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 McMenamin, John S. Purcell and Michael P. Walsh (the "Inquiry")

Inquiry Management Meeting
held on
Monday 28 January 2019

Decision

1. Introduction

1.1. This Inquiry Management Meeting ("IMM") was held to consider the options available to the Inquiry for proceeding with the module relating to SPC 6 of the Notice of Inquiry. This was necessary because of the continuing illness of one of the Persons Concerned, Mr Michael Fingleton. The Inquiry conducted the initial part of the IMM in public in order to outline the events that led to the calling of this meeting. Because the substantive part of the meeting potentially involved discussion of Mr Fingleton's medical condition, that part was heard in private.

1.2 SPC 6 alleges that INBS failed to ensure that certain reports relevant to commercial lending and credit risk management were provided to the Board of Directors in accordance with INBS's internal policies. SPC 6 also alleges that Mr Michael Fingleton and Mr Stan Purcell participated in the commission of this prescribed contravention.

1.3 This decision deals with:

1. Introduction
2. Outline of Events Leading to this IMM
3. Relevant Statutory Framework
4. Mr Fingleton's Fitness to Participate in the Inquiry
5. Decision in relation to SPC 6 Options
6. Post IMM Event.

2. Outline of Events Leading to IMM

2.1 11 Inquiry Management Meetings have been held either in private or in public between July 2015 when the Notice of Inquiry was served and the commencement of the first module of the Inquiry in December 2017.

2.2 Opening statements in the first module of the Inquiry (dealing with allegations set out at SPC 5 in the Notice of Inquiry) commenced on 11 December 2017 and were completed on 13 December 2017. The hearing of evidence was scheduled to begin on 9 January 2018.

2.3 Following the procedure adopted by the Inquiry at the IMM and out of respect for Mr Fingleton's expectation of confidentiality, this Inquiry Decision will refer to the various medical doctors who provided medical certificates (and oral evidence) to the Inquiry on behalf of Mr Fingleton as Clinicians A to F.

2.4 On 8 January 2018, the first of Mr Fingleton's medical certificates was provided to the Inquiry by Clinician A, the day before the hearing of evidence in SPC 5 was due to begin. A further medical certificate of Clinician A was produced on 15 January 2018, which was also the day before the postponed hearings were due to commence. A third medical certificate was produced by Clinician B on the 24 January 2018 suggesting that Mr Fingleton would be unable to participate in the Inquiry for some weeks.

2.5 On 30 January 2018, a hearing was held in private to hear evidence on oath from Clinician B regarding Mr Fingleton's health and (following that oral hearing) the hearing of evidence in the SPC 5 module was again adjourned until 13 February 2018. There was however a fourth medical certificate produced by a third clinician, Clinician C, on 2 February 2018 and following examination of this doctor under oath, the SPC 5 hearings were further adjourned until 20 February 2018 when they commenced, some six weeks later than originally scheduled.

2.6 On 1 March 2018, Mr Fingleton emailed the Inquiry requesting that hearings should be in the mornings only on health grounds**.** Following a private hearing of the Inquiry this was so ordered by the Inquiry Members.

2.7 The Hearing of evidence in the SPC 5 module was adjourned on medical grounds on the application of Mr Fingleton for five days in April and thereafter the Inquiry proceeded to hear from witnesses and completed the evidence in respect of SPC 5 on 27 June 2018.

2.8 The Inquiry directed that oral submissions in relation to the SPC 5 module would be heard in September 2018 and in that regard, written submissions were to be furnished by Enforcement on 20 July 2018 and by the Persons Concerned by 16 August 2018. Enforcement and Mr Purcell both furnished submissions as requested. Mr Fingleton however, through his son Michael Fingleton Junior, provided a medical certificate from a fourth clinician, Clinician D, on 10 August 2018, indicating that Mr Fingleton would not be able to meet the deadline for the SPC 5 written legal submissions and sought an adjournment for an indeterminate period of time.

