Neutral Citation: [2016] IEHC 514

THE HIGH COURT

JUDICIAL REVIEW

[2015 No. 510 J.R.]

BETWEEN

JOHN STANLEY PURCELL

APPLICANT

AND

CENTRAL BANK OF IRELAND, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

AND

THE HIGH COURT

[2015 No. 5823 P.]

JOHN STANLEY PURCELL

PLAINTIFF

AND

CENTRAL BANK OF IRELAND, THE ATTORNEY GENERAL OF IRELAND AND IRELAND

DEFENDANTS

JUDGMENT of Mr. Justice Hedigan delivered on the 29th day of July, 2016.

1 INTRODUCTION

1.1. The present proceedings involve both a judicial review and plenary action. In the judicial review, Mr. Purcell ("the applicant") challenges the jurisdiction of the Central Bank of Ireland to hold an inquiry in respect of him, as part of the Central Bank's administrative sanctions procedure ("the ASP"), pursuant to Part IIIC of the Central Bank Act 1942, as amended ("the Act of 1942"). The applicant has also raised a number of procedural challenges in respect of the Central Bank's decision to initiate the inquiry, including delay, bias, pre-judgment and oppression and equality before the law. By order of White J., dated 8th September, 2015, leave was granted to the applicant to seek the following reliefs:

> "(i) An order of certiorari quashing the decision of the First Respondent to hold an Inquiry under part IIIC of the Central Bank Act 1942 (as amended) to determine whether the Applicant participated in the commission of purported prescribed contraventions of Irish Nationwide Building Society (INBS).
>
> (ii) An order of prohibition preventing the respondent, its servants or agents from holding any proposed Inquiry in respect of the Applicant pursuant to part IIIC of the Central Bank 1942 as amended.
>
> (iii) A declaration, by way of judicial review, that the decision of the First Respondent to hold an Inquiry pursuant to part IIIC of the 1942 Act is ultra vires, null and void and of no legal effect.
>
> (iv) An order of certiorari quashing the decision of the First Respondent to issue a Notice of Inquiry under part IIIC of the Central Bank Act 1942 (as amended) to determine whether the Applicant participated in the commission of purported prescribed contraventions of INBS.
>
> (v) A declaration, by way of judicial review, that the decision of the First Respondent to issue a Notice of Inquiry pursuant to part IIIC of the 1942 Act is ultra vires, null and void and of no legal effect.
>
> (vi) A declaration, by way of judicial review, that in determining to issue a Notice of Inquiry in respect of the Applicant, the First Respondent acted in excess of the Central Bank Act 1942 as amended and without jurisdiction.
>
> (vii) A declaration by way of Judicial Review that the decision of the First Named Respondent to initiate an Inquiry is null and void and of no effect by reason of the Respondent's failure to adhere to the principles of natural and constitutional justice enshrined in Bunreacht na hÉireann and the European Convention on Human Rights.
>
> (viii) A declaration by way of Judicial Review that the decision of the First Named Respondent to initiate an Inquiry was made in breach of fair procedures and natural justice.
>
> (ix) An order of certiorari quashing the decision of the First Respondent to enter into a settlement with INBS dated 15th July 2015.
>
> (x) A declaration, by way of judicial review, that the 'settlement' entered into between the first Respondent and INBS dated 15th July 2015 is ultra vires, null and void and of no legal effect."

1.2. In the plenary proceedings, the applicant challenges the constitutionality of Part IIIC of the Act of 1942 and seeks, *inter alia*, the following reliefs in respect of the notice of inquiry issued to him by the Central Bank:

> (i) A declaration that Part IIIC of the 1942 Act is invalid by virtue of Article 15.4 of Bunreacht na hÉireann being repugnant to Article 34 and Article 38 thereof;
>
> (ii) A declaration that the first defendant, in adopting the procedures purportedly enacted by the third defendant in Part IIIC of the 1942 Act has acted to the detriment of the plaintiff and in breach of his personal right to his good name and to earn a livelihood under Article 40.3.2 of Bunreacht na hÉireann;

(iii) A declaration that the first defendant was acting ultra vires in entering into a settlement pursuant to Part IIIC of the 1942 Act with INBS;

(iv) Damages.

The declaratory relief sought in respect of incompatibility with Article 6 and the provisions of the first part of the first schedule of the European Convention on Human Rights is no longer being pursued.

2 THE PARTIES
2.1. The applicant is a former executive director and secretary of Irish Nationwide Building Society ("the INBS"), having retired on 31st March, 2010.

2.2. The Central Bank of Ireland is a statutory body responsible for regulating and supervising the conduct of financial institutions in Ireland having offices at Dame Street, Dublin 2. The powers of the Central Bank derive from the Act of 1942.

2.3. The Attorney General is the chief law officer of the State designated by the Constitution.

2.4. The second and third defendants are joined to these proceedings as the appropriate defendants where a constitutional claim is made against the State.

3 FACTUAL BACKGROUND
3.1. The applicant is a former executive director and secretary of INBS. INBS was a building society regulated by the Central Bank of Ireland/Irish Financial Services Regulatory Authority ("IFSRA").

3.2. The applicant joined INBS in 1986 and he remained there until he resigned from his position on 31st March, 2010. He joined INBS as its financial controller and remained in that position until April 2003 when he became secretary. He was also appointed as an executive director in December 1994. In his capacity as secretary, the applicant attended Audit Committee meetings between 2003 and 2010 and was a member of the senior management of INBS throughout the period 2004–2008. The applicant tendered his resignation from INBS in circumstances where the Minister for Finance declared that "legacy directors" (he was one) were not to remain in institutions covered by the State guarantee. He states that since then, he has not been in a position to obtain employment. At the end of 2011, together with a business partner, he formed a limited company, Private Financial Management Limited ("PFML"). He further states that a small amount of work was brought in by the company in 2012 and in early 2013 work was obtained from an entity which helped people with loan arrears. He also did some limited part-time sub contract work for a firm of accountants. However, the applicant states that both work arrangements ceased after it became clear that the clients did not want the applicant involved given the ASP and civil action against him. PFML ceased trading in 2013.

3.3. INBS was a building society regulated by the Central Bank throughout the period the subject matter of the notice of inquiry. INBS increased dramatically in size from 1986–2007. In 2008, INBS began to sustain severe losses and on 30th September, 2008, INBS was one of six Irish institutions whose debts were covered by the State guarantee. The assets and liabilities of INBS were transferred to Irish Bank Resolution Corporation ("the IBRC") on 1st July, 2011, pursuant to an order of the High Court. On the 28th July, 2011, INBS's authorisation to raise funds under the terms of s. 17 of the Building Societies Act 1989 ("the Act of 1989") was revoked in accordance with s. 40 of the Act of 1989. This revocation, however, did not affect its status as a registered building society and INBS continues to be subject to the obligations imposed by the Act of 1989.

3.4. The collapse of INBS resulted in a cost to the Irish taxpayer in excess of €5 billion. The Central Bank determined that it was necessary to investigate whether it was appropriate to conduct an inquiry into whether INBS had committed any prescribed contraventions and whether any persons concerned in its management had participated in the suspected commission by INBS of any suspected contraventions. INBS's commercial loan book grew by 128% from 31st December, 2004, to 31st December, 2008. Furthermore, its commercial loan portfolio contained a significant percentage of loans having both a capital and interest moratorium. As at September 2009, 63% of the commercial loan book was on a capital and interest moratorium and a further 31% was on a capital moratorium. By June 2008, a significant proportion of its commercial lending involved loan to value ratios in excess of 95%. In addition, there was evidence to suggest that INBS had engaged in speculative lending both in the United Kingdom and Europe. In addition, a significant proportion, by value, of its commercial loan book was subject to profit share agreements such that, on the sale of the asset being financed by INBS, the profits arising from the sale (after costs) would be shared between the borrower and INBS.

3.5. In 2009, the Board of INBS determined that an investigation should commence into legacy issues and related matters at INBS. In 2010, the scope of this investigation, carried out by Ernst & Young ("EY"), was expanded. The Financial Regulator at this time also decided to undertake an investigation into the lending and governance practices of INBS. In her affidavit sworn on 16th September, 2015, Ms. Louise Gallagher, Deputy Head of Enforcement in the Central Bank, states that INBS queried whether a separate investigation on behalf of the Financial Regulator was required having regard to its intention to conduct an internal investigation, and after the Financial Regulator advised that it intended to prepare a report on lending practices at INBS. INBS offered to share any information which it obtained in the course of its internal investigation. A scope of work and agreement in the form of a protocol for information gathering and logistics were agreed in this regard in November 2010 between INBS, EY, McCann Fitzgerald and the Central Bank.

3.6. In her affidavit sworn on 14th September, 2015, Ms. Gallagher describes the nature and scale of the investigation of INBS and the persons concerned in its management. She states that this investigation "was the most significant and extensive investigation ever conducted by the Central Bank". The investigation involved an extensive review of hard copy and electronic material, the issue of over 200 statutory requests to witnesses for information and 21 formal interviews. Ms. Gallagher further states that, during the course of the investigation, successive tranches of new evidence were identified by INBS/IBRC, including most recently in May 2015. This necessitated repeated assessment of the detail of the investigation.

3.7. By letter dated 17th January, 2012, the Central Bank served an "examination letter" on the applicant. The applicant was also provided with material by the Central Bank which contained the underlying documentation supporting the decision to investigate the suspected prescribed contraventions ("SPCs"). By further letter dated 31st May, 2012, the applicant's then solicitors wrote to the Central Bank in the following terms:

> "By way of preliminary objection to any inquiry as proposed it is our contention that any proposed inquiry would be unconstitutional, ultra vires the relevant statutory power, in breach of the principle of natural constitutional justice and grossly unfair and prejudicial to our client."

