

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”)**

INQUIRY MANAGEMENT MEETING

Wednesday 30 November 2016

Decision on Stay Application by Mr Michael Fingleton

1. In a series of correspondence between 8 June 2016 and 30 September 2016 and at the Inquiry Management Meeting held on 30 November 2016, Mr Fingleton submitted that the Inquiry against him should be stayed. He based this application for a stay on two grounds:

(a) Mr Fingleton is involved in proceedings issued by Irish Bank Resolution Company (“IBRC”). He said that these proceedings require consideration of a significant volume of documentation which will in itself be onerous. In addition, he submitted that the IBRC proceedings will be operating in tandem with the Inquiry and that this will materially impinge on his ability to deal with both.

(b) Judicial Review proceedings challenging the authority of the Central Bank of Ireland (“Central Bank”) to issue the Notice of Inquiry in respect of this Inquiry were instituted by Mr Fingleton. This challenge was unsuccessful before the High Court and Mr Fingleton has appealed the High Court decision. Mr Fingleton submitted that the Inquiry should be stayed until this legal process is completed “at all levels”.

IBRC proceedings

2. Mr Fingleton has presented the following rationale in support of his submission that the Inquiry be stayed on the basis of these proceedings:

- (a) It is unfair, unjust and burdensome to deal with the civil proceedings while also dealing with the Inquiry. It is unfair to expect him to deal with parallel hearings. In his letter of 8 June 2016 he referred to the imminent delivery of a large volume of documentation in relation to those proceedings and again at the Inquiry Management Meeting he advised that he expected delivery of a large volume of documentation. He said that it would be extremely difficult, if not impossible, for him to deal with both matters. Mr Fingleton said that he was under medical supervision and was approaching his 80th year and that he has been advised that it is extremely doubtful that he can continue to deal with all of the issues arising in the Inquiry.
- (b) There is no political imperative in proceeding with the Inquiry. He further submitted there is no financial, economic or regulatory justification for proceeding with the Inquiry.
- (c) Given the delay to date in the Investigation it would be of no significance to defer the Inquiry.
- (d) Proceeding with the Inquiry would damage his case with IBRC. Further, Mr Fingleton had stated in correspondence that proceeding with the Inquiry was an attempt by the Central Bank to damage his case with IBRC.
- (e) Mr Fingleton referred to the similarity of issues being addressed in both the IBRC proceedings and the Inquiry.
- (f) There was a conflict of interest on the part of the Central Bank in pursuing the Inquiry.

Judicial Review Proceedings

3. Mr Fingleton has presented the following rationale in support of this submission that the Inquiry be stayed pending the conclusion of the appeals process in the Judicial Review proceedings:

- (a) If he succeeds in his appeal and even if the Inquiry outcome is positive to him, Mr Fingleton will suffer irreparable reputational and other damage.
- (b) There are no negatives for the Central Bank in delaying the Inquiry whereas he would suffer stress, anxiety and trauma in the event of the Inquiry proceeding. He said that proceeding is a misuse of power without commensurate justification. He referenced the possibility of further appeal to the Supreme Court and to the European Court of Human Rights.
- (c) The Central Bank would sustain unjustifiable costs in proceeding with the Inquiry prior to the conclusion of the appeals process.

Enforcement Submissions

- 4. Enforcement made written and oral submissions in relation to Mr Fingleton's application for a stay of the Inquiry.
- 5. In written submissions dated 7 October 2016 Enforcement submitted that:
 - (a) Mr Fingleton's appeal of Noonan J's decision¹ in his Judicial Review proceedings is not listed until June 2017 and it is therefore difficult to see how the progress of the Inquiry at this stage could visit any unfairness on Mr Fingleton. [Mr Farrell confirmed at the Inquiry Management Meeting on 30 November that the appeal is listed for 20 June 2017].
 - (b) In the context of his Judicial Review proceedings, Mr Fingleton did not proceed with his application to the Court for a stay on the Inquiry and in the appeal arising from those proceedings he has not sought an expedited hearing. As pointed out by Noonan J, if any unfairness arises at a future date due to the parallel progression of the Inquiry with other proceedings, the Inquiry Members can manage this at that time. The hypothetical necessity for case management at some future point is not a basis for staying the proceedings now.

