The decision of the Tribunal was confirmed by Order of the High Court (Barniville P.) on 5 November 2026

IRISH FINANCIAL SERVICES APPEALS TRIBUNAL

Register No. 031/2025

IN THE MATTER OF PART VIIA OF THE CENTRAL BANK ACT 1942 (AS AMENDED)

BETWEEN:

DAVID GUINANE

Appellant

-and-

THE CENTRAL BANK OF IRELAND

Respondent

Panel members: Mr Justice John MacMenamin, Chairperson
Patricia O'Sullivan Lacy, Deputy Chairperson
Úna Tighe SC, Member

DECISION

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INTRODUCTION

Background

1. This decision of a panel of the Irish Financial Services Appeals Tribunal is delivered in an appeal brought by Mr David Guinane. At the times relevant to this case, Mr Guinane **(**the **"appellant"**) was the Chief Executive Officer of the retail banking division of what was then Irish Life and Permanent Group Holdings plc (**"IL&P Group"**). IL&P Group was then a licensed credit institution, or bank, and its retail banking division operated under the brand names *permanent tsb* and PTSB.

2. Mr Guinane brings this appeal against the Central Bank's decision made pursuant to its Administrative Sanctions Procedure. More precisely, the decision was made pursuant to section 33AQ(8)(a) of the Central Bank Act, 1942, as amended (the "**1942 Act**"). It was issued by the Central Bank (the **"Bank"**) on 23 April 2025, on behalf of a designated sole *"inquiry member"*, Mr Peter Hinchliffe (the **"Inquiry Member"**), who was appointed under section 33BE of the 1942 Act by the Deputy Governor of the Central Bank.

3. The Inquiry Member found that while being *"a person concerned"* in the management of IL&P Group, the appellant had participated in a *"prescribed contravention"* by PTSB, whereby PTSB had, during the **"relevant period"** between 19 January 2009 and April 2010 breached Chapter 1, General Principle 1 of the Consumer Protection Code 2006 (the **"Code"**). In essence, General Principle 1 provided that a regulated entity was to ensure that it acted *"honestly, fairly and professionally in the best interests of its customers and the integrity of the market"*. The Inquiry Member held that the appellant had participated in a *"strategy"* implemented by PTSB whereby certain customers of PTSB were overcharged on their mortgages. The outcome of this Decision can be found in the conclusion and synopsis.

4. At the time of the inquiry the subject of this appeal, (the **"Inquiry"**), the banking business was carried on in a separate company called permanent tsb p.l.c. For this reason, both in this Tribunal decision and in the Decision under

appeal (the latter is referred to as the **"Decision"** or, alternatively, the **"Inquiry Decision"**), the term **PTSB** refers to the retail banking business carried on by the *"regulated financial service provider";* initially, IL&P Group and later, permanent tsb p.l.c. The term *"regulated financial service provider"* (**"RFSP"**) is defined by section 2 of the 1942 Act.

Preliminary observations

5. At the outset, a number of observations may be made to assist the reader.

Context and meaning

6. First, it has sometimes been written that, in law, context is everything, or nearly so. This observation was never more true than in this case. The questions of context and meaning are central to this case. This is, admittedly, a detailed decision. Literally hundreds of thousands of words have been spoken and written in this case in a consideration of the appellant's use of just three words *"OK with that"* written in an email in response to what was characterised as a *"proposal"* presented to him by other PTSB employees to implement the strategy. If some quotations and citations are very full – and they are – it is to ensure that what is written and said in this process is seen in its full context, meaning, and effect.

Time

7. Second, this administrative sanctions procedure (**"ASP"**) involving the appellant has already gone through three phases. An investigation by the Enforcement Directorate of the Central Bank (**"Enforcement"**), which commenced on 28 December 2018, lasted until 27 May 2021. The Inquiry, now under appeal, technically commenced on 9 November 2021, but completed its work, including all ancillary matters, on 15 October 2025. There were many good reasons for this elapse of time. The next phase, the appeal to this Tribunal, was commenced by a Notice of Appeal dated 28 May 2025 and is concluded with this Decision. The slight overlap between the dates of the Inquiry and the filing of the Notice of Appeal is explained by an ongoing issue regarding the redaction of findings made in the Inquiry concerning PTSB, and finally dealt with on 15 October 2025. The Tribunal had hoped to complete

the appeal by the end of December 2025. This did not prove possible. A number of preliminary legal issues arose, which were dealt with by way of written submissions and in case management hearings. The papers for the appeal comprised 24 Lever Arch files. There were case management hearings in 2025 and early 2026, and the substantive appeal hearing took place over the course of January and February 2026. A further hearing was necessary in May 2026. The parties were circulated with a draft of the decision on the 25th of August 2026. Certain legal issues arose from that, as well as the question of costs. These will be dealt with in a supplemental decision. Altogether this process has taken eight years up to the date of this Decision. Finally, as a result of legislative amendments described later and contained in the Central Bank (Individual Accountability Framework) Act, 2023, the decision of this Tribunal may also be subject to a confirmation process by the High Court. (The Tribunal's decision on this issue will be set out in a supplementary decision, having heard submissions thereon.) Seen in the round, this has been an inordinately prolonged process.

Definition of terms in this decision

8. Third, it has already been noted that both the Inquiry, and this Tribunal, have delivered *"decisions"*. The distinction has already been explained in the course of this Decision. Additionally, the term **"LPT"** means the legal practitioner team appointed to advise the Inquiry Member. The document containing the case preferred against the appellant will, where necessary, be referred to as the **"Allegation"**. Other abbreviations and acronyms will be explained in this decision. The law as described and outlined in this decision concerning this Inquiry is that which was in force at the time of the Inquiry. It has since been significantly amended.

Sources and chronology

9. Fourth, insofar as possible the relevant matters are set out in a chronological order. This was not always easy. It was necessary to draw from a number of sources; principally, the Investigation Report of Enforcement, the Notice of

Inquiry and Allegation, the Inquiry Decision and documentary evidence referred to in that Decision.

FRAMEWORK: STATUTORY INTERACTION BETWEEN THE TRIBUNAL AND THE INQUIRY PROCESS

10. The fact that the law has been quite recently amended has already been referred to. For this reason, it will be necessary to outline this Tribunal's new jurisdiction in relation to the matter under appeal; and later to describe the law which governed the Inquiry Member's Decision. Together, they form the basic framework for this decision.

JURISDICTION OF THE TRIBUNAL

Timing of the amendments

11. The Inquiry process against the appellant was initiated on 9 November 2021. While that process was in being, the Oireachtas enacted the Central Bank (Individual Accountability Framework) Act, 2023 (the "**2023 Act**"). Certain provisions of that Act were brought into effect on 9 March 2023. These had a significant bearing on the jurisdiction of the Tribunal. (See, Freeman, J., *The Central Bank Acts A Commentary* (Clarus Press, 2026) at pages 36 *et seq*; also, 340 *et seq*).

Sui generis jurisdiction

12. Prior to the enactment of the 2023 Act, there was a question as to whether this Tribunal was vested with a jurisdiction to entertain a broader, *de novo* type, appeal. There is no longer any doubt. In simple terms, as a result of the 2023 Act, the position is as follows: first, a decision by an Inquiry Member is immune from judicial review; second, the jurisdiction of this Tribunal is now amended to what may be characterised as *"judicial review grounds";* third, reflecting the effect of the decision of the Supreme Court in *Zalewski v The Workplace Relations Commission* [2021] IESC 24, [2022] 1 I.R. 421, the

decision of this Tribunal may now be subject to confirmation by the High Court.

13. This new legislation therefore, vests in the Tribunal a type of jurisdiction which is *sui generis*. It does not fall within any of the categories identified in the decision of the Supreme Court in *Fitzgibbon v The Law Society* [2015] 1 I.R. 516. The amended Tribunal legislation does not provide in form, or law, for a *de novo* appeal; or an appeal on the record; or an appeal against error; or an appeal on a point of law.

14. It can, however, be said that the "judicial review" jurisdiction now to be exercised by this Tribunal is, in form, one generally vested in the Superior Courts. These matters were the subject of some discussion on the concluding day of the Tribunal hearing, on 18 May 2026.

15. The 2023 Act also introduced significant changes in the investigation process. As this part of the legislation was not in force, it need not detain the reader. It must also be noted that the investigation process in this case was not the subject of appeal.

An inquiry member's immunity from judicial review

16. Section 67 of the 2023 Act brought into effect a new section 33BF of the 1942 Act in substitution for its predecessor. Section 33BF now provides:

> "*33BF Leave shall not be granted for judicial review of any of the following:*
>
> *(a) a finding made by the Bank under section 33AQ(1) or (2);*
>
> *(b) a decision of the Bank imposing a sanction under section 33AQ;*
>
> *(c) a decision of the Bank imposing a sanction under Section 33AR(2)(b) or (4).*"

17. As a consequence, findings by an inquiry are not to be subject to judicial review. An application for leave to apply for judicial review of any other decision of the Bank must be made within "*two months after the date on which*

notice of the decision was first notified to the person concerned" or within any extended period that the High Court might order. The Tribunal notes that this might appear to be an *"ouster clause"*. (See Hogan and Morgan, *Administrative Law in Ireland*, (5th ed, Thomson Reuters, 2019), paragraphs 11-03 to 11-09; and Freeman J., *The Central Bank Acts A Commentary* (Clarus Press, 2026), at page 281).

18. How, in the circumstances, section 33BF should be interpreted can be left for decision to another case and/or another forum.

Definition of an "inquiry decision"

19. Next, section 33AW (substituted by section 53 of the 2023 Act) now defines, at subsection (1)(a), an *"inquiry decision"* as meaning any of the following:

> *"(i) a finding made by the Bank under section 33AQ(1) or (2);*
>
> *(ii) a decision of the Bank imposing a sanction under section 33AQ;*
>
> *(iii) a decision of the Bank imposing a sanction under section 33AR(2)(b) or (4)(b)"*, (that is a decision by the Bank following the parties availing of alternative resolution procedures, described below).

20. Then, again by section 53 of the 2023 Act, the *"appeal decision"* is now to mean a decision of this Tribunal *"affirming, or varying, or made in substitution for, an inquiry decision";* section 33AW(1)(B).

21. As a consequence, an *"inquiry decision"*, is now a *"decision appealable to this Tribunal"* for the purposes of Part VIIA under section 33AW(2). However, section 33AW(3) then goes on to provide:

> *"(3) An appeal under Part VIIA against an inquiry decision may be made only on one or more of the following grounds:*
>
> *(a) any ground that could, but for section 33BF be relied on in an application seeking judicial review of the inquiry decision;*
>
> *(b) so far as it is not within paragraph (a), the ground that any sanction imposed is not proportionate.*

(4) An inquiry decision and an appeal decision do not take effect unless confirmed by the High Court on an application under this section."

22. The plain meaning of the words of the statute are, therefore, clear, as to the two grounds providing for an appeal to this Tribunal.

Jurisdiction of the High Court

23. Section 33AW also sets out when an inquiry decision, and a decision of this Tribunal on appeal, are to come into effect. These are not immediately relevant.

24. Section 33AW(5) provides that where a person the subject of an inquiry decision does not appeal a decision under Part VIIA within the period required by that Part, or where an appeal is withdrawn, or where the appeal Tribunal makes an appeal decision, the Bank shall, *"as soon as practicable"*, make an application to the High Court for confirmation of the inquiry decision or appeal decision as the case may be. (section 33AW(5)(a)(b)(c)).

25. Then, under the new section 33AW(6):

"(6) On an application under sub-section (5), the High Court shall confirm the decision unless it is satisfied, on the basis of the evidence that was before the Bank or the Appeals Tribunal when making the decision –

(a) that the Bank or the Appeals Tribunal made an error of law which is –

(i) manifest from the record of the decision, and

(ii) fundamental so as to deprive the decision of its basis, or

(iii) that any sanction imposed is manifestly disproportionate.".

26. It is clear, therefore, that these three criteria, manifest error, fundamental

nature, and proportionality, would be the issues for the High Court to consider on a confirmation application.

Application to this case

27. These jurisdictional provisions were commenced on 19 April 2023 (S.I. No. 176 of 2023). Thus, from that date, the Inquiry Member in this case was not amenable to judicial review. The new "judicial review type jurisdiction" was vested in this Tribunal. This legislation might arguably have had an impact on the form of appeal available to the appellant while his case was pending. But in the event this issue need not arise for consideration.

Section 93 of the 2023 Act: new procedures for investigations

28. As already noted, in section 93, and elsewhere in the 2023 Act, there are new procedures for investigations. The Bank promulgated guidelines for such investigations in December 2023.

29. It is necessary to re-emphasise, therefore, first that the investigation into the appellant was not appealed, and second, that in any event, what is now contained in legislation for the future, was not applicable to the investigation in this case.

Submissions by counsel for the appellant

30. It follows from the foregoing that the Tribunal did not accept submissions made by the appellant to the effect that a broad interpretation should be given to the concept of "judicial review grounds". Theoretically, those words might have a very wide application indeed; including, even, constitutionality. That would be patently an absurd interpretation.

31. Counsel also made reference to what was seen as an incongruity in the Bank's case. This was to the effect that, while the Administrative Sanctions Procedure is understood to be a civil matter, nonetheless the sanctions could have very serious career-threatening consequences. These are dealt with later in the outline of sanctions which might be imposed in the event of an allegation being made out. These considerations do have consequences for the constitutional

rights of a *person concerned*, such as the appellant. These rights were engaged at all stages of the process and described later.

32. Counsel for the appellant also observed what was said to be a further incongruity in the case law in that, while the process was to be seen as a civil matter, the Bank nonetheless relied on "judicial review" authorities relating to criminal law dealing, *inter alia*, with the question of delay in criminal prosecutions. These, and other issues pertaining to the process, are illuminatingly dealt with in the earlier publication by Freeman – *The Central Bank Acts Annotated and Consolidated* (Thompson Hall, 2019[1]). Relevant issues pertaining to the possible interaction of this process with ECHR jurisprudence are dealt with there. (See *Engel v The Netherlands* [1979-80] 1 EHRR, and subsequent case law).

The Central Bank v CD

33. The Tribunal also notes the recent important High Court judgment in *Central Bank of Ireland v CD* [2026] IEHC 203. That judgment deals with the distinct issues concerning the Central Bank's administration of its Fitness and Probity regime. The facts of that case are distinct from those here considered. The judgment issued after argument in this case was concluded. For these reasons, the Tribunal did not consider it necessary to reconvene to consider the judgment. Nor was it necessary to refer to the decision of this Tribunal in *AB v Central Bank of Ireland* [09/2022]. The subsequent *Review of the Fitness and Probity Regime* by Mr Andrea Enria issued on 11 July 2024.

34. The new jurisdiction is innovative. The Tribunal directed itself to the following effect: first, it must give effect to the plain meaning and effect of the words of the 2023 Act; second, these words carry with them the presumption that the powers vested in this Tribunal are to be exercised in accordance with the Constitution; third, the provisions are to be seen as enjoying the presumption of constitutionality (*East Donegal Cooperative Livestock Mart Limited v Attorney General* [1970] I.R. 317). However, these are not the only broad

[1] Page 174, footnotes 764 and 765.

parameters to be considered.

Zalewski v The Workplace Relations Commission

35. During the course of submissions to this Tribunal, the question arose as to whether the Inquiry Member in this case was engaged in the "*exercise of limited functions and powers of a judicial nature, in matters other than criminal matters*" even though he was not "*a judge or a court appointed or established as such under the Constitution*" (Article 37 of the Constitution).