2.9 A further medical certificate was provided on 20 August 2018 by a fifth Clinician, Clinician E, indicating that Mr Fingleton would be unable to participate in the business of the Inquiry for another month. The Inquiry wrote to Clinician E requesting her further professional opinion in respect of the following matters:

> *"1. the date upon which you might reasonably expect Mr Fingleton to be …. able to continue to participate in the Inquiry on the current half day oral hearing basis; In this regard please note such oral hearings are due to recommence on 2 October 2018 in which Mr. Fingleton is scheduled to be an active participant;*
>
> *2. the nature of Mr Fingleton's illness and the medium and long term prognosis in respect of same; and*
>
> *3. the basis for your view that he is unfit to engage in any activity relating to the Inquiry for one month from the date of the certificate."*

In response, a further medical report was submitted by Clinician E on 7 September 2018 which stated: *"I am not able to determine at this time when he* [Mr Fingleton] *will be …. able to participate in the Inquiry."*

As a result, both the oral submissions in respect of SPC 5 scheduled for September and the commencement of SPC 6 evidence, which had been scheduled for 9 October 2018, were adjourned.

2.10 The Inquiry heard evidence on oath from Clinician E on 24 September 2018 in relation to Mr Fingleton's condition and prognosis and a further Medical Report was provided by her on 26 October 2018. This Report stated that Mr Fingleton would not be able to take part in the Inquiry on either a written or oral basis *"until at least January 2019 when I will review the situation again."*

2.11 On 2 November 2018, the Inquiry Members wrote to Mr Fingleton noting the Medical Report that had been received from Clinician E on 26 October 2018 and querying whether he wished to make an application for an adjournment of the SPC 6 hearings or any other application. In response, an email was sent to the Inquiry Members on behalf of Mr Fingleton which stated:

> *"[Mr Fingleton] is unable at this time to deal with or participate in any elements of the Inquiry including, but not exclusively… SPC6 Hearings due to his present illness."*

2.12 A further private hearing of the Inquiry took place on 13 November 2018 during which Clinician E was again questioned by a member of the Legal Practitioner Team (**'**LPT') as to Mr Fingleton's condition and prognosis. She stated that she did not expect Mr Fingleton to be in a position to participate in the Inquiry for a further three months although she could not be certain about that time period.

2.13 On 14 November 2018, the Inquiry wrote to the Persons Concerned and Enforcement referring to the Medical Reports received from Mr Fingleton's treating clinician, Clinician E, on 7 September 2018 and 26 October 2018 as well as the oral evidence heard on 24 September and 13 November 2018. This letter invited submissions from the Persons Concerned and Enforcement as to whether the commencement of the SPC 6 hearings should be postponed further. Mr Purcell and Enforcement furnished submissions as requested. Mr Purcell stated that no fair Inquiry could be conducted without the full participation of Mr Fingleton. Enforcement did not advocate any specific outcome or approach.

2.14 A sixth treating clinician, Clinician F provided a report on 20 November 2018. This did not impact on the overall prognosis that had been provided by Clinician E. A further update was provided by Clinician E on 26 November 2018 in which she stated that she would review Mr Fingleton's condition in January 2019.

2.15 The Inquiry wrote again to the Persons Concerned and Enforcement on 26 November 2018 seeking submissions on three options for proceeding with the SPC 6 Module of the Inquiry and directing that an IMM should be held to consider these options. The Inquiry proposed that at this IMM all potential options for proceeding with SPC 6 would be considered:

> *"The IMM will consider all potential options regarding the SPC 6 hearings including:*
>
> ***1.*** *Proceeding in respect of all Persons Concerned, including Mr Fingleton;*
>
> ***2.*** *Proceeding in respect of those Persons Concerned identified in SPC 6, excluding Mr Fingleton and stay the SPC 6 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 6 until such further date as may be identified by the Inquiry."*

The letter invited the Persons Concerned and Enforcement to make written submissions on these or any other options they wished the Inquiry to consider. In the event, no further options were suggested.

2.16 Submissions were received from Mr Purcell, Enforcement and the LPT. Submissions were sought from Mr Fingleton but no response was received. Mr Purcell provided submissions on 2 December 2018 and 13 December 2018. Enforcement provided submissions on 23 November 2018 and 7 December 2018. Further Submissions were sought from Enforcement by way of letter dated 21 December 2018 and were received on 14 January 2019. The LPT provided submissions on Option 1 on 14 December 2018 and on Options 2 and 3 on 21 January 2019.

2.17 Clinician E provided two Medical Reports in January 2019 – the first dated 15 January 2019 and the second dated 24 January 2019. These Reports stated that Mr Fingleton would not be able to take part in the Inquiry in any capacity for a period of four months after which the matter would be reviewed.