¹ Michael P Fingleton v Central Bank of Ireland [2016] IEHC 1

- (c) In relation to the IBRC proceedings in respect of which Mr Fingleton has given no information regarding dates, the existence of those proceedings does not justify a stay on the Inquiry.
6. At the Inquiry Management Meeting, Mr Farrell, on behalf of Enforcement submitted that:
- (a) An application for a stay had been raised by Mr Fingleton in his Judicial Review proceedings but was not pursued.
- (b) In relation to Mr Fingleton's concerns about having to deal with the concurrent IBRC proceedings, Mr Farrell stated that this issue had been considered by Noonan J who had held against Mr Fingleton as he had failed to elaborate or explain how it was unfair to face these simultaneous proceedings.
- (c) In relation to Mr Fingleton's complaint that he had to fight on two fronts and that this caused a considerable drain on his resources, Mr Farrell noted that this was considered by Noonan J who was unconvinced by this argument.
- (d) In relation to there being no public interest or political imperative in pursuing the Inquiry, Mr Farrell pointed out that this was also an issue raised before Noonan J who disagreed.
- (e) In relation to the reputational damage that Mr Fingleton said he would suffer if the Inquiry proceeded prior to the conclusion of his appeal of Noonan J's judgment, Mr Farrell noted that Mr Fingleton had issued public proceedings and had abandoned his stay application in the Judicial Review proceedings. Mr Farrell referred to Eager J's decision² in relation to Mr Purcell's application for a stay. Eager J refused the stay on the basis of a very real public interest in the matter proceeding relying on principles set out in *Okunade and Others v Minister for Justice Equality and Law Reform, Ireland and the Attorney General* [2012 IESC 49].

² Ex tempore, 19 September 2015

- (f) Mr Farrell said that even though Mr Fingleton has a right of appeal, he nonetheless lost in the High Court and he is therefore in a weaker position in relation to the question of a stay.

Legal Practitioner Team (“LPT”) Submissions

7. Mr O’Moore addressed Mr Fingleton’s application as follows:

- (a) He noted that while Mr Fingleton raised a concern in relation to his health at the hearing no evidence had been presented to support the proposition that his health is such that the Inquiry should be stayed.
- (b) He referred the Inquiry Members to Noonan J’s judgment in relation to Mr Fingleton’s contention that pursuing the Inquiry against him imposed a burden on him that is disproportionate to the public interest in having an Inquiry. He also referred to Noonan J’s consideration of Mr Fingleton’s contention that the expenditure on legal costs associated with preparing for the Inquiry would deplete the limited resources available to him to pursue his Judicial Review proceedings. Noonan J was not convinced by either argument.
- (c) Mr Fingleton has not pressed his application for a stay of the Inquiry pending conclusion of his appeal.
- (d) Mr O’Moore noted that Mr Fingleton referenced in correspondence Mr Purcell’s case which also failed. He said that Mr Fingleton was not a party to that case and therefore had no jurisdiction to seek a stay with reference to those proceedings. He noted that Mr Purcell has not made the argument that the Inquiry should be halted because of the existence of his case in the system.
- (e) With regard to difficulties faced by Mr Fingleton on account of the parallel IBRC proceedings, Mr O’Moore stated that Noonan J held that this was an issue that could be addressed by the Inquiry Members. Mr O’Moore said that no case has been made that a stay is justified because of the existence of the other proceedings in which Mr Fingleton is legally represented.

- (f) Mr O'Moore also addressed the contention by Mr Fingleton that there was no harm in granting a stay and he referred to two portions of Eager J's judgment in relation to Mr Purcell's application for a stay of the Inquiry:

"On behalf of the Central Bank, the security, severity and the scale of the financial crisis in Ireland meant the Central Bank had to address unprecedented difficulties in relation to the financial system. Real and significant public interest exist in it being permitted to continue its Inquiry which is a joint inquiry involving five people."

and:

"The Central Bank Act, as amended, enjoys the presumption of constitutionality. It is in the public interest in protecting the integrity of the financial services, supervisory and regulatory system ... and an injunction in this case would undermine the supervision and regulation on the system is an integral part of the relationship with the European Central Bank."

DECISION OF THE INQUIRY MEMBERS

Proceedings taken by IBRC against Mr Fingleton

8. As has been pointed out in respect of other applications, the Inquiry Members have a statutory obligation of expedition. Section 33AY(1) and (2) 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."

