

CENTRAL BANK OF IRELAND

INQUIRY PURSUANT TO PART IIIC OF THE CENTRAL BANK ACT 1942 CONCERNING THE IRISH NATIONWIDE BUILDING SOCIETY, MICHAEL P. FINGLETON, WILLIAM GARFIELD MCCOLLUM, TOM MCMENAMIN, JOHN S. PURCELL AND MICHAEL P. WALSH (“the Inquiry”)

Decision in Relation to the Procedure for identifying witnesses and obtaining witness statements

INTRODUCTION

1. At the Inquiry Management Meeting which took place on 12 October 2016 (the “IMM”), the Legal Practitioner Team (“LPT”) suggested that in circumstances where the IMM had been adjourned to 30 November 2016 and in light of the statutory duty of expedition the Inquiry Members could consider whether all or any of the matters identified in the letter of 5 October 2016 from the Regulatory Decisions Unit (“RDU”) to the Persons Concerned and Enforcement (the “5 October Letter”) could be decided without an oral hearing.
2. The issues identified in the 5 October Letter were:
 - i. Termination Application of Mr Michael Walsh.
 - ii. Stay application by Mr Fingleton.
 - iii. Procedural Aspects, to include:
 - Effect of the Settlement Agreement with INBS;
 - Status of the Investigation Report;
 - Modular approach to Inquiry hearing;
 - Order of any modular hearing
 - Procedure for identifying witnesses and obtaining witness statements.
 - iv. Proof of Documents.
 - v. Access to Documents.

3. The Inquiry Members decided by Decision issued on 17 November 2016 that three of the issues outlined above could be dealt with through written submissions and did not require an oral hearing. These issues are:
 - i. Procedure for identifying witnesses and obtaining witness statements.
 - ii. Effect of the Settlement Agreement with INBS.
 - iii. Status of the Investigation Report.

Procedure for identifying witnesses and obtaining witness statements

4. By letter dated 16 September 2016 to the Persons Concerned and to Enforcement, the RDU identified a number of elements that the Inquiry Members indicated should be included in a procedure for identifying witnesses and obtaining witness statements (the “September Outline”).
5. By letter dated 3 October 2016 in response to the letter of 16 September 2016, William Fry, on behalf of Mr Walsh, identified a number of concerns in relation to the proposed contents of a procedure for identifying witnesses and obtaining witness statements as follows:
 - Mr Walsh expressed concern as to how a list of witnesses could be drawn before the case against him had, in his view, been adequately set out.
 - Mr Walsh asked why it would be the LPT and not the Inquiry Members themselves who would identify witnesses who would be called by the Inquiry and queried the role of the LPT.
 - Mr Walsh asked who the solicitors were who it was proposed would prepare witness statements and who would instruct them.
 - Mr Walsh asked for clarity relating to the right of a Person Concerned to comment on the list of witnesses, to object to a witness and to request further witnesses.
6. In a submission dated 7 October 2016, Enforcement expressed the view that the adoption of a witness protocol was a matter for the Inquiry Members and did not make substantive comments on it.

7. By letter dated 11 October 2016, RDU furnished a procedure entitled: "Steps for Initial Engagement with Witnesses: Irish Nationwide Building Society Inquiry" (the "Draft Witness Protocol"). This protocol sets out 12 steps for the engagement of witnesses by the Inquiry Members and is set out in full at Appendix 1 hereto.
8. Following communication of the decision of the Inquiry Members to deal with the procedure for identifying witnesses and obtaining witness statements by way of written submission, the LPT, the Persons Concerned and Enforcement were invited to make submissions. In respect of Mr Michael Fingleton, the deadline for such submissions was extended from 25 November 2016 to 16 December 2016 in circumstances where he had stated that he had not received previous correspondence from the Inquiry Members.
9. In their submissions dated 21 November 2016, the LPT addressed the issues raised by Mr Walsh in his letter of 3 October 2016 which are summarised at paragraph 5 above. Addressing the points raised by Mr Walsh the LPT submitted:

- The LPT did not believe that the timing of the identification of witnesses had any bearing on the appropriateness of the Draft Witness Protocol.

The Inquiry Members agree. The Draft Witness Protocol is simply a procedure that will be followed in the identification and engagement with witnesses.

- The LPT stated that they did not believe that any issue arose from the fact that the LPT would initially identify potential witnesses in circumstances where it is ultimately the Inquiry Members who will determine the witnesses to be contacted.

