

An Coimisiún Imscrúdúcháin
(CORPARÁID na hÉIREANN um
RÉITEACH BAINC)



Commission of Investigation
(IRISH BANK RESOLUTION
CORPORATION)

The Hon. Mr. Justice Brian Cregan
Sole Member

FIFTH INTERIM REPORT

23rd November 2018

Submitted to the Taoiseach pursuant to section 33(3)
of the
Commissions of Investigation Act 2004

1. Introduction

- 1.1. On 16th June 2015 the Government made an Order under the Commissions of Investigation Act 2004 (the "2004 Act" or the "Act") establishing the Commission of Investigation into Irish Bank Resolution Corporation ("IBRC"). This Order is set out in S.I. 253 of 2015 - Commission of Investigation (Irish Bank Resolution Corporation) Order 2015.
- 1.2. Under the Order of the Government which established the Commission, the Taoiseach was appointed as the Specified Minister pursuant to section 3(3)(b) of the Act.
- 1.3. The Statutory Instrument establishing the Commission provided that the Commission should (subject to section 6(6) of the Act) submit to the Taoiseach the final report in relation to its investigation no later than 31st December 2015.
- 1.4. Section 6(6) of the Act provides that

"The specified Minister may, at the commission's request, revise the time frame for the submission of its final report to the extent consistent with the objective of having the investigation conducted and the report submitted as expeditiously as a proper consideration of the matter referred to the commission permits. "

- 1.5. This interim report is submitted to the Taoiseach pursuant to section 33(3) of the Act which provides that

"If a commission requests that the time frame for submitting its final report be revised under section 6(6), the commission shall submit an interim report to the specified Minister with the request."

- 1.6. The purpose of this interim report is to set out the work which has been undertaken

by the Commission, to outline work which remains to be done and to request an extension of time for submitting the Commission's final report under section 6(6) of the Act.

2. Developments since the establishment of the Commission

- 2.1. On 16th June 2015 the Government appointed Mr. Justice Daniel O'Keeffe, a former judge of the High Court, as Sole Member of the Commission.
- 2.2. On 9th July 2015 Mr. Justice O'Keeffe retired from his appointment and on 9th July 2015 the Government appointed Mr. Justice Brian Cregan, currently a judge of the High Court, as Sole Member of the Commission.
- 2.3. The Commission submitted its First Interim Report to the Taoiseach on 13th November 2015. That Report set out the work of the Commission to date, informed the Government that certain legislative changes were required to overcome legal difficulties in respect of banker- customer confidentiality and also requested a revision of the time frame for submitting its final report under section 6(6) of the 2004 Act.
- 2.4. On 22nd December 2015, the Taoiseach agreed to extend the time within which the Commission had to submit a Report until 30th April 2016.
- 2.5. On 14th January 2016, the Taoiseach wrote to the Commission requesting a further Interim Report on the work completed on all aspects of its Terms of Reference, including in relation to the Siteserv transaction.
- 2.6. The Commission furnished its Second Interim Report to the Taoiseach on 15th April 2016. This Second Interim Report summarised the work which had been undertaken by the Commission since the submission of its First Interim Report on 13th November 2015. It also requested an extension of time for submitting its final report.
- 2.7. On 26th April 2016 the Taoiseach wrote to the Commission extending the time for submitting the Commission's final report under section 6(6) of the Commissions of Investigation Act 2004 until the end of June 2016.

