

An Inquiry pursuant to Part IIIC of the Central Bank Act 1942 (as amended) concerning the Irish Nationwide Building Society, Michael Fingleton, William Garfield McCollum, Tom McMenamín, John S. Purcell and Michael P. Walsh (the “Inquiry”)

Inquiry Decision Regarding Proceeding with SPC 7

Introduction

1. On 1 May 2019, the Inquiry Members received an updated medical report from Mr Michael Fingleton’s doctor, which indicated that although the prognosis for his recovery was good, he was making slow improvement. In her professional opinion, he would not be able to take part in the Inquiry on either an oral or written basis for the next month. She stated that she would be reviewing Mr Fingleton in a month’s time.
2. On 13 May 2019, the Inquiry Members wrote to the Persons Concerned and Enforcement stating that following this medical report, they would now need to consider how to proceed with the SPC 7 Module. This letter stated:

“The Inquiry Members are of the view that the possible options for proceeding are similar to those considered by them when reaching their Decision of 4 March 2019 on the SPC 6 hearing, i.e.

1. *Proceeding in respect of all Persons Concerned, including Mr Fingleton;*
2. *Proceeding in respect of those Persons Concerned identified in SPC 7 excluding Mr Fingleton, and staying the SPC 7 hearing insofar as Mr Fingleton is concerned until such further date as may be identified by the Inquiry;*
3. *Postpone any hearings in respect of SPC 7 until such further date as may be identified by the Inquiry.*

In making their decision, the Inquiry Members will consider all submissions received in respect of SPC 6, together with their Decision of 4 March 2019.”

The letter went on to invite submissions in respect of SPC 7 by Thursday 23 May 2019. On receipt of the submissions from the Persons Concerned and Enforcement (if any), the Inquiry Members would determine whether an Inquiry Management Meeting (“IMM”) would be required prior to making their decision in respect of the SPC 7 hearing.

Inquiry Members’ Decision of 4 March 2019 and Submissions Received

3. The Decision of 4 March 2019 was delivered by the Inquiry Members following submissions from Mr Purcell, Enforcement and the LPT and an IMM conducted on 28 January 2019. The three options as outlined above were considered and we decided to proceed with SPC 6 in accordance with Option 2. In the course of this decision, we stated at paragraphs 5.15 – 5.17:

“With respect to Option 2, what is envisaged is that the hearing into the SPC 6 module would proceed as against INBS and Mr Purcell, who, apart from Mr Fingleton, is the only remaining person concerned with that SPC (“the First SPC 6 Hearing”). The commencement of the SPC 6 hearing as against Mr Fingleton would be adjourned until he is in a position to participate (“the Second SPC 6 Hearing”).

At the Second SPC 6 Hearing, Mr. Fingleton will be in a position to make submissions as to what steps need to be taken to ensure that his right to fair procedures is vindicated. For the purpose of the determination with the Inquiry members are now making, it is anticipated that Mr. Purcell will be able to cross examine Mr. Fingleton at the Second SPC 6 Hearing and that Mr. Purcell will be able to challenge any new evidence presented at that hearing.

The Inquiry will not make findings as regards INBS or Mr Purcell’s alleged participation in any breaches until after Mr Fingleton’s ability to participate in any Second SPC 6 Hearing has been determined.”

4. At paragraph 5.26 of this Decision, the Inquiry Members stated:

“In the event that Mr Fingleton is not in a position to engage with SPC 6 and is not available as a witness, the law is clear that the onus is on Mr Purcell to demonstrate a real risk of prejudice of an unfair hearing. The Inquiry Members are satisfied that he has not done so, and that Mr Purcell’s right to a fair hearing is not prejudiced by the proposed Option 2”.

5. SPC 6 hearings had been scheduled to commence on 27 March 2018. Late in the afternoon of the 25 March 2019, the Inquiry received an email from Mr Fingleton Junior, writing on behalf of his father, questioning the fairness and the constitutionality of the Decision. Mr Fingleton Junior stated:

“The decision by the members of the Inquiry following representation from the RDU and EDF to hold the SPC 6 hearings in two parts is prejudicial to the interests of my father. It is also contrary to fair procedures and the principles of natural and Constitutional justice and the right for him to defend his good name.