2.18 All written submissions together with the oral submissions made to the Inquiry at the Inquiry Management Meeting on 28 January 2019 have been considered by the Inquiry.

3. Relevant Statutory Framework

3.1 The Inquiry is being conducted pursuant to Part IIIC of the Central Bank Act 1942 (as amended) (the "Act").

3.2 Section 33AY of the Act addresses the conduct of Inquiries. Subsection 1 provides:

> *"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."*

3.3 Subsection 2 provides:

> *"At an Inquiry, the bank shall observe the rules of procedural fairness but is not bound by the rules of evidence."*

3.4 With regard to the power of the Inquiry to adjourn or postpone hearings of the Inquiry, section 33 AP of the Act, subsections 4 and 5 provide:

> *"(4) The Bank may adjourn an Inquiry from time to time and from place to place, but if it does so, it shall ensure that the regulated financial service provider or other person concerned is notified of the date, time and place at which the Inquiry is to be resumed.*
>
> *(5) The Bank may proceed with an Inquiry in the absence of the financial service provider or other person concerned so long as that financial*

service provider or person has been given an opportunity to attend the Inquiry or to make written submissions to it."

3.5 The Central Bank has prescribed Inquiry Guidelines pursuant to section 33BD of the Act. The Inquiry Guidelines provide that:

"*4.5 The Inquiry Members must act fairly and must consider and deliberate upon such applications as may be made to them in the course of the Inquiry.*

4.6 The Inquiry Members may be required to deal with a number of preliminary applications and issues, including inter alia:

1. A decision to proceed in the absence of the regulated entity

The Inquiry may proceed in the absence of the regulated entity provided that the regulated entity has been given an opportunity to participate in an Inquiry or to make written submissions to it.

2. A request for an adjournment

The Inquiry Members may, at any point during an Inquiry, be requested to adjourn any Inquiry hearing. The Inquiry Members have the discretion to grant or refuse an application for an adjournment. In considering any such request the Inquiry Members shall exercise their discretion fairly, in accordance with fair procedures, taking into account the circumstances of the application and any submissions made, and where granted shall ensure that the regulated entity is notified of the date, time and place at which any Inquiry hearing is to be resumed."

4. Mr Fingleton's Fitness to Participate in the Inquiry.

4.1 Part IIIC of the Act does not expressly address the current issue facing the Inquiry. In considering Mr Fingleton's fitness to engage with the Inquiry, the Inquiry Members found the provisions of Section 4(2) of the Criminal Justice (Insanity) Act 2006 (as amended) ("the 2006 Act") to be a helpful touchstone

as suggested by Enforcement although it is acknowledged that this section relates to criminal and not regulatory proceedings. Section 4(2) provides:

> *"(2) An accused person shall be deemed unfit to be tried if he or she is unable by reason of mental disorder to understand the nature or course of the proceedings so as to-*
>
> *(a) plead to the charge,*
>
> *(b) instruct legal representative,*
>
> *(c) in the case of an indictable offence which may be tried summarily, elect for a trial by jury,*
>
> *(d) make a proper defence,*
>
> *(e) in the case of the trial by jury, challenge a juror to whom he or she might wish to object, or*
>
> *(f) understand the evidence."*

4.2 In *Minister for Justice v BH (No2)* [2015] IEHC 601, the High Court considered that the criteria described in section 4 of the 2006 Act could be applied *mutatis mutandis* in the context of extradition proceedings for the purpose of considering whether the requested person was fit to deal with same.

4.3 The position as regards claims of prejudice based on health grounds in criminal proceedings was summarised in Dunne, *Judicial Review of Criminal Proceedings* (2011), at paragraph 8.99:

> *".. It is now clear that the courts do not recognise the age, ill-health, disability or incapacity of the applicant as forms of prejudice that, in themselves, are capable of giving rise to a real and serious risk of an unfair trial or of constituting exceptional circumstances that would make it on their own unjust to put an applicant on trial."*

4.4 From the point of view of progressing SPC 6, the Medical Reports from Clinician E contain the relevant information as to Mr Fingleton's current ability to participate in the Inquiry. In her medical report of 15 January 2019, Clinician E stated:

> *"1. He is not in a position to author written submissions on a legal point.*

2. He is not in a position to attend oral hearings and participate in same either by examining witnesses or making legal submissions or as a witness himself.
3. He is not in a position to instruct lawyers to act on his behalf before the Inquiry."

