

**THE HIGH COURT
PLANNING AND ENVIRONMENT**

Record No. 2024/562MCA

**IN THE MATTER OF SECTION 160 OF THE PLANNING AND DEVELOPMENT ACT 2000 (AS
AMENDED)**

BETWEEN:

JOHN HEGARTY, EUGENE GLENDON AND SYLVIA GLENDON AND GEMMA DESMOND

Applicants

-and-

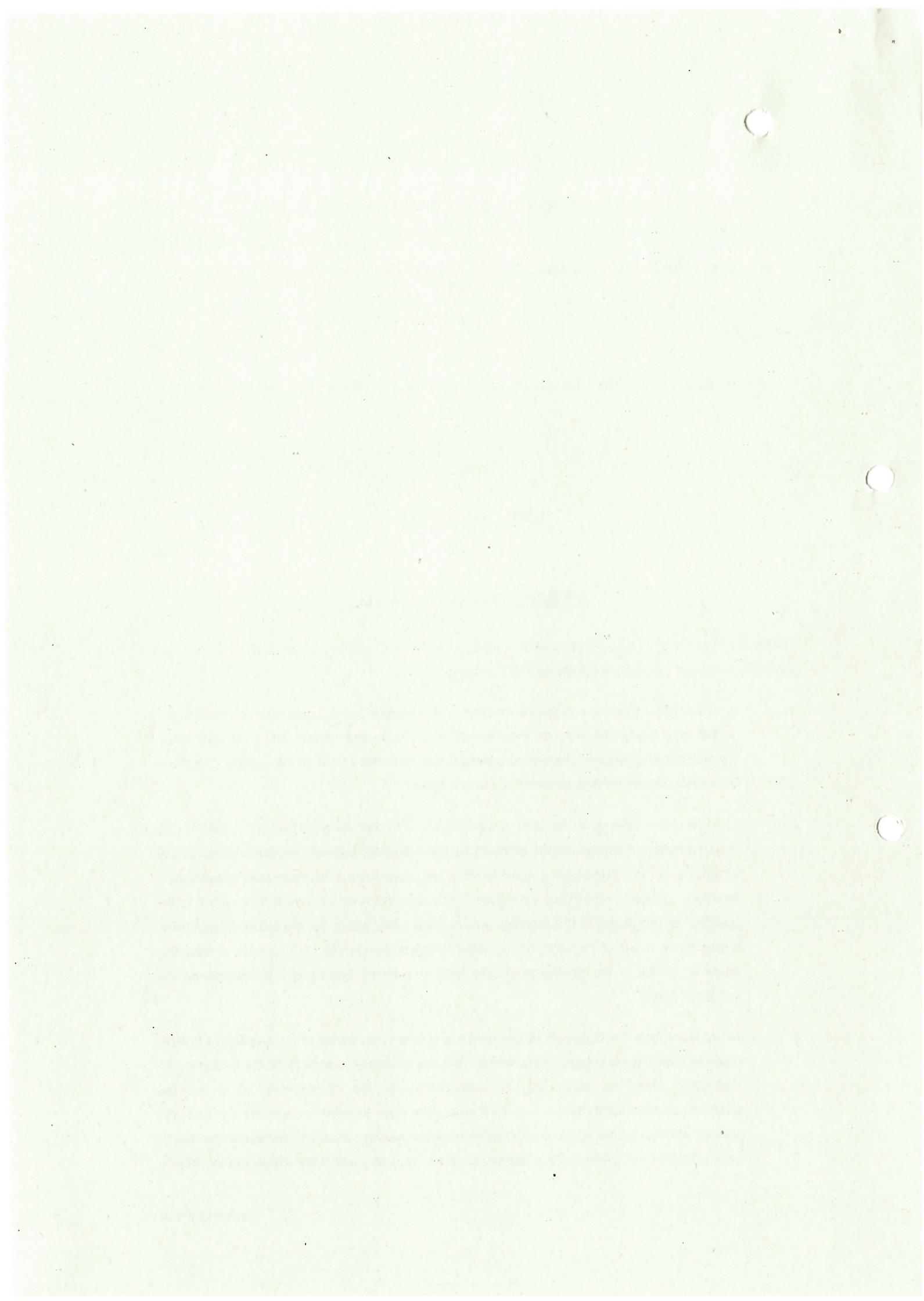
TOWERCOM LIMITED

Respondent

AFFIDAVIT OF MORAG POLLOCK

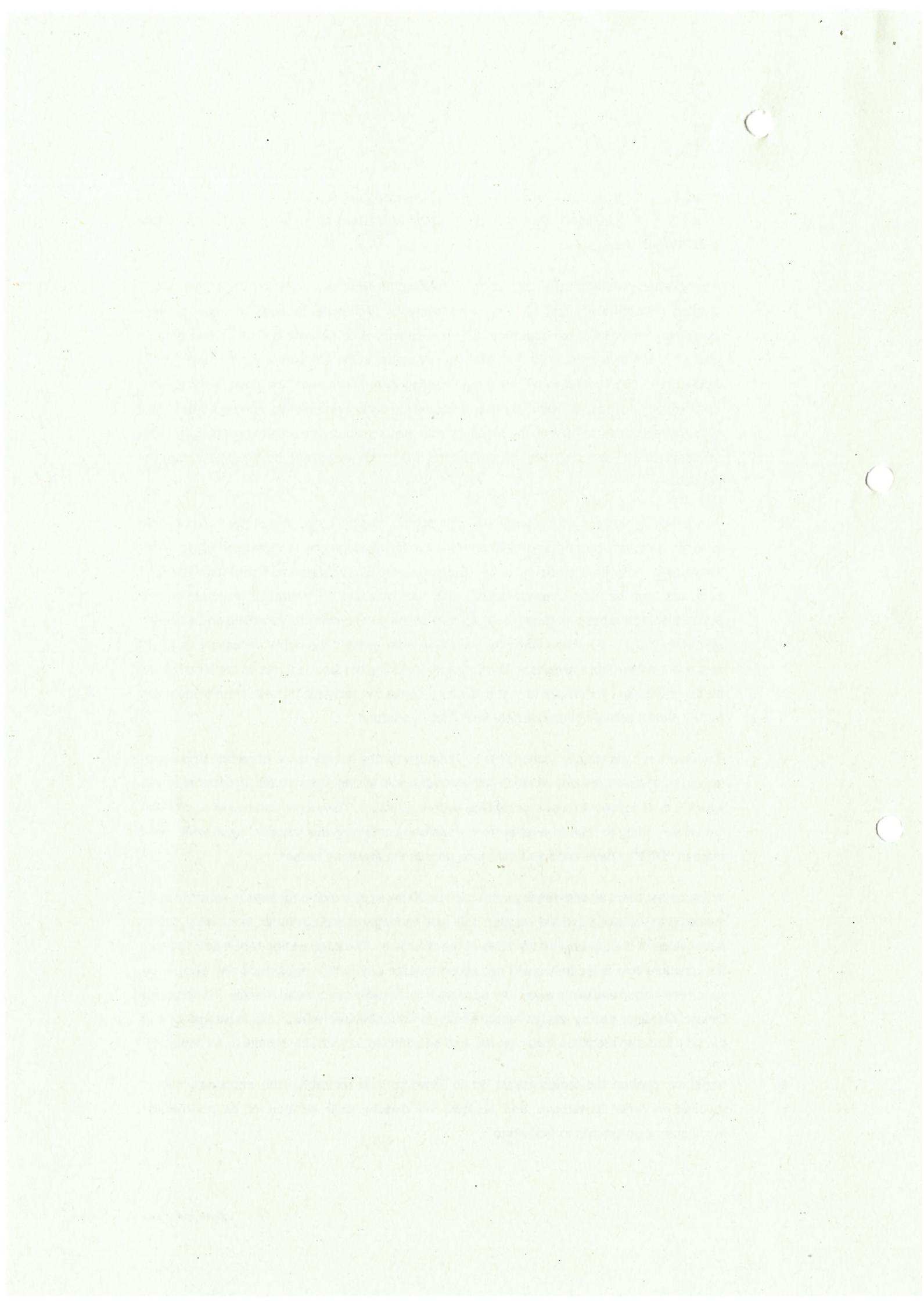
I, MORAG POLLOCK, Chief Executive of Usher House, Main St, Dundrum, Dublin 14 D14 N7Y8, aged eighteen years and upwards, **AFFIRM** and say as follows:

