

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”)

INQUIRY MANAGEMENT MEETING

Wednesday 30 November 2016

Decision on Proof of Documents

Introduction

1. At an Inquiry Management Meeting (the “**IMM**”) held on 16 March 2016, the Inquiry Members gave directions seeking submissions on a number of matters including Proof of Documents.
2. This issue arises for consideration as the documents provided as part of the Investigation Report (and Revised Supplemental Investigation Report), including its appendices and those contained on the accompanying USB stick, are significant in volume amounting to some 110,000 documents. Concerns have been expressed by certain of the Persons Concerned in relation to the costs associated with the consideration of this volume of material and the consequent potential duration of the Inquiry.
3. The direction issued by the Inquiry Members followed an oral submission by the Legal Practitioner Team (the “**LPT**”) during the IMM that:

“it would be profoundly desirable that, during the course of the Inquiry proper, that it wouldn’t be required that each document be individually proved. Instead it seems to us, consistent with the obligation of expedition placed on the Inquiry, that documents would be admitted into evidence without formal proof and indeed would be admitted into evidence not just as a document but at least as prima facie evidence of their contents, subject obviously to the ability of

anybody who wishes to do so, including the Legal Practitioner Team, to rebut those contents.”

Relevant Legislation and Guidelines

4. Section 33AY of the Central Bank Act 1942 (as amended) (the “**Act**”) provides:

“33AY(1) The Bank shall conduct an inquiry with as little formality and technicality, and with as much expedition, as a proper consideration of the matters before it will allow.

(2) At an inquiry, the Bank shall observe the rules of procedural fairness, but is not bound by the rules of evidence.”

5. Paragraph 4.1 of the Inquiry Guidelines prescribed pursuant to section 33BD of the Central Bank Act 1942 (the “**Guidelines**”) reflect this statutory position:

“The Inquiry is not a court of law, and the procedure at the Inquiry hearing will be kept as informal as possible. The Central Bank has a statutory duty to undertake the Inquiry with as little formality and technicality, and with as much expedition, as proper consideration of the matter will allow. However, an Inquiry into suspected prescribed contravention(s) is a serious matter and the procedure at Inquiry must reflect this fact. The Inquiry will at all times observe the rules of procedural fairness, but is not bound by the rules of evidence.”

6. In relation to the jurisdiction of the Inquiry Members to adopt an evidence protocol, paragraph 2.8 of the Guidelines provides that:

“... The Inquiry Members will decide how the Inquiry will proceed and the procedures to be followed.”

The Proposed Evidence Protocol

7. On 27 April 2016 the LPT made written submissions attaching a proposed Evidence Protocol (the “**Proposed Evidence Protocol**”) which would apply to documents and witness statements provided to the Inquiry. Having set out the relevant legislation and portions of the Guidelines, the LPT noted that aside from these provisions “*it is well*

established that there is no requirement at common law that a disciplinary or other tribunal or inquiry must observe the strict rules of evidence that apply in courts of law.”

8. The Proposed Evidence Protocol provided as follows¹:

1. *“ All documents provided to the Persons Concerned as part of the Investigation Report (including its Appendices and those contained on the USB stick provided)² shall be admitted in evidence as prima facie evidence of the [truth] of their contents.*
2. *All witness statements provided to the Inquiry by any person who has been invited or summoned by the Inquiry Members to do so shall be admitted in evidence as prima facie evidence of the [truth] of their contents.*
3. *The Inquiry Members may, from time to time, identify further documents which they propose to admit into evidence as prima facie evidence of the [truth] of their contents.*
4. *Notwithstanding the admission into evidence of any documents (including any witness statement on the basis suggested at paragraph 2 above), the Person(s) Concerned and Enforcement shall be entitled to challenge the contents of any such document inter alia by seeking the leave of the Inquiry Members to examine any witness.*
5. *Where any Person(s) Concerned or Enforcement wishes to object to the admission into evidence of any document or category of documents (including any witness statement) on the basis identified in this Evidence Protocol, they shall bring an application challenging such admission pursuant to the procedure to be identified.*
6. *The above mentioned protocol is subject to the Inquiry Members entitlement to give any directions they consider appropriate to protect the confidentiality or commercial sensitivity of any document or part of a document.*

¹ This incorporates amendments suggested at the IMM and also reflects amendments in respect of typographical errors identified by Enforcement.