The Inquiry Members are of the view that this is consistent with the general role of the LPT of assisting the Inquiry as provided for in section 33AY(3) of the Central Bank Act 1942 (as amended) ("the Act") and the Inquiry Members will ultimately make the determination as to the witnesses to be called in accordance with paragraph 3.1 of the Outline Procedure for the Inquiry pursuant to Part IIIC of the Central Bank Act 1942 (the "Outline Procedure").

- The LPT submitted that in their view, the Draft Witness Protocol does not preclude the Inquiry Members from adding further witnesses beyond those identified in the initial witness schedule.

The Inquiry Members agree that they are entitled to add further witnesses in the course of the Inquiry.

- Arthur Cox has been identified as the law firm who has been engaged for the purposes of assisting the RDU in providing administrative support and assistance on procedural matters to the Inquiry.

In this regard, RDU will engage with Arthur Cox on behalf of the Inquiry Members in relation to the implementation of the Draft Witness Protocol. As pointed out by the LPT, witnesses are not obliged to avail of Arthur Cox in preparing their statements and may seek their own legal advice or indeed dispense with same.

- The LPT submitted that the Draft Witness Protocol does not preclude the Persons Concerned from bringing any concerns they have regarding the identity of a particular witness to the Inquiry Members' attention. In addition, it is submitted by the LPT that the Persons Concerned will have an opportunity to request that further witnesses be added to the witness schedule as provided for in paragraph 3.5 of the Outline Procedure.

The Inquiry Members agree with the LPT submission in this regard.

- In conclusion, the LPT suggested that the Draft Witness Protocol should be kept under review by the Inquiry Members and that they should be free to revise and amend it as they consider appropriate.

The Inquiry Members agree with the addition of an express provision as suggested by the LPT, namely:

“The Inquiry Members reserve the right to amend, supplement and/or depart from these Steps during the course of the Inquiry where they consider it appropriate to do so.”

10. On 25 November 2016, William Fry, on behalf of Michael Walsh, made further submissions regarding the Draft Witness Protocol. Mr Walsh repeated his submission that he found it difficult to see how a list of witnesses could be drawn up before the case against him had been adequately set out and that he could not know what witnesses to call until all documents which he requested had been made available to him.

The Inquiry Members reiterate the point made at paragraph 9 above. The Draft Witness Protocol is simply an outline of the procedure that will be adopted in the identification and engagement with witnesses.

11. Mr Walsh further submitted that he was “entitled to call whatever witnesses he considers appropriate (and/or to *require* that the Inquiry call witnesses proposed by him)”. He said that the Draft Witness Protocol as drafted suggested that a Person Concerned may request that a witness be added to the witness schedule. He said that it was an obvious requirement of fair procedures in an Inquiry such as this that Mr Walsh be entitled to call witnesses (or ensure that they are called by the Inquiry), as well as cross-examine witnesses.

12. Paragraph 3.5 of the Outline Procedure provides:

“Where a Person Concerned indicates that he believes a person should be invited to provide a witness statement or appear before the Inquiry to give evidence and/or to produce specified documents and/or to attend the Inquiry from day to day, the Person Concerned shall identify the precise name and address of the person in question and specify with particularity the evidence which he believes that person can provide the Inquiry and/or the documents which the Person Concerned believes that the person should be required to produce. This paragraph shall also apply to Enforcement, in the event that the Inquiry Members invite Enforcement to give its views as to who it believes should be invited to provide a witness statement or appear before the Inquiry to give evidence and/or produce specified documents and/or to attend the Inquiry from day to day.”

13. The Inquiry Members are of the view that it is not a requirement of fair procedures that there should be an absolute or unfettered entitlement to call witnesses. It is a matter for the Inquiry Members to determine what witnesses are necessary in establishing

whether the suspected prescribed contravention(s) (“SPCs”) the subject of the Inquiry have been committed or whether any of the Persons Concerned participated in the commission of any SPC. The Persons Concerned are entitled to request that persons be called as witnesses and where the Inquiry Members are satisfied that their proposed evidence is relevant such witnesses will be asked to provide evidence to the Inquiry.

14. At paragraphs 17 and 18 of his submissions Mr Walsh expressed concerns in relation to the proposed role of Arthur Cox in preparing witness statements.