1. I am the Chief Executive of the Respondent ("**Towercom**") and I make this affidavit for and on behalf of Towercom from an examination of its books and records and from facts within my own knowledge save where otherwise appears and where so otherwise appears, I believe those facts to be true and accurate in every respect.
2. I beg to refer to the pleadings and proceedings had to date herein when produced. I have read the Notice of Motion and the affidavits of John Hegarty, Eugene Glendon and Eoin Brady grounding same. Towercom's replying affidavits have been prepared under considerable pressure. As such, responses are limited to addressing the critical issues with regard to the question of the status of the development in issue. My failure (or the failure of any other deponent on behalf of Towercom) to specifically address or refute any allegation or assertion made on behalf of the Applicants should not be taken as Towercom's acceptance of the validity of same.
3. As appears from the Notice of Motion and the affidavits on behalf of the Applicants herein, these proceedings relating to works which have commenced on lands at the Eir Exchange on Wellington Road in Cork City, in connection with the replacement of a wooden telecommunications pole with a new steel pole. The Applicants, who live in the vicinity of the works, contend that the works are development which requires planning permission. However, I am advised and so believe that the works in question are exempted development, having



regard to section 4(1)(g) of the Planning and Development Act 2000 ("the 2000 Act") and Class 31(j) in Schedule 2, Part 1 of the Planning and Development Regulations 2001 ("the 2001 Regulations").

4. The wooden pole at the Eir Exchange on Wellington Road is owned by Vodafone Ireland Limited ("Vodafone") and is used exclusively by Vodafone to accommodate network equipment essential to the operation of its mobile telephone network in Cork. It has been in place since in or around 1999, not 2011 as suggested in the affidavit of the Second Named Applicant. I beg to refer to a "Radio Engineering Site Justification" provided by Vodafone, upon which and marked "MP1", I have endorsed my name prior to the swearing hereof. This document provides context as the function of the equipment on the pole in providing network coverage to the Cork city area, as well as the impact on services if the equipment was not available.
5. I understand that the wooden pole was originally erected by Eir as part of the Eircell mobile telephone network in or around 1999 and that Eir occupies the site at Wellington Road under lease from Trinity Presbyterian Church. Subsequently, Eir separated its Eircell mobile phone business from its main operations and sold that business to Vodafone. As part of that transaction, title in the pole (and the equipment on the pole) passed to Vodafone and a licence agreement was put in place whereby Vodafone were granted the rights necessary to retain and operate the mobile telephone infrastructure including the wooden pole on the land leased by Eir at the site. I understand that this was a common mechanism used in the transaction for transfer of network related assets from Eir to Vodafone.
6. Towercom is contractually responsible to Vodafone for the maintenance of certain Vodafone-owned mast structures, one of which is the wooden pole at Wellington Road. In circumstances where it is necessary to repair or replace such a structure, Towercom is required to perform the works. I beg to refer to a letter from Vodafone confirming this position, upon which and marked "MP2", I have endorsed my name prior to the swearing hereof.
7. In the instant case, an engineering inspection undertaken by Indigo engineers in January 2024 indicated to Vodafone that the wooden pole was no longer standing plumb, most likely due to subsidence of the soil around the base of the structure. The engineering report advised that the structure had failed and could not accommodate any further equipment and should be decommissioned and taken away. As appears from the affidavit of Sean Bradley, Towercom's Design Manager having design responsibility for infrastructure assets, his investigations of the pole had also identified it as high risk and one that would probably require to be replaced.
8. Vodafone passed the Indigo report on to Towercom to undertake the necessary works required in order to remove and replace the existing pole as part of its contractual maintenance obligations to Vodafone.