The holding of any part of the SPC 6 hearings without his presence is Unconstitutional and contrary to the Supreme Court Judgement in the Abbeylara Case (2002) which found that the decision of their inquiry to defer the cross-examination of the witnesses to the later part of the hearing (and not contemporaneously) was unconstitutional.

As a result of this judgement it is clearly unconstitutional for the Inquiry to hold the SPC 6 hearing without my father being present and his right to cross examine the witnesses for the full hearings contemporaneously.

It is also a fundamental constitutional right for my father to defend and protect his good name in all circumstances. This right could be seriously jeopardised by the absence of my father from that part of the hearing where witnesses could make damaging statements that he could not contemporaneously challenge and defend. The fact that all such hearings are open to the public and the media could result in such damaging statements being published under privilege and could only be challenged and defended by my father at a much later date when the damage would have already been done.

Furthermore, in the event statements are made which are damaging to my father's position, which have not been contested, the Inquiry Members may have formed a view prejudicial to my father which means those Members will be liable to objective bias and may be required to recuse themselves.

In light of the foregoing I believe the Inquiry should reconsider their decision and hold the full SPC 6 hearing when my father would be able to attend.”

6. The Inquiry adjourned the commencement of SPC 6 Hearings pending legal submissions on the points raised by Mr Fingleton Junior. These submissions were received from the LPT and Enforcement on 29 March 2019. The LPT addressed the implications of the judgment in **Maguire v Ardagh**¹ (the *Abbeylara* case) on any decision that might be taken to adopt Option 2. They stated by way of conclusion that:

“Mr Fingleton will be entitled to insist that all witnesses giving evidence on this issue be recalled and to cross-examine them in the usual way. Furthermore, the Inquiry will not be deciding the issue regarding INBS’ alleged commission of SPC 6 or the alleged participation of any of the Persons Concerned in that SPC until after the conclusion of all of the evidence and the making of submissions including by Mr Fingleton.”

The LPT also addressed issues of prejudice to Mr Fingleton and objective bias on the part of the Inquiry Members. With regard to the former they said that the Inquiry could be held in private if there was an apprehension of reputational damage to Mr Fingleton. On the question of bias they stated that they did not believe that *“there would be grounds upon which a reasonable apprehension could be formed that the Inquiry Members would not bring an impartial mind to the hearings. It is clear from the Decision that the Inquiry Members are mindful of Mr Fingleton’s entitlements to be heard and have made clear that no finding will be made until the conclusion of SPC6 “*

7. Enforcement also dealt with the issue relating to deferral of cross-examination and stated at paragraph 30 of its submission:

¹ [2002] 1 IR 385

“It is clear from the foregoing that the context of the Inquiry is entirely different from that pertaining in the Abbeylara case. The Inquiry has at all times sought to facilitate the PCMs, including Mr Fingleton owing to his circumstances. There does not seem to Enforcement to be any basis for the objection articulated in the objection e-mail, which assumes the Inquiry will deprive Mr Fingleton of his right to cross examination. In fact, as is clear from the LPT’s Submissions concerning Options 2 and 3, quoted above, the staggered hearing model adopted by the Inquiry is one that allows for a flexible approach, and which has the capacity to fully vindicate Mr Fingleton’s rights. The Inquiry has made it clear that Mr Fingleton will be able to make applications in that regard if he becomes fit to participate in a Second SPC6 Hearing. The Inquiry’s approach is to allow for applications if and when Mr Fingleton is fit.”

On the issue of bias, Enforcement observed at paragraph 50:

“The Inquiry Members are experienced professionals and are, in Enforcement’s view, capable of preserving their neutrality until the entirety of the evidence is concluded and tested by Mr Fingleton. No reasonable observer of the procedure envisaged by the Inquiry to facilitate Mr Fingleton re-engaging with the Inquiry would be concerned that bias had arisen from the staggered hearing of SPC 6.”