² Including the Revised Supplemental Investigation Report

7. *The above mentioned protocol is subject to the terms of the Inquiry Guidelines and the Outline Procedure. The Inquiry Members reserve the right to amend, replace, supplement or depart from this Evidence Protocol during the course of the Inquiry.*”
9. The LPT advised that the Proposed Evidence Protocol suggested was similar to the “Bula/Fyffes” model (the “**Bula/Fyffes Model**”) adopted in Commercial Court cases and competition cases involving large scale documentation.
10. The LPT stressed that the Proposed Evidence Protocol contained two limitations (at points 4 and 5 of the Proposed Evidence Protocol):
- (a) *“An entitlement on the part of any Person(s) Concerned or Enforcement to explain or dispute the meaning of the contents of the relevant document by other evidence.*
- (b) *If the Person(s) Concerned or Enforcement wish to object to the admission into evidence of any document or category of documents they are entitled to bring an application challenging such admission pursuant to a procedure to be identified.”*
11. At the IMM held on 30 November 2016, these points were described by the LPT as “the critical paragraphs” and they make it clear that the Persons Concerned, or Enforcement, have a mechanism by which they can challenge the introduction of this *prima facie* evidence. There are two different ways that this can be done:
- i. With respect to point 4, where a Person Concerned or Enforcement doesn't have an objection *per se* to the application of the Proposed Evidence Protocol but wishes to look at the particular document in question, there is a mechanism whereby, even though that document has been admitted into evidence.....the Persons Concerned and Enforcement shall be entitled to challenge the contents of any such document, inter alia, by seeking the leave of the Inquiry Members to examine any witness.
 - ii. With respect to point 5, the LPT submitted that this would arise where a Person Concerned or Enforcement decided that the Proposed Evidence Protocol was not suitable for a category or for a particular document.”

12. In other words, the Inquiry Members can be asked to call the author of a document in order that they may be cross-examined or, in the alternative, the contents or admission of a document may be challenged.

13. By way of further example, in their written submissions dated 27 April 2016, the LPT referred to Practice Direction 32 applying in England and Wales in the context of civil litigation. This provides at paragraph 27.2:

“All documents contained in bundles which have been agreed for use at the hearing shall be admissible at that hearing as evidence of their contents, unless (a) the Court orders otherwise, or (b) a party gives written notice of objection to the admissibility of particular documents.”

14. The LPT submitted that the Proposed Evidence Protocol would ensure that documentation will be dealt with in a pragmatic way. They further submitted that the Proposed Evidence Protocol met the concerns raised by some of the Persons Concerned in respect of the conduct of the Inquiry and would ensure that the Inquiry was undertaken with as little formality and technicality and as much expedition as possible. In addition, the LPT submitted that the requirements of procedural fairness are reflected in the Proposed Evidence Protocol.

15. The LPT stated:

“The Evidence Protocol is simply that, a protocol and is not intended to be prescriptive as to each and every document to be admitted.”

16. At the IMM held on 30 November 2016 the LPT submitted that:

“An extended hearing, a protracted hearing, is not in the interests of anybody, including, and in particular, the Persons Concerned. Any steps that are consistent with fairness must be taken in order to expedite this Inquiry, that is a statutory requirement, but also, I think, a common sense requirement. It’s not to the benefit of the Persons Concerned, or Enforcement indeed, to extend both the time taken to get to hearing and the length of hearing, because this protocol will expedite, we hope, both of those things, because, without the protocol, the author of potentially every single document would have to be identified and contacted and arranged and arrangements would have to be put in place for

that author to give evidence of that document ... fair procedures can be observed even if a protocol like this is put in place. So it's conditional on fair procedures being observed, it's conditional on procedural fairness being met."