In his affidavit sworn on 27th August, 2015, the applicant states that without prejudice to his right to challenge any proposed inquiry, he voluntarily responded to the merits of the case the subject of the ASP by letter dated 31st May, 2012.

3.8. By letter to the Central Bank, dated 12th May, 2012, the Board of INBS stated:

> "6.1.01 Due to the lack of contemporaneous knowledge of the Current Board…INBS cannot admit or deny any or all of the SPCs so far as they relate to matters or events during the legacy period or indeed before July 2009. Assuming that CBoI has sought, or will seek, information or explanations of such matters and events from former INBS officers or executives centrally involved in the matters and events concerned, the Current Board has been advised that INBS should defer its position in relation to the admission or denial of the SPCs, until the persons who were responsible for managing INBS during the legacy period have had the opportunity to provide such information or explanations and to make submissions to CBoI on them.
>
> 6.1.02 It is principally a matter for those responsible for managing INBS during the legacy period to provide detailed explanations and submissions on matters which occurred during the legacy period. INBS is not now in a position to provide explanations for any of the relevant matters in respect of any period prior to July 2009, being the earliest date of the appointment of any member of the Current Board."

3.9. Separate proceedings were issued against the applicant and other former directors of INBS by IBRC/INBS by way of plenary summons served on 19th March, 2013. The statement of claim was delivered on 17th April, 2013, by which it was sought to hold the applicant liable for the losses of INBS up to €6 billion. A confidential settlement was agreed with the special liquidators of IBRC in March 2015 without an admission of liability. The applicant pursued the Central Bank for indemnity and/or contribution due to its approval of the delegation to Mr. Michael Fingleton, managing director of INBS.

3.10. By letter dated 1st July, 2013, the Central Bank wrote to the applicant stating that they were "currently considering revisions to the Administrative Sanctions Guidelines dated October 2005" and by letter dated 6th November, 2013, revised guidelines were sent to the applicant which took effect immediately. In these revised guidelines, "persons concerned" included persons formerly concerned in the management of participating institutions.

3.11. The Central Bank served a new investigation letter on the applicant on 12th December, 2013. The Central Bank decided not to proceed with the SPC pertaining to governance which addressed the delegation of powers to the managing director, as well as several other SPCs. The applicant stated in a letter to the Central Bank, dated 3rd February, 2014, that no specific documentation had been provided with this investigation letter.

3.12. The notice of inquiry dated 9th July, 2015, which issued to INBS, the applicant and others, listed 21 prescribed contraventions which INBS is suspected of having committed. Amended Administrative Sanctions Guidelines were provided to the applicant. The applicant was also issued with ten bankers' boxes of documents and a USB key which contained 110,000 documents underpinning the alleged SPCs. The SPCs relate to seven different aspects of INBS's commercial lending and credit risk management processes including: the initial loan application stage; the loan approval process; the taking of security, obtaining of valuations and adherence to maximum loan to value ratios; the monitoring of commercial lending; the role of the INBS's Credit Committee; reporting obligations to the Board of INBS relating to commercial lending and credit risk management; and the requirement for a formal credit risk policy relating to the establishment of profit share arrangements. According to the Central Bank, the principal emphasis of the SPCs concerns the failure of INBS to follow its own policies and procedures in relation to commercial lending and credit risk management.

3.13. On 15th July, 2015, the Central Bank published a publicity statement in which it stated that the Central Bank and INBS had entered into a settlement, wherein INBS admitted to all prescribed contraventions alleged against it. The statement included the following comment from the Director of Enforcement at the Central Bank, Ms. Derville Rowland:

> "INBS has admitted multiple failings at several levels of its commercial lending process, from operational lending, to credit review, its Credit, Provisions and Audit Committees all the way to its Board of Directors. INBS's admitted failings amount to a consistent and, at times, wholesale disregard for its own policies and procedures."

INBS were fined €5 million, the maximum sum under Part IIIC of the Act of 1942. The Central Bank stated that, as INBS does not have any assets, the public interest

4 THE LEGAL FRAMEWORK

4.1. Part IIIC, which provides for the ASP procedures, was inserted into the Act of 1942 by s. 10 of the Central Bank and Financial Services Authority of Ireland Act 2004 ("the Act of 2004"). This took effect on 1st August, 2004. Further subsequent amendments were made by Central Bank Reform Act 2010 ("the Act of 2010"), Central Bank (Supervision and Enforcement) Act 2013 ("the Act of 2013") and since November, 2014, a number of supervisory responsibilities and decision making powers have moved to the European Central Bank. Pursuant to s. 33BD, the Central Bank may prescribe, and amend, guidelines in respect of the conduct of inquiries under Part IIIC. As in *Fingleton v. The Central Bank of Ireland* [2016] IEHC 1, the relevant guidelines in the present proceedings are the 2005 Guidelines, which were subsequently superceded in 2013.

4.2. Section 2(1) of the Act of 1942 defines a regulated financial service provider to include "(a) a financial service provider whose business is subject to regulation by the Regulatory Authority under this Act or under a designated enactment or a designated statutory instrument." Section 2(4) provides:

> "For the purposes of this Act, a person is concerned in the management of a body corporate, or a firm, that is a regulated financial service provider if the person is in any way involved in directing, managing or administering the affairs of the body or firm."

4.3. Under s. 5A(e) of the Act, the Central Bank has the function of holding an inquiry under Part IIIC. The Bank also has the function, as set out in s. 5A(i), to "perform such other functions as are imposed on it by or under this and any other Act or law."

4.4. Part IIIC deals with the power of the Central Bank to hold inquiries. Section 33AO provides for the jurisdiction of the Bank to hold an inquiry and the basis upon which such jurisdiction may be exercised. It provides:

> "(1) Whenever the Regulated Authority suspects on reasonable grounds that a regulated financial service provider is committing or has committed a prescribed contravention, it may hold an inquiry to determine whether or not the financial service provider is committing or has committed the contravention.

(2) Whenever the Regulatory Authority suspects on reasonable grounds that a person concerned in the management of a regulated financial service provider is participating or has participated in the commission of a prescribed contravention by the financial service provider, it may hold an inquiry to determine whether or not the person is participating or has participated in the contravention."

Section 67(b) of the Act of 2013 inserted the following provision:

"(3) Without prejudice to the exercise of the Bank's powers under subsection (2), an inquiry referred to in that subsection may form part of an inquiry held under this section in relation to the suspected commission of a prescribed contravention by the financial service provider."

4.5. Section 33AP outlines the Bank's obligation to give notice of the inquiry to the regulated financial service provider ("the RFSP") or other person concerned:

"(1) Before holding an inquiry under section 33AO, the Regulatory Authority shall give notice in writing of the proposed inquiry to the financial service provider or other person concerned.

(2) The notice must—

(a) specify the grounds on which the Regulatory Authority's suspicions are based, and

(b) specify a date, time and place at which the Regulatory Authority 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."

4.6. Section 33AQ provides the decisions the Bank can make at the conclusion of the inquiry:

"(1) At the conclusion of an inquiry held under section 33AO, the Regulatory Authority shall make a finding as to whether the financial service provider concerned is committing or has committed the prescribed contravention to which the inquiry relates.

(2) At the conclusion of an inquiry relating to the conduct of a person concerned in the management of a regulated financial service provider, the Regulatory Authority shall make a finding as to whether the person is participating or has participated in the prescribed contravention to which the inquiry relates."

Subsection (5) outlines the sanctions the Bank may impose if it makes a finding that a person concerned in the management RFSP is committing or has committed a prescribed contravention, which includes *inter alia* "a direction to pay to the Regulatory Authority a monetary penalty not exceeding the prescribed amount [€500,000 being the relevant sanction applicable during the period concerned, or some other amount as prescribed in the Regulations]" and "a direction to pay to the Regulatory Authority all or a specified part of the costs incurred by the Regulatory Authority in holding the inquiry and in investigating the matter to which the inquiry relates."

4.7. Section 33AR describes the alternative procedure when commission of, or participation in, prescribed contravention is acknowledged. It provides:

"(1) If, in a case where the Regulatory Authority suspects on reasonable grounds that a regulated financial service provider is committing or has committed a prescribed contravention, the financial service provider acknowledges that the financial service provider is committing or has committed the contravention, the Regulatory Authority may—

(a) with the consent of the financial service provider, dispense with an inquiry and impose on the financial service provider any sanction that it is empowered to impose on regulated financial service providers under section 33AQ, or

(b) hold an inquiry to determine what sanction (if any) should be imposed on the financial service provider in accordance with that section."

4.8. Section 33AS(2) provides:

"If the Regulatory Authority decides to impose a monetary penalty on a person under section 33AQ or 33AR, it may not impose an amount that would be likely to cause the person to be adjudicated bankrupt."

4.9. Section 33AT provides that a financial service provider may not be penalised twice for the same contravention. Subsection (1) states:

"If the Regulatory Authority imposes a monetary penalty in accordance with section 33AQ or 33AR and the prescribed contravention in respect of which the sanction is imposed is an offence under a law of the State, the financial service provider or other person concerned is not liable to be prosecuted or punished for the offence under that law."

4.10. Section 33AV provides:

"(1) If the Regulatory Authority suspects on reasonable grounds that—

(a) a regulated financial service provider is committing or has committed a prescribed contravention, or

(b) a person concerned in the management of the financial service provider is participating or has participated in such a contravention,

it may enter into an agreement in writing with the financial service provider or person to resolve the matter.

(2) Such an agreement is to be on such terms as are specified in the agreement and is binding on the Regulatory Authority and the financial service provider or person concerned. Those terms may include terms under which that financial service provider or person accepts the imposition of sanctions of the kind referred to in section 33AQ.