- 2.8. The Commission furnished its Third Interim Report on 27th June 2016. This Third Interim Report summarised the work which had been undertaken by the Commission since the submission of its Second Interim Report and also requested an extension of time for submitting a final report under section 6(6) of the 2004 Act.
- 2.9. As a result of the Commission's First Interim Report, the Oireachtas passed the Commission of Investigation (Irish Bank Resolution Corporation) Act 2016 which became law on 1st August 2016 (the "2016 Act"). The 2016 Act provided that the Commission could compel any person to produce to the Commission (and to admit into evidence) any document or information which the Commission deemed necessary for its investigation, notwithstanding any duty of confidentiality owed by that person in respect of that document or information.
- 2.10. On 27th July 2016, the Commission's Terms of Reference were amended and the Commission was requested to investigate the Siteserv transaction in the first module of its work.
- 2.11. As a result of the provisions of the 2016 Act and the amendments to its Terms of Reference, the Commission has been able to make significant progress in its investigation into the Siteserv transaction since 1st August 2016.
- 2.12. The Commission submitted its Fourth Interim Report to the Taoiseach on 8th December 2017. This Fourth Interim Report summarised the work undertaken by the Commission from June 2016 to November 2017. It also included a request for an extension of time for submitting its final report to 31st December 2018 as the Commission was then of the view that its work would be completed by the end of December 2018. However, the investigation has proven to be more complex than originally envisaged. Accordingly, in this Fifth Interim Report, the Commission is requesting a further extension of time as set out below.

3. The Commission's work on the Siteserv Transaction

Introduction

- 3.1. Siteserv plc was an Irish company which was indebted to IBRC in the amount of approximately €160 million as at March 2012. Following the preparation of reports by professional advisors which looked at various options for Siteserv, IBRC agreed to a process whereby Siteserv would sell its operating subsidiaries and use the proceeds to pay down some of its debt to IBRC. IBRC agreed to write off the difference between the proceeds it received and the total debt owed to it. Siteserv engaged two separate corporate finance firms to manage this sales process, in which many companies, both domestic and foreign, made bids for the Siteserv operating subsidiaries. This process led to an agreement for the sale by Siteserv of its operating subsidiaries in March 2012. The transaction was completed in June 2012.
- 3.2. In order to investigate the transaction properly the Commission has been obliged to examine in detail the events and circumstances that led to the decision to commence the sale process, the sale process itself, the company's engagement with IBRC throughout the sale process and post-transaction events. This has proven to be a complex series of events involving many parties. The Commission has also had to take evidence from a large number of people who were involved in the transaction over the course of a number of years.
- 3.3. The Commission has had to investigate many elements of the transaction as well as the financial components related to it in order to properly understand the transaction and to respond to its terms of reference. This is a lengthy and complex task.

Discovery

- 3.4. To date, the Commission has issued 56 directions for discovery of documents and has received 63 affidavits of discovery.
- 3.5. On foot of discovery directions, the Commission has received approximately 500,000 pages of documentation in discovery from all relevant parties.

Witness Statements

- 3.6. The Commission has also received 102 witness statements. Some witnesses have furnished a number of witness statements to the Commission.

Oral hearings

- 3.7. The Commission commenced oral hearings on 31st October 2017. The bulk of the Commission's work since its Fourth Interim Report in November 2017 has consisted of hearing oral evidence from a variety of witnesses.
- 3.8. So far, the Commission has heard 148 days of evidence in oral hearings. Given the confidential nature of the Commission's work, underpinned by statutory obligations of confidentiality, the Commission cannot give details of that evidence in this Interim Report. The Commission has heard evidence inter alia from:

- (i) Corporate finance advisers to Siteserv;
- (ii) Corporate finance advisers to IBRC;
- (iii) Legal advisers to Siteserv;
- (iv) Siteserv non-executive directors;
- (v) Siteserv executive directors;
- (vi) Underbidders for Siteserv; and
- (vii) The Bank's observer in the sales process.

Future work - Phases of Evidence

- 3.9. The Commission is structuring its Siteserv investigation into five separate phases to deal with the various issues arising under its Terms of Reference. These phases are as follows:

Phase 1 - Evidence in relation to the "commercial soundness" of the Siteserv transaction and whether there is prima facie evidence of material deficiencies in the performance of their functions by the directors and executives of IBRC (Term of Reference 2(b) and (c));

Phase 2 - Evidence on the processes, procedures and controls operated by IBRC in relation to the Siteserv transaction (Term of Reference 2(a));

Phase 3 - Evidence in relation to the Department of Finance (Term of Reference 2(e));

Phase 4 - Evidence in relation to "unusual share trading" (Term of Reference 2(d));
and

Phase 5 - Evidence on interest rates (Term of Reference 1B).