36. Counsel for the Bank accepted that the highly significant principles regarding administrative tribunals in *Zalewski v The Workplace Relations Commission* [2021] IESC 24, [2022] 1 I.R. 421 were also applicable to the Inquiry. Therefore, it was accepted that the standard of justice applicable could not be lower or less demanding than the justice administered in courts under Article 34; and that the functions being performed and the power being exercised by an Inquiry Member must comply with the fundamental components of independence, impartiality, dispassionate application of the law, openness, and above all, fairness, which are understood to be the essentials of the administration of justice. The Tribunal will refer to these *Zalewski* principles in the course of this decision. These issues are not simply ones of characterisation, or what is called taxonomy. They are, rather, fundamental ones, of substance as well as form.

37. Finally, under this heading, during the appeal to this Tribunal, counsel for the Bank made justified criticisms of the manner in which the appellant's case was presented insofar as their case did not sufficiently address "*the jurisdiction of the Tribunal*". In order to regularise matters, counsel for the appellant asked for a three-week adjournment to place the matters raised within the judicial review grounds the legal context required. The Bank responded within another three weeks. The appellant cited, in its new written document, a number of authorities which had not been raised earlier. The Bank did not have the opportunity to deal with those in oral argument. Accordingly, as a matter of fairness, the Tribunal will not address those additional citations.

38. The Tribunal decision now turns to the important issue of statutory interpretation.

Statutory interpretation

39. In considering the provisions of the legislation, the Tribunal is mindful of the well-known statutory interpretation principles as recently reiterated in the decisions of the Supreme Court in *Heather Hill Management Company CLG v An Bord Pleanála* [2022] IESC 43, [2024] 2 I.R. 222 and *A, B and C v The Minister for Foreign Affairs* [2023] IESC 10, [2025] 1 I.R. 417, [2023] 1 I.L.R.M. 335.

40. In interpreting this legislation therefore, the following principles apply. First, legislative intent is a misnomer; a court cannot peer into the minds of parliamentarians when they enacted legislation. Second, and instead, what a court is concerned to do when interpreting a statute is to ascertain "*the legal effect attributed to the legislation by a set of rules and presumptions that common law (and latterly statute) has developed for that purpose"*; *Heather Hill*, paragraph 118. Third, the words of a statute are to be given primacy within this framework. They are the best guide to the results that the Oireachtas wanted to bring about. The text is the sole identifiable and legally admissible outward expression of the members' objectives: it is the only source of information which a court can be confident that all members had access to, and had in their minds, when a statute was passed. Fourth, at the same time the Oireachtas usually enacts a composite statute, rather than a collection of dissociated provisions. It does so in a pre-existing context and for a purpose. The best guide for that purpose is the language of the statute read as a whole; but sometimes that necessarily falls to be understood and informed by reliable and identifiable background information. (See, *Heather Hill*; *A, B and C;* and the judgment of McKechnie J. in *The People (Director of Public Prosecutions) v Browne* [2018] IESC 67, [2019] 2 I.R. 1). In *Heather Hill*, Murray J. went on to emphasise (at paragraphs 116-120):

> *"However — and in resolving this appeal this is the key and critical point — the "context" that is deployed to that end and "purpose" so identified must be clear and specific, and where wielded, to displace the apparently*

clear language of a provision, must be decisively probative of an alternative construction that is itself capable of being accommodated within the statutory language."

These principles will be applied in this decision.

41. This decision later deals with the application of these important principles. The decision now turns to the factual background and the origins of the case.

FACTUAL BACKGROUND AND DOCUMENTARY EVIDENCE

42. The factual origins of this case lie in events which took place in the first decades of this century, and especially around the financial crisis between 2008 and 2014.

43. From the year 2009 onwards, there were calls for investigations into the activities of a number of lending institutions. These calls concerned alleged overcharging by banks and other lenders. One particular concern was in relation to tracker mortgages. The question was whether lenders had, to the detriment of customers, engaged in overcharging by denying them their tracker mortgages entirely or by charging an unfavourably high interest rate on their tracker mortgages.

44. It emerged that, in order to protect their solvency, lenders had indeed engaged in this conduct. There were calls for individual accountability. The Tribunal was informed that the appellant is the only person thus far who has been subjected to an inquiry arising from what was referred to as *"the tracker mortgage scandal"*. In a statement to the Inquiry Member at the conclusion of the hearing, the appellant claimed that he had been *"scapegoated"*.

The PTSB investigation

45. Ultimately, in the year 2014, the Enforcement Directorate of the Central Bank commenced an investigation into PTSB's activities. This will be referred to as the **"PTSB investigation"**. The scope of this investigation was to ascertain

activities by that firm in the lending market from 2004 to 2018. Later, in 2018, Enforcement reached a conclusion that it had encountered material which, in its view, made out the basis of a case that the appellant had, personally, participated in a contravention by PTSB.

The Guinane investigation

46. As a consequence, Enforcement decided, in 2018, to initiate an investigation against the appellant himself (the **"Guinane investigation"**). For a time, this ran in conjunction with the investigation into PTSB.

The PTSB settlement

47. In 2019 PTSB entered into a settlement with the Central Bank. It admitted it had carried out 42 regulatory contraventions, was reprimanded, and fined €21 million. Other financial institutions were subject to much greater penalties.

Tracker mortgages

48. The issue which first arose in the PTSB investigation concerned the provision of tracker mortgages. The interest on a tracker mortgage – the *tracker interest rate* – is:

> *"the interest applied to a mortgage product which 1) tracks a rate which comes from a publicly available source which can be verified by both the customer and the regulated entity, including, without limitation, a rate that tracks the European Central Bank ('ECB') main refinancing operations rate; and 2) which is calculated in a manner similar to a rate which falls 1) above, and includes interest rates calculated on the basis of a fixed rate margin and/or a pricing promise."*

49. This rather technical definition is drawn from the *Tracker Mortgage Examination, Final Report* published by the Central Bank in July 2019 (at page 4, footnote 1) in respect of its Tracker Mortgage Examination (**TME**), which began in December 2015 in relation to financial institutions.

50. Put more simply, a tracker mortgage is a type of home loan that follows, or "tracks," the movement of a specific interest rate, usually the European Central

Bank (**ECB**) rate, to which is added an agreed margin. This means that when the benchmark rate changes, the interest rate on the mortgage also changes, by the change to the benchmark rate.

PTSB and tracker mortgages

51. PTSB first introduced tracker mortgages in January 2004. Approximately 12,800 tracker mortgage loans which it offered were subject to conditions contained in *"Letters of Approval"*. These were referred to as ***"loan offer letters"***. Each loan offer letter set out information relevant to the individual borrower, including the applicable tracker interest rate as a stated percentage over the ECB rate. An example given at paragraph 6.23 of the Decision was:

> *"Loan Type: Tracker Mortgage (ECB + max 1.10%)."*

52. Certain loan offer letters (279 approximately) included a condition called *"Special Condition 706"* (**"SC706"**). As background to what follows, it is helpful to set out what the Investigation Report described in relation to a number of mortgages where PTSB interpreted SC706 in a particular way:

> *"This practice continued for in excess of one year until PTSB was challenged by the Financial Regulator (as it then was) ("the FR") on a separate but related issue. At that point it is evident that PTSB reconsidered its position, decided that SC706 was clear and that all customers should be given their original lower tracker interest rate on expiry of the fixed rate period. Thereafter PTSB remediated customers impacted by issues in connection with SC706. 279 customers were remediated with a total payment at the time of €1.34m. 234 of those customers were remediated as a result of the issue detailed above. 45 customers were remediated as a result of not being offered any tracker rate as a result of a systems error made."* (para. 1.16)

SC706

53. Under the lending arrangements then current, PTSB tracker mortgage holders enjoyed the right to switch to a fixed interest rate for a period. SC706 provided

that where an applicant had switched to a rate which was *"fixed"* for a certain period,

> *"the applicant must inform permanent tsb on expiry of the fixed rate period, whether the rate on the loan is to switch to a further fixed rate (if available) or whether the loan is to revert to a tracker mortgage loan* ***as described above****."*
> (emphasis added by the Tribunal)

54. The last three words were to hold much significance. In summary therefore, the loan offer letters, in these cases, went on to state that, in the absence of instructions from a loan applicant, the interest rate at the expiry of the fixed rate period would switch to the then current variable interest rate as might thereafter be varied from time to time.

55. The loan offer letters in these cases, therefore, set out that customers might begin repayments on a tracker rate. This was set by reference to the then current *"ECB rate"*, understood to be the main refinancing rate at which banks might borrow from the ECB. Thereafter, customers might, for a period, opt to repay their mortgages at a fixed interest rate. But, at the conclusion of the fixed rate period, customers had an option to revert to *"a"* tracker rate. The question which arose, therefore, was whether the term *"as described above"* referred to the tracker interest rate applicable at the time of the inception of the mortgage (as set out in the loan offer letter), or whether, rather, it applied to the tracker interest rate available at expiry of the fixed rate period.

The *credit crunch*

56. By 2008, PTSB along with other financial institutions, began to feel the effects of the *"credit crunch"*. The then looming financial crisis had consequences for lenders, as well as borrowers. Like other lenders, PTSB found that it was facing an increased cost for funds borrowed on the inter-bank market. But, on tracker mortgages, it was receiving only interest calculated as a percentage over the ECB rate. As a result, margins were affected, with potentially serious implications for profitability.

The effect on lenders

57. One consequence of this mismatch was that tracker rate mortgages became increasingly expensive and unattractive for lenders. Lending institutions, including PTSB, introduced measures in order to *"push up rates"*, that is, to increase the margin of profitability. While lenders could readily increase their standard variable rate, customers with tracker mortgages also paid only the agreed margin above the ECB rate. By late 2008, PTSB was apprehensive that, as a result of both the costs of funds and narrow margins, the profitability of the firm would be potentially compromised. The existing tracker rate mortgages were, therefore, a matter of very serious concern.

Interpretation of SC706

58. In the year 2009, PTSB interpreted the words *"as described above"* in SC706 in a particular manner, as touched on above. The firm interpreted the words as meaning, only, the rate which was available at the time of the customer's reversion to a tracker rate; and not the rate which had been available at the time of the original inception of the mortgage as set out in the loan offer letter. As a result of this approach, later described as a *"strategy"*, a significant number of customers suffered real financial detriment and distress. Rather than reverting to the *"price promise rate"* specified in loan offer letters, they were, instead, placed on to what was termed an *"appropriate tracker rate"* which was the rate current at the time of reversion from a fixed interest rate. This placed substantial financial pressure on many already hard-pressed borrowers.

The broker's query in January 2009

59. In or about January 2009, a mortgage broker queried with PTSB whether their client, who was on a fixed rate until July 2009, would revert to the original tracker rate of ECB+0.9% on expiry of the fixed rate because SC706 was in her original loan offer. This query brought into focus whether, on expiry of a fixed rate period, a mortgage customer should revert to the original ECB *price promise rate* specified in the loan offer letter or to an *"appropriate tracker rate"* at the then current interest rate. As this query came from a broker, it was sent to the Marketing Department.

60. Based on documents in evidence, the Inquiry Member found that, on 12 January 2009, Ms Ailbhe O'Doherty (a Manager in the Marketing Department) emailed Mr Joseph Fleming (Head of Compliance), and described the query which had come in.

61. The *"strategy"* which was the subject of the Inquiry was initiated at a meeting which took place on 12 January 2009. Ms O'Doherty invited six other people by email. These were Joseph Fleming (Compliance); Daragh Larkin (Head of Mortgage, Account Servicing); Ruth Brophy (Compliance Specialist); Anne Furlong (Senior Manager, Mortgage Department); Kevin O'Connor (in-house solicitor); and Ruta Walsh (Marketing Department).

62. Ms O'Doherty suggested in her email that it was necessary to get the view of Legal/Compliance regarding *"some queries"* relating to the interpretation of an *"old mortgage condition"* which appeared on loan offers from approximately 2005. This *"condition"* was SC706.

63. On the same day (12 January 2009), Ms O'Doherty emailed Niall O'Grady (General Manager, Marketing, PTSB). She copied Mr O'Connor (the in-house solicitor) with a brief summary of the mortgage condition query. She expressed the view in the email that condition SC706 was *"ambiguous"*. She wrote in the email that the plan was to allow the specific customer to revert to *"the tracker rate offered on the loan offer in this case"*. She further noted that where this condition was specifically queried in any other cases, these would be dealt with in the same way, that is by giving the tracker rate as per the condition. But the email continued *"However, unless the customer contacts us requesting the old tracker rate they will continue to be offered and default to the current rates available today."*

64. The Inquiry Member referred to interviews during the investigation phase at paragraph 7.42 of his Decision. Mr O'Connor, the in-house solicitor, stated to the investigator in interview that he had been the drafter of SC706, and, said then that, in his view, SC706 was *"not clear"* because *"some customers read this as meaning that on expiry of the fixed rate, that they'd be entitled to go*

back to the original tracker rate on the Letter of Approval which is on the front page, as opposed to obtaining whatever the then rate was on the expiry of the fixed rate period". This extract from Mr O'Connor's interview was taken from paragraph 5.18 of the Investigation Report.

The "ExCo meeting"

65. Mr O'Grady (General Manager, Marketing) raised the query at a weekly meeting of the PTSB Executive Committee (**ExCo**) on 13 January 2009. He did so under *"any other business"*. The matter was not on the agenda. The minutes of ExCo stated that Mr O'Grady was *"reviewing the situation"* regarding SC706. Mr O'Grady's evidence to the Inquiry was that he took the issue to ExCo because he was looking for guidance on an unfamiliar issue and ideally, for someone else to *"take ownership"* of the issue (paragraph 7.13 of the Decision).

66. On the same day, 13 January 2009, Mr O'Grady emailed Ms O'Doherty. He told her that SC706 had been raised at ExCo, and that two points needed to be addressed. These were: how big an exposure this posed for PTSB; and the issue of PTSB's obligation to other tracker customers who had already defaulted from a fixed rate to a standard variable rate.

67. Although none of the attendees had any recollection of the particular events or discussions at the meeting, it was accepted that the questions raised at ExCo regarding SC706 were those of Mr Guinane (paragraphs 7.18 and 7.19 of the Decision).

68. Further legal input came from Mr Kevin O'Connor, the in-house legal adviser, on 15 January 2009. This concerned the effect of SC706. On the same date, Ms O'Doherty emailed Mr O'Connor and Mr O'Grady, attaching a document setting out the background to SC706. In fact, it went rather further, as it set out that customers would be reverted to their original tracker rate *if* they contacted PTSB *and* sought to revert to that rate.

The O'Grady Email

69. An email sent by Mr O'Grady to the appellant, Mr Guinane, on Friday, 16 January 2009 is the kernel of the case. This will be referred to as the **"O'Grady Email"**. It is important to set it out in full.

> *"Dave*
>
> *As mentioned this summarises the issue we discussed re tracker customer.*
>
> *Overall*
> *The issue refers to approx. 10,000 mortgage contracts for customers who started on price promise tracker. These customers have the option to take a fixed rate (to date only about 400 have taken a fixed and this will fall further as all fixed rates are higher than tracker rates).*
>
> *At the end of the fixed rate period, they will default to a variable rate.*
>
> *Once they have defaulted to the variable rate there is no option for them to request to go back to any tracker.*
>
> *Specific issue to decide on*
> *Customers who started on this price promise tracker and go to a fixed rate have the option of reverting, in the words of the loan condition, to a tracker mortgage loan "as described above" if they contact us on expiry of the fixed rate period. The conditions above this condition on the Letter of Approval refer to the price promise.*
>
> *Which tracker they have the option of reverting to appears ambiguous (the original or today's?). So we have the option of making which ever* (sic) *we chose* (sic) *available to them. In the event that a customer case is referred, [LEGAL ADVICE REDACTED]*
>
> *Therefore, in view of […] the very low exposure we have to this, I propose we allow the customers who actually contact (1 so far) to revert to their*

original tracker."

