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Oireachtais  
Houses of the  
Oireachtas

# **Joint Committee of Inquiry into the Banking Crisis**

## **Section 25 Statement of**

**Dr. Con Power**

**Strictly Private & Confidential**

As indicated on its cover page, the document(s) contained within are confidential unless and until the Joint Committee decides otherwise including where the Joint Committee publishes such document(s). For the avoidance of doubt, “documents” include witness statements in this context. Further to section 37 of the Houses of the Oireachtas (Inquiries, Privileges and Procedures) Act 2013 (“the Act”), while the documents remain confidential, you must not disclose the document(s) or divulge in any way that you have been given the document(s), other than:

- “(a) with the prior consent in writing of the committee,
- (b) to the extent necessary for the purposes of an application to the Court, or in any proceedings of the Part 2 inquiry, or
- (c) to his or her legal practitioner.”<sup>1</sup>

Serious sanctions apply for breach of this section. In particular, your attention is drawn to section 41(4) of the Act, which makes breach of section 37(1) a criminal offence.

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<sup>1</sup> See s.37 of the Houses of the Oireachtas (Inquiries, Privileges and Procedures) Act 2013

## Oireachtas

19<sup>th</sup> September 2015

Attachment sent with a letter of this date to Mr John Hamilton, Clerk to the Committee, Joint Committee of Inquiry into the Banking Crisis in reference to mentions of me by name of pages 50, 60, 86, 87, and 91 of the transcript of the meeting of the Committee held on Wednesday, 2 September 2015, Vol 2, No. 57 Morning and No. 58 Afternoon.

**Dr Con Power, former non-executive director of the Irish Nationwide Building Society (INBS) from 23<sup>rd</sup> March 2000 to 23<sup>rd</sup> February 2006, and former inaugural Chairperson of the statutory Financial Services Ombudsman Council from 1<sup>st</sup> October 2004 to 16<sup>th</sup> October 2008.**

### **[1] Documentation at the first INBS Board meeting that I attended on 23<sup>rd</sup> March 2000:**

23-03-2000 Thursday – 11.00 – Board – My first INBS Board meeting – I was formally co-opted to and became a member of the Board thereat, but in advance I had received no prior written notice, agenda or papers for the Board (although I had received a comprehensive Audit Committee agenda and papers from Mr Stan Purcell, as per my note dated 21-03-2000), other than a telephone notification from MF of the date and time of the meeting. I assumed this absence of Board documentation was because of banking confidentiality on the grounds that I had not yet been co-opted on the Board and INBS was not going to give sensitive banking information to me until I became a Board member through co-option at that meeting! I was surprised therefore to see that Mr Don O'Connor, Chairman, commenced the meeting by placing his two thumbs under his chin and, inclining his head towards the Managing Director, put the question to Michael Fingleton ... "Well, Michael, what do you have for us today?" I questioned this absence of advance documentation and the absence of the Chairman's documentation with MF privately after the meeting and I sought that documentation be issued prior to each future Board meeting. MF fully and instantly accepted the point (after an initial jocose - "Ah, Connie, we're all friends here!" ... to which I responded "No, not in business") and advance documentation, as appropriate, was always issued for each Board meeting thereafter. The quality and quantum of Board documentation improved significantly on an iterative basis after Dr Michael Walsh became Chairman on 1 May 2001, and Dr Walsh presided over a significant improvement in the governance culture of the Chair and the efficiency of conduct of the meetings.

**[2] My resignation as a non-executive director of the Irish Nationwide Building Society on 23<sup>rd</sup> February 2006, and the context in which that arose in the late evening of 22<sup>nd</sup> February 2006:**

22-02-2006 Wednesday – late p.m. – Mr Brendan Burgess advised me by telephone that INBS lodged papers in the High Court seeking a Judicial Review of a recent finding by the Financial Services Ombudsman. Mr Burgess told me that the papers seeking the Judicial Review contained three elements of legal challenge ... (1) the actions of the Ombudsman, (2) the legality of Statutory Instrument (S.I.) Number 190 of 2005 – Compensation Amounts & Definition of Consumer ... made by the Financial Services Ombudsman Council as a Council Regulation, and (3) the constitutionality of the Central Bank and Financial Services Authority of Ireland Act 2004. Mr Burgess prefaced his comments with the remark that “I know that you do not know what I am going to say because if you did you would have taken action.”