3.10. The Commission is making substantial progress in its investigation of the Siteserv transaction. The Commission is currently focusing on the first - and most time-consuming - phase of its work (i.e. whether the transaction was not “commercially sound”).

3.11. The Commission plans to hear oral evidence next from:

- (i) the purchaser of the Siteserv subsidiaries, together with advisers;
- (ii) IBRC directors; and
- (iii) IBRC executives.

3.12. The witness statements which the Commission has obtained from the former executives and directors of IBRC address the Siteserv transaction as well as the processes, procedures and controls which were operated by IBRC and, where relevant, the principles and policies within IBRC in respect of the setting of interest rates. These issues will be addressed by the former IBRC directors and executives in their oral evidence to the Commission.

3.13. Whilst the Commission is currently hearing oral evidence on phase one of its work, it is also working on the other phases of its investigation. The Commission has obtained witness statements from current and former officials within the Department of Finance and from the former Minister for Finance. It has also obtained witness statements from officials within IBRC who interacted with the Department of Finance.

3.14. In addition, the Commission has obtained witness statements and evidence in relation to whether any unusual trading in Siteserv shares took place.

3.15. When the oral hearings have finished, the Commission expects that it will require approximately six months to write its report. In accordance with legal requirements of due process and the requirements of the applicable legislation, that draft must be circulated to relevant parties named in it to afford them the opportunity to comment on it. The Commission expects that review period will require about three months.

3.16. The Commission's suggested timetable for a report to An Taoiseach on its First Module is, therefore, as follows:

- (i) Oral hearings completed – 30th June 2019;
- (ii) Production of draft report – 31st December 2019;
- (iii) Review period for relevant parties – 28th February 2020;
- (iv) Finalising report – 31st March 2020.

3.17. Accordingly, at the conclusion of this Interim Report, the Commission is requesting an extension of the date for submission of its final report on the Siteserv transaction to 31st March 2020.

4. Confidentiality of Evidence to the Commission

- 4.1. Section 11 (1) of the 2004 Act provides that: "*A Commission shall conduct its investigation in private*".
- 4.2. In addition, section 11(3) of the 2004 Act provides that a person shall not disclose or publish any evidence given by a witness while giving evidence in private (subject to limited exceptions) and section 11(5) provides that the disclosure or publication of such evidence is an offence.
- 4.3. In the circumstances, the Commission is of the view that it would not be lawful or appropriate to set out a summary of the evidence which it has heard to date. To do so would work a manifest injustice to many parties who have yet to give evidence to the Commission.

5. The Cost of the Commission

The Commission's own costs to date

- 5.1. The Commission's own costs up to 31st October 2018 amount to approximately €4.56 million. This expenditure includes salaries, legal costs, rent, building overheads, services and administration costs.

The Commission's future costs

- 5.2. The Commission has not made, nor makes now, any estimate of the likely costs of its investigation into the Siteserv transaction. Any estimate of such costs in the public domain is not one which the Commission has prepared.

Costs of Witnesses

- 5.3. Many of the parties with whom the Commission is dealing (in particular, witnesses) will seek recovery of costs from the Commission. The Commission does not have details of the amount of such costs incurred to date, or any estimate of their future costs until their engagement with the Commission's work is complete. The Commission has not as yet made any determination with regard to the recovery of costs pursuant to the 2004 Act, but expects to be able to do so after completion of its investigation.
- 5.4. In respect of a small number of witnesses however the Commission has made orders in relation to "heavy expenses". These have related to the costs of discovery (excluding legal costs).

6. Request for Extension of Time

6.1. The Commission expects to be able to submit to An Taoiseach its final report into the Siteserv transaction by 31st March 2020. Accordingly, the Commission requests an extension of time to 31st March 2020.

Signed: Brian J. Cregan.

The Hon. Mr. Justice Brian Cregan

23rd November 2018