4.5 Neither Enforcement nor the LPT could identify an Irish authority concerning the concept of unfitness to participate in regulatory or disciplinary proceedings. In the U.K. the general position was set out by Gibson LJ in *Teinaz v London Borough of Wandsworth* [2002] EWCA Civ 1040, at para. 21:

> *"A litigant whose presence is needed for the fair trial of a case, but who is unable to be present through no fault of his own, will usually have to be granted an adjournment, however inconvenient it may be for the tribunal or court and to the other parties. That litigant's right to a fair trial under Article 6 of the European Convention on Human rights demands nothing less. But the tribunal or court is entitled to be satisfied that the inability of the litigant to be present is genuine, and the onus is on the applicant for an adjournment to prove the need for such an adjournment."*

Gibson LJ went on to suggest how a tribunal or court could satisfy itself in relation to medical evidence and stated at para. 22:

> *"I make these comments in recognition of the fact that applications for an adjournment on the basis of a medical certificate <u>may present difficult problems requiring practical solutions if justice is to be achieved</u>.*" (Emphasis added).

The Inquiry has sought such a practical solution in the Options presented for consideration at this IMM.

4.6 The Inquiry Members are satisfied on the basis of the medical evidence received, that Mr Fingleton has suffered from ill health over the past months. Clinician E's specific outline of Mr Fingleton's inability to engage with all aspects of the Inquiry quoted above are all encompassed by section 4(2) of the 2006 Act. Accordingly, the Inquiry Members find that Mr Fingleton is currently unfit to

participate in the SPC 6 module. This finding is based on the evidence currently available to the Inquiry.

4.7 Clinician E has not been a position to give any definite date upon which Mr Fingleton would be able to resume his engagement with the Inquiry. At the date of her Report of 24 January 2019, she stated that Mr Fingleton was suffering from ill-health to the extent that he was unable to participate in the Inquiry and that she did not believe he would be able to take part in the Inquiry on either a written or an oral basis for at least four months.

4.8 In a medical report of 7 September 2018, Clinician E stated: *"the prognosis of recovering from this illness is good, although recovery is slow".* On 26 October 2018 this same Clinician stated: *"it is my professional opinion that the prognosis for recovery from this [illness] is good."* This prognosis was repeated again in her medical report of 24 January 2019.

4.9 On the basis of these extracts from the Medical Reports the Inquiry is proceeding on the understanding that Mr Fingleton's illness is temporary and that he will in due course be in a position to participate in this Inquiry. This temporary illness is expected to continue until at least May of this year but may extend beyond that time.

4.10 The Inquiry will continue to seek medical reports from Clinician E in order to monitor Mr Fingleton's ability to participate in the Inquiry and may take any further steps necessary in this regard.

5. Decision in relation to SPC 6 Options

Option 3: Postponing the SPC Hearings until such further date as may be identified by the Inquiry.

Mr Purcell's Application

5.1 The Inquiry wrote to the Persons Concerned and Enforcement on 26 November 2018 directing that an IMM would be held on 10 December 2018. As already

outlined, the Inquiry proposed that at this IMM all potential options for proceeding with SPC 6 would be considered and outlined three specific options.

5.2 In his first submission dated 22 November 2018 Mr Purcell stated:

> *"My submission is that no fair Inquiry can be conducted without Michael Fingleton's attendance and full participation in all aspects of the Inquiry as a Person Concerned ("PCM").*
> *Therefore I submit that the commencement of the SPC 6 hearings should be postponed until Michael Fingleton is able to fully participate as a PCM."*

5.3 Following receipt of the Notice of the IMM and the three options which were identified for consideration, Mr Purcell emailed the Inquiry on 2 December 2018 and stated:

> *"I submit that the potential options 1, 2 and 3 should be disregarded by the Inquiry as they are incompatible with the requirements of a fair Inquiry as set out in my 22 November submission".*

5.4 The Inquiry informed Mr Purcell that he would be given an opportunity to provide reasons for the views expressed in his submissions at the IMM. Mr Purcell replied by email dated 6 December 2018:

> *"The reason why I submit that no fair Inquiry can be conducted without Michael Fingleton is because of Michael Fingleton's central role in INBS as managing director and his responsibility for and control and knowledge of all aspects of the lending function."*

5.5 The IMM was postponed until 28 January 2019 and following the public hearing outlining the circumstances that had led to the holding of the IMM, the meeting reverted to a private session. Mr Purcell's submissions and the contention that no fair Inquiry could be conducted without Mr Fingleton's attendance and full participation were considered.