Mr O'Grady's follow-up email and the appellant's response

70. On Monday, 19 January 2009 Mr O'Grady emailed Mr Guinane (copying Ms O'Doherty and Mr O'Connor) requesting a response to the O'Grady Email sent on 16 January 2009, saying, *"Dave, Can I take it that you are OK with this"*.

71. On the same day, 19 January 2009, Mr Guinane responded to Mr O'Grady's email stating *"OK with that"*.

72. Mr O'Grady then forwarded that email from Mr Guinane to Mr O'Connor with Mr O'Grady, adding the words *"for the record"*. This email was recorded in the Investigation Report (at paragraph 5.28) as *"i.e. confirmation to Mr O'Connor that Mr Guinane had signed off on the proposal set out in the email of 16 January 2009 from Mr O'Grady to Mr Guinane.*" Whether or not the appellant had, in fact, "signed off" on "the proposal" said to be set out in the O'Grady Email is at the heart of this appeal.

Role of PTSB's Compliance Department

73. In an email dated 5 February 2009, Ms Ruth Brophy (Compliance) wrote to Ms O'Doherty (Marketing) that she had discussed the condition with Mr Fleming (Head of Compliance), and agreed that customers should default to a variable rate (as opposed to a tracker) as *"this is in line with the terms and conditions"* (where a customer failed to contact PTSB before expiry of their fixed rate period).

74. She went on:

> *"We have all agreed that if a customer misunderstands the condition and entered into their fixed rate on the understanding that they would return to the original tracker margin, that we will honour the original margin. If a customer takes our intended meaning of the condition they will be entered into a "tracker" which will be the tracker rate appropriate to the loan at that time."*

75. This email set out *"the strategy"* with great clarity. It can be compared and contrasted with the wording of the O'Grady Email.

76. While the Decision recorded detailed descriptions of what happened thereafter within PTSB, these did not directly involve the appellant. Until the Financial Regulator (the statutory predecessor to the Bank) intervened in December 2009, no one in PTSB's Compliance Department appeared to have raised any issue about the strategy.

Ambiguity

77. Legal professional privilege protects legal advice furnished by lawyers to their clients. Throughout the process PTSB asserted its right to rely on such legal professional privilege. This was asserted throughout the three phases described. However, as a matter of law, it can be said that it is generally known that, in law, an ambiguous term is to be interpreted subject to what is called the "*contra proferentem*" rule. That means that an ambiguity in a contract will be resolved against the party who proffers the term.

PTSB's engagement with the Financial Regulator

78. Arising from material in the public domain, the then Financial Regulator engaged with PTSB in December 2009 on the removal of the option to return to a tracker rate from options letters issued to customers with SC706 at the end of any fixed interest rate period entered into pursuant to the special condition. It was accepted that this had taken place in the context of a *"systems change"* made on the withdrawal of tracker rates, for both new business and discretionary options, at the maturity of fixed interest rate periods. As the Inquiry Member records (at paragraph 7.111 of his Decision), the issue of the proper implementation of SC706 was a live issue in the central functions of PTSB at that time.

The KPMG Report

79. By the year 2010, the Office of the Financial Regulator had been abolished and its functions subsumed into the Central Bank. The question of remediation for PTSB customers with SC706 was dealt with by the Central Bank on the basis

of a report which had been prepared by KPMG for PTSB on 18 January 2011. In total, PTSB paid out the sum of €1,198,577 to 234 affected customers.

80. However, as recorded in the Investigation Report, this engagement between PTSB and the Central Bank by reference to the KPMG report had been *"entirely silent"* concerning matters which only became apparent through a review of the documents received from PTSB during the course of the Central Bank's Tracker Mortgage Examination (**TME**). It will be recollected that the TME commenced in 2015. This included the critical email correspondence. It is very clear from their Report that the Enforcement investigators considered this email correspondence to be of great significance and it apparently formed much of the basis of what followed, which was the Guinane investigation.

The Investigation Report

81. The Investigation Report, therefore, formed the basis for the Bank's *"suspicion"* on *"reasonable grounds"* that the appellant had *"participated"* in a prescribed contravention by PTSB. It is considered further below.

PTSB's response to the PTSB investigation concerning SC706

82. Because of events which occurred later, a description of context also requires a brief description of the involvement of PTSB's solicitors in the PTSB investigation. The relevant details are summarised in the Investigation Report (in the Guinane investigation). In correspondence, PTSB's lawyers submitted that PTSB had acted entirely in good faith.

83. Enforcement rejected this contention. It did not accept PTSB had appropriately approached the matter in good faith. It did not accept that SC706 had been operated appropriately. The Investigation Report in the Guinane investigation observed (paragraph 6.12) that,

> *"In any event, the question of "good faith", or any rejection of a suggestion by PTSB that "it deliberately decided to act inappropriately against the interests of all customers whose loans contained SC706 more*

generally" is "not relevant" in analysing whether a breach of General Principle 1 of [the Code] occurred."

84. This was because in Enforcement's view the test applicable in assessing whether there had been a contravention was one of strict liability, and therefore, in determining whether a breach occurred, intent did not arise.

MR GUINANE'S ALLEGED PARTICIPATION (AS DESCRIBED IN THE INVESTIGATION REPORT)

85. The question of the appellant's alleged participation was dealt with in Chapter 6 of the Investigation Report, at paragraph 6.32 onwards.

Mr Guinane as a *"person concerned"*

86. Neither in the Inquiry nor before this Tribunal was there any dispute that the appellant was a person concerned in the management of PTSB.

Mr Guinane's alleged *"participation"*

87. The Investigation Report identified *"key events"* as evidence of Mr Guinane's participation in the alleged contravention by PTSB.

> *"6.37 Regarding Mr Guinane's "participation" the evidence is clear that he played a key and decisive role in the commission of the suspected contravention by the firm. In this regard the key events are as follows:*
>
> - *PTSB received a consumer query regarding the interpretation and application of SC706 in or around 8 January 2009*
> - *On 12 January 2009 Ms O'Doherty (a Manager in the Marketing Department of PTSB) emailed Mr O'Grady (General Manager Marketing in PTSB) regarding a "Mortgage Loan Condition Query"*
> - *On 12 January 2009 Ms O'Doherty emailed certain individuals requesting a meeting in order to get*

"legal/compliance" views on queries received regarding a mortgage condition

- *On 13 January 2009 Mr O'Grady raised the issue at the weekly PTSB executive committee ("ExCo") meeting*
- *On 15 January 2009 Mr O'Connor (the in-house PTSB lawyer) advised Ms O'Doherty [PART PRIVILEGED DOCUMENT]*
- *On 15 January 2009 Ms O'Doherty emailed Mr O'Connor and Mr O'Grady attaching a document advising that "unless the customers contact [sic] prior to the expiry of their fixed rate and requests the original tracker as per the loan offer we will continue to default them to current rate (tracker or LTV variable)*
- *On 16 January 2009 Mr O'Grady emailed David Guinane (copying Ms O'Doherty and Mr O'Connor) and advised him that PTSB had received queries regarding a mortgage condition (SC706), and that the condition was ambiguous regarding whether customers were supposed to revert to the original tracker rate or the tracker rate in being following a fixed rate period. He also proposed "we allow the customers who actually contact (one so far) to revert to their original tracker"*
- *On 19 January 2009 Mr O'Grady emailed David Guinane (copying Ms O'Doherty and Mr O'Connor) requesting a response to his previous email from 16 January 2009 saying "Dave, Can I take it that you are ok with this"*
- *On 19 January 2009 David Guinane responded to Mr O'Grady's email of 19 January stating that he was "OK with that""*

88. The matters set out above (including the emails) were in evidence in the Inquiry. It might be observed that the only matters that directly involved the appellant were his receipt of the O'Grady Email (of 16 January 2009) and Mr

O'Grady's follow-up email of 19 January 2009, and the appellant's own response *"OK with that"*. This response begged the question with what precisely was the appellant *"okay with"*? That question was, or ought to have been, at the heart of the Inquiry.

89. The Investigation Report continued:

> *"6.38 Regarding Mr Guinane's "participation" and having regard to the evidence set out above, ENF suspects on reasonable grounds that Mr Guinane played a key and decisive role in the commission of the suspected contravention by the Firm.* ***In this regard it is evident that Mr Guinane signed off on the proposal made to him on 16 January 2009 to only give what was at that time the more favourable tracker rate back to those customers who specifically requested the lower interest rate, or queried or complained****, leaving all remaining customers with SC706 who rolled off a fixed rate on a higher, and less favourable tracker rate. It is further evident he did so in full knowledge of the [LEGAL ADVICE REDACTED]*
>
> (emphasis added by the Tribunal)
>
> *6.39 In the circumstances, ENF suspects on reasonable grounds that Mr Guinane "participated" in the Firm's alleged breach of Chapter 1, General Principle 1 of the 2006 Code as set out above. ENF's believes* (sic) *that that satisfies the second part of the second limb of the two stage test set out at Section 33AO of the 1942 Act set out at paragraph 6.3 above."*
>
> (emphasis added by the Tribunal)

Investigation Report, Chapter 7 – Concluding Analysis

90. Having concluded that PTSB had contravened General Principle 1, the Report went on to state:

> *"7.5 Thereafter PTSB remediated customers impacted by issues in connection with SC706. 279 customers were remediated, with a total payout at the time of €1.3 million. 234 of those customers*

were remediated as a result of the issue detailed above. 45 customers were remediated as a result of not being offered any tracker rate as a result of a systems error."

91. As against the appellant, the Report then concluded (emphasis again added by the Tribunal):

> *"7.6 ENF also suspects on reasonable grounds that Mr Guinane participated in the Firm's contravention of Chapter 1, General Principle 1 of the 2006 Code (and prescribed contravention* (sic)*)* ***by signing off on the proposal made to him by Mr O'Grady on 19 January 2009 i.e. the strategy to only give the better rate back to those customers who specifically requested the lower interest rate or queried or complained.*** *At that time Mr Guinane was CEO of PTSB and a member of the Firm's Group Senior Management Team reporting directly to the Firm's CEO. ENF thus suspects on reasonable grounds that David Guinane was, during the Relevant Period a "person concerned" in the management of the Firm."*

92. How the Inquiry Member decided to interpret these very clear words is described later.

93. The Report went on (emphasis added):

> *"7.7 ENF suspects on reasonable grounds* ***that Mr Guinane made the Decision on 19 January 2009*** *at a time when he was fully aware of the factual position i.e. that 400 customers would be immediately impacted, that the condition was, in the opinion of PTSB, ambiguous and that [PRIVILEGED LEGAL ADVICE REDACTED]. Furthermore, at interview on 22 May 2019 Mr Guinane admitted that the Decision was not fair."*

94. The word "Decision" was capitalised in the Investigation Report.

95. As a consequence, Enforcement was satisfied that all the requirements

necessary to initiate an inquiry were present.

96. As will be seen, in more detail later, before an inquiry could be initiated against an individual, it was first necessary for the Bank to suspect on reasonable grounds that an RFSP had committed a prescribed contravention (section 33AO(1)). There followed a two-limb test, as set out at paragraph 33AO(2), to establish that the individual was concerned in the management of the RFSP, and that the individual had "participated" in the commission of the prescribed contravention. Once satisfied of these two "*limbs*" the Bank might hold an inquiry to determine whether the person had participated in the contravention.

97. On this basis, Enforcement believed that the first and second parts of the second limb of the two-stage test set out at section 33AO(2) had been satisfied and that there was an appropriate legal and evidential basis for referring the matter concerning Mr Guinane to inquiry.

98. The text, highlighted above, makes clear that the case made by Enforcement – the *"reasonable grounds"* on which its *"suspicions"* were based – was that the appellant had *"signed off on"* a *"proposal"*. All these matters as background, this Tribunal decision now turns to the statutory jurisdiction for the Inquiry.

THE STATUTORY JURISDICTION FOR THE INQUIRY

The legislation

99. For the full meaning and effect of the provisions to be understood, they must be set out in detail.

Section 33AO: inquiry

100. Consideration of the legislation governing an inquiry (including this one) must begin with section 33AO of the 1942 Act. The meaning words of each of the statutory provisions, and their effect, are the first *"port of call"*. Therefore, any approach which sought to *"deconstruct"* the meaning, or ignore words of the legislation, cannot be tenable.

101. Section 33AO therefore provides (emphasis, bold and underlining, added by Tribunal):

> *"(1) Whenever the Bank 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 Bank 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****.*
>
> *(3) Without prejudice to the exercise of the Bank's powers under sub-section (2), an inquiry referred to in that sub-section may form part of an inquiry held under this section in relation to the suspected commission of a prescribed contravention by the financial services provider".*

102. As will be seen, the Tribunal has underlined certain key words which are further analysed in the context of the Decision under appeal.

103. First, it can be seen that the first step is as to whether the Bank holds a "*reasonable suspicion*". In the appellant's case, the "*reasonable suspicion*" was based on the Investigation Report furnished to the Bank

104. Second, insofar as an inquiry into an individual "*person concerned*" arises, the "*suspicion*" must be that the "*person concerned*" "*participated*" in the commission of "*a prescribed contravention*".

105. Third, as the legislation then stood, it was necessary (a), to prove that the regulated financial service provider had *itself* committed a prescribed

contravention; and thereafter, (b), under section 33AO(2) to determine whether or not the *"person concerned"* had actually *"participated in the contravention"*.

106. It follows that the contravention in which the person concerned must have participated is the same contravention as that committed by the regulated financial service provider.

Section 33AP: notice of inquiry

107. Section 33AP deals with the mandatory conditions precedent for an Inquiry. Here again, the wording of the text is vital. Section 33AP(1) provides:

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

108. In turn, section 33AP(2) then provides that the Notice *must*:

> *"(a)* ***specify the grounds on which the Bank's suspicions are based****, and*
>
> …..
>
> *(c) invite the financial service provider or person concerned either to attend the inquiry or make written submissions about* ***the matter to which the inquiry relates…****"*
>
> (emphasis added by the Tribunal)

109. The words of the section, and particularly, the term *"specify the grounds"*, are of critical importance. They have a plain meaning. Likewise, the reference to *"the matter to which the Inquiry relates"*, and other later words in the legislative scheme, confirm that an inquiry member is not at large in relation to the findings he might make. Nor would they be entitled to redefine the allegation already made on the basis of the Bank's *"reasonable suspicion"* based on identified *"grounds"*.

110. The effect, therefore, was that the Inquiry was confined to that matter which

was identified in the Notice of Inquiry (considered below). The statutory chain-link between the Bank's *"reasonable suspicion"* that a specified *"prescribed contravention"* had been committed, and any consequent inquiry is of particular relevance in this case.

Section 33AQ: decisions of the Bank on conclusion of inquiry

111. Section 33AQ then deals with the decisions which the Bank may make at the conclusion of an inquiry. It provides:

> *"(1) At the **conclusion** of an inquiry held under section 33AO the Bank shall make a finding as to whether the financial service provider 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 Bank shall make **a finding** as to whether the person is participating or has participated **in the prescribed contravention to which the inquiry relates.**"*
>
> (emphasis in both added by the Tribunal).

112. The task of an inquiry member is, therefore, to determine only whether the person concerned, had actually participated in the contravention to which the Inquiry *relates*.