15. As already stated at paragraph 9 above, Arthur Cox has been identified as the law firm who has been engaged for the purposes of assisting the RDU in providing administrative support and assistance on procedural matters to the Inquiry. In this regard, RDU will engage with Arthur Cox on behalf of the Inquiry Members in relation to the implementation of the Draft Witness Protocol. As pointed out by the LPT, witnesses are not obliged to avail of Arthur Cox in preparing their statements and may seek their own legal advice or indeed dispense with same.

16. By letter dated 13 December 2016, Mr Michael Fingleton made submissions on the Draft Witness Protocol document and specifically raised seven points:

- Mr Fingleton stated that until he had the evidence necessary to prepare his defence, he would not know what witnesses were required.

This point was also raised by Mr Walsh in his submissions and the Inquiry Members reiterate that the timing of identifying witnesses is a separate issue from the steps that will be followed in engaging with them and taking statements.

- Mr Fingleton submitted that he regarded it as his right to call witnesses that he considered necessary without the agreement of the Inquiry Members and to add further witnesses during the course of the Inquiry if necessary. He objected to any restriction on this as a breach of his right to fair procedures and his right to defend himself.

The response to a similar point made by Mr Walsh is set out in full at paragraphs 11, 12 and 13 above and as stated, the Inquiry Members do not believe that fair procedures requires an unfettered entitlement to call witnesses.

- Mr Fingleton asked about issuing subpoenas if required.

Under the Act, the Inquiry Members are entitled to summon witnesses. Section 33BA states:

"1. At an inquiry, the [Bank] may, in writing –

- (a) summons a person to appear before the inquiry to give evidence, to produce specified documents, or to do both, and*
- (b) require the person to attend from day to day unless excused, or released from further attendance, by [the Bank]."*

The attendance of witnesses is also dealt with at paragraph 3.4 of the Outline Procedure.

- Mr Fingleton stated that he must be provided with all relevant documentation well in advance of any hearing. He further submitted that he must be informed in advance of any documents forwarded to the witness under Step 6 of the Draft Witness Protocol.

The Inquiry Members are of the view that this is a matter of procedure which will be dealt with in advance of any modular hearing and is not relevant to the Draft Witness Protocol.

- Mr Fingleton raised the question of evidence and statements from witnesses outside the jurisdiction and asked what format would be required.

Where witnesses are identified who are outside the jurisdiction, the manner in which evidence may be obtained from those witnesses will be addressed on a case by case basis.

- Mr Fingleton submits that the right to examine witnesses must be made available as soon as possible after the witness has given evidence or made available a statement in accordance with Step 12.

This is a matter that will arise after the completion of the twelve steps outlined in the Draft Witness Protocol and therefore is not relevant to this Decision.

- Mr Fingleton disagreed with Arthur Cox Solicitors being involved in taking witness statements and submitted that a conflict of interest arises in circumstances where that firm is acting as Solicitors to the Inquiry. He suggests that witnesses should prepare their own statements with appropriate assistance from their own legal representatives.

The Inquiry Members' view in relation to the role of Arthur Cox has been set out above at paragraphs 9 and 15. Further, the Inquiry Members are satisfied that no conflict of interest arises in relation to the role of Arthur Cox in the implementation of the Draft Witness Protocol as suggested by Mr Fingleton.

- Finally, Mr Fingleton asked whether the section 41A witness statements would be sworn in the form of an affidavit.

For the avoidance of doubt, statements taken under the Draft Witness Protocol are not obtained under section 41A of the Building Societies Act 1989. The procedure for obtaining statements by the Inquiry Members is set out at section 33BA(5) of the Act. Paragraph 4.14 of the Inquiry Guidelines prescribed pursuant to section 33BD of the Central Bank Act 1942 (the "Inquiry Guidelines") and paragraph 3 of the Outline Procedure, in particular paragraph 3.7, also address the procedure for obtaining witness statements. There is no requirement for witness statements to be sworn by affidavit or otherwise.

Paragraph 4.14 of the Inquiry Guidelines provides:

"The Chairperson may also allow a witness at the Inquiry to give evidence by tendering a written statement, verified by oath. The witness

may be required to attend the Inquiry hearing for the purposes of examination.”