(3) The Regulatory Authority may enter into an agreement under this section—

(a) without having held an inquiry into the matter under section 33AO or 33AR, or

(b) after beginning (but not after completing) such an inquiry."

The following provisions of s. 33AV were inserted by s. 69 of the Act of 2013:

"(3A) Subject to subsection (4), where the regulated financial service provider or person concerned in the management of the financial service provider with whom the Bank has entered into an agreement under this section fails to comply with any of the terms of the agreement, the Bank may apply to the High Court for an order under subsection (3B).

(3B) If satisfied on application to it under subsection (3A) that the regulated financial service provider or person concerned has failed to comply with any of the terms of the agreement under this section, the High Court may make an order requiring that regulated financial service provider or person to comply with those terms or that term, as the case may be.

(4) The Bank may, by proceedings brought in a court of competent jurisdiction, recover as a debt due to the Bank the amount of any amount agreed to be paid under an agreement entered into under this section."

4.11. Section 33AW deals with when decisions of the Central Bank take effect:

"(1) A decision of the Regulatory Authority imposing a caution or reprimand takes effect—

(a) if no appeal against the decision is lodged with the Appeals Tribunal within the period allowed for lodging such an appeal—at the end of that period, or

(b) if such an appeal is lodged with the Appeals Tribunal within that period and the decision is confirmed by that Tribunal (with or without variation) — at the time when the period allowed for lodging an appeal with the High Court against that decision has ended, no appeal having been lodged within that period, or

(c) if such an appeal is lodged with the Appeals Tribunal within that period but is later withdrawn — at the time of the withdrawal of the appeal, or

(d) if an appeal is made to the High Court against the determination of the Appeals Tribunal in respect of the decision and, on the hearing of the appeal by that Court, that determination is confirmed (with or without variation) — at the time of confirmation of that determination, or

(e) if an appeal is made to the High Court against the determination of the Appeals Tribunal but is later withdrawn — at the time of the withdrawal of the appeal.

(2) A decision of the Regulatory Authority directing payment of a monetary penalty, a refund of money or costs takes effect—

(a) if—

(i) the amount of the penalty, refund or costs is not paid to the Regulatory Authority within the period allowed for appeals against such a decision, and

(ii) no appeal to the Appeals Tribunal is lodged within that period or, having been lodged within that period, is later withdrawn, at the time when the decision is confirmed by an order of a court of competent jurisdiction, or

(b) if such an appeal is lodged with the Appeals Tribunal within that period and the decision is confirmed by that Tribunal (with or without variation) — at the time when the period allowed for lodging an appeal with the High Court against the determination of that Tribunal in respect of the decision has ended, no appeal having been lodged within that period, or

(c) if such an appeal is lodged with the Appeals Tribunal within that period but is later withdrawn — at the time of the withdrawal of the appeal, or

(d) if an appeal is made to the High Court against the determination of the Appeals Tribunal in respect of the decision and, on the hearing of the appeal by that Court, that determination is confirmed (either with or without variation) — at the time of confirmation of that determination, or

(e) if an appeal is made to the High Court against the decision of that Tribunal but is later withdrawn — at the time when the appeal is withdrawn."

4.12. Pursuant to s. 33AX, a decision of the Bank "made at the conclusion of an inquiry held under section 33AO or section 33AR is an appealable decision for the purposes of Part VIIA."

4.13. Section 33AY outlines how the proceedings at inquiries shall be conducted. The section provides:

"(1) The Regulatory Authority 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 Regulatory Authority shall observe the rules of procedural fairness, but is not bound by the rules of evidence.

(3) The Regulatory Authority may be assisted by a legal practitioner when conducting an inquiry.

(4) A financial service provider or other person who has, in accordance with section 33AP, been invited to attend an inquiry or a part of it is entitled to be represented at the inquiry or part by a legal practitioner or, with the leave of the Regulatory Authority, by any other person."

4.14. Section 33AZ states that an inquiry is normally to be held in public. It provides:

"(1) Except as provided by subsection (2), the Regulatory Authority shall hold its inquiries in public.

(2) The Regulatory Authority and the financial service provider or other person to whom an inquiry relates may agree that the inquiry should be held in private, but even if they do not agree, the Regulatory Authority may nevertheless decide to hold an inquiry in private if it is satisfied that—

(a) evidence may be given, or a matter may arise, during the inquiry that is of a confidential nature or relates to the commission, or to the alleged or suspected commission, of an offence against a law of the State, or

(b) a person's reputation would be unfairly prejudiced unless the Regulatory Authority exercises its powers under this section.

(3) The Regulatory Authority may at any time vary or revoke a decision made under subsection (2)."

4.15. Section 33BA describes the powers of the inquiry to summon witnesses and take evidence. The section provides:

"(1) At an inquiry, the Regulatory Authority may, in writing—

(a) summons a person to appear before the inquiry to give evidence, to produce specified documents, or to do both, and

(b) require the person to attend from day to day unless excused, or released from further attendance, by the Regulatory Authority.

(2) The person presiding at an inquiry may require evidence to be given on oath, and may for that purpose—

(a) require a witness at the inquiry to take an oath, and

(b) administer an oath to the witness.

(3) The oath to be taken by a person for the purposes of this section is an oath that the evidence the person will give will be true.

(4) The person presiding at an inquiry—

(a) may require a witness at the inquiry to answer a question put to the witness, and

(b) may require a person appearing at the inquiry in accordance with a summons issued under this section to produce a document specified in the summons.

(5) The person presiding at an inquiry may allow a witness at the inquiry to give evidence by tendering a written statement, which, if the person presiding so requires, must be verified by oath."

Section 70 of the Act of 2013 inserted the following provisions:

"(6) Without limiting subsections (1) to (4), the Bank has the same powers that a judge of the High Court has when hearing civil proceedings that are before that Court with respect to the examination of witnesses (including witnesses who are outside the State).

(7) A person who is summoned to appear before the Bank under this section is entitled to the same rights and privileges as a witness appearing in civil proceedings before the High Court.

(8) An answer to a question put to a person in response to a requirement under subsection (4)(a) or information provided by a person in response to a requirement under subsection (4)(b) is not admissible as evidence against the person in criminal proceedings, other than proceedings for perjury, if the information was provided on oath.

(9) A person who—

(a) obstructs the Bank in the exercise of a power conferred by this Part,

(b) without reasonable excuse, fails to comply with a requirement or request made by the Bank under this Part,

(c) in purported compliance with such a requirement or request, gives information that the person knows to be false or misleading, or

(d) refuses to comply with a summons to attend before, or to be examined on oath by, the Bank, commits an offence and is liable—

(i) on summary conviction, to a class A fine or imprisonment for a term not exceeding 12 months, or both, or

(ii) on conviction on indictment, to a fine not exceeding €250,000 or imprisonment for a term not exceeding 5 years, or both."

4.16. Section 33BC, as inserted by s. 71 of the Act of 2013, provides for the publication of certain information relating to the imposition of administrative sanctions as follows:

"(1) If on the holding of an inquiry under section 33AO the Bank has found that—

(a) a regulated financial service provider is committing or has committed a prescribed contravention, or

(b) a person concerned in the management of the financial service provider is participating or has participated in such a contravention, it shall publish, subject to subsection (4), in such form and manner as it thinks appropriate, the finding and such (if any) of the particulars specified in subsection (3) as it thinks appropriate.

(2) If the Bank has, in accordance with section 33AR, imposed—

(a) a sanction on a regulated financial service provider in respect of the commission of a prescribed contravention, or

(b) a sanction on a person concerned in the management of a financial service provider in respect of the person's participation in the commission by the financial service provider of such a contravention, it shall publish, subject to subsection (4), in such form and manner as it thinks appropriate, such (if any) of the particulars specified in subsection (3) as it thinks appropriate.

(3) The particulars referred to in subsections (1) and (2) are as follows:

(a) the name of the regulated financial service provider or person concerned on whom a sanction has been imposed;

(b) details of the prescribed contravention in respect of which the sanction has been imposed;

(c) details of the sanction imposed;

(d) the grounds on which the finding is based.

(4) Subsections (1) and (2) do not apply to the finding or particulars specified in subsection (3)—

(a) if publication of the finding or particulars involves the disclosure of confidential information the disclosure of which is prohibited by the Rome Treaty, the ESCB Statute or the supervisory EU legal acts (within the meaning of section 33AK(10)), or

(b) if the Bank determines—

(i) that the finding or particulars are of a confidential nature or relate to the commission of an offence against a law of the State, or

(ii) that publication of the finding or particulars would unfairly prejudice a person's reputation.

(5) The Bank shall publish annually, in a summary form, information on its actions under this Part. …"

4.17. Section 33BD, as inserted by s. 14 of the Act of 2010, provides that the Bank may make guidelines with respect to the conduct of proceedings under Part IIIC:

"(1) The Regulatory Authority may prescribe guidelines with respect to the conduct of inquiries under this Part, and may for that purpose, incorporate by reference any procedure prescribed by Rules of the Superior Courts as in force at a specified time or as in force from time to time.

(2) The Regulatory Authority may at any time amend or revoke guidelines prescribed under this section.

(3) Guidelines prescribed under this section, and any amendment to, or revocation of, those guidelines, must be in writing and be published in a manner determined by the Regulatory Authority."

4.18. Section 33BE(2) enables independent people to be appointed to perform and exercise the powers of the Bank under Part IIIC. Subsection (2) states:

"Without prejudice to the generality of subsection (1), the Bank may for the purposes of that subsection designate a person who is not an officer or employee of the Bank. A person so designated is an agent of the Bank for performing and exercising the functions and powers of the Bank under this Part or the part of those functions and powers for which the Bank designated him or her."