Enforcement also submitted that it did not consider that there were adequate grounds for holding hearings in private given the default position of the Inquiry was to conduct hearings in public.

8. Mr Fingleton Junior responded to the submissions received from the LPT and Enforcement by email dated 2 April 2019. This response is set out in full below:

“Submissions of LPT

Dealing with the substance of LPTs submissions. In paragraph 52 on the submissions, it is stated that the right to be heard can be made subject to the imposition of reasonable procedural time limits. I would comment that it is contrary to the principles of natural justice that the basic right to be heard as in

my father's case can be supplanted by putting in place time limits and adhering rigidly to such limits in the context of his medical circumstances.

With reference to the quote from the Supreme Court judgment in MacPhartlain that an individual be given "a meaningful opportunity to be heard"; if for medical reasons an individual is delayed from attending, to place time limits in such circumstances, is not giving a "meaningful opportunity to be heard".

LPT have focused on being heard at the IMM and my father having been given the opportunity to be heard at the IMM. With respect, that is not the issue. The issue is the substantive hearing and that my father would be deprived of the right to cross- examine and make statements and submissions in answer to adverse comments made in relation to him at such substantive hearings where for medical reasons he is unable to attend.

With reference to the quotation relating to personal rights from the In re Haughey case it is worth emphasising the following from the quotation- "the State, either by its enactments or through the courts, must outlaw any procedures which will restrict or prevent the party concerned from vindicating these rights".

It is also worth emphasising in the Supreme Court in the Maguire V Ardagh (Abbeylara) case McGuinness J's endorsement of the findings of the High Court.

".....it does not seem to me that a cross- examination so limited in time and even more damagingly, postponed until after completion of all the evidence in chief could adequately meet the standards set by this court In re Haughey.

LPT has quoted Hedigan J in O'Brien v Moriarty Tribunal and it is worth repeating same.

"Where there is a clear public interest involved such as is the case with any Tribunal of Inquiry, then even the right to cross examine ones accusers may be

controlled, subject to not imperilling a fair hearing or a fair result. The right to cross examine ones accuser may therefore be curtailed but only within a firm basis in law consistent with the constitution.”

While the first part of SPC 6 relates to Mr. Purcell the same three Inquiry Members who will be hearing the second part relating to my father are hearing it. There is no mystical way that if evidence is given which is damaging to my father in the first part that such evidence can be unheard for the purposes of the second part. This is so whether the hearings are in private or public. Consciously or unconsciously the Inquiry Members at the first part may have absorbed and accepted such evidence. This is the reason that my father must be given the opportunity at the time the evidence is first given to cross-examine and/or make submissions or indeed produce contrary evidence.

With reference to objective bias, as stated above uncontested evidence heard and digested by Inquiry Members cannot be unheard and delayed cross-examination and the late giving of contrary evidence by witnesses as suggested by LPT does not eliminate the possibility of preconceived conclusions having been previously made by Inquiry Members.

LPT refers to the factoring in of public interest. I would point out that in Article 40 of the Constitution there is no restriction on the personal rights of the individual except “during the existence of a state of war or armed rebellion”.

For all the foregoing reasons I respectfully request that in the interest of natural justice and in furtherance of my father’s constitutional rights that no further hearings take place in respect of the SPCs until my father is in a position to attend.

Enforcements Submissions

As Enforcement have stated clearly regardless of submissions or advice it is for the Inquiry Members to determine the matters raised on behalf of my father. First, I wish to refute absolutely the suggestion being made by Enforcement that the application I have made was made with intent to trip up the Inquiry. I

take grave exception to such an allegation. The application was made by me to protect the personal and constitutional rights of my father.

Enforcement have referred to a case of a criminal trial application for delay being refused as no steps were taken for seven months in respect of video surveillance evidence. My father's case is entirely different. He has been seriously unwell for a considerable period of time and had been hospitalised.

