. It also follows that the existence of any documents from the Central Bank to the Davy Group, or from the Davy Group to the Central Bank, or indeed internal Davy Group documents which evidence (or indeed fail to evidence), attempts made by the Davy Group to reduce the CCRR will either '*advance the case of'* Ailmount '*and/or weaken'* the case of Bank of Ireland.

29. Furthermore, the existence of the letter dated 14 December 2023 from the Central Bank leads this Court to conclude that it is probable (rather than just possible) that there exists documents from the Davy Group and internal to the Davy Group and indeed between the Davy Group and its advisers, relating to the subject matter of that letter, i.e. the capital requirements of the Davy Group. Thus, these documents should be discovered, subject of course to any privilege, if they exist. For this reason, this Court is not prepared to limit the category in the manner sought by Bank of Ireland, i.e. just between the Central Bank and the Davy Group.

30. It is also relevant to note that if the order for discovery led to no documents, or very few documents, being discovered on the part of Bank of Ireland, this could advance Ailmount's

alternative claim, namely that Bank of Ireland breached Clause 9.7 by *not* using reasonable endeavours to reduce the CCRR.

31. For all these reasons, this Court concludes that Category 2 in the terms sought by Ailmount is a category of documents that is relevant.

32. However, Bank of Ireland also resists this category of discovery on another ground, i.e. on the basis that it is disproportionate. Mr. Casey avers on behalf of Bank of Ireland that:

> "18. I am advised that the Davy Group submits capital returns to the Central Bank on a quarterly basis each year and that it undertakes monthly calculations on the assessment of its capital position and requirements. I am advised that very significant ongoing work and due diligence is required by regulated organisations, across all business functions, to comply with the reporting obligations. As presently sought by the Plaintiff, **I am advised that Category 2 could potentially require, at a very high level, the Defendant's to identify, collect, review and produce a vast amount of documentation from the Davy Group** and the wider Bank of Ireland Group over the course of 2022 and **potentially up to 2024**, including but not limited to:
>
> 18.1. each monthly and quarterly request to all business functions with the Davy Group for their input;
>
> 18.2. all internal queries and due diligence carried out on foot of those requests;
>
> 18.3. all reporting back to the team responsible for capital management and then all engagement between that team and the Davy Group's executive function;
>
> 18.4 followed by any communications with the Defendants, to finalise regulatory capital calculations." (Emphasis added)

33. Bank of Ireland is therefore claiming that if Category 2, in the terms sought by Ailmount, is ordered, it would be disproportionate.

34. As is clear from the judgment of Costello J in *IBRC v Fingleton* [2015] IEHC 296, the burden of proof lies on the party resisting discovery to establish that it would be disproportionate to require it to discover the documents which are relevant. However, this Court is not persuaded by this evidence on behalf of Bank of Ireland, that, if it orders discovery of Category 2, in the terms sought by Ailmount, rather than those sought by Bank of Ireland, this would be disproportionate.

35. Firstly, there is no indication of the number of additional documents which Bank of Ireland claims would be caught by Ailmount's category versus Bank of Ireland's alternative category.

36. Secondly, there is no indication of the additional expense which would be involved in ordering Ailmount's category versus Bank of Ireland's category.

37. While not determinative, it is also relevant to note that the difference between the time period suggested by Ailmount (up to the date of the order, i.e. mid-February 2024) and the date suggested by Bank of Ireland (17 July 2023) is only a period of seven months and no evidence has been provided that this additional 7 months is disproportionate.

38. In addition, for the reasons stated in relation to Category 1, it seems probable that there may be documents *created after* 17 July 2023 under Category 2 (communications regarding the CCRR and capital returns) which are relevant to the dispute between the parties.

39. Accordingly, this Court does not believe that Bank of Ireland has discharged the burden of proving that ordering Category 2 in the terms sought by Ailmount would be disproportionate.

CONCLUSION

40. For all these reasons, this Court orders the categories of discovery sought by Ailmount in the terms sought by it and subject to the temporal limits sought by it.

41. Finally, looking at this dispute in the round, it is clear that engagement by the Davy Group with third parties (including the Central Bank) regarding, in particular, the CCRR is at the heart of the dispute. Yet, thus far, Bank of Ireland has refused to disclose the nature of the confirmation, if any, it sought from the Central Bank regarding the CCRR. It did so on the basis that it felt that the question did not '*arise from the matters pleaded'*.

42. In this regard, it is important to bear in mind that the basic purpose of discovery is to '*ensure as far as possible'* that '*justice on full information'* may be done (per Finlay CJ in *AIB plc v Ernst & Whinney* [1993] 1 IR 375 at 390, combined with the fact that the capital requirements of the Davy Group is clearly an issue in dispute.

43. It is also important to bear in mind that there can be a public interest involved in discovery orders being granted, namely the efficient use of court resources. This is because, *per* O'Flaherty J. in *AIB*, at p 396, the

> "purpose of discovery is to help to define the issues as sharply as possible in advance so that the actual hearing is allowed to take its **course as smoothly as possible**" (Emphasis added)

Thus, when one considers a key issue in this case, i.e. the CCRR, it is clear that disclosing information regarding same will not only ensure that justice is done on '*full information'* but also increase the chance of a resolution of this case (once all relevant information has been disclosed), quickly by a court (once the issues are sharply defined). However, there is also the additional public interest that sharply defining the issues also increases the chance of a settlement, thereby saving even more court resources, than an efficient trial.

44. As this Court will grant the orders of discovery sought, it is expected that the parties will be able to reach agreement on the form of any final orders. For this reason, this Court orders the parties to engage with each other to see if agreement can be reached regarding all outstanding matters, without the need for further court time, with the terms of any draft court

order to be provided to the Registrar. However, this case will be provisionally put in for mention a fortnight from the delivery of this judgment at 10.45 am (with liberty to the parties to notify the Registrar, if such a listing proves to be unnecessary).