5.6 Option 3 would appear to be consistent with Mr Purcell's submissions. If the Inquiry decides at this time to adopt Option 3, this would in effect be potentially an indefinite postponement of the SPC 6 hearing as the medical evidence

provided to the Inquiry to date is that while the prognosis for Mr Fingleton's recovery is good, the timeline for this is not certain.

5.7 The Inquiry has considered the duty of expedition set out in s. 33AY (1) of the Act.

5.8 A further consideration for the Inquiry is the public interest in the work of the Inquiry proceeding. In their written submissions, the LPT referred to an *ex tempore* judgment of Eagar J dated 19 September 2015 in *Purcell v Central Bank of Ireland*. This was in the context of Mr Purcell's application to the High Court for a stay of the Inquiry. In the course of his judgment Mr Justice Eager stated (at p.43 of the transcript):

> *"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 existed in it being permitted to continue its inquiry which is a joint inquiry involving five people. 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 and the system is an integral part of the relationship with the European Central Bank."*

5.9 In his judgement delivered on 4 January 2016 in the case of *Fingleton v the Central Bank of Ireland* [2016] IEHC 1, Noonan J also addressed the public interest in the Inquiry continuing. Addressing arguments put forward by Mr Fingleton that the Inquiry imposed a burden on him that was disproportionate to the public interest, Mr Justice Noonan stated at para. 148:

> *"In the final analysis, the applicant has not satisfied me that there is any unfairness inherent in the inquiry process to which he is subject…. It seems to me that the public interest is well served by a credible system of financial regulation and enforcement such as that provided for by the Act."*

5.10 The statutory obligation of expedition imposes a duty on the Inquiry to consider all reasonable ways to move forward with the Inquiry notwithstanding Mr Fingleton's illness.

5.11 The Inquiry has decided not to adopt Option 3. This decision is based on the indeterminate nature of the Medical Reports in terms of Mr Fingleton's likely recovery and the consequent delay and uncertainty as to when he will be in a position to re-engage with the Inquiry. The work of the Inquiry has already been delayed significantly and the obligation of expedition and the public interest in the Inquiry progressing imposes a duty on the Inquiry Members to seek a way forward that protects the rights to due process that each of the Persons Concerned are entitled to and at the same time allows the work of the Inquiry to continue.

Option 1: Proceeding in respect of all Persons Concerned, including Mr Fingleton.

5.12 This option envisages proceeding with SPC 6 as against INBS and the two relevant Persons Concerned, Mr Michael Fingleton and Mr Stan Purcell. Among the authorities cited to us, the Inquiry in particular noted the case of *Brabazon-Drenning v United Kingdom Central Council for Nursing, Midwifery and Health Visiting* [2001] HRLR 6, which summarised the legal position at para. 18:

> *"Save in exceptional cases where the public interest points strongly to the contrary, it must be wrong for a committee, which has the livelihood and reputation of a professional individual in the palm of its hands, to go on with the hearing when there is unchallenged medical evidence that the individual is simply not fit to withstand the rigours of the disciplinary process".*

5.13 The Inquiry must decide as to whether it would be appropriate to proceed against Mr Fingleton notwithstanding the Medical Reports received and the evidence given. Clearly the Inquiry has an obligation of expedition and there is also a public interest in the Inquiry proceeding. However as outlined in the three cases of *R v Hayward*, *R v Jones and R v Purvis* [2001] EWCA Crim 168, [2001] QB 862 which involved an appeal by three accused who were tried in their

absence, this discretion should be exercised with great care and only in rare and exceptional circumstances should it be exercised in favour of a trial taking place or continuing, particularly where the defendant is unrepresented. The case of *GMC v Adeogba and Visvardis* [2016] EWCA Civ 162, which involved a disciplinary hearing by the medical council in the UK, followed the criteria set down by the Court in the *Hayward*, *Jones* and *Purvis* cases and stated that proceeding in the absence of the accused should only be done where there is a good reason to do so.