5 SUBMISSIONS OF THE APPLICANT

Judicial Review
Oppression

5.1. The applicant submitted that the further pursuit of him by a state body (the Central Bank) for contraventions for which he has already been pursued in a civil action taken by IBRC/INBS, by and on behalf of the State, and for which he paid a settlement to the State, represents an oppressive and unduly burdensome decision and one which is unreasonable and disproportionate. He will have to bear his own legal costs for his defence at the inquiry. Furthermore, the inquiry can award the costs of the inquiry and the investigation preceding the inquiry against the applicant. The applicant can also be fined up to €500,000 and can be disqualified from being involved in the management of a RFSP.

5.2. The applicant relied on *Meadows v Minister for Justice, Equality and Law Reform & Ors.* [2010] IESC 3, [2010] 2 I.R. 701 wherein Denham J. (as she then was) stated that one of the relevant factors in the general test for judicial review is:

> "(vii) The Court should have regard to what Henchy J. in the State (Keegan) v. Stardust Victims' Compensation Tribunal referred to as the 'implied constitutional limitation of jurisdiction' in all decision-making which affects rights. Any effect on rights should be within constitutional limitations, should be proportionate to the objective to be achieved. If the effect is disproportionate it would justify the court setting aside the decision."

Bias

5.3. The applicant submitted that the decision to pursue an inquiry against him was biased and/or made in circumstances where a real apprehension of bias on the part of the decision-maker existed. The evidence of bias on the part of the Central Bank is as follows: (i) the Central Bank bears such responsibility itself for the failure of INBS that it cannot have objectively determined to pursue the inquiry; (ii) the Central Bank abandoned prescribed contraventions in respect of governance and the delegation of powers to Mr. Fingleton after that had been joined to the civil action in respect of those prescribed contraventions; (iii) the Central Bank decided to pursue the prescribed contraventions and subsequent inquiry notwithstanding that, what the applicant terms another state action, was being pursued against the applicant in respect of the same issues; and, (iv) the Central Bank's publicity statement in respect of the settlement with INBS evidenced bias and pre-judgment through publicly stating that the failures of INBS went to the Board of Directors, and thereby making an assertion of guilt in regard to the applicant.

Pre-judgment/Settlement

5.4. There is considerable overlap between this issue and the plenary claim that the Central Bank acted *ultra vires* in entering into a settlement with INBS and, subsequently, releasing a publicity statement which the applicant contends amounted to a pre-judgment prior to the inquiry into his role in the commission of SPCs in INBS. An argument was advanced by the applicant that the Central Bank and INBS colluded and acted in bad faith in making a settlement. However, when put to the applicant in cross-examination whether he still maintained in these proceedings that the settlement was made in bad faith and with collusion, he stated that he did not in light of the evidence of Mr. Rory O'Ferrall, Director of INBS.

5.5. Thus, the main argument on this issue made by the applicant was that the settlement was entered into *ultra vires.* It was claimed that the Central Bank accepted the admissions of INBS and published those admissions in circumstances where the applicant had not been afforded an opportunity to address the breaches in respect of which INBS made admissions.

5.6. It was submitted that the Central Bank acted unreasonably and in breach of their own guidelines in accepting the settlement in which they knew that the admissions were being made in the absence of the applicant having been afforded the opportunity to consider the issues and make submissions. The applicant asserted that INBS set the precondition by which the Central Bank would have been enabled to accept the admissions. The precondition was that the applicant and others had to be afforded the opportunity to consider the issues and make submissions. The applicant argues that the Central Bank ignored this precondition and accepted admissions by INBS without affording the applicant such an opportunity and thus in an *ultra vires* manner. The applicant had a right to be afforded a proper opportunity to consider the allegations being made against him and to respond to same in accordance with the principles established in *Dellway Investments Ltd. & Ors. v. National Asset Management Agency & Ors.* [2011] 4 I.R. 1.

5.7. The applicant sought to distinguish the *Fingleton* case on the grounds that, unlike *Fingleton* where he argued that he ought to have been afforded the opportunity to make submissions in respect of the admissions made by INBS, the applicant contends that he ought to have been afforded the opportunity to consider and make submissions on the alleged breaches underpinning the SPCs to which INBS subsequently admitted.

5.8. Furthermore, the applicant argued that any admissions made by INBS ought to have been made to the inquiry itself so that the applicant could then make submissions. It was submitted that the Central Bank acted *ultra vires* its powers under s. 33AV of the Act when the Enforcement Division entered into an agreement with INBS in July 2015, accepting as it did admission by INBS without the opportunity having being afforded to the applicant and others to make submissions. As a result of the settlement, which the applicant contends amounted to a pre-judgment on the part of the Central Bank, the inquiry members, who are agents of the Central Bank, are placed in an invidious position of conducting an inquiry in the context of the foregoing.

Delay

5.9. The applicant submitted that the appropriate time for the Central Bank/IFSRA to pursue sanctions was during the period of their alleged commission between 1st August, 2004 and 30th September, 2008. The issues to which the SPCs relate formed part of the regulatory dialogue between the Central Bank and INBS during the relevant period. The Central Bank dealt with the compliance issues pertaining to lending through correspondence, inspections, meetings and phone calls. It was submitted that having elected to deal with and address the issues which formed the basis of the SPCs, the Central Bank cannot now pursue the applicant in relation to the same issues some eight to twelve years later. The applicant relied on *R. (Nadarajah) v. Secretary of State for the Home Department* [2005] EWCA Civ. 1363 in this regard, where the Court of Appeal stated at para. 68:

> "Where a public authority has issued a promise or adopted a practice which represents how it proposes to act in a given area, the law will require the promise or practice to be honoured unless there is good reason not to do so. What is the principle behind this proposition? It is not far to seek. It is said to be grounded in fairness, and no doubt in general terms

> that is so. I would prefer to express it rather more broadly as a requirement of good administration, by which public bodies ought to deal straightforwardly and consistently with the public. In my judgment this is a legal standard which, although not found in terms in the European Convention on Human Rights, takes its place alongside such rights as fair trial, and no punishment without law. That being so there is every reason to articulate the limits of this requirement – to describe what may count as good reason to depart from it – as we have come to articulate the limits of other constitutional principles overtly found in the European Convention."

5.10. The applicant also argued, however, that the introduction of the ASP in 2005 was not accompanied by any change to the manner in which the Central Bank continued to address issues with INBS during the relevant period and that administrative sanctions were neither brought nor threatened by the Central Bank against INBS.

5.11. The applicant contended that a change in the regulatory approach has prejudiced him. He was given to assume that the INBS was being regulated under a principle-based or light-touch regulatory process. This form of regulation is now being departed from. Reliance was placed on *R. (Niazi) & Ors. v. Secretary of State for the Home Department* [2008] EWCA Civ. 755, where the Court held that a change of policy must not be made so as to unfairly frustrate any reliance which the individual has legitimately placed upon it.

5.12. It is alleged that the applicant participated in breaches by INBS of contraventions by INBS of reg. 16(1) of the Credit Institutions Regulatory Document Impairment Provisions 1992 ("the 1992 Regulations") and ss. 17 and 76(1) of the Act of 1989. The applicant submitted that pursuant to the s. 19(5) of the Act of 1989, any prosecution may commence within three years of the date of the offence and this time limit would have applied in the event that summary proceedings had been brought against the applicant. It was argued such period should by analogy apply to the commencement of an inquiry into SPCs under the ASP.

5.13. The applicant also claimed that his ability to properly defend himself in the inquiry has been detrimentally impaired as the SPCs were not initiated against him when he was a director of INBS. It was submitted that the applicant's ability to properly defend himself is dependent upon contemporaneous evidence. He cannot properly defend himself when he is reliant solely on documentary evidence.

Jurisdiction

5.14. The applicant submitted that the definition of a "person concerned in the management of the Society" does not extend to a person who has retired and is no longer concerned in its management. He argues that in *Fingleton*, Noonan J. erred in finding that "persons concerned" extended to persons formerly concerned in the management of the society. It was submitted that the fact that the provision does not apply to those formerly concerned is evident from the plain wording of the section itself. The applicant submitted that the definition of an RFSP, pursuant to s. 3(2) of the Act of 2013, was not applicable to the applicant at the time and that s. 2(4) of the Act of 2004 only applied to those presently concerned in the management of the RFSP. Section 3(2) provides as follows:

> "References in this Act to a regulated financial service provider, or a related undertaking, shall, unless the context otherwise requires, be read as including a person who was a regulated financial service provider, or a related undertaking, at the relevant time."

5.15. It was also argued that the Act only applies to an entity that is carrying on the business of providing one or more financial services and does not apply to entities that are no longer active. Therefore, the Act ceased to have any application to the applicant when INBS ceased carrying on the business of providing financial services.

5.16. It was contended that the financial regulator had no intention of applying the Act to former management or to institutions which were not providing financial services. The applicant referred in this regard to the IFSRA "Outline of Administrative Sanctions Procedure 2005" and the "Administrative Sanctions Guidelines 2005" which refer to persons concerned in the management of an RFSP and in which no reference is made to persons formerly concerned in the management of a RFSP. Such reference was added to the 2013 and 2014 Guidelines after the initiation of the investigation which led to the ASP against the applicant.

Plenary Action
Bad Faith and Ultra Vires

5.17. As noted above, the argument regarding collusion and bad faith is no longer being pursued. The grounds pursued by the applicant in relation to the Central Bank acting in an *ultra vires* manner are also set out in the section dealing with pre-judgment/settlement.