9. On foot of this report and following further investigations by Mr. Bradley, including a drone survey to ascertain the condition of the wooden pole, Towercom determined that the pole should be replaced before the end of the current year and that the replacement pole should be located approximately 3.2 metres away from the existing wooden pole.
10. Towercom then engaged Priority Geotechnical Limited ("**Priority**") to undertake a site investigation to determine the ground and groundwater conditions present at the site so as to allow for the design of a replacement pole, which can be safely erected, taking account of the site and ground conditions. This was done in August 2024 and is the activity which the First Named Applicant refers to at paragraph 6 of his affidavit. This is dealt with in more detail in the affidavit of my colleague, Sean Bradley, who has overall responsibility for the design and management of the works. To be clear, the activities which occurred in August were purely in the nature of site investigation works and did not involve any works in connection with the replacement of the existing structure.
11. Having received a report from Priority that contained data which showed the site ground conditions were suitable for a replacement pole, drawings for a replacement pole and a structural analysis report were prepared. The intention is to replace the existing wooden pole with a steel monopole which will be painted dark brown and will be 15 metres high. The replacement structure will be a 12m steel support pole painted dark brown to reflect the colour of the existing wooden pole. There will be a 3m pole extension with antenna cluster and dishes on top (15m overall height). The height of the replacement structure will not exceed the height of the existing pole. The replacement structure is 508mm wide all the way from the base to the top. The existing pole is 320mm wide at its widest point, making the new structure 59% wider than the existing pole. As is pointed out by Mr. Bradley, it is not intended to add more antennae, in fact fewer in total (proposed 3 panels and 2 dishes vs 5 antenna and 1 dish currently). The three new panels are slightly longer than existing panels attached, 1.5m long (new) vs 1.4m long (existing). Dishes will remain the same size at 0.3m.
12. In advance of the works, a Design and Construction Safety and Health Plan was drawn up. It was intended that the works to be done in two stages in November and December 2024. This provided for installation of two vibration monitors, one on the outside wall of the exchange building and the other on the inside of the building, a noise monitor was installed on the boundary wall on Wellington Road. The first stage of the works commenced on 6 November 2024 involving excavations for foundation works and foundation installation and ducting works. Once the concrete foundations were put in, stage one of the works was complete and the concrete would be allowed to cure for a number of weeks before stage two would occur. The second stage, which was expected to occur in early December 2024, envisaged a return to the site in order to install the new monopole, which would involve the use of a crane. The equipment on the existing pole would be moved over to the new monopole and the existing wooden pole decommissioned and removed.

13. No planning permission was sought for the works, on the basis that the works are exempted development. In this regard, and as pointed out in the affidavit and report of Mairi Henderson, an independent planning consultant retained by Towercom following the institution of these proceedings, two potential exemptions are available under section 4(1)(g) of the 2000 Act and Schedule 2, Part 1, Class 31(j) of the Regulations. Those exemptions are available to a "statutory undertaker".

14. I note that the affidavit of Eoin Brady asserts that the works cannot be exempted development because Towercom "*is not a statutory undertaker authorised to provide telecommunications services*". In this regard, Mr. Brady points to the fact that Towercom does not appear on the public register maintained by the Commissioner for Communications Regulation (Comreg). I am advised and so believe that Mr. Brady is incorrect and that Towercom is undertaking the works as a statutory undertaker. In this regard, the definition of statutory undertaker is set out in section 2(1) of the 2000 Act as follows:

"statutory undertaker" means a person, for the time being, authorised by or under any enactment or instrument under an enactment to—

(a) construct or operate a railway, canal, inland navigation, dock, harbour or airport,

(b) provide, or carry out works for the provision of, gas, electricity or telecommunications services, or

(c) provide services connected with, or carry out works for the purposes of the carrying on of the activities of, any public undertaking;