Submissions on behalf of the Persons Concerned

17. Submissions in response to the LPT's Proposed Evidence Protocol were made on behalf of Mr Walsh both in writing and orally at the IMM held on 30 November 2016. Submissions were also made in writing by letter dated 8 June 2016 on behalf of Mr McMenemy. Mr Fingleton attended the IMM held on 30 November 2016 and spoke to this issue personally. None of the other Persons Concerned made submissions on the issue. Mr Purcell, who attended the IMM on 30 November 2016, advised that he had no submissions to make.

(1) Fair Procedures

18. At the IMM held on 30 November 2016, Counsel for Mr Walsh submitted that proof of documents was a question of fair procedures rather than a question of the technical rules of evidence. He submitted that the extent of the procedural fairness which must be applied will depend on the particular circumstances. He said that the particular context of this Inquiry which has the power to make findings and impose sanctions requires a very vigorous application of the rules of procedural fairness. He addressed the Inquiry Members in relation to the rule against hearsay and the dangers of admitting such evidence.

19. In support of his submissions, Counsel for Mr Walsh quoted an extract from the Supreme Court decision in *Borges v Fitness to Practise Committee of the Medical Council and the Medical Council* [2004] IESC 9. In this case the Fitness to Practise Committee purported to admit into evidence a transcript of the evidence given by witnesses, who had accused Dr Borges of serious wrongdoing, to the General Medical Council in the UK.

20. When this judgment is read in full, it is clear that the court confirmed that a body such as the Medical Council could depart from procedures which would be essential in a court of law. Keane J, referring to the Court's decision in *Kiely v Minister for Social Welfare* [1977] IR 267 in particular, stated that they could act on the basis of unsworn

evidence or hearsay but could not act in a way which is inconsistent with fair procedures and that basic fairness of procedure requires that persons be allowed to cross-examine their accusers.

21. Brendan T Muldowney and Co Solicitors, on behalf of Mr McMenamín, in submissions made on 8 June 2016 objected to the Proposed Evidence Protocol on the grounds of fair procedures stating:

“All documents that are relied on and produced must be proved in the ordinary way as to their creation, existence, authenticity and provenance by those who created them and we shall not be accepting any lesser or slip shod approach herein and hereto.”

22. Mr Fingleton also made oral submissions at the IMM held on 30 November 2016 regarding the requirements of fair procedures and submitted that the full rules of evidence should apply to this Inquiry in light of the very serious charges being brought against the Persons Concerned. He said:

“I think strict proof should be applied in respect of each document admitted as evidence. I think nothing less will suffice.”

23. Section 33AY of the Act clearly states that the rules of evidence do not apply to the conduct of an Inquiry. This is, however, subject to the obligation on the part of the Inquiry Members to follow fair procedures.

24. Courts also recognise that inquiries such as this are not bound by rules of evidence and may, for example, admit hearsay evidence provided that to do so does not imperil a fair hearing or fair result.

25. The entitlement of the Persons Concerned to fair procedures are, in the view of the Inquiry Members, adequately protected by points 4 and 5 of the Proposed Evidence Protocol which give the Persons Concerned and Enforcement (a) an entitlement to challenge the content of a document by seeking leave of the Inquiry Members to examine any witness and (b) an entitlement to object to the admission into evidence of a document or category of documents.

26. Taking into account the volume of documentation involved in this Inquiry and the fact that the Inquiry is required to act with as little formality and as much expedition as a proper consideration of the matters before it will allow, it seems to the Inquiry Members that the Proposed Evidence Protocol offers an appropriate balancing of these factors with the overriding obligation of the Inquiry to follow fair procedures.

(2) Mr Walsh's concerns regarding inconsistencies between the Bula/Fyffes Model and the Proposed Evidence Protocol

27. In their written submissions dated 27 April 2016 the LPT have stated that the Proposed Evidence Protocol is similar to the model that was used in the cases of *Bula Limited v Tara Mines Limited and Others* [1997] IEHC 202 and *Fyffes plc v DCC plc and Others* [2005] IEHC 477. A model for the admission of documents was agreed by the parties in these cases which involved a very large quantity of discovered documentation.