I note Enforcement's comments on the Abbeylara case. I respectfully submit it is illogical and incorrect to suggest that the principles enunciated in the Abbeylara case should not be followed in the present case. As set out in Abbeylara cross-examination should not be delayed from when evidence is first given.

In relation to the publicity point Enforcement's analysis on whether the hearing should be in public or in private is focusing on the wrong issue. The issue in respect of my father is that evidence may be given seriously adverse to his reputation and character and that may get wide publicity with he being deprived at the time of the right to counteract such evidence.

With regard to the issue of objective bias I would repeat my observations in relation to LPT's submissions. The argument put forward by Enforcement that the SPC6 is a continuous hearing is not the issue. The issue is that SPC6 is to be broken into two halves and the Inquiry may hear evidence detrimental to my father with no cross-examination or counter evidence which otherwise might well not be the case if cross-examination and other contrary evidence was made available at the same time. It is a fallacy to imply that the second half is merely the continuum of one hearing. In reality there are two separate hearings, one dealing with the liability of certain persons and the other dealing with the liability of my father except that in the first hearing, matters may be alleged against my father and he will be deprived of the right to address same at the appropriate time. This is not in accordance with "the rules of procedural fairness" as required by Section 33BD of the Act. Indeed previously LPT had referred to the hearings as a "Staggered Hearings approach".

It is important to emphasise that in addition to acting as judges in this case, the Inquiry Members are also acting as a jury unlike in a serious criminal case. It would be unconscionable and objected to by all right minded persons that if a jury has found a defendant guilty in one case having come to certain conclusions on the facts that some months later in a related criminal case against another defendant that the same jury members would be sought out to act as jury in the second case.”

Inquiry Hearing of 3 April 2019

9. These matters were considered at an oral hearing of the Inquiry on 3 April 2019, following which the Inquiry Members rose to consider their decision. There was no appearance by or on behalf of Mr Fingleton, despite the Inquiry Members offer that a family member could attend on Mr Fingleton’s behalf. In the circumstances, Mr Fingleton Junior did not take up the offer to make oral submissions nor did anyone else on Mr. Fingleton’s behalf.
10. The Inquiry Members determined that they were satisfied (on the question of bias) that they would not be effected by evidence presented during the first part of the SPC 6 module. The Inquiry Members emphasised that they would not be making any decision in relation to the breaches alleged against INBS or the participation of any Persons Concerned until the conclusion of both parts of the SPC 6 hearing².
11. On the issue of deferral of the right of cross-examination in the context of **Maguire v Ardagh** the Inquiry Members were satisfied that the matters considered by the Supreme Court judgment could be distinguished from those in the context of the SPC 6 hearing. We noted that there was no question of restrictions on the nature or timing of the examination of witnesses in relation to the alleged participation in SPC 6 or in the cross-examination of those witnesses.³
12. On the issue as to whether to sit in private, the Inquiry Members referred to Section 33AZ of the 1942 Act (as amended) and noted the exceptions thereto. We analysed the position as follows:

² Page 87 of the Transcript

³ Page 88 of the Transcript.

“Whilst it is foreseeable that adverse comments affecting Mr Fingleton’s reputation may be made against him during the course of the hearings, and that ordinarily, this would not amount to unfair prejudice as he would be in attendance and could challenge this evidence, Mr Fingleton will not be in attendance due to ill health. In those circumstances and based on the information and evidence available to the Inquiry Members regarding itself, the inability to contemporaneously address those adverse comments in a public hearing could amount to an unfair prejudice.