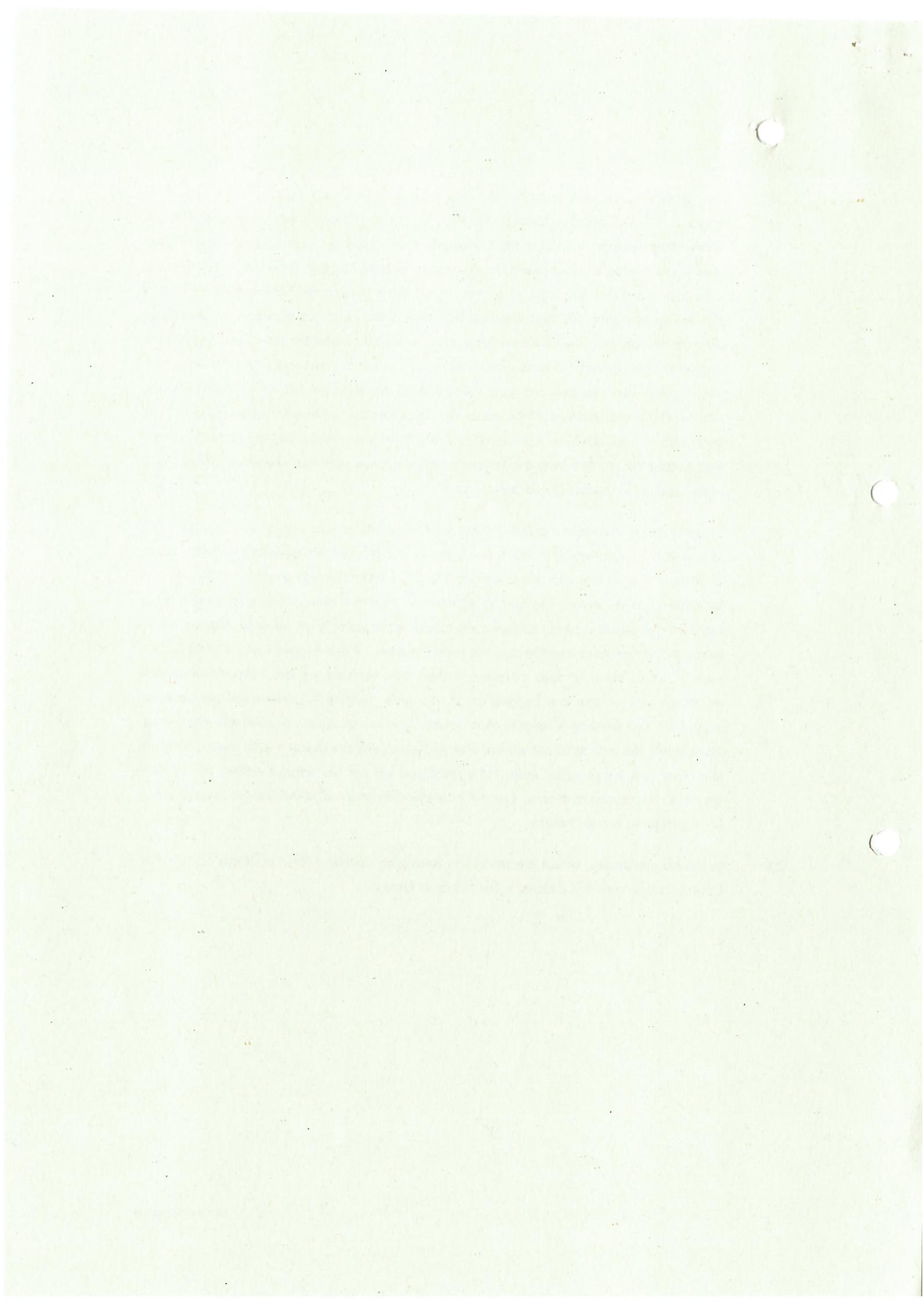
15. Mr. Brady is correct that Towercom is not listed on the Comreg public register of persons authorised to provide telecommunications services. However, the pole in question is owned by Vodafone. As Vodafone's letter referred to above makes clear, it is authorised by or under Regulation 4 of the European Communities (Electronic Communications Networks and Services) (Authorisation) Regulations 2011, to provide, or carry out works for the provision of telecommunications services. The works at issue in these proceedings involve the carrying out of works for the provision of telecommunications services. Towercom is contractually obliged to Vodafone to repair and maintain (including, where appropriate, to replace) the pole and is, accordingly, acting as Vodafone's agent in carrying out the works. In the circumstances, I am advised that both Vodafone and Towercom are entitled to the exemptions in section 4(1)(g) and Class 31(j).