5.14 The Inquiry Members believe that adopting Option 1 at this time and based on the evidence currently before the Inquiry is not appropriate in light of the legal authorities cited above.

Option 2: Proceeding in respect of those Persons Concerned identified in SPC 6, excluding Mr Fingleton and staying the SPC6 hearing insofar as Mr Fingleton is concerned, until such further date as may be identified by the Inquiry.

5.15 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").

5.16 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.

5.17 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.

5.18 The issue remains, however, as to whether Mr Purcell would be prejudiced by the Inquiry proceeding as against him in Mr Fingleton's absence (either temporary or permanent) and whether "staggered" hearings as outlined above would be prejudicial to Mr Purcell.

5.19 It is noted that neither the LPT nor Enforcement were able to identify any precedent for this approach of "staggered" hearings in a regulatory or disciplinary context.

Section 33AP of the Act

5.20 The provisions of Part IIIC of the Act provide for both financial service providers and Persons Concerned to be notified with respect to an Inquiry. Section 33 AP(1) and (2) provide:

> *"(1) Before holding an inquiry under section 33 AO, the Bank shall give notice in writing of the proposed inquiry to the financial service provider or other persons concerned.*
> *(2) The notice must-*
> > *(a) specify the grounds on which the Bank's suspicions are based, and*
> > *(b) specify a date, time and place at which the Bank will hold the inquiry, and*
> > *(c) invite the financial service provider or person concerned either to attend the inquiry or to make written submissions about the matter to which the inquiry relates."*

The Notice of Inquiry does not require a Person Concerned to attend. Rather it invites such a person either to attend or to make written submissions.
In this regard section 33 AP(5) states:

> "*(5) The Bank may proceed with an inquiry in the absence of the financial service provider or other person concerned so long as that financial service provider or person has been given an opportunity to attend the inquiry or to make written submissions to it".*

5.21 The principles established by criminal law are of assistance in identifying the correct approach to adopt in determining whether Mr Purcell would be

prejudiced were the Inquiry to proceed against him in the absence of Mr Fingleton. The case of *R. v Jones* (No 2) [1972] 1 WLR 887; [1972] All ER 731, was decided by the English Court of Appeal and is a relevant authority on the issue of proceeding without all the accused present. It accepted that whilst it was more usual to proceed with all the accused present, it was sometimes convenient and permissible to proceed in the absence of one or more of the accused where it was appropriate to do so.

5.22 The Inquiry Members agree with the LPT's submission that:

> *"Absent any prejudice to the remaining accused that cannot be remedied, it would appear that a Court can and most likely would proceed against that accused. The court (tribunal) would have to be satisfied, by the remaining accused, that he would suffer some specific and not merely fanciful prejudice if it were to accede to an application to stay the proceedings as against him".*[1]

5.23 A number of criminal cases have been cited by Enforcement and the LPT on the issue of prejudice suffered by reason of a gap in the evidence – either a missing document or a missing witness. The approach to be taken to missing evidence was established by *Braddish v DPP* [2001] 3 IR 127, in which the Supreme Court prohibited a trial because a CCTV recording had been destroyed. The Inquiry finds that, in an application to have one's trial prohibited, the onus is on the applicant to demonstrate a real risk of an unfair trial. In *McFarlane v DPP* [2006] IESC 11, [2007] 1 IR 134 Hardiman J stated at para. 23:

> *"In order to demonstrate that risk* [a risk of an unfair trial] *there is obviously a need for an applicant to engage in a specific way with the evidence actually available so as to make the risk apparent."*

5.24 On the issue of establishing prejudice, the case of *Z v DPP* [1994] 2 IR 476 provides useful guidance on the principle that a person claiming that the continuance of a trial would be prejudicial to them, must engage with the specific facts. In its submissions of 23 November 2018, Enforcement set out

[1] Outline Submissions on behalf of the Legal Practitioner, 21 January 2019, para. 46

three principles in respect of the concept of prejudice by reference to three cases that provided guidance as to how the courts would assess claims of prejudice. The LPT submitted that these principles correctly summarised the law. The three cases in question are: *P. H. v DPP* [2007] IESC 3; *C.K. v DPP* [2007] IESC 5, and *J.B. v DPP* [2006] IESC 66.