However, whilst we do remain open to the possibility of reverting to private session, and we have regard to public interest in these proceedings progressing in public; therefore, we have decided that for the moment, we will proceed with public hearings and where evidence prejudicial to the reputation of Mr Fingleton arises, we will hear such evidence in private. We may review this decision in relation to progressing in public if necessary, but this is our current position....⁴

Response to Letter of 13 May 2019

13. On 20 May 2019, Enforcement responded to the letter of 13 May 2019 stating that it did not intend to make any submissions at this time.
14. No submissions were received from Mr Purcell.
15. By email dated 23 May 2019, Michael Fingleton Junior responded on behalf of his father. He stated that the decision to hold SPC 6 hearings in two parts was prejudicial to the interests of his father. He also stated that it was contrary to fair procedures and the principles of natural and Constitutional justice and the right for Mr Fingleton to defend his good name. He said that to continue in the same manner for the SPC 7 hearings would be to raise the same issues for his father.
16. He expressed the view that the Inquiry had erred in its opinion of the legal effect of ***Maguire v Ardagh*** and objective bias. Mr Fingleton Junior submitted that the Inquiry

⁴ Page 89 of the Transcript.

should reconsider their decision not to hold the full SPC 7 hearing until such time as his father was in a position to attend.

17. Mr Fingleton Junior appended his Submission dated 2 April 2019 that he had provided to the Inquiry in response to submissions received from Enforcement and the LPT in relation to proceeding with the SPC 6 module. This submission is set out in full above.

LPT Submissions in Response to Mr Fingleton’s Email of 23 May 2019

18. On 29 May 2019, the LPT provided submissions in response to Mr Fingleton Junior’s email of 23 May 2019.
19. The LPT advised that on the issue of deferral of the right of cross-examination in the context of *Maguire v Ardagh* the Inquiry Members were satisfied that the matters considered by the Supreme Court judgment could be distinguished from those in the context of the SPC 6 hearing. The LPT noted our conclusion that there was no question of restrictions on the nature or timing of the examination of witnesses in relation to the alleged participation in SPC 6 or in the cross-examination of those witnesses.⁵
20. On the issue as to whether to sit in private, the Inquiry Members referred to Section 33AZ of the 1942 Act (as amended) and noted the exceptions thereto. The Inquiry Members analysed the position as follows:

“Whilst it is foreseeable that adverse comments affecting Mr Fingleton’s reputation may be made against him during the course of the hearings, and that ordinarily, this would not amount to unfair prejudice as he would be in attendance and could challenge this evidence, Mr Fingleton will not be in attendance due to ill health. In those circumstances and based on the information and evidence available to the Inquiry Members regarding itself, the inability to contemporaneously address those adverse comments in a public hearing could amount to an unfair prejudice.

However, whilst we do remain open to the possibility of reverting to private session, and we have regard to public interest in these proceedings

⁵ Page 88 of the Transcript.

progressing in public; therefore, we have decided that for the moment, we will proceed with public hearings and where evidence prejudicial to the reputation of Mr Fingleton arises, we will hear such evidence in private. We may review this decision in relation to progressing in public if necessary, but this is our current position....⁶.

21. The LPT considered Mr Fingleton Junior's assertion that if the SPC 7 hearings were to progress on the basis of Option 2, "the same issues" would arise for his father.
22. The LPT pointed out that Mr Fingleton Junior does not point to any additional or new reason for the alleged frailties in proceeding by way of staggered hearing, in respect of the SPC 7 hearing. It was LPT's view that not only have the Inquiry Members dealt with those arguments, pursuant to their decision of 3 April 2019, but Mr Fingleton cannot point to any practical difficulty or example of any prejudice that arose in the context of the first SPC 6 hearing. In that regard, it is noteworthy that Mr Fingleton (and by extension Mr Fingleton Junior) had available to him transcripts of the SPC 6 hearings and has not raised any issue in respect thereof.
23. In addition, the LPT noted Mr Fingleton has had available to him the witness statements prepared by the persons likely to be summoned to give evidence in the context of the SPC 7 hearing. Again, Mr Fingleton Junior does not identify any witness or potential piece of evidence that might in any way prejudice his father in the manner contended for in his email.
24. The LPT summarised the position as follows:

"In summary, the Inquiry Members have previously determined to deal with SPC 6 by proceeding in respect of the SPC 6 hearing in respect of the other relevant Persons Concerned and staying the SPC 6 hearing insofar as it related to Mr Fingleton. The first SPC 6 hearing has already been held. As noted in LPT's submissions regarding Options 2 and 3 in respect of SPC6 the potential legal and practical implications of holding a staggered hearing are numerous. However, no new issue has been identified or raised by Mr Fingleton (or indeed any other party) in the context of the Options for the SPC 7 hearing nor indeed

⁶ Page 89 of the Transcript.

does he point to any examples of any specific prejudice arising from the first SPC 6 hearing. As noted by the Inquiry Members in the Decision if evidence may be given which is potentially damaging to Mr. Fingleton's reputation, the Inquiry Members can consider sitting in private."

25. Mr Fingleton Junior was given an opportunity to respond to these submissions from the LPT but did not do so, nor did he seek any extension of time within which to do so.

Decision on Whether to Hold an IMM Before Deciding on SPC 7 Progress

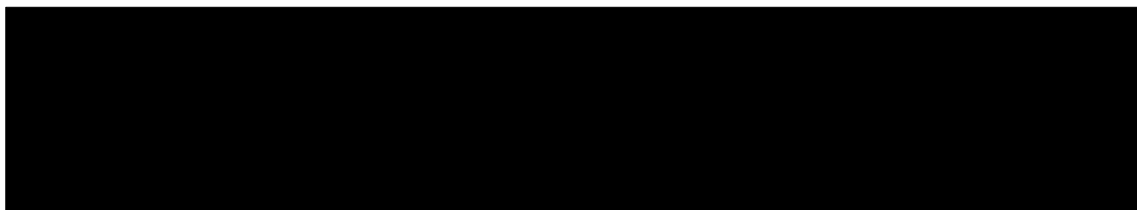
26. The Inquiry Members have considered the submissions of the LPT and Mr Fingleton Junior and have come to the view that there is no necessity to hold an IMM on the question of how to proceed with SPC 7. The Inquiry Members believe that those submissions together with the submissions considered in respect of SPC 6 and the oral hearing conducted in relation to the commencement of SPC 6 are sufficient to provide the Inquiry Members with the information and arguments in respect of this issue.

Decision of the Inquiry Members

27. The Inquiry Members have reviewed the submissions received in relation to the decision to proceed with Option 2 in the context of the SPC 6 hearing and are satisfied that their decision to distinguish the present Inquiry from the facts that applied to the Abbeylara case was correct in law.
28. Mr Fingleton has not indicated what particular prejudice or unfairness might occur in the context of the SPC 7 hearing that would distinguish it from the SPC 6 hearings.
29. The Inquiry Members do not believe that the "staggering" of hearings, as has already occurred in respect of the SPC 6 hearing, represents an unfair prejudice to Mr Fingleton, nor does it represent any breach of his constitutional right to fair procedures.
30. The Inquiry Members are satisfied that any prejudicial publicity to Mr Fingleton can be dealt with by reverting to private hearings and this can be dealt with during the course of the oral hearing.

31. The Inquiry Members are mindful of their obligations of impartiality and are satisfied that no bias will occur.
32. The Inquiry Members are satisfied that the conduct of the SPC 6 Hearings demonstrated the effectiveness and fairness of their approach. There has been no objection raised by or on behalf of Mr Fingleton that he has suffered any particular prejudice or unfairness in the course of the SPC 6 hearings and the Inquiry Members are satisfied that no such prejudice or unfairness occurred.
33. In all these circumstances, the Inquiry Members have decided to proceed with SPC 7 in accordance with the procedure described as Option 2 and to hear evidence regarding INBS and the alleged participation of Mr Purcell at Part 1 of the SPC 7 Module. Part 2 of SPC 7 Module, involving evidence in relation to Mr Fingleton's alleged participation will take place when he is certified as medically fit to attend.

34.



Marian Shanley
Geoffrey McEnery
Ciara McGoldrick

14 June 2019