Section 33AQ(5): sanctions and costs

113. Section 33AQ(5) deals with provisions for sanctions (including costs orders) in the event that the Bank makes a finding that a person concerned in the management of a regulated financial service provider is participating, or has participated, in the commission by that financial service provider of *"a prescribed contravention"*. The use of the indefinite article – *"a"* in the context of a *"prescribed contravention"* – simply confirms that section 33AQ(5) is of general application to all inquiries. Section 33AQ(5)(e) confirms, in its express terms, the link between *"investigating"* and the matter

"to which the Inquiry relates". It confers on an inquiry member power to impose a costs sanction on a person the subject of the inquiry by making:

> *"(e) a direction to pay the Bank all or a specified part of the costs incurred by the Bank* ***in holding the inquiry*** *and* ***in investigating the matter to which the inquiry relates****"*.

(emphasis added by the Tribunal)

Section 33AQ(8): notification of inquiry findings

114. Section 33AQ(8) provides that, at the conclusion of an inquiry relating to the conduct of a person concerned in the management of a regulated financial service provider, the Bank shall notify such person of its decision. The Bank's decision must set out:

> *"(a) its finding as to whether or not the person is participating or* ***has participated in the commission of the prescribed contravention to which the inquiry relates****, and*
>
> *(b)* ***the grounds upon which the finding is based****, and*
>
> *(c) if the Bank finds that the person participating or* ***has participated in the contravention****, the sanctions (if any) imposed under this section in respect of the participation."*

(emphasis added by the Tribunal)

115. Again, in section 33AQ(8)(a),(b) and (c), (above), there is a clear textual thematic link derived from the words *"prescribed contravention to which the Inquiry relates"*. These words refer back to those *"grounds"* referred to in section 33AO. The link is also clearly established by section 33AP(2)(a), which refers to *"the matter"* to which the inquiry relates; throughout the provisions of section 33AP(2)(c), and section 33AQ(2); and the words *"holding the inquiry and in investigating the matter to which the inquiry relates"* as found in the section 33AQ(5)(e) dealing with the costs of an inquiry. (Emphasis, by underlining, added by Tribunal).

116. It can be concluded, therefore, that taken together, the statutory words move in lockstep between the sections and sub-sections in which they are found. They set out a scheme as to how the process is to operate. The link, in section

33AQ(5)(e), between the words *"holding the inquiry"* and the words *"in investigating the matter to which the Inquiry relates"* could not be clearer. This link must be looked at in the context of the Bank's submissions later. It is important, as, at a time when the "investigation phase" was not on a statutory basis, the legislation, nonetheless, expressly contemplated that a decision to hold an inquiry would be preceded by some process - an "investigation" - that identified the *"reasonable grounds"* on which the Bank might form a *"suspicion"* that a suspected prescribed contravention had occurred.

117. In short, the ground for the Inquiry was laid in the Investigation Report. That Report provided the jurisdiction and outlined the framework of reference for such Inquiry.

Sections 33AR and 33AV: alternative resolution procedures

118. It is also necessary to mention, albeit more briefly, sections 33AR and 33AV which provide for alternative resolution procedures. Under the first, section 33AR, where commission, or participation in the commission, of a specified prescribed contravention, is acknowledged by a firm and/or an individual, the Bank may dispense with an inquiry. In any such case, the Bank can, with consent, proceed to impose a sanction, or absent consent from such firm or individual, may proceed to an inquiry to determine what sanctions, if any, should be imposed.

119. Section 33AV applies where an RFSP or individual (as the case may be) is willing to enter an agreement in writing with the Bank to resolve an SPC. Any such agreement may be made before an inquiry commences or where an inquiry has begun, prior to its completion. Any such agreement may include provision for the imposition of (agreed) sanctions

120. Needless to say, the nature and gravity of an allegation in such a situation will be of prime importance to a firm or individual considering whether to acknowledge, or agree to resolve, an alleged contravention, an issue returned to later. Equally, what is contained in an allegation may have a profound bearing on the Bank's willingness to resolve the matter; and on what basis.

The Inquiry Member

Appointment of the Inquiry Member

121. Sections 33BE(1) and (2) of the 1942 Act vest the Deputy Governor of the Bank with the power to appoint either internal officers or employees of the Bank as inquiry members, or alternatively, to designate a person who is not an officer or employee of the Bank but would be *"designated as an agent of the Bank for performing and exercising the functions and powers of the Bank…"*.

122. On 30 July 2021, the Deputy Governor of the Central Bank appointed Mr Peter Hinchliffe as Sole Inquiry Member. Mr Hinchliffe's background is described in pleadings furnished by the Central Bank. He sits as a decision maker in a range of regulatory bodies in the United Kingdom. He was appointed to a panel of potential inquiry members, which was operated by the Bank following an open competition in the year 2021. He was subject to a rigorous selection and vetting process. While qualified as a barrister only in the United Kingdom, and not in Ireland, he was to be assisted at the Inquiry which was to take place by an LPT who would be expert in Irish law.

The Inquiry Member's experience

123. The Inquiry Member must therefore, be taken as being experienced in this field of activity in the United Kingdom. Indeed, his Decision gave every evidence of considerable and detailed thought and consideration from the time the Inquiry hearing closed on 15 March 2024, the written findings, delivered on 8 November 2024, the sanctions hearing on 19 January 2025, the final written Decision issued on 23 April 2025, and the Decision on Publication on 15 October 2025 (considered later in this decision).

THE OPINION OF THE FIRST LPT OF 15 OCTOBER 2021

124. Prior to initiating the process, the Inquiry Member obtained and received advice from a very experienced senior counsel. Even if ungrammatically, this senior counsel will be referred to, as the **"first LPT"**. He furnished advices

which, at minimum, were highly significant on 15 October 2021. There he advised, in specific terms, on the scope of the Inquiry, as provided for in the legislation.

125. He wrote (emphasis added by Tribunal):

> *"6. The Act is not therefore prescriptive in terms of how the alleged contravention is described in the Notice.*
>
> *7. It is clear from the structure of the Act that the jurisdiction to hold an inquiry, and therefore the jurisdiction of the person appointed to conduct an inquiry requires the Bank to suspect on reasonable grounds that a prescribed contravention has been committed. The inquiry which is provided for under the Act is then an inquiry into whether* ***that particular prescribed contravention has been committed****.*
>
> *8. In the circumstances in my view the* ***Notice of Inquiry and the description of the allegation therein are constrained by the Act. The contravention, the subject of the Inquiry, can only be the contravention which the Bank suspects has been committed. The allegation cannot therefore be amended in any way which alters the substance of that allegation e.g. by changing the particulars of the act amounting to the alleged contravention, or the provisions of law of which the contravention is alleged to be in breach****.*
>
> *9. That is not to say that the Notice must follow any particular form of words previously used to describe the suspected contravention. If the Inquiry Member is of the view that the manner in which the contravention has previously been described (e.g. in the investigation report at Section 4.3 of the letter of 15 May 2019 referred to therein) merits further clarification. There is no barrier to that clarification being provided in the Notice of Inquiry. Some care should be taken in*

> *so doing, however, lest any issue is raised about the precise scope of the Inquiry. In this regard, in my view the prescribed contravention is adequately described in the Investigation Report.*"

The Investigation Report to which the LPT referred was of course that outlined earlier.

126. These advices were furnished to the parties. This was to be the framework. Nothing could have been clearer. If, for some reason, the Inquiry Member thought otherwise, it was incumbent upon him so to advise the parties and give timely notice to them of any alternative view and his reasons therefor. He did not do so.

THE NOTICE OF INQUIRY

Introductory observation

127. The Notice of Inquiry was issued by the Central Bank on 9 November 2021, pursuant to section 33AP(1) of the Act.

128. The words of section 33AP cited earlier are reflected in the Notice of Inquiry and the Allegation. Together, these could be referred to as the statutory "*moorings of the Inquiry*".

129. It must follow that if the Inquiry became unhitched from those moorings, then to paraphrase the words of Henchy J. in *The State (Holland) v Kennedy* [1977] I.R. 193, it might fall into an unconstitutionality, breach the requirements of natural justice, or fail to stay within the bounds of the jurisdiction conferred on it by statute.

The structure of the Notice of Inquiry

Statutory basis

130. The Notice of Inquiry was stated to be a *"Notice of an Inquiry pursuant to Part IIIC of the Central Bank Act, 1942 (as amended) concerning Mr David Guinane"*. The Notice of Inquiry stated, at the first paragraph (bold text in the original):

> *"The Central Bank of Ireland (the **Central Bank**) has determined that it has reasonable grounds to suspect that Mr David Guinane (the **Person Concerned**), being a person concerned in the management of permanent tsb plc (**PTSB**) during the period of 19 January 2009 to April 2010 (the **Relevant Period**), participated in the commission of a prescribed contravention by PTSB."*

131. The reference to the *"Relevant Period"* is to the period within which the appellant was stated to have been concerned in the management of PTSB. As will be seen, the prescribed contravention of which PTSB was suspected was alleged to have occurred during that Relevant Period.

132. In relation to PTSB, the Notice of Inquiry referred to *"Annex A":*

> *"The prescribed contravention which PTSB is suspected of having committed and the prescribed contravention by PTSB in which the Person Concerned is suspected of having participated is set out in **Annex A** to this Notice of Inquiry*."

133. Then the Notice went on:

> *"Pursuant to section 33AO of the Central Bank Act, 1942 (as amended) (the **Act**) the Central Bank will now hold an inquiry to determine whether or not the Person Concerned participated in the commission by PTSB of the suspected prescribed contravention. In the event that an oral hearing is convened the Person Concerned will be provided with advance notice of same and will be invited to attend the Inquiry hearing at Central Bank of Ireland, New Wapping Street, North Wall Quay, Dublin 1 or such other location as may be advised. Pursuant to Section 31(1)(a) of the Civil*

Law and Criminal Law (Miscellaneous Provisions) Act, 2020 the Central Bank may choose to hold part of or all of any Inquiry hearing(s) remotely. In the event that an oral hearing is not convened the Person Concerned will be provided with the opportunity to provide submissions and evidence to the Inquiry."
(emphasis added by the Tribunal)

134. The Notice continued:

"The Inquiry Guidelines are published in the Central Bank's website and set out the procedures which the Central Bank ordinarily proposes to follow when holding an Inquiry under Part III C of the Act (the ***Inquiry Guidelines****).*

An Inquiry is comprised of one or more impartial decision maker(s) appointed by the Central Bank with no prior involvement in the subject matter of the Inquiry or supervision or authorisation of the regulated entity, known as Inquiry Member(s). The Central Bank has, pursuant to section 33BE of the Act, appointed ***Mr Peter Hinchliffe*** *to act as the Sole Member of the Inquiry (the* ***Inquiry Member****)."*

The "grounds" for the Bank's "suspicions"

135. The Notice specified "*the grounds*" as follows:

"The grounds on which the Central Bank's suspicions are based are set out in the Investigation concerning David Guinane pursuant to the Administrative Sanctions Procedure (the ***Investigation Report****) which is contained in* ***Annex B*** *to this Notice of Inquiry. Please note that PTSB has asserted legal professional privilege over certain material contained in the Investigation Report."*

136. The Notice of Inquiry, thereby, by its terms confirmed the link between the Inquiry and the "*investigation to which it related*", to use the terminology of, for example, section 33AP(2)(b) (above).

Legal professional privilege and other procedural matters

137. The Notice continued:

> *"The material over which legal professional privilege is asserted by PTSB is detailed in the Investigation Report and is provided to you on a confidential basis and subject to the provisions of section 33AK(6) of the Act and to legal professional privilege asserted by PTSB. Any onward disclosure of such information may constitute a breach of confidence as against PTSB, in relation to PTSB which has reserved all its rights.*
>
> *All information contained in the Investigation Report should be treated as confidential and must not be used for any purpose other than your participation in the Inquiry."*
>
> *In order to facilitate the efficient running of the Inquiry the Person Concerned is asked to complete an Inquiry Management Questionnaire (**IMQ**) (which is set out at **Annex C** to this Notice of Inquiry) and to return it no later than close of business, Wednesday 8th December 2021 to the Regulatory Decisions Unit (**RDU**)* at [address].
>
> *Upon receipt and review of the response to the IMQ, the Inquiry Member will determine whether to convene an Inquiry Management Meeting (**IMM**). If the Inquiry Member decides to hold an IMM, RDU will inform the Person Concerned of the location, date and time of the IMM and the matters which the Inquiry Member wishes to address at the IMM. It should be noted that, pursuant to section 33AP(5) of the Act, in the event that the Person Concerned fails to attend any part of the Inquiry (including any IMM) the Inquiry may proceed in his absence. Further, pursuant to section 33BA(1) of the Act, the Inquiry Member may summons a person to appear before the Inquiry to give evidence, to produce specified documents or to do both and to require the person to attend the Inquiry from day to day unless excused or released from further attendance.*

Invitation to the appellant to make written submissions / adduce evidence

138. The Notice contained reference to section 33AP and the matters to which the Inquiry related as follows:

> *"Pursuant to section 33AP(3) of the Act, the Person Concerned may before the date of the Inquiry lodge with the Inquiry any written submissions and/or evidence that the Person Concerned wishes the Inquiry to take into account when considering the matters to which the Inquiry relates. It should however be noted that the IMQ identifies certain issues in respect of which written submissions must be provided together with the completed IMQ. Following receipt of responses to the IMQ and/or any IMM the Inquiry Member will issue directions in respect of the timeline for the lodging of any submissions, evidence or any other related material."*
>
> (emphasis added by the Tribunal)

Investigation Report / Scope and subject matter of the Inquiry

139. There was then, a specific reference to what was contained in the Investigation Report in that invitation section of the Notice of Inquiry, which began:

> *"In addition to responding to the IMQ and/or any IMM the Inquiry Member invites the Person Concerned to submit a response to any factual or legal conclusions in the Investigation Report with which they disagree on or before close of business on Friday 7 January 2022."*
>
> (emphasis added by the Tribunal)

140. This was express confirmation that the grounds on which the Bank's suspicions were based, were to be as set out in the Investigation Report. The provision confirmed that the Inquiry was to be concerned with, and only with, those grounds.

141. There was a further reference to the scope and subject matter as follows:

> *"In the event that the Inquiry makes a finding that the Person Concerned participated in the prescribed contravention suspected to have been committed by PTSB in the Relevant Period, it may impose certain sanctions. A full list of the sanctions that are available to the Inquiry in*

respect of any contraventions found to have been committed during the Relevant Period are set out in section 33AQ of the Act. Further details of the Central Bank's approach to sanctions can be found in the Central Bank's Administrative Sanctions Procedure Sanctions Guidance and in the Inquiry Guidelines as referred to above."
(emphasis added by the Tribunal)

142. In summary, the Notice of Inquiry complied in detail with all the provisions of section 33AP.

THE ALLEGATION AGAINST PTSB

143. The first annex to the Notice of Inquiry was Annex A. This was headed *"Outline of the Suspected Prescribed Contravention"* and will now be referred to the **"allegation against PTSB"**. Following the sequence of required issues in section 33AO(1) and (2), the allegation against PTSB referred first to the O'Grady Email; the email from Niall O'Grady to the appellant of 16 January 2009. Then, Annex A stated that:

*"Following an investigation the Central Bank suspects on reasonable grounds that from January 2009, PTSB understood that Special Condition 706 (a special condition in PTSB's tracker mortgage contracts relating to certain customers' enduring right to a tracker rate, (**SC706**)) was ambiguous. It was also suspected that PTSB was advised that this issue could affect up to 10,000 customers, but was immediately applicable to 400 such customers who were at that time on a fixed rate and had SC706 in their mortgage contracts."*

144. Annex A then set out how the strategy was put into effect:

*"From 19 January 2009 to April 2010 (the **Relevant Period**), it is suspected that PTSB decided to apply and/or decided to continue to apply a rate that was less favourable to customers, save in circumstances where individual customers raised specific queries in relation to that rate."*

145. Annex A then set out the PTSB contravention based on the grounds set out in the Investigation Report:

> *"The Central Bank suspects on reasonable grounds that PTSB treated those customers who did not complain about the tracker rate that was applied after a fixed rate period, unfairly and contrary to their best interests compared to those that did i.e. by only giving those who complained or queried a more favourable tracker rate. It is suspected that this approach was in breach of the principle contained in Chapter 1, General Principle 1 of the Consumer Protection Code, 2006 (the* ***2006 Code****) which required PTSB to* "ensure that in all its dealings with customers and within the context of its authorisation it acts honestly, fairly and professionally in the best interests of its customers and the integrity of the market.*"*

THE ALLEGATION AGAINST MR GUINANE

The terms of the Allegation

146. Within this framework of the allegation against PTSB, Annex A of the Notice of Inquiry then addressed the appellant's alleged participation in the contravention in question:

> *"The Central Bank also suspects on reasonable grounds that Mr Guinane participated in PTSB's contravention of Chapter 1, General Principle 1 of the 2006 Code (a prescribed contravention) by signing off on the proposal made to him on 19 January 2009 i.e. the strategy to only give the more favourable rate back to those customers who specifically requested their original and lower interest rate or queried or complained. At that time Mr Guinane was CEO at PTSB and a member of PTSB's Group Senior Management Team which reported directly to Irish Life and Permanent Plc's CEO. The Central Bank thus suspects on reasonable grounds that David Guinane was, during the Relevant Period, a person concerned in the management of PTSB."*
>
> (emphasis added by the Tribunal)

147. In contrast to the contravention alleged against PTSB, which was alleged to

have been committed during the Relevant Period, the Allegation against the appellant was confined to a specified act – *"signing off on"* a *"strategy"* – alleged to have occurred on a single date: 19 January 2009. As indicated earlier, the Allegation stated, in terms, that the "proposal" "made to" the appellant was *"i.e."* (that is) the "strategy". Put simply, the "proposal" *was* "the strategy". No other case was made.