Enforcement submitted[2]:

> *"Three principles in respect of the concept of prejudice can be drawn from these recent authorities:*
>
> *a. in order to raise prejudice and applicant has to fully engage with the facts and to clearly explain why the missing witness or document was essential to their defence;*
>
> *b. that prejudice will not be sufficient to prohibited a trial if it relates to evidence the essence of which can be obtained from other sources; and*
>
> *c. that, where prejudice is established, the onus is on the applicant to establish why one cannot rely on warnings from the trial judge to ensure a fair trial.*"

Whilst obviously the context for these decisions was quite different from that pertaining to this Inquiry, the principles established are of assistance in determining whether Mr Purcell has established that no fair Inquiry could be conducted without Mr Fingleton's attendance and full participation.

5.25 Mr Purcell has submitted that the Inquiry cannot be fair as against him without Mr Fingleton's full participation. However, crucially Mr Purcell has not identified any specific prejudice that he believe he would suffer if SPC 6 was to go ahead without Mr Fingleton as either a Person Concerned or witness.

5.26 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.

[2] Outline Legal Submissions of Enforcement, 23 November 2018, para. 21

5.27 There does not appear to be a precedent for what is proposed in Option 2 and the Inquiry Members note that the courts generally favour unitary hearings and lean against fragmented hearings. In their written submissions to the Inquiry, the LPT provided examples of where the Irish courts have indicated this preference. In the case of *Campion v South Tipperary County Council* [2015] IESC 79, [2015] 1 IR 716 McKechnie J stated at para. 22:

> *"it remains the position that, at primary level, a unitary trial is the starting point. Experience throughout many decades of litigation has shown that in the vast majority of cases this is the best mechanism by which justiciable issues can be determined, not only so as to achieve justice, but also as representing the most expeditious and cost effective way of doing so."*

In the context of modular trials Clarke J (as he then was), in *Cork Plastics v Ineos Compound UK Ltd* [2008] IEHC 93, noted at para. 3.1:

> *"There can be little doubt but that the default position is that there should be a single trial of all issues at the same time."*

The LPT also referred to *Irish Bank Resolution Corporation Ltd v Quinn* [2016] IESC 50, in which the Supreme Court recognised the principle against fragmentation. This involved an appeal from a decision of Charleton J who declined to stay proceedings taken in Ireland on the ground of *forum non conveniens* and the concern was raised that this could lead to the case which the plaintiff wished to bring being fragmented.

5.28 Option 2 can be distinguished from authorities that deal with unitary hearings:

i. No finding in relation to the allegations set out in SPC 6, or in relation to participation in that SPC by any Person Concerned, will be made until the conclusion of SPC 6.

ii. Option 2 applies to proceeding in respect of SPC 6 only. In the event that Mr. Fingleton's position persists, it may be necessary for the Inquiry to hold a separate Inquiry management Meeting to deal with the approach to be taken in respect of the SPC 7 Module.

5.29 The obligation of expedition and the public interest in the work of the Inquiry continuing imposes on the Inquiry Members an obligation to seek ways forward that seek to protect the interests of all. The Inquiry Members believe that the proposal at Option 2 best achieves these objectives.

5.30 The Inquiry will write to all relevant parties outlining the arrangements for the First SPC 6 Hearing.

6. Post IMM Events

6.1 On 3 March 2019, the Irish Mail on Sunday published an article suggesting that Mr. Fingleton had been present in Montenegro on 24 January 2018, and that he executed documentation in Montenegro on that date. The significance of this account, if correct, is that on that date Mr. Fingleton was certified as too ill to attend the Inquiry.

6.2 The Inquiry Members are writing to Mr Fingleton to obtain his comments on this article. Upon receipt of these comments, the Inquiry Members will consider what further steps may be required.

6.3 However, it is important to note that the medical complaint from which Mr. Fingleton is currently suffering (as attested to by Clinician E and Clinician F) is very different to the medical condition in respect of which Clinician A and Clinician B provided certificates in January 2018. The decision of the Inquiry Members as to Mr. Fingleton's ability to participate in the Inquiry at this time is based exclusively on the medical reports of Clinician E and Clinician F (and the sworn testimony of Clinician E). For this reason, the determination of the Inquiry Members as to Mr. Fingleton's ability to take part in the Inquiry at this point in time is unaffected by the recent newspaper report.

Marian Shanley

Geoffrey McEnery

Ciara McGoldrick

4 March 2019