Breach of Right to his Good Name and Livelihood

5.18. The applicant argued that the nature, content and announcement of the settlement between INBS and the Central Bank was prejudicial to him in implying that he participated in the admitted contraventions in INBS. The applicant argued that the publication of the statement could have been deferred until the end of the inquiry but instead, the Central Bank published it at the earliest opportunity. It was submitted that by acting in this manner, the Central Bank damaged his reputation in the public domain and cast a public assertion of guilt on him in advance of the inquiry.

5.19. It was contended that this adverse publicity prevented him from seeking or maintaining employment in financial services. During cross-examination by Mr. Gallagher S.C., the applicant accepted that in 2012, prior to the publication of the Central Bank's statement, a considerable level of publicity surrounded the fact that he was being sued by IBRC/INBS for breach of his directors' duties. He also agreed that there was further publicity in 2013 when the case was in court and he made an application to sue the Central Bank. He accepted that this media publicity, including a Prime Time programme which criticised the manner in which INBS was run, made it difficult for him to engage in the provision of financial services after he resigned from INBS.

Articles 34 and 38 of Bunreacht na hÉireann

5.20. It was also argued that the inquiry is engaged in the exercise of judicial power contrary to Article 34 of the Constitution. It was accepted by the applicant that each of the five indicia of the administration of justice, postulated by Kenny J. in *McDonald v. Bord na gCon* [1965] I.R. 217 at p. 231, must be satisfied if he is to succeed in this apart of his case. The applicant contends that the powers of the Central Bank under Part IIIC satisfy the five criteria.

5.21. Regarding the first criterion, the SPCs alleged against the applicant include allegations of failing to comply with provisions of the Act of 1989 and the 1992 Regulations. Contravention of these provisions is a criminal offence and it was submitted, therefore, that

the Part IIIC powers are engaged in determining a violation of the law in the sense articulated by McCarthy J. in *Keady v. Commissioner of An Garda Síochána & Ors*. [1992] 2 I.R. 197.

5.22. The applicant submitted that the powers available to the Central Bank of imposing monetary penalties and disqualification orders satisfy the second criterion. Furthermore, it is contended that s. 33AQ provides for a determination of the rights or liabilities on the part of the applicant. These arguments were also relied upon in respect of the third criterion.

5.23. In respect of the fourth criterion, the applicant argued that the powers vested in the inquiry by Part IIIC are not limited in nature. The applicant contends that s. 33AW merely involves a confirmatory application to the Court for the purposes of giving effect to the penalty. There is no provision in the Act relating to sanction such as, for example in the Nurses and Midwives Act 2011, where there is a facility to apply to the High Court for the setting aside of the sanction and/or the finding of the Board.

5.24. In relation to the fifth criterion, the applicant relied on the decision of *Keady*, in which, at p. 205, McCarthy J. differentiated *In Re the Solicitors Act, 1954* [1960] I.R. 239 from cases under the Medical Practitioners Act or the Nurses Act in which the courts had no history of supervising and disciplining medical or nursing professionals. He stated:

> "It is sought to apply the inferential reasoning from the cases under the Nurses Act and the Medical Practitioners Act to the instant case. It follows, it is said, from the extension of *In re the Solicitors Act, 1954* [1960] I.R. 239. A feature of the *Solicitors Act* case, not to be found here or in cases under the Medical Practitioners Act or the Nurses Act, or if there were such, under the Dentists Act, 1985, and identified by Kenny J. in *McDonald v. Bord na gCon (No. 2)* [1965] I.R. 217 is test no. 5 - the role of the courts as a matter of history in the supervision and disciplining of solicitors. There is no such history in the other cases although that circumstance does not appear to have been addressed in those to which I have referred. All of them are, however, cases in which the right of the individual to work in an occupation for which he has been trained over a period of years and achieved an expertise and certified qualification were concerned."

O'Flaherty J. distinguished the position of a member of An Garda Síochána, stating at p. 212:

> "That case was concerned with the taking away or the suspension of a professional qualification; it is to be distinguished from this case because while a garda who is dismissed loses his immediate employment he does not lose any qualification by virtue of his dismissal."

The applicant argued that the potential consequences of the ASP for a person concerned in the management of a company, namely disqualification and/or the imposition of a penalty up to €500,000, are more far-reaching than that for a member of An Garda Síochána who has been found to have breached An Garda Síochána disciplinary regulations. It was, therefore, submitted that given the potential severe impact on the applicant, such a process should be restricted to the courts.

5.25. In relation to Article 38 of the Constitution, it was submitted that Part IIIC of the Act of 1942 goes beyond mere investigatory powers and, in effect, the nature of the process engaged in by the Central Bank is a trial of criminal offences, being the alleged prescribed contraventions of the Act of 1989 and the 1992 Regulations. As such, they are only capable of being tried in due course of law pursuant to Article 38.

6 SUBMISSIONS OF THE RESPONDENT

Judicial Review

6.1. The Central Bank submitted that this Court is bound by the judgment delivered in *Fingleton v. Central Bank of Ireland* [2016] IEHC 1, in which Noonan J. rejected all of the grounds raised by the applicant (see *Worldport Ireland Limited (In Liquidation)* [2005] IEHC 189). The contended distinction between the two proceedings made by the applicant is rejected by the respondent. It argues that the applicant is obliged to advance substantial reason to justify this court not following the judgment of Noonan J. and that he has not done so.

6.2. In relation to the proper role of judicial review, it was contended that the issues the applicant has raised in judicial review are more properly matters for the inquiry. The relevant Inquiry Guidelines, prescribed by the Central Bank pursuant to s. 33BD of the Act of 1942, provide that the applicant could raise and resolve these issues before the inquiry prior to the commencement of the inquiry hearing. The jurisdiction of the High Court may not be invoked in respect of hypothetical, anticipated and apprehended events (see *Kennedy v. Director of Public Prosecutions* [2007] IEHC 3, *Carroll v. Law Society of Ireland* [2000] 1 I.L.R.M. 161). The applicant's argument is also based incorrectly on the assumption that the inquiry will act in an unlawful and disproportionate manner. Thus, it was submitted that the applicant's case fails *in limine*.

6.3. The Central Bank also relied on the decision in *Fingleton* where, at para. 144, Noonan J. held that a complaint in relation to the presence or absence of documentation relevant to the proceedings was ultimately a matter for the inquiry.

Oppression

6.4. In respect of the substantial costs the applicant faces if he decides to defend the allegations against him before the inquiry, the Central Bank submitted that the oppression does not arise from the Central Bank's conduct but rather the failure of the applicant to obtain appropriate indemnity insurance.

6.5. The Central Bank rejected the contention that the ASP amounts to the State seeking to pursue and punish the applicant for the second time in relation to the alleged wrong. As acknowledged in evidence by the applicant, a director has two distinct duties: (i) the duty as director to the regulated entity, breach of which may be pursued by that entity through legal action, and (ii) the duty to ensure that the provisions of the law are not breached or contravened, breach of which can only be pursued by the regulator. Thus, while the subject matter may overlap to some extent, the nature and purpose of civil proceedings is fundamentally different to that of the ASP. The fact that the applicant had to defend civil proceedings cannot give rise to immunity from legitimate statutory enforcement action by the Central Bank.

6.6. More generally, the applicant was aware from 2005 of the existence of the ASP and the potential consequences associated with same.

Bias

6.7. The respondent submits that the argument advanced by the applicant, namely that the Central Bank failed in its regulatory role

to the extent that it is now precluded from taking any enforcement action, does not attempt to distinguish between, on the one hand, the financial stability role of the Central Bank and, on the other, its regulatory and enforcement role. The Central Bank is statutorily mandated to carry out the latter role in accordance with the provisions of s. 33AO of the Act of 1942 irrespective of any perception of its shortcomings or failures in relation to financial stability. Furthermore, the applicant's proposition ignores that fact that INBS and the persons concerned in its management had primary responsibility for complying with the legal regulations which govern its activities. The applicant is not immune from legal action on the basis that the alleged prescribed contraventions did not come to the attention of the Central Bank during the relevant period.

6.8. The Central Bank also rejected the applicant's contention that the Central Bank is attempting to conceal its failings by pursuing the directors and INBS. The evidence that exists, such as the Report of the Commission of Investigation into the Banking Sector in Ireland and the 2010 Report to the Minister for Finance by the Governor of the Central Bank, in fact contradicts this proposition. Its failings are graphically described therein in great detail. These reports have been accepted by the Central Bank.

Pre-judgment/Settlement

6.9. At the outset, it was submitted that the applicant does not have standing to challenge a settlement entered into by INBS and the Central Bank. Further, and in the alternative, the Central Bank contends that this issue cannot be determined by the Court in circumstances where INBS is not a party to the judicial review proceedings.

6.10. The Central Bank disagreed with the contention that entering into a settlement with INBS gives rise to pre-judgment on the part of the Central Bank. Pursuant to s. 33AV of the Act, the Central Bank is specifically empowered to settle with an RFSP or a person concerned in the management of an RFSP. It was submitted that no leave was granted for the argument raised by the applicant during the course of submissions, to the effect that the settlement could only be entered into with inquiry members, rather than the Enforcement Division of the Central Bank. In any event, it was contended that such was an incorrect interpretation of s. 33AV and showed a misunderstanding of the interplay between ss. 33AR and 33AV.

6.11. Further, the Central Bank rejected the applicant's assertion that in *Fingleton* Noonan J. wrongly determined that an RFSP could not be prevented by the Central Bank from admitting that it is committing or had committed a prescribed contravention and that the Bank has a discretion to enter into a settlement. The Central Bank had no power to prevent INBS from making admissions and thereafter, which the applicant accepts, INBS had the discretion to decide whether to enter into a settlement with the Central Bank. It was submitted that Noonan J. correctly understood the distinction and the fact that acknowledgements could be made by INBS at any time, independently of the settlement.