148. Importantly, the Allegation then set out the extent of the appellant's awareness or knowledge in the context of what had been described earlier:

> *"The Central Bank suspects on reasonable grounds that Mr Guinane made the decision on 19 January 2009 at a time when he was fully aware of the factual position i.e. that 400 customers would be immediately impacted, and [LEGAL ADVICE REDACTED]."*

149. Again, the case was made, that the suspicion was that the appellant *"made the decision"* and did so on one date (19 January 2009).

150. It will be noted, first, both the allegation against PTSB and the Allegation were contained in one annex - Annex A - to the Notice of Inquiry. The second Annex, "B", contained the Investigation Report. This was referred to in the Notice as *"specifying the grounds on which the Bank's suspicions"* were based. At risk of repetition the Investigation Report, therefore, identified *"the grounds"*.

Drafting the Allegation

151. One of the noteworthy features of this case is that the Inquiry Member took it upon himself to draft the Allegation. In doing so, he, almost entirely adopted the phraseologies to be found in the Investigation Report. As drafted, therefore, the Allegation set out the framework within which the Inquiry was to proceed and to make a determination in relation to what was contained in that Allegation, as reflected in the Investigation Report.

THE INQUIRY

The relationship between the Inquiry and the Investigation Report

152. The Inquiry procedure proper commenced on 9 February 2022. There were a number of preliminary hearings.

153. The Investigation Report was relevant as the source of the *"reasonable grounds"* of the Bank's *"suspicions"* of the matters set out in Annex A to the Notice of Inquiry (including the Allegation against the appellant).

Certain matters arising from the Investigation Report

154. It is fair to conclude that, in his decision, the Inquiry Member sought to identify how the *strategy* came about, more fully than in the Investigation Report.

155. He described the extent to which PTSB personnel other than the appellant – including Mr O'Grady, Mr O'Connor and Ms O'Doherty – played a role in the formulation of the strategy. There was an important email from Mr O'Grady at 08:52 on 15 January 2009 to Mr O'Connor and Ms O'Doherty. This contained a draft of an email intended to be sent to the appellant. Mr O'Connor's return email, on the same day, contained a quite lengthy document to be *"kept on file"*, and which set out the proposed approach (or *strategy*). The involvement of the appellant was significantly more peripheral than set out in the Investigation Report.

156. The Enforcement investigators had accepted evidence from persons who had been significantly involved in devising, evolving and executing the strategy throughout the relevant period. The transcripts of the appellant's interviews on 15 November 2017 (part of the PTSB investigation), and 22 May 2019, appeared to be focused less upon his role, but rather his acknowledgements that the strategy, as executed by PTSB, had been wrongful.

157. The Inquiry Member concluded that the O'Grady Email of 16 January 2009 was *"ambiguous and unclear"* (see the section of this Tribunal decision headed *The Inquiry Member's Findings and the Allegation*, sub-heading, *The O'Grady*

Email was "unclear"). The Inquiry Member does not appear to have ever asked himself whether that email was ambiguous and unclear by design. The Inquiry Member did not address the fact that, when the appellant assented to the email, he did not have available to him, or seek, anything other than the email itself from Mr O'Grady, defined earlier as the O'Grady Email.

158. An issue not considered by the Enforcement investigators was the timeline records of the emails between Mr O'Grady and the appellant between 16 January 2009 to 19 January 2009. These showed that Mr O'Grady's "chaser", or reminder email, was timed at 14:16 on 19 January 2009. The appellant's response was timed at 14:19, just three minutes later. This was first identified in the initial statement of the appellant on 28 June 2022. This would appear to be the first intimation of what, for brevity, will be called the **"negligence question"**. This definition will comprise the issues of negligence, carelessness and recklessness as the Inquiry Member subsequently concluded. The Inquiry Member found, as a matter of probability, that there had been a three-minute time elapse between Mr O'Grady's reminder, and the appellant's response.

159. The words *"carelessness"*, *"negligence"* and *"recklessness"* did not appear anywhere in the Investigation Report, an omission that is considered later in this decision. Rather, the Investigation Report stated that the appellant, as Chief Executive, had played a *"key and decisive role"*. He had approved, *"made the decision"* or *"signed off on"* the strategy, which the Report found to be contained in the O'Grady Email. This had been done by the words *"OK with that"*.

160. In his Decision on Sanction (at page 19), the Inquiry Member observed that the investigation which led to the Inquiry being instituted referred to *"a large number of issues the appellant had a legitimate right to challenge and/or explain."* He added *"my written findings expand on the position set out in the Investigation Report on a number of these issues and reach conclusions on Mr Guinane and his conduct that are more favourable to Mr Guinane than might otherwise have been inferred from the Investigation Report."* This was a considerable understatement. But the passage begged the question: how far

had the Inquiry Member "expanded" the Allegation, whether or not such expansions might be said to have favoured the appellant at the conclusion of the 13-day hearing? It begged the further question of whether the substance of the Allegation had been changed?

The interpolation of negligence, carelessness or recklessness

The first public hearing

161. By the time of the first substantive public hearing on 21 February 2024, the Inquiry Member had taken a substantial number of procedural steps. He had promulgated four protocols dealing with matters such as procedure, the role of participants (which he identified as parties and persons who were involved throughout the Inquiry), and legal professional privilege.

162. Also, by the time of the first public hearing on 21 February 2024, a new Senior Counsel had been appointed as a member of the legal practitioner team. This team will be referred to as the **"second LPT"**.

Early indications of possible reframing of the Allegation

163. This decision now describes some early indications which, in hindsight, suggested an alteration in the Inquiry's approach. First, on that first hearing day, the second LPT's senior counsel sought to identify issues which would fall to be determined thereafter by the Inquiry. In the course of his opening, he posed a rhetorical question. This was to the effect that, when the Inquiry was considering whether PTSB had committed the prescribed contravention, whether the Inquiry then needed to ask itself "*whether PTSB and/or Mr Guinane had any particular intent or mental state for example negligence or recklessness?"* (emphasis added). On one reading, the focus of that fleeting observation, might be seen as a reference to the appellant. These questions of negligence and recklessness did not arise in the Investigation Report. The case made there was unequivocal. The content made the case for a very grave conclusion of conduct that involved a strategy of *knowingly* overcharging customers.

164. Second, at paragraph 3.12 of his Decision, the Inquiry Member quoted a passage from his own opening remarks, where he had stated:

> *"This Inquiry is required to consider all matters within its scope afresh and will reach its own conclusions based on the evidence and submissions put before the Inquiry."*
>
> (Opening Statement of Mr Peter Hinchliffe dated 21 February 2024).

165. While that observation on the scope of the Inquiry could be interpreted in a number of ways, it might be seen in light of the second LPT's observations in relation to negligence. If so, it too might have been another early intimation of the Inquiry actually becoming unhitched from its statutory moorings.

166. Third, possibly a sign of the same *"unhitching process"* may be discernible in the context of what the Inquiry Member later wrote, when he did touch on the important legal advice which he received from the first LPT on 15 October 2021. He wrote at paragraph 3.9 of his Decision:

> *"This is an inquiry into whether a person concerned in the manage of an RFSP "is participating or has participated in the commission of a prescribed contravention by the financial service provider.""*

167. But this quotation was not complete. In full, section 33AO(2) provides (emphasis added):

> *"whenever the Bank 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."*

168. As will later be seen in the *Inquiry Member's Reasoning Process* section of this decision, there were frequent occasions when the Inquiry Member carried out his analysis on the basis of what might be necessary constituent elements of *a contravention* as defined in the statute, as opposed to what was necessary to prove *the contravention* contained in the Allegation.

Arriving at the finding of negligence

Mr O'Grady's evidence

169. It is now necessary to consider parts of the evidence which gave rise to the Inquiry Member's findings of negligence against the background described earlier. This material is to be seen in addition to the "*three minute time interval*" referred to earlier. The material includes Mr O'Grady's concession in evidence that the actions taken by PTSB personnel subsequent to 19 January 2009 might not have been consistent with the "*sign off*"; the fact that neither Mr O'Grady nor the appellant had any real recollection of the problem discussed at the ExCo meeting; the absence of any evidence of the appellant's involvement after the date of his ostensible assent; and the role of some managers and employees in PTSB subsequent to the "*sign off*". These findings, taken together must be seen in the context of the legal opinion obtained from the second LPT after the Inquiry had ostensibly closed on 15 March 2024. This legal opinion, which was dated 17 July 2024, is considered below.

170. The Inquiry Member's Decision records that Mr O'Grady was closely cross-examined on what was contained in or implied by his email of 16 January 2009. The Inquiry Member found that it was Mr O'Grady's intention that it should be used as a "*sign off*". The Inquiry Member made the observation that Mr O'Grady gave answers openly and thoughtfully but with some contradiction. Mr O'Grady believed the actions taken by the Marketing Department in PTSB after Mr Guinane's "sign off" were consistent with that sign off but, after cross-examination, he was prepared to accept that this was not the case. (paragraph 7.51 of the Decision)

The appellant's limited role

171. The Inquiry Member concluded that there was no evidence that the appellant had any involvement with the implementation of the "*strategy*" subsequent to 19 January 2009 (paragraph 7.97 of the Decision). There was also no evidence that the appellant had actively applied his mind to the precise implementation

of the approach which he had ostensibly authorised, for example, by asking colleagues about what had been done. Nor was there evidence that he had read subsequent PTSB compliance reports which did outline the strategy in very considerable detail. As pointed out earlier, it is interesting to contrast the opaque phraseology contained in the O'Grady Email of 16 January 2009 with what Ms Ruth Brophy explicitly wrote in the email of 5 February 2009; considered above under the heading *Factual Background and Documentary Evidence*, sub-heading *Role of PTSB Compliance Department*. There, the strategy was described in great detail. The Inquiry Member's consideration of, and conclusions on, the appellant are considered in further detail below, notably, in the section of this decision entitled *The Inquiry Member's Reasoning Process*, under the sub-heading *Issue No.1: The Inquiry Member's approach to "participation" and "participated"*.

The role of PTSB employees and managers other than the appellant

172. The question of negligence is also to be seen in the light of the Inquiry Member's findings on PTSB itself at paragraph 8.3 of his Decision. These included, *inter alia*, the finding that PTSB had been aware of the legal position that applied to customers and to the tracker rate; and that PTSB's staff were expert and knowledgeable and would have been aware that most customers were not so expert and knowledgeable.

173. The Inquiry Member found that PTSB sought to take advantage of its superior understanding of the mortgage loan agreements in order to charge customers a higher rate of interest than properly applied. He took the view that PTSB chose not to inform customers of their contractual rights; that, by knowingly taking the actions set out, PTSB acted in bad faith in its dealings with their customers; that these actions and omissions were unfair; and that PTSB staff were motivated by a desire to protect the interests of the firm at a time of difficulty; and that that was a breach of General Principle 1. Later, PTSB very strongly objected to the finding of bad faith as having been made without notice.

174. The Inquiry Member concluded that PTSB was aware that SC706 was not ambiguous, but took effect so as to commit PTSB to provide the original

tracker rate set out in each loan offer and that that awareness grew during the relevant period. In December 2009 and January 2010, PTSB began to consider whether its position on SC706 complied with the Code and then, recognised the need to construe that condition in light of the loan offer letters issued containing that condition.

The Opinion of the Second LPT of 17 July 2024

Introduction

175. These various parts of evidence are to be seen as context for what transpired subsequent to the Inquiry proper. It is not necessary to describe all the evidence. What is necessary, rather, is to (a) compare the Inquiry Member's conclusions with the Allegation, and (b) to ask whether he acted *ultra vires* in altering the substance of the Allegation when he was not permitted to do so.

The question posed of the second LPT

176. The Inquiry Member's conclusions on the appellant cannot be understood fully without also adverting to an opinion of the second LPT furnished on 17 July 2024. This was some months after the Inquiry had ostensibly closed on 15 March 2024. What transpired during that four-month time interval was not part of the evidence.

177. That legal opinion was furnished by the second LPT at the request of the Inquiry Member. It was headed "*Inquiry Member's queries on meaning of "recklessness" and whether individual* (sic) *can be found to have participated in prescribed contravention* (sic) *if they acted recklessly or negligently."* The opinion, therefore, addressed itself to two issues. First, the meaning of "*recklessness*" in both the civil and criminal law context, and any guidance on the extent to which it is to be assessed on the basis of a subjective or an objective test. Second, whether a person concerned in the management of a regulated financial service provider (RFSP) who recklessly or negligently (or carelessly) took an active part in a series of acts by that RFSP that gave rise to a prescribed contravention by the RFSP of a regulatory requirement imposed under the 1942 Act could be found to have participated in that prescribed contravention. Those involved in law and others will note that the Inquiry

Members queries were framed as abstract, hypothetical questions. But the purpose for which the opinion was sought was not on an abstract issue. The questions posed of the second LPT referred to *"a"* person concerned. But the opinion was applied to *"the"* person concerned, that is the appellant against whom a grave allegation had been made, specifying details.

Reference to the first LPT's Opinion of 12 December 2021

178. The opinion is most detailed on the questions that were posed of the second LPT by the Inquiry Member. It ran to some 41 pages. It did refer to the legal advice provided by the first LPT on 12 December 2021, which had actually dealt with the question of *"participation"*. Again, the question that arises is that of context. It is impossible to interpret *"participation"* in the terms of negligence, carelessness or recklessness without having regard to the very specific nature of how the term was used in the Allegation.

179. The Inquiry Members's queries of the second LPT were directed at the question whether it was open to the Inquiry Member to engage in a particular form of definition of the term *"participate"* and *"participation"*. In the *Inquiry Member's Reasoning Process* section, this Tribunal decision presently deals with the manner in which the Inquiry Member sought to justify this course of action.

