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Purcell v CBI Judgment

Former INBS director loses challenge to Central Bank Inquiry

On 29 July 2016 John Stanley Purcell, a former executive director and secretary of Irish Nationwide Building Society ("**INBS**"), lost his High Court challenge to the Central Bank's Inquiry process. It is the second unsuccessful legal challenge to be taken by a former INBS director arising from the Central Bank's Inquiry process – the first one was taken by Michael Fingleton. Mr. Fingelton is appealing the High Court ruling in his case.

Mr. Purcell's challenge related to a Notice of Inquiry dated 9 July 2015, which was served on him by the Central Bank under its Administrative Sanctions Procedure. The Notice of Inquiry related to his suspected involvement, as a person concerned in the management of INBS at the relevant time, in various regulatory breaches which were alleged to have been committed by INBS (the "**INBS Inquiry**"). Mr. Purcell subsequently commenced two sets of proceedings in relation to the INBS Inquiry. The first set sought Judicial Review of the Central Bank's decision to include him in the INBS Inquiry and the second set was a constitutional challenge to the Central Bank's Inquiry process. One Judgment was delivered in respect of both challenges.

In relation to the Judicial Review grounds, the High Court adopted the decision given by it previously in the case of *Michael P Fingleton v The Central Bank of Ireland [2016] IEHC 1*, because it found that the factual background and claims made by Mr. Purcell under this head overlapped substantially with the claims made in the *Fingleton* case. As the constitutional issues had not been ruled on in

For further information on any of the issues discussed in this article please contact:

Muireann Reedy
DD:+ 353 (0)1 674 1002
muireann.reedy@dilloneustace.ie

Fingleton, the Court made a ruling on these issues in Mr. Purcell's case.

The arguments made by Mr. Purcell and the Court's findings are summarised below.

Judicial Review Grounds

Mr. Purcell argued that he should not be included in the INBS Inquiry for various reasons including oppression, bias, pre-judgment, delay and lack of jurisdiction. The High Court summarised the relevant findings made in the *Fingleton* case, noting that it was adopting also this reasoning in respect of Mr. Purcell. The key points were as follows:

(i) the coincidental existence of civil proceedings could not have the effect of granting the Applicant immunity from a statutory Inquiry (Mr. Purcell argued that as he had already been pursued by the State in civil proceedings launched by INBS/IBRC against former INBS directors, for which he had paid a settlement, it was oppressive and disproportionate for him to be pursued by another State body in relation to similar issues);

(ii) the Applicant's claim that he could not get a fair hearing before the Inquiry due to the manner in which the Central Bank had dealt with INBS had not been established and there was no basis for the suggestion that any publicity surrounding the Applicant could impact the Inquiry Members whose independence and impartiality was not impugned (Mr. Purcell argued that the wording of the publicity statement released following the Central Bank's settlement with INBS, which referred to the failures of INBS going to the Board of Directors, amounted to an assertion of guilt against him);

(iii) no specific prejudice was alleged arising from delay and the Applicant had failed to establish any ground based on culpable delay or prejudice which would justify interfering with the holding of the INBS Inquiry (Mr. Purcell argued that he was prejudiced by delay as the Central Bank was conducting the INBS Inquiry 8-12 years after the relevant events); and

(iv) the phrase "*person concerned in the management*" in the relevant statute was not limited to persons currently concerned in the management of a regulated entity. It was concerned with participation in wrongdoing of a regulated entity, by persons who were by virtue of their status, in a position to influence the actions of the regulated entity at the time when it committed the wrong (Mr. Purcell argued that as he was no longer involved in the management of INBS he did not fall within the remit of the INBS Inquiry).

Constitutional Challenge

Mr. Purcell argued that the Inquiry was unconstitutional as it breached Article 34 (which provides that justice shall be administered by the Courts save in certain exceptional circumstances prescribed by law) and Article 38 (which states that nobody may be tried on any criminal charge save in due course of law i.e. before the Courts).

The High Court found that it had to answer the following 4 questions in relation to Mr. Purcell's constitutional challenge: (1) Is the Inquiry proposed an administration of justice? (2) Does the Inquiry seek to impose penal liability on the Applicant? (3) Is the financial burden on the Applicant oppressive and unfair? (4) Is the burden on the Applicant of pursuing this Inquiry disproportionate to the level of public interest in enquiring into the collapse of INBS?