Delay

6.12. The Central Bank submitted that it has not delayed, inordinately or otherwise, in serving the notice of inquiry. On the contrary, it was argued that the Central Bank has carefully conducted the investigation with all due expedition consistent with the nature and scale of the investigation, the complexity of the issues under investigation, the changing corporate structure of INBS and challenges in identifying relevant evidence.

6.13. The Central Bank submitted that the applicant failed to identify the period of delay with precision and only suggests that the period is between August 2004 and July 2015. Such a timeframe is predicated on the suggestion that the Central Bank was aware and dealing with the alleged contraventions during the relevant period, which is contested. It was noted that the applicant adopted conflicting positions during submissions regarding the nature of the engagement and knowledge of the Central Bank. In one respect, the applicant contended that the regulatory approach was light-touch and that no investigation was conducted during the relevant period, but on the other hand, that there was extensive engagement between the Central Bank and INBS to the effect that the regulator had knowledge of the prescribed contraventions and the issues had been dealt with during the period. However, in any event, the Central Bank contends that the evidence clearly establishes that there was light-touch regulation which relied on trust and the assurances regarding compliance given by INBS and those concerned in its management. This was an approach to regulatory supervision which was in accordance with international standards at the time.

6.14. In any event, the Central Bank contends that the issue of delay is a matter for the inquiry members who are obliged to observe the rules of procedural fairness in the conduct of the inquiry in accordance with the provisions of s. 33AY of the Act of 1942.

6.15. The Central Bank asserted that the applicant has sought to raise the issue of estoppel which is outside the scope of leave granted for judicial review. Without prejudice to the leave issue, it was submitted that the rules governing the applicant and the obligations to comply with those rules have never changed and the height of the applicant's argument relates to a different approach to regulatory enforcement since the financial crisis.

6.16. Furthermore, the applicant failed to engage with the evidence and has not identified any specific prejudice arising from the alleged delay. As the SPCs are primarily evidenced by reference to extensive documentary materials, the Central Bank contends that this cannot give rise to the contended prejudice, namely that the prejudice arises from the passage of time and the inevitable dwindling recollection of events by all parties concerned. Even if the applicant had identified specific prejudice, there was a failure to establish that the inquiry was incapable of dealing with and mitigating the consequences of that delay or prejudice.

6.17. In addition, it was submitted that the argument in respect of the time limits applicable to the bringing of summary legal proceedings is not relevant to the issue of delay.

6.18. Finally, it was submitted that this issue was considered and determined by Noonan J. in *Fingleton*, where he held at para. 133:

> "In the present case, the applicant does not allege any specific prejudice arising from delay. He does not suggest that there is any missing evidence or that there are witnesses who are unavailable. On the contrary, it would appear that to a very significant extent, the inquiry will be concerned with evidence in documentary form which appears to be extremely comprehensive. Even if there had been any blameworthy delay in this case, it could only relate to the 'pre-charge' investigation and would thus, as explained by O'Donnell J. [in *Kennedy v. Director Public Prosecutions* [2012] IESC 34], have less significance, in any event, than 'post-charge' delay.
>
> 134. In the event, the applicant has not, in my view, made out any ground based on culpable delay or prejudice, and certainly none that could justify any interference by the court with the holding of the inquiry."

Jurisdiction

6.19. The "person concerned" argument was rejected by the Central Bank. The Act would be required to expressly state such a position if a continuing relationship with the RFSP was required to exist at the time of the formation of the suspicion or the inquiry. It was submitted that the relevant consideration is the status of the person concerned at the time the alleged prescribed contraventions occurred. It was argued that the issue has been definitively determined by Noonan J. in *Fingleton* to the effect that the relevant applicable provisions are those provided in Part IIIC, more particularly s. 33AO, and not the definition as provided in the 2013 Guidelines, and, on that basis, the applicant was a person concerned in the management of INBS during the relevant period. As adverted to by Noonan J., the existence of a later amendment to the Guidelines cannot be relied upon to suggest that the interpretation of the definition in 2004 has a different meaning and was required to be amended.

6.20. The argument that there was no jurisdiction to conduct an inquiry, on the basis that INBS is a "shell" entity and no longer a regulated service provider, was categorically rejected by the Central Bank. It was submitted that Noonan J. rejected this argument in *Fingleton*.

Plenary Action
6.21. The Central Bank contends that the precise demarcation between the judicial review and the plenary action is not clear and that there has been a repeat of various matters more properly the subject of judicial review.

Ultra Vires

6.22. The Central Bank rejected the argument that it acted *ultra vires* in accepting the admissions by INBS. It could not prevent INBS from making admissions. It rejected the claim that there was an obligation on the Bank to contact the applicant to seek observations and submissions in respect of the SPCs and that this was a pre-condition to the exercise of the Bank's powers. It was argued this point is more suitable for judicial review. This was not pleaded in either proceedings and, in any event, is wrong as a matter of law.

Breach of Right to his Good Name and Livelihood

6.23. The Central Bank submitted that the rights under Article 40.3.2 of the Constitution are not absolute. The applicant failed to establish that there was an interference with these rights. In relation to his good name, it was noted that the applicant may make an application to the inquiry to sit in private. As regards the alleged breach of his right to a livelihood, the Central Bank submitted there is no substance to this claim as considerable publicity surrounded the applicant's role in INBS prior to the settlement and further, the applicant would be required to inform any prospective employer of his involvement in INBS and the fact that admissions had been made by the institution.

Articles 34 and 38 of Bunreacht na hÉireann

6.24. The Central Bank submitted that Part IIIC of the Act is not invalid by reason of Article 34 or Article 38 of the Constitution. In particular, the conduct of the inquiry, as envisaged by Part IIIC of the Act: (i) does not amount to the exercise by the Central Bank of a judicial function reserved to the Courts pursuant to Article 34.1 of the Constitution; (ii) if it does amount to the exercise of a judicial function, then it falls within the scope of "limited functions or powers" within the meaning of Article 37.1 of the Constitution; and (iii) the potential sanctions that may be imposed for prescribed contraventions do not amount to or give rise to penalties approximating those which would arise on the prosecution and conviction of any person on a criminal charge and the ASP does not constitute a trial of a criminal charge within the meaning of Article 38 of the Constitution.

6.25. In summary, it was submitted that the ASP, as provided for by Part IIIC of the Act, does not contravene the provisions of Articles 37 or 38 of the Constitution in that:

(i) Part IIIC of the Act provides for the conduct of a specific administrative procedure involving an inquiry by the Central Bank;

(ii) Part IIIC of the Act does not provide for the determination or ascertainment of the rights of parties. There are no parties as such. The Central Bank conducts an inquiry into suspected prescribed contraventions;

(iii) The function envisaged by Part IIIC of the Act is inherently regulatory and does not amount to a determination of any *lis inter partes* (see *Goodman International v. Hamilton* [1992] 2 I.R. 542; *Kennedy v. Hearne* [1988] I.R. 481);

(iv) Part IIIC of the Act is an integral aspect of financial regulation and is required to address the complex risks of the financial system and is essential to effective financial system governance. As such, it is distinct from and independent of the judicial system;

(v) The imposition of sanctions in the nature of fines or disqualification are, where there is no appeal to the Irish Financial Services Appeals Tribunal, subject to judicial confirmation in accordance with the provisions of Part IIIC of the Act;

(vi) The sanctions imposed pursuant to Part IIIC of the Act are not enforceable by a court as a judgment or by the executive power of the State called in to enforce such judgment;

(vii) The regulatory function envisaged by Part IIIC of the Act is not a function characteristically or historically carried out by the courts;

(viii) The regulatory function envisaged by Part IIIC of the Act does not apply at large but rather is limited to the regulated financial services industry. As such, anyone who participates in the said industry voluntarily submits to the process of regulation provided for, which process is an inherent and essential part of the entitlement to participate in the provision of financial services;

(ix) Insofar as the imposition of sanctions pursuant to Part IIIC of the Act might be regarded as coercive, deterrent or punitive in its effect, it serves a legitimate regulatory function which is a measured and proportionate response to the complexity of financial markets;

(x) The ASP provided for by Part IIIC of the Act does not carry any of the indicia of criminal process (see *Melling v. O'Mathghamhna* [1962] 1 I.R. 1; *McLoughlin v. Tuite* [1989] 1 I.R. 82);

(xi) While EU law does not mandate that the particular prescribed contraventions in the present case be addressed by

way of the ASP, it does require, in respect of some of them, that there be penalties other than criminal sanctions. EU law requires that many important obligations imposed on financial service providers are addressed by way of an administrative sanctions procedure which procedure is specifically distinguished from civil and criminal proceedings.

(xii) Even if, which is not accepted, any of the functions could be regarded as being judicial in nature, they are limited functions or powers within the meaning of Article 37.1 of the Constitution.

6.26. In respect to whether a process is the administration of justice, reliance was placed on *McDonald v. Bord na gCon; Madden v. Ireland* (Unreported, High Court, McMahon J. , 22nd May, 1980); *Federal Commissioner for Taxation v. Munro* (1926) 38 C.L.R. 153 at pp. 178-9. The Central Bank also relied on the recent Supreme Court decision in *O'Connell v. The Turf Club* [2015] IESC 57 which confirmed that a procedure which does not satisfy all the *McDonald* criteria is definitively not an administration of justice. The fact that the outcome of the inquiry can result in serious sanctions for the applicant is not the relevant test. Furthermore, it was submitted that the decision also illustrates that whether a process has been characteristic of the courts as a matter of history is likely to be a point of particular weight.

