

CENTRAL BANK OF IRELAND

INQUIRY PURSUANT TO PART III(C) 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 Status of the Investigation Reports

INTRODUCTION

1. At the Inquiry Management Meeting which took place on 12 October 2016 (the “IMM”), the Legal Practitioner Team (the “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.

STATUS OF THE INVESTIGATION REPORTS

4. By letter dated 16 September 2016 to the Persons Concerned and to Enforcement, the RDU advised:

“The Inquiry Members are of the provisional view that the Investigation Reports merely identify a series of allegations, as set out in the Notice of Inquiry, together with the grounds upon which those allegations are based. In addition, the Investigation Reports identify certain documents relevant to those allegations. It is the Inquiry Members’ provisional view, and subject to any submissions from the Persons Concerned or Enforcement, that beyond the above, the Investigation Reports do not constitute evidence.”

5. By letter dated 3 October 2016 in response to the letter of 16 September 2016, William Fry, on behalf of Mr Walsh, agreed with the provisional view of the Inquiry Members that the Investigation Reports did not constitute evidence.

6. In a submission dated 7 October 2016, Enforcement expressed the view that *“it may be unnecessary for the Inquiry Members to make a determination on the evidential status of the Investigation Reports in light of the proposed adoption of the Revised Evidence Protocol.”* Enforcement referred to paragraph 1 of the proposed protocol which provides:

*“All documents provided to the Persons Concerned as part of the Investigation Report (including its Appendices and those contained in the USB stick provided) * shall be admitted in evidence as prima facie evidence of the proof of their contents.*

** Including the Revised Supplemental Investigation Report.”*

7. In circumstances where Enforcement were of the view that a determination on the status of the Investigation Reports appeared unnecessary they declined to make detailed submissions on the issue.
8. Following communication of the Decision of the Inquiry Members to deal with the status of the Investigation Reports 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 observed that:

“Enforcement does not make clear the relevance of paragraph 1 of the Revised Evidence Protocol to the question of the status of the Investigation Reports. For the avoidance of doubt, the LPT does not propose, either in the Revised Evidence Protocol or its submissions regarding the proof of documents that the Investigation Reports (as distinct from those contemporaneous documents which were provided as part of the Investigation Reports) would be admitted in evidence as prima facie evidence of the proof of their contents.”
10. The LPT submitted that the provisional view of the Inquiry Members in relation to the status of the Investigation report was correct.
11. In submissions dated 25 November 2016, William Fry, on behalf of Michael Walsh, again agreed with the provisional view of the Inquiry Members that the Investigation Reports did not constitute evidence.
12. In submissions dated 25 November 2016, Enforcement stated that the view expressed by the LPT in relation to paragraph 1 of the Revised Evidence Protocol (the “Protocol”) (set out at paragraph 9 above) is not apparent from the wording of paragraph 1.
13. The Inquiry Members are of the view that paragraph 1 of the Protocol relates to the contemporaneous documents provided with the reports and not the reports themselves which set out the narrative of the investigation and conclusions reached by Enforcement.

14. The evidential status of the documents referred to in the Investigation Report is the subject of a separate determination (on Proof of Documents) made following the Inquiry Management Meeting held on 12 and 13 December 2016. The purpose of this present decision is to consider the evidential status of the Investigation Reports and not the appended or referenced documents.

15. Enforcement addressed the issue of the status of the Investigation Reports stating that the contents of the Investigation Reports could be divided into the following broad categories:

“

- (a) information about the legal context and background to the investigation;*
- (b) background information with respect to INBS and contextual information provided in relation to the evidence relied upon in the Investigation Reports;*
- (c) description/summary and/or quoted extracts from the evidence/information relied upon in the Investigation Reports;*
- (d) copies of any Investigation Letter(s) issued to INBS and the Persons Concerned and any response thereto, namely Appendices E and F of the Investigation Report, which have been provided in accordance with paragraph 2.3 of the Inquiry Guidelines; and*
- (e) conclusions and reasons for same.”*

16. Enforcement submitted that there is no necessity to treat the other aspects of the Investigation Reports as having no evidential value particularly having regard to the provisions of section 33AY(1) and (2). Enforcement submitted that categories (a) and (b) above should be treated as prima facie correct subject to the right of a Person Concerned to challenge any particular aspect.

17. The Inquiry Members are of the view that the contents of the Investigation Reports coming within (a) and (b) are not evidence relevant to the Suspected Prescribed Contraventions (“SPCs”) but are rather background information and is not relevant to the question of whether the Investigation Reports have any evidential value. The extent to which the Persons Concerned accept the contents of these introductory chapters can be raised in advance of the modular hearings.

18. Enforcement submits that category (c) should be treated as an accurate road map to the underlying documents. The Inquiry Members are of the view that this is not relevant to the question of whether the Investigation Reports have any evidential value. The Inquiry Members are of the view that extracts in the Investigation Reports from underlying evidence cannot be treated as proof of the contents of the underlying documents.
19. Enforcement expressed the view that at a minimum the Protocol should address (d) above. The status of these documents will be the subject of the determination on Proof of Documents. The Inquiry Members are of the view that the proposed Protocol captures the documents referred to at (d) above.
20. As regards category (e) Enforcement notes that the Inquiry Members will form their own independent conclusions at the end of the Inquiry which is, of course, correct.
21. The Inquiry Members do not agree with Enforcement's submission that by treating the Investigation Reports as having no evidential status the Inquiry Members would be unnecessarily and inappropriately deprived of the benefit of the considerable work that was carried out in preparing the Investigation Reports.
22. Enforcement relied on the judgment of Henchy J. in *Kiely v Minister for Social Welfare* [1977] 1 IR 267 regarding the effect of material being admitted as prima facie evidence. The Inquiry Members are of the view that the judgment is not of direct relevance in determining whether the Investigation Reports should be regarded as prima facie proof of its contents although the case is of relevance in considering the consequences of a determination that underlying documentation shall be accepted as prima facie correct.
23. By letter dated 13 December 2016, Mr Michael Fingleton made submissions on the status of the Investigation Reports. He submitted that "*all Investigation Reports including all documentation and Section 41A interviews do not constitute evidence.*" This determination is concerned only with the status of the Investigation Reports and not with underlying documentation including the records of section 41A interviews. These documents are the subject of a separate determination on Proof of Documents. Mr Fingleton referred to the seriousness of the issues involved and the implications for the Persons Concerned and the requirements of fairness and fair procedures in support of his position.

24. Given the potentially serious consequences for the Persons Concerned should any adverse finding be made against them, neither the obligation of expedition nor the fact that the Inquiry is not bound by the rules of evidence justify conferring evidential status on the Investigation Reports. The Inquiry Members are of the view that to do so would be inconsistent with their obligation to follow fair procedures. Inquiry Members are of the view that it would be inappropriate to use the content of the Investigation Reports as evidence to establish whether any SPC has been committed.

CONCLUSION

25. The Inquiry Members have therefore decided that the Investigation Reports do not constitute evidence. As noted above the evidential status of the underlying documentation is the subject of a separate determination on Proof of Documents.

Marian Shanley
Geoffrey McEnery
Ciara McGoldrick

20 January 2017