16. At paragraph 10 of Mr. Glendon's affidavit, he states that the current wooden pole is "virtually indistinguishable from any other telephone pole, of which there are many in the architectural conservation area". He says that "*the construction of a wider mast, with additional antenna, made of a different material presumably metal and of an unknown colour in a significantly*

more visible location would be likely to materially affect the character of the architectural conservation area by adding a discordant vertical emphasis to the area and altering the current balance between the horizontal lines of the housing and the vertical lines of the Trinity Presbyterian Church. It would be highly visible and discordant in the setting of the conservation area and the individual protected structures and compete with the setting of Trinity Presbyterian Church and its dominant and notable spire". I have set out details as to the new pole above. It will be same height as the present pole (a 12 metre plus 3 metre monopole). It will be painted dark brown. It will be 508mm wide all the way from the base to the top, whereas the existing pole is 320mm wide at its widest point. The number of antennas attached to the replacement structure will not exceed the number of antennas attached to the existing pole. The existing pole has a total of 6 antennae and dishes, while the replacement structure will have a total of 5 antenna and dishes. Insofar as it is relevant, I say and believe that the new structure will not be materially different to the existing structure. In this regard, Towercom has commissioned photographs showing the existing pole from a number of locations, as well as photomontages showing what the proposed new pole will look like. These demonstrate that there will be no material difference in the character of the area when the new pole is in place, compared to the current situation. The condition and location of the new pole will not differ in any significant way from the pole which has been in place for 25 years. I beg to refer to a booklet of photographs upon which marked "MP3" I have signed my name prior to the swearing hereof.

17. Finally, although I am advised that it is not entirely relevant to the core issue as to the planning status of the works, paragraph 12 of Mr. Hegarty's affidavit suggests that the works carried out on 6 November 2024 *"were organised to happen swiftly and decisively"* and in *"an effort to get surprise works done and avoid objection and discussion...before objections could be effective"*. I take very serious issue with these statements. As the affidavit of Sean Bradley will demonstrate, the works were carefully planned and organised over a number of months and were preceded with a site investigation and several other pre-works drawings and reports. The wider impact of both the site investigation and the works was taken into account by the installation of noise and vibration monitoring equipment on prior to the commencement of works on 6 November. On the basis that the works are exempted development, there was no requirement to give the Applicants or any other party, including the planning authority, any notice.
18. Furthermore, I should confirm that even though the Applicants made complaints of alleged unauthorised development to Cork City Council in respect of the activities on the site in August 2024, the Council has not served a warning letter under section 152 of the 2000 Act on the Council, which would be normal if it had a concern that unauthorised development was being or was intended to be carried out.

19. The affidavits also seek to paint Towercom operatives in a very poor light in terms of the interactions which occurred between Mr. Hegarty and other persons who made demands that works should cease. In this regard, I understand from Towercom employee Raymond Ryan that he endeavoured to be polite in his interactions with Mr. Hegarty, even though the situation was heated and that Mr Hegarty was concerned about noise and vibrations and demanded that the works cease. Mr. Ryan informed Mr. Hegarty that noise and vibration monitoring was being conducted from the Eir exchange building without the vibration alarm being triggered at any point. He explained that he was in charge of the site but was met with profanities from Mr. Hegarty, who was very annoyed, demanding to speak to the person in Towercom who had directed the carrying out of the works. Mr. Ryan has also informed me that around 12.36, an unknown male individual approximately 5 feet 6 inches in height, balding and with a beard approached the site and placed a device through the metal rail fence and asked personnel to smile, saying that he would see them in court.
20. There has been a telecommunications structure in place at the Eir Exchange site since 1999, to supply mobile coverage to the Cork City area. As outlined in the Vodafone "justification" document, loss of the site would seriously impede that coverage and the wider network connectivity in the area. The current structure is now in a precarious situation and if not replaced it presents a risk of collapse and failure in the event of an adverse weather event, which is more likely to occur during the winter season. If this happens and a replacement pole is not in place, mobile coverage in the area serviced by the telecommunications equipment on the site and connectivity of the local network in general will be seriously impacted. The granting of an injunction would, thus, cause serious problems for the public. Against this, the new structure will not change the streetscape in any material way. Whilst it is located in a conservation area, the streetscape will not be radically altered by the new structure. In the circumstances, I say and believe that the Court should refrain from granting an injunction as sought herein.
21. In the circumstances, where the works are exempted development, I pray this honourable Court to refuse the relief claimed in the Notice of Motion.



AFFIRMED by MORAG POLLOCK

this day of 2024

at

in the City/County of Dublin

before me a Practising Solicitor/ Commissioner for
Oaths and [I personally know the Deponent.] OR

[the Deponent has been identified to me by

[] who is personally known to me and
who certifies that the Deponent is personally known to
him/her.]