I confirmed that while I knew of the adverse ruling made by the Ombudsman against the INBS and while I realised that the INBS had the right to Appeal under the 2004 Act, I had no knowledge of INBS seeking a Judicial Review that included a challenge directly to the FSO Council. The matter of seeking a Judicial Review with those three components had not been discussed with me or, to my knowledge, with the INBS Board. As I observed, I was, of course, aware that an adverse finding had been made against the INBS by the Financial Services Ombudsman. I also appreciated that, in the normal course of business, the INBS would probably consider and seek legal advice on the possibility of an Appeal to the High Court against the finding of the Ombudsman, under the relevant Sections of the 2004 Act. Indeed, Michael Fingleton had mentioned to me personally in his management capacity and not at a Board meeting, out of courtesy because of my position as Chairperson of the Financial Services Ombudsman Council, that INBS would probably consider a High Court Appeal. I observed, in answer to Mr Fingleton, that INBS had every right to make an Appeal under the 2004 Act as had any and every other financial institution against which an adverse finding as made. An official of the Department of Finance who was one of the liaison persons with the Financial Services Ombudsman Council assured me that the making of an Appeal to the High Court by the INBS under the 2004 Act would not and could not give rise to a conflict of interest for me as an FSO Council member because the composition of membership of the Council under Section 57BC of the 2004 Act, which provided for the inclusion on the Council of persons with experience in the financial services industry and there were then at least two full-time career senior bankers on the Council, whereas I was merely a non-executive director who had never during my entire career been an employee or executive of a financial services entity.

In my view, a challenge to the legality of S.I. 190 and to the constitutionality of the 2004 Act went far beyond the scope of a High Court Appeal against the finding of the Ombudsman, made under the terms of the 2004 Act. I believed that such a fundamental and far-reaching issue of litigation that sought to challenge the Constitutionality of primary legislation and that sought to challenge the legality of a Statutory Instrument should have been reserved for the INBS Board. Based on what I heard from Mr Burgess, I believed that the nature of the Judicial Review sought by the INBS was not and could not remotely be considered to be an Appeal under the relevant Section of the 2004 Act ‘in the normal course of business’, whereas an Appeal ‘simpliciter’

against a finding of the Ombudsman, made under the terms of the Act, would have been within the normal course of business.

In my view, the norms of corporate governance required that a decision on such a fundamental issue as a challenge to the legality of a Statutory Instrument and the Constitutionality of an Act of the Oireachtas should have been a reserved issue for the INBS Board. The reality was, of course, that, once S.I. 190 was challenged, an immediate and direct conflict of interest arose for me as Chairperson of the Council as the S.I. was an FSO Council Regulation and had been signed into law by me personally. Whether or not the legal action taken by INBS was 'in the normal course of business and within the delegated powers of the Managing Director' or a 'reserved issue for the Board' was a question never pursued by me as the answer was not relevant to my decision to immediately resign from the INBS Board to protect the integrity of the Financial Services Ombudsman Council. In my view, my decision to immediately resign from the INBS Board was inevitable and irreversible once the INBS 'pressed the action button' by lodging the papers in the High Court challenging the legality of the Statutory Instrument that was made by the FSO Council and signed into law by me personally, thus creating an immediate conflict of interest for me.