28. In his written submissions dated 8 June 2016 Mr Walsh distinguished the Proposed Evidence Protocol suggested by the LPT from the Bula/Fyffes Model noting:

(a) The Bula/Fyffes model was applied on the basis of agreement between the parties to the litigation:

As was pointed out by Counsel for Enforcement at the IMM on 30 November 2016, the Bula/Fyffes model requires the agreement of the parties as the courts are bound by the Rules of Evidence whereas the Inquiry is not.

Whilst it is correct to say that the Bula/Fyffes model was agreed between the parties in that case, the LPT submitted at the IMM on 30 November 2016 that in the circumstances of the present Inquiry which has generated a significant quantity of documentation and which has been criticised by the Persons Concerned because of the cost and length of time it will take to complete, it is reasonable to try to address these concerns by introducing a proof of documents protocol.

(b) The Bula/Fyffes model applies to documents that have been discovered on oath:

The LPT submitted at the IMM on 30 November 2016 that although the documents in question have not been discovered under oath, they are documents that have been identified by Enforcement as relevant. As referred to by the LPT in oral submissions, Chapter 5, paragraph 5.4 of the Investigation Report gives a summary of the type of documentation involved:

"Loan sample documentation; commercial administration documentation reviewed in relation to loans; information obtained from Summit, the electronic loan system used by INBS; contemporaneous reports prepared by the Internal Audit Department of INBS or by third parties; regulatory correspondence between INBS and the Central Bank/Financial Regulator; electronic data obtained from INBS; interview evidence from individuals interviewed as part of the Investigation; other interview evidence obtained as part of the Investigation; corporate governance documentation comprised of four distinct categories; minutes of board packs and packs of documents received by the Board; minutes of Audit Committee meetings and packs of documents received by the Audit Committee; minutes of Credit Committee meetings and packs of documents received by the Credit Committee; minutes of Provisions Committee meetings and packs of documents received by the Provisions Committee."

In addition, certain documents were provided pursuant to Section 41A³ of the Building Societies Act 1989. The LPT submitted at the IMM on 30 November 2016 that the documents and information that may be secured under Section 41A are wider than could be requested in discovery and that a failure to comply with a notice issued under this section attracts serious criminal sanctions including imprisonment of up

³ "41A.-(1) The Central Bank may, by notice in writing served on a building society or a related body, require the society or body to provide that Bank with

- (a) such information, documents, or other material or explanation of matters, that relate to the business or the plans for the future development of the society or the body as may be specified in the notice, and
- (b) a report by a person approved by that Bank on, or on specified aspects of, information or documents, or other material so provided."

to five years. They suggested that the Inquiry Members could take comfort from this.

- (c) In the Bula/Fyffes Model, a document is admitted as *prima facie* evidence of the truth of its contents only as against the party who created the original of the document in question. Counsel for Mr Walsh submitted that there was a basic unfairness in the suggestion that documents be taken as proof of their contents against persons other than the documents' author. He quoted Clarke J in *Moorview Developments v First Active plc* [2008] IEHC 211 where he set out the rationale for this requirement.

The LPT submitted at the IMM on 30 November 2016 that because of the nature of the Inquiry it was sensible and appropriate to apply the Proposed Evidence Protocol as against everyone involved in the Inquiry as opposed to just the person who created the document. The vast majority of the documents that are at issue are likely to be internal INBS documents and as stated by the LPT in oral submissions:

"...the persons concerned are, all five of them, either employees or directors, or both, of the Bank, and in those circumstances, we take the view that to require the -- those documents to be, as it were, admissible against everybody involved in the Inquiry, is appropriate and it's reasonable."

