CENTRAL BANK OF IRELAND

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

Effect of the Settlement Agreement between INBS and the Central Bank

DECISION

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 (the "RDU") to the Persons Concerned and Enforcement (the "5 October Letter") could be decided without an oral hearing.

2. The matters 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 matters outlined above could be dealt with through written submissions and did not require an oral hearing. These matters are:

    i. Procedure for identifying witnesses and obtaining witness statements.
    ii. Effect of the Settlement Agreement with INBS.
    iii. Status of the Investigation Report.

Effect of the Settlement Agreement with INBS

4. On 15 July 2015, the Central Bank published a document entitled "Settlement Agreement between the Central Bank of Ireland and Irish Nationwide Building Society" with a sub heading that stated: "Following Central Bank Investigation INBS admits widespread beaches". A publicity statement followed which said that INBS had entered into a settlement agreement following the conclusion of the Central Bank's most significant and extensive regulatory investigation to date. Although a fine of €5 million was imposed, the INBS had no assets and would therefore not be pursued by the Central Bank in respect of that fine.

5. By letter dated 16 September 2016 from the RDU to the Persons Concerned and Enforcement, the Inquiry Members expressed the view that it would be of assistance to clarify their understanding of the effect (if any) of the settlement concluded by the Central Bank with INBS on the conduct of the Inquiry.

6. The letter stated that in light of the judgments of Mr Justice Noonan (in the context of Mr Fingleton's proceedings) and Mr Justice Hedigan (in the context of Mr Purcell's proceedings), as well as the judgment in the Court of Appeal of Mr Justice Hogan (in the context of the discovery application in Mr Purcell's proceedings), the Inquiry Members were of the provisional view that the settlement agreement is of no relevance to the conduct of the Inquiry (save that INBS itself will not be a participant before the Inquiry).

7. Consequently, the letter stated, it was the Inquiry Members' provisional intention that the Inquiry will consider whether or not INBS committed each of the SPCs identified, as well as considering whether the Persons Concerned participated in the commission by INBS of any of the SPCs. It was further stated that the fact that INBS has concluded

the settlement agreement with the Central Bank will have no bearing on the Inquiry Members' determination as to whether or not any SPC was committed by INBS.

8. In a letter dated 3 October 2016 from William Fry Solicitors, on behalf of Mr Michael Walsh, it was stated:

> *"Mr Walsh is of the view that the settlement agreement reached between INBS and the Central Bank (the "Settlement Agreement") is of no probative value in the context of the allegations made against the Society, or Mr Walsh, and, if this is what the Inquiry Members are saying, then he shares their view.*
>
> *However, Mr Walsh has made submissions(1) in relation to the Settlement Agreement and contends that in light of the manner in which it was procured and the publicity surrounding it, the settlement has the effect that the Inquiry cannot proceed, inter alia, on the ground of pre-judgment and bias.*
>
> *Mr Walsh looks forward to hearing further from the Inquiry Members on how they intend to inquire into the allegations against the Society if the Society itself will not be a participant before the Inquiry.*
>
> 1. In particular, paragraphs 143 -155 of Mr Walsh's Termination Submissions dated 11 May 2016."

9. In his submissions of 11 May 2016 relating to his application for the termination of the Inquiry as against him Mr Walsh stated that the settlement with INBS[1], and the press release issued by the Central Bank surrounding that settlement appeared to state as a fact that the SPCs were committed by INBS. Mr Walsh contended that these were evidence of pre-judgment and bias as against him. Mr Walsh submitted:

> *"It is difficult to escape the conclusion that the "settlement" is a contrived one, especially when one considers the prior statements made by the Board of INBS to the effect that they could not admit any of the alleged contraventions and to do so would undermine fair procedures".*

[1] The Notice of Inquiry issued on the 9 July 2015. The settlement with INBS was published on the 15 July 2015.

10. In submissions dated 7 October 2016, Enforcement stated that they agreed with the provisional view expressed by the Inquiry Members in the letter of 16 September 2016 that the settlement agreement between the Central Bank and INBS is of no relevance to the conduct of the Inquiry (save that INBS itself will not be a respondent to the Inquiry). It was stated that:

> "*Our view is that the Inquiry must consider whether INBS committed each SPC. We also agree that the fact that this settlement was reached should not impact on this determination which should constitute a full consideration of the evidence before the Inquiry."*

11. Following the Decision of the Inquiry Members to determine the question of the effect of the settlement agreement with INBS without an oral hearing, the LPT made a submission on that issue on 21 November 2016. They submitted that the allegations of pre-judgment and bias raised by Mr Walsh in his letter of 3 October 2016 and set out in his termination submissions were matters to be considered in the context of Mr Walsh's termination application and did not affect the correctness of the preliminary view adopted by the Inquiry Members as to effect of the Settlement Agreement.

12. The LPT further submitted that the fact that INBS would not be participating in the Inquiry would not preclude the Inquiry from making findings as to whether INBS had committed some or any of the SPCs.

13. In his submissions of 25 November 2016, Mr Walsh again asserted that he did not think the Inquiry Members should make any finding or determination about the effect of the settlement agreement between the Central Bank and INBS before the hearing of Mr Walsh's application for the Inquiry against him to be terminated. He concluded that *"rather than having no relevance to the Inquiry, the settlement agreement is in fact a ground for its termination as against Mr Walsh".*

14. In considering the question of the effect of the settlement the Inquiry Members have had regard to the reference to this issue in a number of judgments issued in proceedings taken by some of the Persons Concerned. Noonan J. in proceedings taken by Mr Fingleton (Michael P Fingleton v The Central Bank of Ireland [2016] IEHC 1) states at paragraph 113 of his judgment:

"*The applicant complains that his defence to the inquiry is now irretrievably prejudiced by the fact that INBS has admitted the prescribed contraventions in which he is alleged to have participated. However, to what extent, if any, admissions made by INBS have any role to play in the inquiry concerning the applicant is in the first instance a matter for the inquiry. One would have thought that as a matter of law, any admissions made by INBS cannot bind the applicant."*

15. In a subsequent judgment delivered by Hogan J. in proceedings taken by Mr Purcell (Purcell v The Central Bank and others [2016] IECA 50) Hogan J. stated at paragraph 23 of the judgment:

> *"…I do not overlook the fact that Mr Purcell contends with some force that the settlement with INBS is a pure contrivance and is wholly artificial. Yet it must be stressed that that settlement is a complete irrelevance so far as either the prosecution or defence of the Notice of Inquiry which he is facing under the administrative sanctions procedure is concerned. ……Insofar, therefore, as the present management of INBS have accepted that there were, historically, "multiple failings" on the part of the Society and – perhaps – by implication, its legacy directors, this could have no probative value whatever so far as the Central Bank's case under the administrative sanctions procedure against Mr. Purcell is concerned."*

Conclusion

16. The Inquiry Members are of the view that the fact that INBS would not be participating in the Inquiry would not preclude the Inquiry from making findings as to whether INBS had committed some or any of the SPCs.

17. The Inquiry Members are of the view that the issues of pre-judgment and bias raised by Mr Walsh are not relevant to this decision which is concerned only with the effect of the Settlement Agreement.

18. The Inquiry Members agree with the comments of Noonan J. and Hogan J. quoted above and have determined that the settlement agreement with INBS entered into by the Central Bank on 15 July 2015 has no probative value to this Inquiry.

Marian Shanley

Geoffrey McEnery

Ciara McGoldrick

20 January 2017