6.27. The Central Bank differentiated the cases of *In Re Solicitor's Act, 1954* and *C.K. v. An Bord Altranais* [1990] 2 I.R. 396, on which the applicant placed much reliance, as the ratio of that case was that the legislature was removing from the Courts a function that, historically, had exclusively been exercised by the courts and was transferring this judicial function to a non-court body. It was submitted that this is not the case with other professions nor with persons who voluntarily engage in a licensed activity regulated by statute and EU law or who participate in the management of such financial service providers knowing that they are subject to a strict regulatory regime.

7 SUBMISSIONS OF THE SECOND AND THIRD DEFENDANTS

7.1. Counsel for the second and third defendants rejected the applicant's contention that an inquiry established pursuant to Part IIIC involves the exercise of a judicial function reserved to the courts by Article 34.1. It was submitted that the five requirements, as set out in *McDonald v. Bord na gCon*, are not satisfied. With respect to the fourth criterion, the defendants submitted that this requirement cannot be met because the enforcement of rights or liabilities or the imposition of a liability by the Central Bank is not self-executing and cannot be enforced of its own right. The defendants also contended that criterion five was not satisfied as the modern system of financial regulation and its supervision and enforcement has not been traditionally or characteristically undertaken by the courts. Regulation and enforcement is within the remit of the Central Bank. Furthermore, the nature of the orders that can be made, and the manner in which this may be done, by the Central Bank pursuant to Part IIIC are not characteristic of orders of the court. Relying on O'Flaherty J.'s reasoning in *Keady v. Commissioner of An Garda Síochána & Ors*. [1992] 2 I.R. 197 at p. 213, the defendants also argued that the first three criteria are not met as Part IIIC establishes an inquiry process and not a contest between parties *stricto sensu*. Moreover, the applicant cannot be said to be exposed to a "severe penalty" comparable to the penalty, dismissal of a garda, imposed in fact in *Keady*.

7.2. The defendants submitted that although also designated as offences alternatively prosecutable under the statutes, the prescribed contraventions do not engage the criminal law process and do not satisfy the indicia of a criminal law charge as set out in *Melling v. O'Mathghamhna*. The ASP is distinct from the criminal process, and, given the highly specialised technical nature of banking requirements, it is appropriate for the Central Bank, as regulator, to investigate and sanction the wrongdoing in question. The applicant is not alleging that he should instead be prosecuted and nor has he provided any particulars as to offences for which he should alternatively have been prosecuted and to what effect.

7.3. In respect to the costs' issue, the defendants contended that this was not a basis for attacking the statute. In any event, the absence of a provision for costs is common in statutory schemes and there is no obligation to fund the applicant's costs (see *Lawlor v. Members of the Tribunal of Inquiry into Certain Planning Matters & Payments* [2009] IESC 50). Secondly, the defendants argued that it is premature to attack the statute on the basis that the scheme contains a provision whereby the applicant may be made liable for his costs. The applicant is not entitled to pursue the matter until such time that an application for a costs order is made or some prospect of a costs order being made.

8 DECISION

8.1. The first matters that the Court must address in this case are:

(i) Whether all the issues the subject of the judicial review have been determined by Noonan J. in *Fingleton v. the Central Bank of Ireland* [2016] IEHC 1.

(ii) If not, which issues were not decided?

(iii) In relation to the issues that were decided, is this Court bound to follow the judgment of Noonan J.

(iv) Does Part III C of the Act of 1942 breach Art. 34 and Art. 38 of the Constitution?

8.2. A very striking aspect of this case is its similarity to that of the *Fingleton* case. The factual background is all but identical. The claims made by the applicant, save for a limited number of issues, are the same. Reading that judgment, it seems to me that the following matters were determined by Noonan J.:

(a) The phrase "person concerned" contained in s. 33AO(2) is self-evidently concerned with participation in the wrongdoing of an RFSP by persons who, by virtue of their status, are in a position to influence the actions of the RFSP when it commits the wrong. It is not limited, as the applicant in that case claimed, to persons presently concerned.

(b) The claim that the INBS settlement was unlawful cannot be advanced because the INBS was not a party to the proceedings.

(c) In any event, the INBS had a statutory right to make admissions and such did not depend upon the consent of the Central Bank. Thus, no right to make submissions could arise on the part of the applicant.

(d) The role of admissions made by the INBS in an inquiry is a matter for the inquiry itself. Concerns in this regard should be addressed to the inquiry. It is no role of judicial review to direct in advance or advise proofs for an inquiry as to how it carries out its task.

(e) The settlement with the INBS does not give rise to objective bias on the part of the inquiry. Its members were not

involved in the settlement and neither their independence nor their objectivity is impugned.

(f) The applicant's claim that he cannot get a fair hearing before the inquiry due to the manner in which the CBI dealt with the INBS was not established.

(g) No specific prejudice was alleged arising from delay. No missing evidence or unavailable witnesses were identified. In fact it appeared the inquiry would be concerned with evidence in documentary form. Even if there was delay prior to commencing the inquiry, it was not as significant than delay since. The applicant failed to establish any ground based on culpable delay or prejudice and certainly none that could justify the Court in interfering with the holding of the inquiry.

(h) There was no basis for the suggestion that any publicity surrounding the applicant could cause the inquiry members, whose independence and impartiality is unchallenged, to do other than carry out their statutory duty to accord the applicant a fair hearing.

(i) The coincidental existence of civil proceedings cannot have the effect of granting the applicant immunity from a statutory inquiry.

(j) There is no basis for the assertion that the applicant was being scapegoated. Moreover, the proposition is contradicted by the fact that there are a number of other parties who are also the subject matter of the notice of inquiry.

(k) Any complaint of a lack of information sufficient to allow him defend himself is a matter for the inquiry and not a matter for judicial review.

Noonan J. summarised his findings as follows:

"146. I am satisfied that s. 33 AO (2) of the Act, when properly construed, applies to the applicant and he is thus lawfully subject to the inquiry. No rights of the applicant have been infringed by the settlement entered into by the respondent with INBS. There has been no culpable delay by the respondent in conducting its investigation into the applicant such as gives rise to any unfairness to him. The applicant is not entitled in these proceedings to mount an indirect challenge to the constitutionality of the Act on any of the grounds advanced, including those concerned with the administration of justice and the imposition of vicarious penal liability.

147. Much of the applicant's claim is an attempt to pre-empt in advance issues before the inquiry which may either never arise, or must first be the subject of determination by the inquiry itself. The suggestion that he will be subject to any prejudice is devoid of substance and without merit.

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. The elaborate procedures provided for by the Act and the guidelines drawn up by the respondent, coupled with an appeal to an independent Tribunal and a further appeal to the High Court, to my mind ensure that the applicant's right to a fair hearing is guaranteed. 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."

8.3. The issues raised in these proceedings and not dealt with by Noonan J. in that case are as follows:

(i) Whether the statutory inquiry proposed is an administration of justice and therefore unconstitutional.

(ii) Whether the inquiry seeks to impose vicarious penal liability on the applicant herein and is unconstitutional.

(iii) Whether the financial burden on the applicant is oppressive.

(iv) Whether the burden imposed on the applicant in pursuing an inquiry was disproportionate to the public interest in holding an inquiry where, it is alleged, there is little or no public interest in holding such an inquiry. Noonan J. relied on the uncontradicted evidence of Professor Moloney. In this case there was partially conflicting evidence given by Dr. Constantin Gurdgiev.

8.4. The principle of judicial comity is a well established one. It requires that one High Court judge should follow the decision of another High Court judge unless there are substantial reasons for believing that the initial judgment was wrong. The principle has a long history. William Black, retired judge of the Supreme Court and previously of the High Court, in a lecture given at Trinity College, Dublin in 1953 entitled "The Doctrine of Precedent in Modern Irish Law", stated as follows:

"If I were confronted with a decision of a court of co-ordinate jurisdiction, which appeared to me of merely doubtful soundness, I nonetheless applied the rule of comity and followed it leaving it for an appellate court to settle the matter."

Black J. asserted that he would only depart from a previous decision if:

"[m]y dislike of which went beyond mere doubt, and amounted to a firm conviction that [it] was wrong, then I would decline to follow it."

More recently the principles of judicial comity were further outlined by Clarke J. in *Worldport Ireland Limited (in Liquidation)* [2005] IEHC 189 where he stated as follows:

"I have come to the view that it would not be appropriate, in all the circumstances of this case, for me to revisit the issue so recently decided by Kearns J. in Industrial Services. It is well established that, as a matter of judicial comity, a judge of first instance ought usually follow the decision of another judge of the same court unless there are substantial reasons for believing that the initial judgment was wrong. Huddersfield Police Authority –v- Watson [1947] K.B. 842 at 848, Re Howard's Will Trusts, Leven & Bradley [1961] Ch. 507 at 523. Amongst the circumstances where it may be appropriate for a court to come to a different view would be where it was clear that the initial decision was not based upon a review of significant relevant authority, where there is a clear error in the judgment, or where the judgment sought to be revisited was delivered a sufficiently lengthy period in the past so that the jurisprudence of the court in the relevant area might be said to have advanced in the intervening period. In the absence of such additional circumstances

> it seems to me that the virtue of consistency requires that a judge of this court should not seek to second guess a recent determination of the court which was clearly arrived at after a thorough review of all of the relevant authorities and which was, as was noted by Kearns J., based on forming a judgment between evenly balanced argument. If each time such a point were to arise again a judge were free to form his or her own view without proper regard to the fact that the point had already been determined, the level of uncertainty that would be introduced would be disproportionate to any perceived advantage in the matter being reconsidered. In the absence of a definitive ruling from the Supreme Court on this matter I do not, therefore, consider that it is appropriate for me to consider again the issue so recently decided by Kearns J. and I intend, therefore, that I should follow the ratio in Industrial Services and decline to take the view, as urged by counsel for the Bank, that that case was wrongly decided."