29. Taking into consideration each of the concerns raised by Mr Walsh, the Inquiry Members are satisfied that the extent to which the Proposed Evidence Protocol departs from the Bula/Fyffes Model is justifiable in the overall context of this Inquiry. Such an approach protects fair procedures and addresses concerns around the volume of documents and possible length of the Inquiry.
30. The Inquiry Members conclude that, given that the vast majority of documents included in this Inquiry are internal INBS documents and given that all the Persons Concerned were either employees or Directors or both of INBS, it is sensible and appropriate to adopt the Proposed Evidence Protocol and to apply the Proposed Evidence Protocol as against everyone involved in the Inquiry as opposed to just the person who created the document.

(3) Further concerns raised by Mr Walsh in relation to the specific provisions of the Proposed Evidence Protocol

31. None of the Persons Concerned other than Mr Walsh raised concerns in relation to the specific contents of the Proposed Evidence Protocol. In addition to the concerns set out above by Mr Walsh in relation to point 1 of the Proposed Evidence Protocol as to how the provisions of the Proposed Evidence Protocol contrasted with the Bula/Fyffes Model, he also raised concerns in relation to points 2, 3, and 7 of the Proposed Evidence Protocol.

Point 2 - Witness statements

32. In his written submissions dated 8 June 2016 Mr Walsh stated that no explanation had been given as to why witness statements would be included or what witness statements would be included. In their written submissions dated 29 June 2016 the LPT submitted that:

“... it is likely that much of the witness evidence before the Inquiry will be of a background, or clearly uncontroversial in nature. In the event that the evidence is controversial then any party can address same.”

33. The Inquiry Members are of the view that it is desirable that witness statements be admitted as suggested by the Proposed Evidence Protocol to avoid the cost of requiring the attendance of all relevant witnesses before the Inquiry. Persons Concerned may decide either to accept the witness statement without challenge, challenge some or all of the content of such witness statement or object to the admission into evidence of the document. The flexibility afforded by this approach is desirable in the interests of minimising the cost and duration of the Inquiry.

Point 3 – Identification of further documents

34. Point 3 of the Proposed Evidence Protocol provides that the Inquiry Members could identify further documents which they propose to be introduced into evidence as prima facie evidence of the proof of their contents. Mr Walsh observed in his written submissions dated 8 June 2016 that it was not known what documents were being referred to or why the Inquiry Members would seek to identify and admit such documents. Mr Walsh stated that it was unclear what is envisaged in a proposal

whereby the Inquiry Members would identify further documents to be admitted under the Proposed Evidence Protocol.

35. The LPT in their written submissions dated 29 June 2016 noted that this might arise where Mr Walsh brought an application for further disclosure of documents. Further, the Persons Concerned could hold documents that they wish to put before the Inquiry and the Inquiry Members may wish to apply the Proposed Evidence Protocol to such documents.
36. The Inquiry Members are of the view that any Evidence Protocol that is adopted by the Inquiry, should be capable of flexibility and should be able to encompass documentation (other than that provided to the Inquiry as part of the Investigation Reports) that may come to light in the course of the Inquiry. This would appear to be a reasonable and logical precaution.

Point 7 – Proposed Evidence Protocol subject to terms of Inquiry Guidelines and the Outline Procedure

37. In relation to point 7 Mr Walsh stated in his written submissions dated 8 June 2016 that it was not explained in what respects the Proposed Evidence Protocol is to be subject to the Inquiry Guidelines and Outline Procedure. The LPT explained that this provision seeks to ensure that the Proposed Evidence Protocol can take account of any unforeseen circumstance that may arise whereby the Proposed Evidence Protocol is deemed not to be applicable or required in respect of any given evidence.
38. The Inquiry Members see the inclusion of point 7 of the Proposed Evidence Protocol as a sensible precaution but do not at this time see any difficulties with the Proposed Evidence Protocol and the Inquiry Guidelines and Outline Procedures.