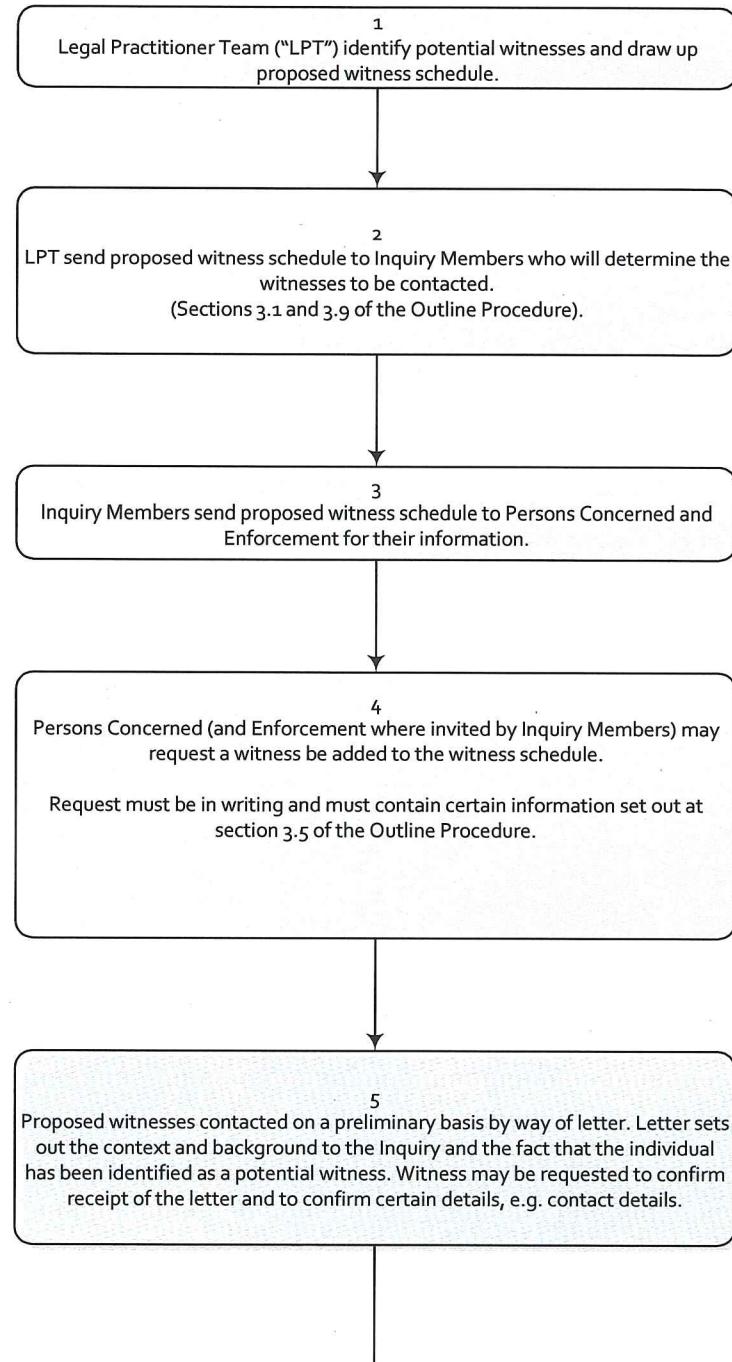
Paragraph 3.7 of the Outline Procedure states:

“Where the Inquiry Members consider it appropriate to do so, the Inquiry Members may request a witness to confirm on oath or by affirmation the contents of his or her witness statement.”

17. The Inquiry Members have decided that the Draft Witness Protocol, which is set out in full in Appendix 1 hereto, will be adopted with the inclusion of the sentence as set out at final bullet point of Paragraph 9 above, namely:

“The Inquiry Members reserve the right to amend, supplement and/or depart from these Steps during the course of the Inquiry where they consider it appropriate to do so.”

Marian Shanley
Geoffrey McEnery
Ciara McGoldrick
20 January 2017



- These steps incorporate the relevant provisions of the Central Bank Act 1942 (as amended) (the "Act"); the Outline Procedure for the Inquiry pursuant to Part IIIC of the Central Bank Act 1942 (as amended) concerning Irish Nationwide Building Society, Michael P. Fingleton, William Garfield McCollum, Tom McMenamin, John S. Purcell and Michael P. Walsh (the "Outline Procedure"); and the Inquiry Guidelines prescribed pursuant to section 33BD of the Central Bank Act 1942 (the "Inquiry Guidelines").
- Defined terms shall have the meaning assigned to them in the Outline Procedure.
- These steps have been prepared for guidance purposes only, and is not intended to be a definitive statement of law or of the procedure to be followed.
- If doubts arise as to the procedure to be followed, the Act, the Outline Procedure, the Inquiry Guidelines or other relevant guidance documents/legislation should be consulted.