23-02-2006 Thursday – 09.30 – I telephoned Mr Stan Purcell (SP) and SP confirmed to me for the first time that INBS was seeking a Judicial Review, including the three elements that had been outlined to me by Mr Burgess, and not merely making an Appeal under the relevant Sections of the 2004 Act against the finding of the FS Ombudsman. Mr Stan Purcell confirmed that this matter had not been discussed in advance at the Board and that the decision to initiate the application for the Judicial Review was taken by MF alone. In those circumstances, I advised Mr Stan Purcell that I had no option but to resign immediately from the Board of INBS, as I perceived a conflict of interest with my position as Chairperson of the FSOC, in which position I intended to continue to serve. I pointed out that an immediate and direct conflict of interest arose for me personally because the application for a Judicial Review included a challenge to the legality of S.I. Number 190 that had been made as a Council Regulation and had been signed into law by me personally as Chairperson of the Council, under the powers conferred by the 2004 Act. Mr Stan Purcell asked that I speak on his mobile with Mr Michael Fingleton (MF) who was in London on business but I responded that there was nothing that MF could say that would change my decision to resign immediately from the INBS Board. I emphasised that I felt both legally and morally obliged to defend any legal challenge to S.I. 190, as made by the Council and signed into law by me. I pointed out that this was a fundamentally different situation to an Appeal to the High Court against a finding of the Ombudsman under the provisions of the 2004 Act.

23-02-2006 Thursday – 10.00 – I spoke at length to Dr Michael Walsh – he (MW) saw the potential conflict of interest but asked me to consider resolving the potential conflict by resigning from the Chairperson of the FSO Council. MW observed that the non-executive directorship of INBS paid more than the Chairmanship of the FSOC and that I would be making a financial sacrifice by resigning from INBS. I explained to him that as I personally signed SI 190 into law in my capacity as Chairperson of the FSO Council, I was irrevocably committed to defending that SI, the legality of which was now being challenged by INBS. I said that, therefore, I would not resign from the Chair of the FSOC and consequently my resignation from the INBS Board



was my irrevocable decision. I explained to MW the position as seen in the documents viewed by Mr Brendan Burgess in the High Court that INBS sought the judicial review under three headings (a) the actions of the Ombudsman, (b) the legality of the Statutory Instrument (SI) Number 190 under which the Ombudsman acted, and (iii) the constitutionality of the 2004 Act under which the Statutory Instrument was made by the FSO Council. I expressed my view that as the Council made the SI and as I, in my capacity as Chairperson, had signed it, I would be obliged to defend the SI in any action that might challenge it. I said that being Chairperson and signing the SI, in my view, gave rise directly to a conflict of interest if the SI was challenged; not my membership *per se* of the Financial Services Ombudsman Council which, according to the Department of Finance, did not and could not give rise to a conflict of interest having regard to the constitution and composition of the Council (which included full-time executive senior executive staff of a number of banks) and to the fact that my non-executive directorship of INBS was in the public domain and known to the Department and to the Minister prior to my appointment to the FSO Council.

23-02-2006 Thursday – late afternoon – I received a telephone call from Mr Michael Fingleton (MF) who was in London. I declined a request from MF to reflect on the matter and to discuss it with him at the weekend on the grounds that nothing that MF would say could alter what had already been done by INBS or my decision that resulted directly therefrom, and I explained to him the nature of the conflict for me arising out of the INBS challenge to the legality of S.I. 190, made by the Financial Services Ombudsman Council and signed into law by me under the powers given in the 2004 Act. I explained that the conflict of interest had nothing to do with membership of the Financial Services Ombudsman Council *per se* or to the making of a High Court Appeal in the normal manner under the terms of the 2004 Act against a finding of the Financial Services Ombudsman. I also said that the fundamental conflict of interest for me personally would remain irrespective of whether or not the decision to seek the Judicial Review has been made by the INBS Board [which it had NOT been so made] or by MF as the Managing Director, but I emphasised that in my view such an issue of litigation on constitutionality / legality should have been a reserved function for the INBS Board. No matter what arguments can be made in that respect, once the legality of a Council Regulation (S.I. 190) had been challenged, I had no option but to resign from the INBS Board. As I saw it ‘the moving finger wrote, and having writ passed on ...’ ... I could not take back my signature of S.I. 190 into law and as my signature was on the S.I., I had no option but to defend that S.I.

23-02-2006 Thursday - 21.35 – my email to Dr Michael Walsh, Chairman, with copy each to the other directors – Mr Michael Fingleton, Mr Stan Purcell and Mr Terry Cooney – resigning as a non-executive director of INBS and of each of three named subsidiaries with effect for the close of business on that day, Thursday 23 February 2006.

**END**