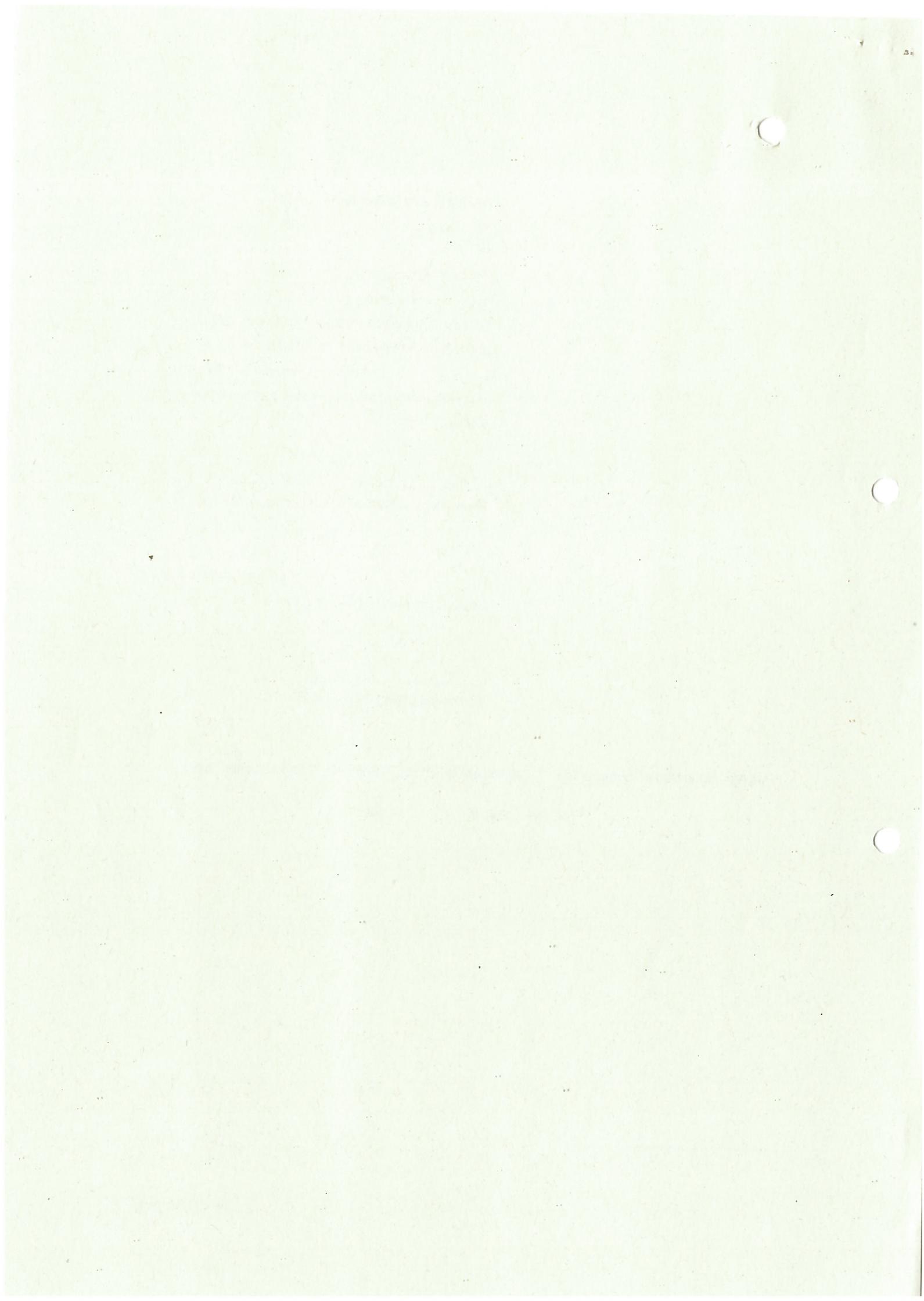
Practising Solicitor/Commissioner for Oaths

[I [] hereby certify that the
Deponent is personally known to me.

Person identifying Deponent]¹

This Affidavit is filed on behalf of the by WILLIAM FRY LLP, Solicitors, 2 Grand Canal, Dublin 2.

Filed this day of 20 .



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