9. Noonan J in Mr Fingleton's Judicial Review proceedings considered the overlap between the civil proceedings and the Inquiry and at paragraph 139 of his judgment stated:

“139. The applicant’s complaint here is largely based on the fact that he says he is being required to “fight on two fronts” in dealing with both the inquiry and the civil proceedings in the Commercial Court. However, the applicant has demonstrated no real basis for that contention in circumstances where the inquiry is scheduled to commence on 1st February, 2016, and last approximately 45 days whereas the discovery process in the Commercial Court case will not conclude before the end of July, 2016, at the earliest, suggesting that a trial may be some way off thereafter. In any event, any perceived difficulty that the applicant encounters because of overlap is a matter that can readily be addressed by the inquiry or the court if necessary. It cannot reasonably be suggested by the applicant that the coincidental existence of civil proceedings can have the effect of somehow granting him immunity against a statutory inquiry.”

The Inquiry Members agree with Noonan J’s assessment although they note that other than in respect of preliminary applications, hearings have not commenced as was anticipated at the time of the judgment. No indication has been given to the Inquiry Members of when these proceedings are likely to be heard. No detail in relation to his difficulties has been provided other than that he is expecting delivery of a significant volume of documentation in the civil proceedings and that he cannot be expected to park his consideration of that discovery while he deals with this Inquiry. Mr Fingleton is legally represented in the civil proceedings and is therefore equipped to deal with this discovery. Even were he not so represented the Inquiry Members are of the view that this is not a sufficient ground to warrant a stay on the Inquiry process. Should any procedural or logistical difficulties arise, such as concurrent hearings, these can be raised with the Inquiry Members.

10. Noonan J was unconvinced in relation to Mr Fingleton’s complaint of financial hardship and the Inquiry Members have not been provided with any basis for finding that the Inquiry should be stayed on this ground.
11. The Inquiry Members have no evidence to support Mr Fingleton’s allegation that there has been any attempt to damage his case with IBRC and Mr Fingleton has not specified how proceeding with the Inquiry will damage his case in the Commercial Court.

12. Any inconvenience to Mr Fingleton in having to deal with concurrent proceedings is outweighed by the public interest, as recognised by Noonan J and Eager J, in progressing this Inquiry.
13. In addition, the Inquiry Members are of the view that the other Persons Concerned are entitled to have the Inquiry conducted with expedition.
14. Mr Fingleton has contended that similar issues arise in the civil proceedings and the Inquiry and therefore that there is unnecessary duplication. This point was raised by Mr Fingleton in his Judicial Review proceedings and was rejected by Noonan J. The Inquiry Members are not satisfied that any similarity of content justifies a stay of the Inquiry. Regulatory proceedings serve a different purpose to civil proceedings.
15. The Inquiry Members are not in receipt of any evidence that would indicate that the Inquiry against Mr Fingleton should be stayed on account of ill health or that his health is prejudicing his ability to manage these concurrent proceedings.

Mr Fingleton's appeal of Mr Justice Noonan's judgment in his Judicial Review proceedings

16. In relation to Mr Fingleton's contention that he will suffer damage if the Inquiry against him were to continue, no detail has been given of any damage, reputational or otherwise, that may arise due to this Inquiry progressing pending conclusion of the appeal process. The Inquiry Members are not satisfied that there is any basis for staying the Inquiry on this ground.
17. The comments regarding the obligation of expedition on the Inquiry Members set out at paragraph 8 above in relation to the civil proceedings are equally applicable in relation to Mr Fingleton's appeal of the Judicial Review proceedings.
18. The Inquiry Members do not agree that there are no negatives for the Bank in waiting for this or any other appeal. It is not in the public interest that this Inquiry be stayed pending Mr Fingleton's exhaustion of the appeal options available to him. While his appeal is scheduled for 20 June 2017, this appeal and indeed any further appeal could take a considerable time to conclude.

19. The Inquiry Members note that the application made by Mr Purcell for a stay of the Inquiry was unsuccessful. Further Mr Fingleton did not proceed with his own stay application.

Conclusion

20. This Inquiry is an important statutory process and should proceed in an orderly fashion. The Inquiry Members are satisfied that there is no risk of injustice to Mr Fingleton through dealing with concurrent proceedings. As noted above any procedural or logistical difficulties that he encounters can be addressed when they arise. The public interest is best served through proceeding with the Inquiry.

Marian Shanley
Geoff McEnery
Ciara McGoldrick

20 January 2017