The most recent example of this principle of judicial comity was its application by Haughton J. in *Sheehan v. Breccia & Ors.* [2016] IEHC 67 where he applied the *Worldport* principles in deciding that he could not depart from a previous decision of Finlay Geoghegan J. in *ACC Bank Plc. v. Friends First Managed Pension Funds Limited & Ors*. [2012] IEHC 435. Haughton J. found at para. 117 that:

> "*[t]he evidence given in ACC and as summarised by Finlay Geoghegan J. in her judgment bears remarkable similarity to the evidence adduced in the present case*."

Applying the principles outlined in *Worldport*, Haughton J. thus found that he should follow the decision of *ACC Bank Plc*.

8.5. There was little or nothing advanced by the applicant herein to argue against the first respondent's submission that all the issues that arose in this case have in fact been adjudicated upon in *Fingleton* and should be followed by this Court. The most that was offered was the simple proposition that Noonan J. was wrong. I have outlined above four issues that were not in fact determined by Noonan J. in his comprehensive judgment in the all but identical *Fingleton* case. That detailed judgment was written following an extensive hearing involving learned submissions by senior counsel on behalf of both the applicant and the respondent. I have not been pointed to nor have I been able to identify any key judgments or statutory provisions that were not opened to that court. The judgment clearly was based upon a review of significant relevant authority. There is no error in the judgment apparent to me and it is a very recent decision. For these reasons, save for the four issues identified by me, I must and I do follow the decision in *Fingleton*.

The four issues not decided in Fingleton
Is the inquiry proposed an administration of justice?

8.6. The test is a well-established one. It is set out in the judgment of Kenny J. in *MacDonald v. Bord na gCon* and has been approved as recently as in *O'Connell v. The Turf Club.* Following these decisions, the administration of justice may be taken to have the following characteristics or requirements:

> (i) a dispute or controversy as to the existence of legal rights or a violation of the law;
>
> (ii) the determination or ascertainment of the rights of parties or the imposition of liabilities or the infliction of a penalty;
>
> (iii) the final determination (subject to appeal) of legal rights or liabilities or the imposition of penalties;
>
> (iv) the enforcement of those rights or liabilities or the imposition of a penalty by the court by the executive power of the State which is called in to enforce its judgment;
>
> (v) the making of an order by the Court which as a matter of history is an order characteristic of courts in this country.

All five of these criteria must be met in order for a process to amount to an administration of justice (see *Keady v. Commissioner of An Garda Síochána & Ors.*, at p. 204). The severity of the impact of sanctions on individuals subject to such a process is not the test (see per O'Donnell J. in *O'Connell v. The Turf Club*, para. 54).

8.7. Applying these criteria to the facts of this case, I find the following:

> (i) The inquiry involved herein is just exactly that. It is an inquiry. It is not required to settle any dispute. It may well make findings that could constitute the ingredients of a violation of the law or as to the existence of rights or obligations. That, however, does not change its fundamental role. It is to enquire into whether certain specified contraventions of the code governing financial regulation were done by the applicant.
>
> (ii) There is no determination of the rights of parties involved in the proposed inquiry. There is no justiciable controversy between two parties (see *Kennedy v. Hearne* [1988] I.R. 481, Finlay C.J.). There is, however, the possibility of the imposition of a substantial liability in both monetary terms and in exclusion from the financially regulated market. This exclusion, however, is not equivalent to the case of a solicitor having his qualification effectively removed. The applicant herein still has his qualification as an accountant. It is not a criminal offence for him to practice as an accountant. The exclusion is even not so severe as that of warning a jockey off the course. The jockey, just like a legal or financial professional, has devoted many years of effort to reach the level of professional jockey. Being warned off the course means that whilst he may continue to ride horses, he cannot ever again pursue the only livelihood for which he trained so assiduously over many years.
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> (iii) There is no final determination by the proposed inquiry. It is in fact the first step in the process. The second is an appeal to the Appeals Tribunal and the third is an appeal to the High Court.
>
> (iv) The imposition of any penalty by the inquiry is not self-executing. Sanctions imposed are not enforceable as a judgment. Section 33AW(2) provides any monetary penalty or costs order only takes effect at the time when the decision is confirmed by an order of the court of competent jurisdiction. Any disqualification order takes effect only when confirmed by the District Court.
>
> (v) The making of orders relating to solicitors has always been something characteristic of courts in Ireland. However, as the cases cited demonstrate, inquiries by other professional bodies do not constitute something in which courts have been involved in the past (see *Geoghegan v. The Institute of Chartered Accountants in Ireland* [1995] 3 I.R. 86). In the area of financial regulation it is undoubtedly the case that courts have not been involved in the past. The evidence of Professor Niamh Moloney and indeed of Dr. Constantin Gurdgiev demonstrated very clearly the overwhelming public interest in maintaining the integrity of the financial sector of society. The role of supervision and enforcement, whilst

linked, are quite separate. They both, however, involve the kind of expertise that has been associated for instance with the planning code. The regulation of the financial sector is a relatively modern phenomenon. It is established by statute and at EU level. As the evidence of both of the above experts demonstrated, it is a highly complex and sophisticated series of interlocking statutes and regulations. It is clear, following recent economic difficulties, that the public interest in the effective regulation of the financial sector is an overwhelming one. It is something that requires different levels and depths of supervision and effective forms of regulation and enforcement. The EU presence in the regulatory framework reflects not only the complexity of cross-border regulation but the necessity for it to operate in a co-ordinated way. The Oireachtas has provided that those functions should be carried out by the Central Bank of Ireland and have established complex and sophisticated administrative machinery for doing so. The courts have manifestly never been involved in this area of financial regulation. Thus, the fifth criterion does not apply to the inquiry.

As noted above, if the process fails even one of the criteria, it is not an administration of justice. In this case, in my judgment, the inquiry process does not fit into any of the five criteria. The constitutional challenge on this ground fails.

Does the inquiry seek to impose penal liability on the applicant herein?

8.8. Clearly it does not. The legislation provides for quite distinct criminal offences. Just because it could find conduct was a contravention which might also be a criminal offence does not transform the inquiry into a criminal process. The inquiry does one thing. A criminal court does quite another. A part of Professor Moloney's evidence was to the effect that proper regulation and enforcement of the financial sector should not be left to the courts. I can readily accept that this must be so. The public interest in maintaining the integrity of financial regulation could never be adequately served by way of criminal prosecution of alleged code violation. The role of an inquiry is to find out what is going on and/or what has happened. It is quite distinct from that of a criminal trial. The role of a criminal trial is solely to determine whether an accused is guilty or not guilty of a specified offence. Here none of the *indicia* of a criminal offence identified in *Melling v. O'Mathghamhna* are present. I do not think that this point was pressed by the applicant herein.

Is the financial burden on the applicant oppressive and unfair?

8.9. I think this argument is in the nature of a *quia timet*. The inquiry may impose no sanction or it may impose one up to €500,000. It may order the applicant to pay the inquiry's costs or a part, or none of its costs. It is true it cannot award him his costs. It is, however, a matter for the applicant whether he incurs any costs. He could decide he did not wish to be legally represented before this entirely independent inquiry. Moreover, it is open to persons in his position to take out insurance cover against such costs. I know the applicant did this and the extent of the cover has been exhausted. The inquiry, however, cannot be saddled with any level of unfairness or oppression due to the applicant not taking out adequate insurance to cover all the costs he might incur. Inquiry costs were a foreseeable risk which was not adequately covered.

Is the burden on the applicant of pursuing this inquiry disproportionate to the level of public interest in enquiring into the collapse of the INBS?

8.10. One has merely to articulate the proposition in order to reject it. The collapse of that financial institution left this country with liability for a colossal sum of money. The exact sum may never be precisely defined but it is a liability in the vicinity of €5 billion. That fact alone would be enough to outweigh any particular burden on anyone. The evidence of Professor Moloney, however, was compelling on the need to investigate what actually happened and to fix the blame for any contraventions that may have occurred. The very essence of her reasoning was that the highly dynamic financial system needs constant in-depth surveillance if anything like the crash that occurred in 2008 is to be avoided. Its very dynamism demands highly adaptable mechanisms of control. An inquest into what went wrong and who was responsible will be an essential part of such control. The personal responsibility of persons in this highly complex structure is an essential part of that control system. It is to be hoped that a thorough inquiry of the kind proposed in this case will illuminate the mistakes, both corporate and personal, that brought about this collapse which was a national financial disaster. The public interest in knowing what happened is overwhelming.

8.11. To summarise; a very substantial part of the factual matrix in this case is identical to that of *Fingleton*. The case made by the applicant is, not surprisingly, difficult if not impossible to distinguish from *Fingleton*. Thus, applying the well established principle of judicial comity, much of the applicant's case here must be governed by the findings of Noonan J. in *Fingleton*. However, the constitutional action, the factually different argument of oppression made by the applicant as opposed to that made by Mr. Fingleton and the disproportionality argument based on the absence of evidence to conflict with that of Professor Moloney remain undecided by Noonan J. in *Fingleton*. In that regard I find the constitutional action fails because the inquiry is not an administration of justice nor does it seek to impose criminal liability upon the applicant, there is no actionable oppression of the applicant in relation to the cost of his involvement in the inquiry and there is no disproportionality between the applicant's interest and the public interest in determining what happened to INBS and who, if anyone, is responsible. The reliefs sought are refused.