180. The second LPT's opinion stated that the previous opinion from the first LPT, dated 12 December 2021, which dealt with participation had not been focused on, and accordingly did not consider, the question of whether a person concerned in the management of a regulated financial service provider who recklessly or negligently or carelessly took an active part in a series of acts by that RFSP that gave rise to a prescribed contravention by the RFSP of a regulatory requirement imposed by the Central Bank could be found to have participated in that prescribed contravention. The opinion of the second LPT went on to state that what was said therein was not intended to contradict or in any way cut across the previous advice of the first LPT on participation with which counsel agreed. What was said was correct. But again, the issue which arose in stark terms was the question of how the terms should be interpreted in

the context of the Allegation, having regard to the plain meaning of "participate" as *"take part in"*. The plain meaning of *"participate"* is considered below under the heading *Issue No.1: The Inquiry Member's approach to "participation" and "participated"*. What was set out in the first LPT's opinion concerning "*participation*" will be set out presently.

The second LPT's conclusion on "participation"

181. In summary, the second LPT concluded that, in the absence of any statutory definition, the words *"participating"* and *"participated"* should be given their ordinary meaning. The opinion stated that, case law on participation in different contexts might illustrate that participation was a question of fact and degree. The analysis would require consideration of the role played by each relevant person in the alleged acts or omissions (per Noonan J. in *Fingleton v Central Bank of Ireland* [2016] IEHC 1); and finally, that the meaning to be attributed to section 33AO(2) of the 1942 Act was to be determined by the ordinary principles of statutory interpretation as set out in *Heather Hill*. The second LPT expressed their opinion that the statutory provision did not contain words that suggested that the Oireachtas intended a specific mental element as a precondition for a finding that a *person concerned in the management* of an RFSP had participated in a contravention by the RFSP. Had the Oireachtas so intended, it would, and could easily, have so legislated.

Tribunal analysis

182. It would have been very prudent if the Inquiry Member had drawn attention to the first LPT's two key advices to provide context. What follows is no criticism of the new team. They answered the questions that were put to them. They referred to the previous opinion of the first LPT of 12 December 2021 which did deal, *inter alia*, with the question of participation. But the second LPT's opinion did not deal with, nor was it asked to deal with, the question of whether "*in the context of this case*" a finding of carelessness, negligence, or recklessness could be made. This was not a hypothetical situation. The matter arose from the concrete reality of the full text of the Allegation.

183. Indeed, it might be said it was unsurprising that the first LPT did not deal with the negligence issue in his opinion. Because to make findings of negligence would have substantially altered the meaning of the Allegation which was based on the Investigation Report. Advising on such an interpretation would have run directly counter to his earlier advice of 15 October 2021 that:

> *"The allegation cannot therefore be amended in any way which alters the substance of that Allegation e.g. by changing the particulars of the act amounting to the alleged contravention or the provisions of law of which the contravention is alleged to be in breach."*

184. This earlier advice is addressed above under the heading *The Opinion of the First LPT of 15 October 2021*.

THE INQUIRY MEMBER'S FINDINGS AND THE ALLEGATION

Introduction

185. It is now necessary to focus on the Inquiry Member's Decision. What he concluded must be compared, and contrasted with, what is contained in, and what was meant by, the Allegation. The essential question which must be faced is whether, having regard to the contents and meaning of the Allegation in its context, the Inquiry Member was entitled in law to reach the conclusions which he did.

186. A superficial enquiry might ask the question why the appellant could complain about being found "guilty of a lesser offence". In fact, what occurred from the outset of the Inquiry onwards had significant prejudicial consequences for the appellant. In order to understand the sections following, it is now necessary to set out what is the *"substance"* of the Allegation, and then compare it with the gravamen of the Inquiry Member's findings.

The Allegation as framed in the Notice of Inquiry

187. The Bank's suspicion on reasonable grounds that the appellant had participated in PTSB's contravention was stated (at paragraph 7.6 of the Investigation Report) as the appellant *"signing off on the proposal made to him by Mr*

O'Grady on 19 January 2009 i.e. the strategy to only give the better rate back to those customers who specifically requested the lower interest rate, or queried or complained"; and (at paragraph 7.7) that the appellant had *"made the Decision on 19 January 2009"*. The Investigation Report, which grounded the Inquiry, could not be clearer: the strategy was proposed to the appellant in the email sent by Mr O'Grady on 16 January 2009 to which the appellant replied *"OK with that"* on 19 January 2009 (in response to a follow-up email from Mr O'Grady).

188. Notwithstanding some slight differences between paragraphs 7.5 and 7.6 of the Investigation Report and the wording of the Allegation, the substance of the Allegation remained the same, as it had to. It is, therefore, necessary to consider core constituent elements of the Allegation.

189. The Allegation was that the appellant *signed off on a proposal made to him* on 19 January 2009. It cannot be overstated that these plain and simple words meant that the "proposal" was contained in the O'Grady Email (of 16 January 2009) which was "signed off on" by the appellant on 19 January 2009. The terms of the Allegation did not permit the uncoupling by the Inquiry Member of the "proposal" from the O'Grady Email.

190. The *"proposal"* was the *"strategy"* to only give the original more favourable tracker rate back to those customers who asked for their original tracker rate or who queried or who complained when not offered that original tracker rate. Again, the Allegation is clear: the "proposal" was the "strategy". There could be no "sign off on" the "proposal" divorced from the "strategy".

191. The appellant *"made the decision"* on a particular date (19 January 2009). The reference to the appellant having *"made the decision"*, read in context, was an allegation that he had consciously and knowingly approved the strategy that discriminated between PTSB's customers by only offering the more favourable tracker rate to those customers who requested it or otherwise complained.

192. At the time he *"made the decision"*, the appellant was *"fully aware"* of the

factual position that 400 customers would be immediately impacted and of legal advice that had been provided to PTSB. This statement confirmed that the Allegation was directed at a deliberate, conscious and knowing act of the appellant in approving a strategy to discriminate between PTSB customers.

The substance of the Allegation

193. Prior to setting out the Inquiry Member's findings, it is useful then, to summarise the substance of the Allegation, which can be simply done as follows.

(a) That, on 19 January 2009, Mr Guinane had signed off on the *proposal* made to him in the O'Grady Email of 16 January 2009.

(b) That the *proposal* was a strategy to only give the original more favourable tracker rate back to those customers who asked for their original tracker rate, or who queried, or who complained when not offered that original tracker rate.

(c) That Mr Guinane made that decision.

(d) That he did so by signing off on the proposal containing the strategy and thereby made the decision on 19 January 2009.

(e) That at the time he made the decision, he was fully aware of the factual position that 400 customers would be immediately impacted and of legal advice which had been provided to PTSB on the question.

194. This was obviously a grave allegation containing within it imputations of knowingly overcharging customers. In the case of a person concerned, the maximum monetary penalty under section 33AQ(5) as it was during the relevant period was €500,000. The appellant could have been directed to pay some or all of the costs of the investigation and the Inquiry. He could also have been barred from carrying on activities in the financial world.

195. The Allegation, carrying with it an imputation of grave unprofessional misconduct contrary to General Principle 1, is impossible to square with the Inquiry Member's decisive conclusion that the O'Grady Email was "unclear" and "open to misunderstanding" and with his ultimate conclusion that the appellant was merely "negligent".

196. The substance of the Allegation is now to be contrasted with what the Inquiry Member actually found in relation to the appellant's participation in the strategy.

197. Here, one must bear in mind the legal provisions which governed him, and which constrained his jurisdiction. In this exercise of comparison with the Allegation, it is not even necessary to take any view as to whether the Inquiry Member's findings on the appellant's conduct were valid or justified: the question is, rather, whether in the context of the statutory provisions and the Allegation it was legally permissible for him to arrive at these findings at all. Did he, in this process, engage in a form of decision-making which, to quote the first LPT, involved him altering the substance of the Allegation?

Findings of the Inquiry Member

The O'Grady Email was *"unclear"*

198. The findings of the Inquiry Member, and his approach to the questions of "participation" and negligence, must be seen in context of his emphatic view that the O'Grady Email was "unclear".

199. On this, the Inquiry Member found that the O'Grady Email:

(a) *"… is poorly expressed. If construed in isolation, it lacks clarity on whether all customers who revert to a tracker rate are to revert to their original tracker rate, or only those customers who specifically requested their original and lower interest rate or who queried or complained about the rate they were offered. In reality, the email was not read in isolation."*; paragraph 9.6;

(b) *"lacked clarity on what it was asking Mr Guinane to approve. This lack of clarity was evident from the text of [the O'Grady Email]";* paragraph 9.57;

(c) *"was poorly drafted and lacked adequate clarity … and was open to*

misunderstanding"; paragraph 9.72;

(d) *"did not expressly seek approval for a strategy to only give the more favourable rate back to those customers who specifically requested their original and lower interest rate, or queried or complained"*; paragraph 9.72;

(e) *"was unclear and that the text of the email when viewed in isolation was ambiguous"*; paragraph 9.73; and

(f) The proposal contained in the O'Grady Email was *"confusingly presented"*; paragraph 9.81.

The finding that the appellant was negligent

200. The appellant is variously described as having been, or appearing to have been, reckless (paragraphs 9.82, 9.110) or having shown a lack of care (paragraphs 9.83, 9.110). The Inquiry Member's ultimate conclusion (at paragraph 9.110) was that the appellant's *"lack of care, attention and diligence"* was *"indicative of negligence"*.

201. The finding that the appellant was negligent in approving an email sent to him by a member of PTSB's executive, Mr O'Grady, begs the question whether it was negligent of the appellant to accept what Mr O'Grady, a member of ExCo, said on trust? That very point was acknowledged by the Inquiry Member when he stated, at paragraph 9.103, that *"[a] CEO cannot cover all issues arising in a regulated business and must rely on delegation to trusted and competent members of staff."* The Inquiry Member did not reconcile two apparently competing, and contradictory, propositions. First, he had found that the appellant was negligent in writing *"OK with that"* in response to Mr O'Grady. Second, he observed that a CEO cannot cover all issues in a regulated business and must rely on delegation to trusted and competent members of staff. Mr O'Grady was the Head of Marketing and a member of ExCo. He was a "trusted colleague".

The Inquiry Member's conclusion on *"participation"* (paragraphs 9.109-9.112)

202. The Inquiry Member acknowledged, at paragraph 9.20 of his Decision, that in the absence of a clear definition in the 1942 Act or case law, the terms "participating" and "participation" *"must be given their ordinary and natural meaning"*. But unfortunately, the Inquiry Member failed to undertake the first vital step of defining what "participating" or "participated" actually meant in their context, that is, the Allegation. Instead, as part of the process, he stated, without analysis, or stated reason, and without recourse to applicable principles of interpretation, that he was *"content to adopt"* a test of whether *"Mr Guinane took an active role in the prescribed contravention by PTSB."* (paragraph 9.22). To decide whether the appellant had taken "an active role", he applied a "five point approach", which is considered below.

203. The Inquiry Member's task was to ascertain what those words meant using established principles of statutory interpretation. His statement (at paragraph 9.29) that he was adopting *"a relatively narrow interpretation of"* the terms "participating" and "participated" as they appear in sections 33AO and 33AQ suggests that he did not understand his statutory remit. Certainly, his Decision does not reveal any of the interpretative principles he applied in adopting his *"narrow interpretation"*. He made what can only be described as a remarkably revealing addendum to paragraph 9.29. He wrote:

> *"I consider this approach is appropriate and fair in the particular circumstances of this Inquiry. It is not necessary for me to draw any conclusions of broader application about the proper interpretation of these terms in order to reach my findings in this Inquiry and I have not sought to do so."*

204. It is not easy to reconcile these observations with the clear guidance of the Supreme Court on statutory interpretation in *Heather Hill* and *A, B and C*.

205. The Inquiry Member's conclusions are to be understood by quoting in detail his own words from paragraph 9.109 of his Decision onwards.

> *"9.109 In coming to a conclusion on whether the findings of fact set out in Chapter 7, 8 and in this Chapter established that Mr Guinane*

participated, as the term is used in section 33AO and 33AQ of the 1942 Act, in the prescribed contravention by PTSB, I have decided that:

(a) As a matter of fact on the ordinary and natural meaning of the word Mr Guinane "participated" in the prescribed contravention by PTSB by signing off on the Proposal. He took take part in the prescribed contravention (sic)*.*

(b) In so doing, Mr Guinane took an active role in the prescribed contravention by PTSB.

(c) Mr Guinane had the knowledge set out at paragraphs 9.3, 9.4, 9.6, 9.7, 9.8 and 9.10 above when signing off the Proposal. He was in a position to understand the issue that he was being asked to consider and to decide and to assess the implications of the decision for PTSB and the relevant customers. However, the Proposal lacked clarity on what it was asking Mr Guinane to approve. This lack of clarity was evident from the text of the Proposal.

(d) When Mr Guinane reviewed and responded to the Proposal he considered the "exposure" of PTSB before giving his approval but he did not have any regard to the consequences for customers. This was despite him being in a position to understand the significance of the Proposal for customers and the risk that customers could be charged a higher interest rate than they were contractually obliged to pay. Mr Guinane did not form a specific intention with regard to the treatment of customers who will be affected by the Proposal.

(e) By signing off the Proposal without taking due care over, or paying any attention to, the consequences for customers despite being in a position to understand the risk that customers could be overcharged, and thereafter failing to take any steps to check that customers were being treated fairly and in their best interests. Mr Guinane's conduct was culpable and blameworthy."

206. The Inquiry Member described the fact that he had taken legal advice after the Inquiry had closed and such advice had been furnished a month later to the parties. The advice dated 17 July 2024 was furnished to the parties on 23 August 2024. The gist of this advice by the second LPT was that participation in the context of the provisions in question could take place either negligently or recklessly. On this basis, the Inquiry Member went on:

> *"9.110 I have concluded that, in the particular circumstances of this Inquiry, participation under section 33AO(2) and section 33AQ(8) of the 1942 Act in a breach of the 2006 Code can arise from conduct that was carried out recklessly or negligently rather than intentionally. I am aware of the distinction between recklessness and negligence and the different manners in which these terms may be applied in civil, regulatory or criminal matters. I have received submissions from Mr Guinane and Enforcement and advice from the LPT on these issues. In these findings I have sought to describe the state of mind of Mr Guinane at particular times in relation to particular actions or omissions. I have referred to Mr Guinane appearing to be reckless in signing off the Proposal without considering the position of customers despite being in a position to understand that the Proposal created a risk that customers could be overcharged. I have said that he needed to be diligent in meeting his legal and regulatory duties in respect of mortgage customers and he was not. I have also referred to his lack of care and/or attention at various times when describing his approach when he was considering and responding to the Proposal. In so doing I have sought to reflect the evidence and submissions in relation to particular actions or omissions on his part. Mr Guinane's lack of care, attention or diligence is indicative of negligence. The evidence does not lead me to conclude that Mr Guinane was aware that the risk that PTSB could be in breach of its regulatory obligations to its customers if he signed off the Proposal. There was no input from other*

managers and professionals in PTSB that alerted him to this risk. He should have been aware of his regulatory obligations, but he was not. In this respect he was negligent."

207. He continued:

> *"9.111 I find that Mr Guinane participated in PTSB's failure to ensure that in its dealings during the Relevant Period it acted fairly and in the best interest of those customers whose mortgage loan agreements contained SC706. His participation arose as a result of a failure to consider the implications for customers of his sign off of the Proposal. My conclusion having taken account of all the relevant circumstances, including his subjective knowledge at the relevant time is that this failure to consider the implications for customers arose from a serious lack of care and attention when considering and responding to the Proposal rather than a reckless disregard for the consequences of the Proposal for customers*."