Approach Suggested by Counsel for Mr Walsh:

39. At the IMM held on 30 November 2016 Counsel for Mr Walsh suggested an alternative to the Proposed Evidence Protocol proposed by the LPT. He suggested that:

“...we would be shown or given groups of documents or individual documents and we would be asked whether or not we had any issue with them and if we didn't we would be happy to say 'that document can be admitted and admitted

as the truth of its contents'. But what we are being asked to do at the moment somewhat on the blind is to say go ahead with the protocol, all of these documents are taken to be true and that's the default standard position, and it's up to you and you have the burden to come and contradict that, and that is difficulty that we have with the proposal and that is why, I think as I said in the interests of trying to put forward a pragmatic solution that marries the two fair procedures and efficiency and cost saving and so on, we put forward that particular proposal."

40. The LPT clarified how the Proposed Evidence Protocol would operate in practice:

"... what we are proposing is that there would be bundles of documents identified at an IMM prior to the commencement of the module and that the protocol would apply to those, but that the Persons Concerned and Enforcement could make applications in relation to that."

41. In light of the Inquiry Members' Decision dated 20 January 2017 to adopt a modular approach and that bundles of relevant documentation will be prepared in advance of each module ("**module bundles**") the Inquiry Members have decided that those documents from the Investigation Report (and Revised Supplemental Investigation Report), including its Appendices and those contained on the accompanying USB stick that are contained in the said module bundles should be admitted in accordance with the Proposed Evidence Protocol. The Persons Concerned will not be asked to approve or be given a veto in respect of their admission as seems to have been suggested by Counsel for Mr Walsh. Rather they will have the entitlement on receipt of the module bundles to make applications pursuant to points 4 and 5 of the Proposed Evidence Protocol. Should documentation not part of the module bundles subsequently appear relevant to the Inquiry Members and be included as part of the module bundle, an objection may be raised in the same way by the Persons Concerned and Enforcement.

42. The Inquiry Members are of the view it would be helpful if the Proposed Evidence Protocol was revised to reflect this modular approach that has now been adopted by the Inquiry. Whilst all of the documents provided to the Persons Concerned as part of the Investigation Report (and Revised Supplemental Investigation Report), including its Appendices and those contained on the accompanying USB stick are capable of being admitted in evidence as *prima facie* truth of their contents, the application of the

Proposed Evidence Protocol will focus on those documents prepared for the modular bundles.

43. Accordingly, the Inquiry Members have decided to adopt the Evidence Protocol set out below for the reasons outlined above.

Evidence Protocol

1. *All documents provided to the Persons Concerned as part of the Investigation Report (including its Appendices and those contained on the USB stick provided)⁴ are capable of being admitted in evidence as prima facie evidence of the truth of their contents.*
2. *The documents provided to the Persons Concerned as part of the Investigation Report (including its Appendices and those contained on the USB stick provided)⁵ as are contained in the bundles of relevant documentation to be provided to the Persons Concerned and Enforcement in advance of each module shall be admitted in evidence as prima facie evidence of the truth of their contents.*
3. *All witness statements provided to the Inquiry by any person who has been invited or summoned by the Inquiry Members to do so shall be admitted in evidence as prima facie evidence of the truth of their contents.*
4. *The Inquiry Members may, from time to time, identify further documents which they propose to admit into evidence as prima facie evidence of the truth of their contents.*
5. *Notwithstanding the admission into evidence of any documents (including any witness statement on the basis suggested at paragraph 2 above), the Person(s) Concerned and Enforcement shall be entitled to challenge the contents of any such document inter alia by seeking the leave of the Inquiry Members to examine any witness.*

⁴ Including the Revised Supplemental Investigation Report

⁵ Including the Revised Supplemental Investigation Report

6. *Where any Person(s) Concerned or Enforcement wishes to object to the admission into evidence of any document or category of documents (including any witness statement) on the basis identified in this Evidence Protocol, they shall bring an application challenging such admission pursuant to the procedure to be identified.*
7. *The above mentioned protocol is subject to the Inquiry Members entitlement to give any directions they consider appropriate to protect the confidentiality or commercial sensitivity of any document or part of a document.*
8. *The above mentioned protocol is subject to the terms of the Inquiry Guidelines and the Outline Procedure. The Inquiry Members reserve the right to amend, replace, supplement or depart from this Evidence Protocol during the course of the Inquiry.”*

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20 February 2017