The High Court found as follows:

(i) the Inquiry did not amount to an administration of justice – it did not have any of the 5 characteristics associated with the administration of justice;

(ii) the Inquiry did not seek to impose penal liability on Mr. Purcell – although the relevant prescribed contraventions were also criminal offences (if proved) this did not transform the Inquiry into a criminal process. The purpose of an Inquiry was different to the function of a criminal court. The role of an Inquiry was to find out what happened. The role of a criminal trial was solely to determine whether an accused was guilty or not guilty of an offence;

(iii) the financial burden on Mr. Purcell was not oppressive or unfair – although the Inquiry could impose a sanction of up to €500,000 on Mr. Purcell and order costs against him, it was up to Mr. Purcell to ensure he had adequate insurance cover. Inquiry costs were a foreseeable risk which Mr. Purcell could have obtained cover for. In terms of the costs of his own defence, the Court stated that it was a matter for Mr. Purcell as to whether he incurred any legal costs – he could have elected to represent himself; and

(iv) the burden on Mr. Purcell of being the subject of the INBS Inquiry was not disproportionate to the public interest in enquiring into the collapse of INBS. The collapse of INBS cost the country approximately €5 billion and a thorough Inquiry would illuminate the mistakes (both corporate and personal), that brought about INBS' collapse, which was a national financial disaster.

Three cases have been referred to Inquiry by the Central Bank to date, the INBS Inquiry, an Inquiry into certain persons concerned in the management of Quinn Insurance Limited (Under Administration) and an Inquiry concerning an insurance intermediary. It would appear that the Inquiry into the insurance intermediary will be no longer be continued following a public statement which was released of a settlement between the Central Bank and Seamus Sutcliffe t/a The Mortgage Centre, in June 2016. In that statement it was noted that as the firm failed to settle the matter prior to a Notice of Inquiry issuing, no discount was given for early settlement with the Central Bank. The statement concluded that "*an Inquiry into this matter will not now take place*."

Note: the Inquiry which was the subject of these proceedings arises from the Central Bank's Administrative Sanctions Procedure which is provided for in Part IIIC of the Central Bank Act 1942 (the "**Act**"). Section 33AO of the Act provides that the Central Bank may hold an Inquiry where it

"*suspects on reasonable grounds*" that a regulated entity has committed a "*prescribed contravention*" (i.e. a breach of financial services legislation which amounts to a "*prescribed contravention*" as described in the Act) or where it suspects on reasonable grounds that a person who is "*concerned in the management*" of a regulated entity "*is participating or has participated*" in the commission of a prescribed contravention by the regulated entity. If a negative finding is made against a regulated entity at Inquiry it can be subject to a significant monetary penalty of up to €10 million or 10 per cent of its turnover (whichever is the greater) as well as certain other sanctions, including revocation of its authorisation. An individual who has negative findings made against them at Inquiry can also be liable to significant sanctions including a monetary penalty of up to €1 million and/or disqualification from being concerned in the management of a regulated entity.

If you have any queries about the Administrative Sanctions Procedure, please contact Muireann Reedy of our Regulatory Investigations Unit at Muireann.Reedy@dilloneustace.ie or at 01-674 1002.

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Muireann Reedy is a senior solicitor in the Regulatory Investigations Unit of Dillon Eustace. Muireann provides clients with legal advice in respect of all contentious regulatory matters, including investigations by the Central Bank of Ireland under its Administrative Sanctions Procedure. Muireann previously worked for over five years in the Enforcement Division of the Central Bank of Ireland.

DILLON EUSTACE

Dublin
33 Sir John Rogerson's Quay, Dublin 2, Ireland. Tel: +353 1 667 0022 Fax: +353 1 667 0042.

Cayman Islands
Landmark Square, West Bay Road, PO Box 775, Grand Cayman KY1-9006, Cayman Islands. Tel: +1 345 949 0022 Fax: +1 345 945 0042.

New York
245 Park Avenue, 39th Floor, New York, NY 10167, U.S.A. Tel: +1 212 792 4166 Fax: +1 212 792 4167.

Tokyo
12th Floor, Yurakucho Itocia Building, 2-7-1 Yurakucho, Chiyoda-ku, Tokyo 100-0006, Japan. Tel: +813 6860 4885 Fax: +813 6860 4501.

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