208. He concluded:

> *"9.112 Pursuant to section 33AQ(8)(a) of the 1942 Act I conclude, on the balance of probabilities, that Mr Guinane's sign off on 19 January 2009 of the Proposal is sufficient to establish that he has participated, while being a person concerned in the management of the IL&P Group in the prescribed contravention by PTSB."*

209. The decision now turns to the Bank's submissions of the Inquiry Member's jurisdiction.

The Bank's submissions on the Inquiry Member's jurisdiction

210. The Bank's submissions to the Tribunal on this and all other issues were admirably clear. Counsel and the legal team assisted the Tribunal with a clear and concise understanding of the Bank's case and the legal context.

211. In argument, counsel for the Bank submitted that the Decision under appeal was *"carefully calibrated"*. The Tribunal does not at all disagree with that description. The Inquiry Member's *"calibration process"* is considered in the section of this decision headed *The Inquiry Member's Reasoning Process.*

212. The Bank's case was that the Tribunal should conclude that the Inquiry Member's findings of negligence, carelessness or recklessness should be seen within the context of the definition of a *"prescribed contravention"*. This definition is contained in section 33AN Interpretation (Part IIIC). Thus, in a somewhat circular fashion the Act defines a prescribed contravention as a contravention of:

> *"(a) A provision of a designated enactment or designated statutory instrument, or*
>
> *(b) A code made or a direction given under such a provision, or*
>
> *(c) Any condition or requirement imposed under a provision or of a designated enactment, designated instrument, code or direction, or*
>
> *(d) Any obligation imposed by any person by this part imposed by the Bank pursuant to a power exercised under this part."*

213. As the Code was a statutory code, General Principle 1 undoubtedly comes within a number of these descriptions.

214. Even though the essential findings of the Inquiry Member were of negligence, carelessness or recklessness, counsel for the Bank submitted that these findings could be encompassed within the words of the Allegation because, in each case he was describing a *"contravention"* and provided the finding came within that description, the Inquiry Member was entitled to make it within the jurisdiction.

215. The Bank's case was that the term *"fully aware"* as deployed in the Allegation, was simply a recitation of what it was that the appellant was aware of in terms of background and requirements upon him. The term did not identify any attaching *"mental elements"* because, it was submitted, the "*actus reus*" was a *"sign off"* itself.

216. That submission did not have regard to, or engage with the fact that, to *"sign off on"* means "to approve, as if by signing; a positive and conscious act"; Oxford English Dictionary; (see, the section entitled *Jurisdiction and/or vires*, sub-heading, *The Allegation: meaning of "to sign off on" and "to decide"*). The Bank's submission did not engage with the careful and deliberate inclusion of that "factual position" which was the context in which the Allegation sat, and could *only* mean, and be intended to mean, that the appellant was *"fully aware"* of the *strategy* committed by PTSB which resulted in direct, adverse impact to affected customers.

217. Indeed, at paragraph 3.13 of his Decision, the Inquiry Member attached importance to this "factual position", identifying it, at paragraph 3.13(k), as a core *"element"* that he *"had sought to understand and assess"* in determining if the appellant had *"participated in the commission of a prescribed contravention by the RFSP"* (emphasis in the Decision). The Inquiry Member's later attempts to decontextualise the "factual position" and divorce it from the Allegation are addressed in more detail later.

218. At this stage, it is sufficient to observe that the reference to *"400 customers"* who would be *"immediately impacted"* would add little to the substance of the Allegation were it truly the case that the reference was *not* intended to convey that the appellant knew that he was signing off on the strategy as it was subsequently implemented. After all, the customers would be affected or impacted (albeit not in a negative way) whether, on one possible interpretation of the O'Grady Email, the proposal was to offer *all* customers who contacted the Bank their original tracker rate on expiry of their fixed rate period; or, on another reading, the proposal, as implemented by the Marketing, Compliance and Legal departments of PTSB, was to discriminate between customers only by offering the original tracker rate to those who expressly requested it or who otherwise queried or complained when not offered their original rate back.

219. Counsel submitted that the provisions of section 33AP of the 1942 Act concerning the content of the Notice of Inquiry were complied with or

discharged when the Investigation Report was provided. What was necessary was only an assertion of basic facts; see, Transcript, Day 6, page 38. Counsel contended that it was not always necessary to prove criminal intent. He cited *C.W. v Minister for Justice* [2023] IESC 22, [2024] 3 I.R. 554, paragraph 17; see Transcript, Day 6, pages 42-44 for the proposition that what would not be found in the provisions was some specific condition or statutory obligation to set out the particulars of an allegation in the Notice of Inquiry. Counsel submitted that the purpose of the Notice was to set out in brief, indeed terse, terms the matters that arose in terms of what was alleged. He contended that it was not necessary to outline a *"route"* or *"path"* to a decision or a *"thesis"* of the case as what was in issue here was a reasoned decision; see, Transcript, Day 6, page 77.

220. Counsel submitted that there was nothing which prohibited an allegation being amended or altered within limitations. The Tribunal rejects these submissions. That is precisely what the words of the statute demand. These words require the establishment of a constitutionally compliant scheme whereby the person concerned would have full and fair notice of the case being made against them (see *Re Haughey* [1971] I.R. 217). Importantly, the first LPT had so advised.

221. The Bank's case was that the Notice of Inquiry was not obliged to set out *mens rea* or the knowledge of the person concerned. To do so would be to "import concepts" from criminal law; Transcript, Day 6, page 50. In a disciplinary procedure involving serious allegations there might be broad concepts or fluid concepts, such as "poor professional performance"; *Corbally v Medical Council* [2015] IESC 9, [2015] 2 I.R. 304; *Walker v Bar Standards Board*, a decision of the Visitors to the Inns of Court on Appeal from the Disciplinary Tribunal of the Council of the Inns of Court of 19 September 2013; case reference PC 2011/0219. In abstract, this may be so. But the Bank's submission did not engage with the specifics and what was contained in *this* Notice of Inquiry and *this* Investigation Report and specifically, *this* Allegation.

222. The Bank submitted that it was not required to say whether or not a

contravention was committed deliberately or involuntarily. Again, this argument might be valid in abstract. It was not however, the case as set out in the Investigation Report, the Notice of Inquiry, or the Allegation, all of which were integral to the case advanced and to which the Tribunal, where appropriate, refers as the "three jurisdictional documents".

223. Counsel advanced the argument that particularisation of an allegation was necessary only in instances when there were allegations of fraud or dishonesty. He cited *McMahon v The Law Society of Ireland* [2009] IEHC 339 and *Singleton v The Law Society* [2005] EWHC 2915 (Admin), [2005] All ER (D) 152 (Nov). The Tribunal observes that this might be so in certain forms of disciplinary proceedings. It is not reflected in any part of the relevant provisions. Section 33AP provides otherwise: the Bank is to give notice in writing and that notice must *"specify"* the grounds upon which the Bank's suspicions are based. The term *"specify"* means to state and describe something clearly, exactly and in detail.

224. Here, as in all of this analysis of the Bank's case, one must look to what is contained, not only in section 33AP, but in section 33AQ which deals with the duty of the Inquiry Member to determine whether or not the prescribed contravention *"to which the inquiry relates"* has been shown.

The Tribunal's observation on the Bank's submissions

225. The Tribunal considers that the Bank's submissions were brave ones, bearing in mind not only what is provided for in the 1942 Act, but also, the fact that the Inquiry Member, in terms, stated at the Inquiry that the Allegation would not be expanded or changed (see below under the heading *Fair Procedures*, sub-heading *The Inquiry Member's reassurance that the Allegation would not be changed).*

226. The Bank's submissions are considered in further detail below in the context of the Tribunal's analysis of *Jurisdiction and/or vires*. At this point, it is apposite to note that, insofar as it might be thought that there was any superficial attraction in the Bank's submission in relation to the scope of the

Inquiry Member's powers, such contention would be put at naught by a simple observation. It is this: the Inquiry Member's findings were based on a flawed reasoning process which must now necessarily be described in considerable detail. It was a foundation stone. This detail is necessary because, unfortunately, it describes a process which would not withstand scrutiny in a court of law.

THE INQUIRY MEMBER'S REASONING PROCESS

Introduction

227. The Tribunal now engages in a more detailed analysis of the Inquiry Member's reasoning process. It is not to be seen in an abstract sense.

228. In this consideration of the reasoning process therefore, four matters are now addressed in more detail. First, how the Inquiry Member approached interpretation of *"participating"* and *"participated"*; secondly, the manner in which the Inquiry Member reframed the Allegation; third, how the Inquiry Member took into account matters occurring after 19 January 2009; and fourth, his consideration of steps that the appellant might have taken, but did not, in order to avoid implementation of the strategy.

Issue No.1: The Inquiry Member's approach to "participation" and "participated"

The Opinion of the first LPT of 12 December 2021

229. Earlier, this Decision referred to the advices given by the first LPT on 15 October 2021. It is now necessary to deal with the second opinion which he gave on 12 December 2021. Perhaps significantly, in the interim period, the Notice of Inquiry and Allegation had been issued to the parties. One of the issues addressed in that opinion was whether there had been any judicial clarification in relation to the phrase or concept of "participation" in the commission of the prescribed contravention. On that issue, the first LPT provided important advice to the Inquiry Member on what transpired to be a vital issue. He stated that, while there was no statutory definition, the ordinary

rules of statutory construction should apply and that the words "participating" and "participated" should be given their ordinary meaning. This was critical advice. As will be seen later, the Inquiry Member did not follow this advice.

230. In the course of this opinion of 12 December 2021, the first LPT referred to *Horgan v Ireland* [2003] 2 I.R. 468. There, Kearns J. considered the meaning of "participation" in the context of war, and of declaration of war, contrary to the provisions of the Constitution. Article 28.3.1 provides *"1. War shall not be declared and the state shall not participate in any war save with the assent of Dáil Éireann"*. Kearns J. stated at page 500, specifically:

> *"In the present instance, the court was concerned with the meaning of the word "participate". In its ordinary sense, the term means "take part in", a definition highlighted by the Irish text [of the Constitution] which uses the phrase "ná páirt a bheith"."*

231. The judge pointed out that as such, the defendants *Horgan* there contended, the words implied a direct involvement in the object of the participation. When applied to a concept such as war, it necessarily implied joining into or becoming involved in the hostilities.

232. It was in *that context* that Kearns J. accepted, at para 516, that the question of participation was one of degree and again, in that context, he stated the issue of participation was not a black and white issue, and might ultimately be, as stated by the first defendant, a matter of substance and degree.

233. The first LPT referred to the decision of *Dubsky v Ireland* [2005] IEHC 442, [2007] 1 I.R. 63, in which the court accepted, that there should be a narrow definition of "participation" in the context of Article 28 of the Constitution. The first LPT then went on to deal with the way in which the meaning of "participate" had been dealt with in the terms of conscientious objection clauses to involvement in abortion. He referred in detail to the case of *R v Salford Health Authority ex parte Janaway* [1989] AC 537. Thus, the House of Lords found that participating for the purposes of the relevant legislation

meant taking part in the process and it did not have an extended meaning of participation by the criminal law but rather, its ordinary and natural meaning.

234. The first LPT also referred to *Doogan Another v Greater Glasgow and Clyde Health Board (Royal College of Surgeons of Midwives and Another intervening)* [2014] EWSC 68, [2015] AC 640, where, in the context of a similar conscientious objection provision concerning involvement in abortion, Baroness Hale made observations, again relevant to this appeal, wherein she accepted that the term could have a broad or a narrow meaning. That was likely to have been in the contemplation of parliament when the Act was passed. Thus, in that context, Baroness Hale stated *"participate"*, in her view, meant taking part in a *"hands on capacity."*

235. Again, against that context, the first LPT pointed out that ultimately these cases may be of limited assistance, other than illustrating that *"participation"* is a question of fact and degree.

236. The first LPT also advised that the question of whether a regulated financial service provider was participating or had participated required an analysis of the role played by each relevant person concerned in the alleged acts or omissions, as suggested by Noonan J. in *Fingleton v Central Bank of Ireland* [2016] IEHC 1. But, there, Noonan J. was dealing with the term in a specific context, that is the word as it occurred in section 33AQ dealing with the category of persons who might be involved in participation in wrongdoing in a regulated financial service provider who, by virtue of their status, were in a position to influence the actions of the provider when it committed the wrong, which "*render[ed] the conduct improper"*.

237. As will be clear therefore, even at the very outset, the Inquiry Member had advice available to him which clearly demonstrated that the words *"participating"* and *"participated"*, in the absence of any statutory definition, should be given their ordinary meaning, that is, *"take part in"*. The ordinary meaning of "participate" identified in addition to the authorities cited above is consistent with the definition of the word "participate" in the Oxford English

Dictionary as *"to take part; to have a part or share with a person, (formerly also of) a thing; to share"*.

How the Inquiry Member dealt with this advice

238. The Inquiry Member's citation and reference to legal authorities did not accurately reflect the law, as presented to him.

239. He stated, at paragraph 9.17 of his Decision, that he had been referred to the decisions in *Horgan v Ireland* [2003] IEHC 64, [2003] 2 I.R. 468 and *Dubsky v Ireland* [2005] IEHC 442, [2007] 1 I.R. 63, and to *"certain English decisions"* in which judicial consideration was given to the term *"participate"* and *"participation"*. The Inquiry Member went on to state *"I note, and take into account, the decisions of the courts in these cases, which I will not summarise here, and the submissions that I have received regarding these decisions."* He went on:

> *"However the factual context in all these cases is very different to that which is being considered by this Inquiry. A number of cases are concerned with an individual's concern over their participation or the participation of the State in an act to which they object as a matter of conscience or belief. Nevertheless, I take particular note that the judgment in Horgan v Ireland referred to a decision on participation being a matter of "substance and degree"."*

240. The Inquiry Member's quotation from *Horgan* was inapposite and decontextualised. The important primary observations from Kearns J. in that decision were unfortunately not referred to. There, the judge gave a definitive, clear, plain meaning interpretation of the word "participate", that is to say, *"to take part"*. It is very hard to understand why this highly relevant passage was not quoted.

241. The references to the important English case law were only described in a footnote. Yet, they too directed the Inquiry Member to the plain meaning of the term "participate" and "participation": that is *"to take part in"*.

242. All the relevant case law, therefore, spoke of the term "participate" in terms of knowingly taking part in, and awareness of that action. The English cases spoke of direct involvement. The Inquiry Member had received this highly relevant advice on 12 December 2021, from the first LPT.

243. The Inquiry Member also referred to *Fingleton v Central Bank of Ireland* where, in considering subsection 33AO(2) of the 1942 Act, Noonan J. stated

> *"It seems to me therefore that it is clear that the misconduct that may be inquired into under the subsection is participation in a prescribed contravention by a person concerned in management on the presumed basis that such managerial status renders the conduct potentially blameworthy. The subsection 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 and renders the conduct improper."*

244. But critically, the passage cited by the Inquiry Member dealt with that category of persons who might *potentially* be found to have participated in a contravention. Noonan J. was *not* dealing with the core meaning of the word which is to "take part in".

245. The Inquiry Member had available to him legal authorities which were appropriate and applicable in the context of the Allegation. In that context, the terms "participate" and "participation" meant that the appellant had taken part in the PTSB strategy knowingly, and was complicit in that strategy. Indeed, he had played "a key and decisive role".

What "participate" meant in the context of the Allegation

246. It is quite correct to say that the first LPT stated that the case law might be of limited assistance other than illustrating that *"participation"* is a question of fact and degree. But the essential point was that the plain meaning of the word *"participate"* is to *"take part in"*; and this must be seen in the context of what was contained in the Allegation. What was said there was that the appellant was a participant in the PTSB strategy. Indeed, in the Investigation Report it

was said that the appellant had played a *key and decisive role* in the strategy. The manner in which the Inquiry Member treated the advice and legal precedent citations raises significant questions under the heading of impartial and dispassionate application of the law, as in *Zalewski*. This was flawed legal reasoning.

The 37 pages devoted to the meaning of "participate" and "participation"

247. A further question, which underlies much of the reasoning, is a simple one. Why did the Inquiry Member devote 37 pages to analysing the term "participation", when the meaning and context had already been identified in the Investigation Report and the Allegation which reflected what was contained in the Investigation Report?

248. The Allegation against the appellant was that he had "participated" in PTSB's contravention. In another case with a different allegation, the primary focus might be on the meaning of "participate".

249. In the appellant's case, there was no doubt as to how the term "participate" was to be interpreted in the Allegation. The manner in which the term "participate" was to be understood was set out above under the heading *Mr Guinane's Alleged Participation (as described in the Investigation Report)*, sub-heading *Mr Guinane's alleged "participation"*, quoting from paragraphs 6.37, 6.38 of the Investigation Report. It will again be recollected that it was the Inquiry Member who drafted the Allegation, adopting the formulation to be found in the Investigation Report.

250. One point is inescapable. The term "*participate*" as used in the Allegation, meant that the appellant was complicit in the strategy, had approved it, and had taken part in it.

The contrast in reasoning in relation to PTSB and the appellant

251. The following section makes a simple point. The Inquiry Member interpreted the allegation against PTSB correctly. He applied the plain meaning of the

words in the allegation against PTSB. Yet, remarkably, when it came to the appellant, he adopted an entirely different mode of interpretation.

The Inquiry Member's approach to PTSB

252. Part of the genesis of the Inquiry Member's reasoning process is what he found in relation to PTSB. He found that the suspected prescribed contravention alleged against PTSB had occurred and was committed by PTSB (paragraph 8.4 of his Decision). He found that from January 2009 to April 2010, PTSB decided to apply, and/or decided to continue to apply, a rate that was less favourable save in circumstances where individual customers raised specific queries in relation to that rate.

253. In so acting, PTSB had treated those non-complaining customers unfairly and contrary to their best interests, an approach that was a breach of the principle contained in Chapter 1, General Principle 1 of the Code that required PTSB to ensure that, in all its dealings with customers and within the context of its authorisation, it acted honestly, fairly and professionally in the best interests of its customers and the integrity of the market. That conclusion, at paragraph 8.4 of the Decision, was supported by the Inquiry Member's findings at paragraph 8.3.

254. Those findings against PTSB were definite and precisely accorded with the allegation against PTSB. PTSB had been aware of the position which applied to customers and was expert and knowledgeable in relation to mortgage loan agreements generally, and the particular terms in question. PTSB would have been aware that most customers were not so expert and would have had limited aptitude, interest or time to engage in detailed analysis of the mortgage loan agreements (paragraph 8.3(d)(i) of the Decision). PTSB sought to take advantage of its superior understanding of mortgage loan agreements in order to charge customers a higher rate of interest than they were legally obliged to pay (paragraph 8.3(d)(iii)). PTSB had chosen not to inform customers of their contractual right to revert to the original tracker rate; did nothing to assist its customers in understanding they had such a right; and, at times, had sought to reduce the chance of a customer gaining such an understanding (paragraph

8.3(d)(iv)).

255. Significantly the Inquiry Member concluded (at paragraph 8.3(d)(v)

> *"By knowingly taking the actions set out in (iii) and (iv) in the hope of profiting from the customer's lack of awareness of their contractual rights PTSB acted in bad faith in its dealings with those customers who PTSB caused to pay a higher rate of interest than they were obliged to when reverting to a tracker loan rate."*

256. PTSB objected to this finding, on the grounds that it had been reached without fair notice to that firm. This issue is dealt with later.

257. The Inquiry Member continued (at paragraph 8.3(f)) that PTSB staff were motivated by a desire to protect the firm's interests and reduce its exposure to tracker rate mortgage loan agreements during a period of extraordinary interest rate movements.

The Inquiry Member's approach in the appellant's case

258. Having outlined that finding, it is then necessary to consider the Inquiry Member's analysis in relation to the appellant's case as it emerged. It was not in dispute that the appellant had written *"OK with that"*. That phrase begged the ungrammatical but important question: what was the appellant okay with? It was unsurprising that the Allegation was framed in precise terms: it was an allegation that the appellant had "signed off on" a "strategy" to only give those customers who complained or queried the more favourable tracker rate. The Inquiry Member failed to engage with the precise elements of the Allegation. Instead, he embarked on a *five point approach*.

259. The Inquiry Member identified, at paragraph 9.29(a) to (e), five factors – subsequently described by the Inquiry Member (at paragraph 9.107) as a *"five point approach"* – that he would assess in order to determine whether the appellant had participated in PTSB's contravention. Essentially, having decided that what was required was for the appellant to have played an *"active role"*, he stated that he would consider whether these five factors were made

out so as to

> *"**then** come to a conclusion on whether in all of the circumstances, Mr Guinane's acts or omissions justify a conclusion that he has participated in the commission of the prescribed contravention by PTSB to which the Inquiry relates."*
> (emphasis added by the Tribunal)

260. This was to approach his statutory function from the wrong starting point. The failure to interpret the statutory words in the context of the precise Allegation against the appellant deprived the Inquiry Member of a logical path to decision. This *five point approach* must now be considered in considerable detail.

261. At risk of repetition, the concept of negligence which the Inquiry Member sought to canvass by resort to the second LPT was not contained in the three jurisdictional documents.

262. In the course of argument before this Tribunal, counsel for the Bank made the case that the Inquiry Member was entitled to make the decisions which he did within the confines of sections 33AO to section 33AQ. The Tribunal has indicated that it is unpersuaded by that argument. In addition to the words themselves, the substance of what is expressed in the statutory provisions makes sense. First, a *person concerned* is entitled to know the nature of the case which is being advanced against them. The section gives effect to that. It is evident that a person concerned is entitled to fair notice or *"specification"* of the matter to which the Inquiry relates. The words cannot be therefore given some type of "broad meaning" which might encompass a range, or spectrum, of conclusions.

263. In its consideration of *The Inquiry Member's Findings and the Allegation*, the Tribunal remarked that the objection to a finding of *"lesser gravity"* might superficially appear counterintuitive. That begs the following questions. First, in the event that a case had been presented for consideration by the Bank concerning carelessness, negligence or recklessness, would an Inquiry have been held at all? Second, if such hypothetical conclusions of lesser gravity had

been reached, would these have provided a scope for settlement with the Bank? Third, for both the Bank and the appellant, a precise allegation would surely have given pause for thought before embarking on a process culminating in a 13-day hearing when the Inquiry Member decided not to award the appellant any costs, and arrived at a decision which was not contained in the Allegation. The process in which the Inquiry Member engaged could not be characterised as some type of approximation to justice in the circumstances.

264. Moreover, the approach urged by the Bank would risk an inquiry being conducted into matters that the Bank, as an investigator, had not considered at all, or in respect of which the Bank had concluded were not appropriate for referral to an inquiry. That is plainly not what the legislation provides.

265. In the context of the Guinane investigation, the Bank had concluded that the facts supported an allegation that the appellant knew what the proposal was and made a decision to approve that proposal. There was no evidence whatsoever that the Bank had ever considered the possibility that the appellant's actions on 19 January 2009 might have constituted carelessness and/or if so, whether, as a matter of law and on the facts, it was permissible or appropriate to refer the matter to inquiry. Indeed, a conclusion that of the case against Mr Guinane was that he had been careless might well have begged other difficult questions, including as to whether there were other persons within PTSB who had been responsible for the discriminatory strategy which the firm actually pursued. If the express legislative provisions for settlements outlined earlier are to be meaningful, it is important that a party, including the Bank itself, should know the precise nature and gravity of the contravention alleged against a person concerned, but also be alive to the fact that the contravention was unlikely to change throughout the Inquiry.

266. For both the Bank in considering any settlement offer, and a party making, or considering making, a settlement offer, the gravamen of the alleged contravention would be key. It can readily be appreciated that a party might be willing to make a settlement based on alleged carelessness rather than an allegation of, hypothetically, dishonesty. Likewise, whether the Bank would

be amenable to settlement, and at what level, would necessarily reflect the gravity of the suspected contravention amongst other things.

The Inquiry Member's five point approach

Introduction to the five point approach

267. The Inquiry Member stated that in reaching a conclusion on whether the findings of fact established that the appellant had participated, as that term was used in section 33AO and 33 AQ of the 1942 Act, in the prescribed contravention by PTSB, he considered it fair and appropriate to take account of five factors. These were:

(a) Whether, as a matter of fact, and on the ordinary and natural meaning of the word, Mr Guinane participated in the acts and/or omissions that constituted the prescribed contravention by PTSB.

(b) If he did, whether Mr Guinane took an active role in the prescribed contravention by PTSB.

(c) Mr Guinane's subjective knowledge when signing off the Proposal.

(d) Mr Guinane's intention or state of mind when signing off the proposal.

(e) *Mr Guinane's culpability or blameworthiness for the prescribed contravention by PTSB.*

268. Even a first reading of the "five points" would indicate the flawed premise on which the Inquiry Member based his Decision. The Allegation against the appellant was precise: it was an allegation that he had "signed off on" the "strategy" to give the more favourable tracker rate only to those customers who asked for it or otherwise complained.

269. The Allegation was not that the appellant had "*participated in the acts and/or omissions"* that constituted the prescribed contravention by PTSB or had taken *"an active role"* in the prescribed contravention by PTSB. It was rather that he had "*signed off on"* the "*strategy"* The appellant's "subjective knowledge" and/or "intention or state of mind" were relevant only insofar as they might have proved essential elements of the Allegation, namely, whether the appellant *knew* of the strategy; knew that he was being asked *to approve* it; and

had consciously signed off on that strategy.

270. If the evidence did not establish that the appellant had signed off on the strategy, the Inquiry Member was not entitled to have recourse to some other allegedly *culpable or blameworthy* acts or omissions of the appellant to conclude that the Allegation was proved.

271. Likewise, the Allegation was that the appellant had committed one act on one particular day. The Inquiry Member sought to rely on matters that occurred *after* 19 January 2009, and on things the appellant might have done, but did not do, in seeking to demonstrate culpability and blameworthiness from which he might conclude that the Allegation had been proved against the appellant. This was logically impermissible. It was an example of *a posteriori* reasoning. Before this Tribunal, the Bank accepted that the contravention alleged was complete on 19 January 2009; see, Transcript, Day 6, page 80.

272. In adopting this five point approach, the Inquiry Member simply did not engage with the Allegation and its constituent elements. More worryingly is the inference that the Inquiry Member *substituted* for the Allegation an allegation of "*whether in all of the circumstances, Mr Guinane's acts or omissions justify a conclusion that he has participated in the commission of the prescribed contravention by PTSB to which the Inquiry relates"*. There was only one act of the appellant's that was (and ought to have been) at issue: his act of responding to the O'Grady Email with the words "*OK with that"*. It is appropriate to set out the relevant part of paragraph 9.29 of the Decision in full, where the Inquiry Member stated:

> *"I will then come to a conclusion on whether in all of the circumstances Mr Guinane's acts or omissions justify a conclusion that he has participated in the commission of the prescribed contravention by PTSB to which the Inquiry relates. In adopting this approach I believe that I am adopting a relatively narrow interpretation of "participating" and "participated" as these terms are used in Section 33AO and 33AQ of the 1942 Act."*

273. The Inquiry Member's approach did not accord with the general principles of statutory interpretation explained in the jurisprudence referred to earlier and did not engage with the Allegation.

The first point: participation in the "acts and omissions" of PTSB

274. In relation to the first point of the five point approach, the Inquiry Member concluded (at paragraph 9.36) that as a matter of fact and, on the ordinary and natural meaning of the word, the appellant had participated in the acts or omissions that constituted the prescribed contravention by PTSB.

275. That conclusion was based on the proposition that the appellant had approved the O'Grady Email, which the Inquiry Member had defined as "the Proposal". The O'Grady Email, however, did not contain "the strategy". The appellant had not approved the strategy. The Inquiry Member stated (at paragraph 9.36) that this conclusion was *"merely a step"* towards deciding if the appellant had participated in the prescribed contravention as the term is used in section 33AO and AQ of the 1942 Act.

276. In his analysis, the Inquiry Member did not refer to the manner in which the contravention was described and outlined in the Allegation. Nor did he advert to the grave nature of the Allegation.

The second point: an "active role"

277. The Inquiry Member concluded that the appellant had taken an active role in the prescribed contravention. He concluded that the appellant signed off on "the proposal" – which was defined to mean the O'Grady Email and not the "strategy" – in the knowledge that others would act upon the authorisation he was giving. That conclusion was curious in its failure to identify precisely "the authorisation" that the Inquiry Member understood had been given. Further, the conclusion was at odds with his own repeated statements that the O'Grady Email was "unclear".

278. The Inquiry Member described the appellant's act of sign-off on *the O'Grady Email* – but not the *strategy* - as an "active step" (paragraph 9.39). He stated

that the appellant's approval was *"a necessary part of the actions that gave rise to the contravention by PTSB"*. Again, the Inquiry Member failed to engage with the Allegation, which was predicated on the O'Grady Email actually containing the proposal that PTSB should engage in the discriminatory strategy.

279. He found that the appellant's knowledge was such that his decision would be followed by PTSB staff and it would affect PTSB's customers. Again, the Inquiry Member failed to address what precisely the "decision" was. To state that PTSB staff would implement decisions of their CEO did not add to the analysis. The question to be determined was what decision the appellant had actually made?

280. At paragraph 9.40, the Inquiry Member stated that the appellant did not take any opportunity to consider what had happened to customers with a "price promise" tracker rate after January 2009. Again, he did not advert to the fact that what was alleged against the appellant was one act on one day (19 January 2009) and that the appellant might have had no reason to follow up given the undoubtedly ambiguous nature of the O'Grady Email.

The third point: subjective knowledge

281. On the third element of the *five point approach* – subjective knowledge – the Inquiry Member identified (paragraph 9.41 onwards) the minimum level of subjective knowledge which he *"attributed"* to the appellant at the time he signed off "the Proposal" (as defined by the Inquiry Member; see, below, under *Issue No.2 Re-characterisation of the Allegation*). Yet, he accepted (at paragraph 9.42) that the appellant had no recollection of the ExCo meeting that had taken place over 15 years before (paragraph 9.44).

282. The Inquiry Member set out evidence given by the appellant to the Inquiry (paragraph 9.44). The Inquiry Member gave a description of inconsistent responses which the appellant had given in interviews with Enforcement in

2017 and 2019 by comparison with his testimony in 2024. Importantly, the Inquiry Member found (at paragraph 9.51):

> *"In coming to a view on what Mr Guinane understood when he read [the O'Grady Email], I note the inconsistencies between Mr Guinane's comments in these interviews and his evidence in the Substantive Inquiry Hearing. However, I do not conclude from this that Mr Guinane was telling the truth in the interviews but had changed his story by the time of the Substantive Inquiry Hearing. I conclude that, as Mr Guinane has consistently said, he has no memory of the decision he was asked to make in January 2009 and was seeking to explain what he did by reference to the documents he was seeing from that time and from the evidence of others in PTSB."*

283. He continued (at paragraph 9.55):

> *"At the Substantive Inquiry Hearing I understood Mr Guinane to be stating that, now that he had seen all relevant documents, he could have understood, or would have understood, from the [O'Grady Email] that all customers who sought a tracker rate after a period of fixed interest rates in a mortgage loan agreement containing SC706 would be given the original tracker rate once they had contacted PTSB to request a tracker rate. He was not stating that he remembered having that understanding at the time."*

284. Importantly, at paragraph 9.57, the Inquiry Member again stated that the O'Grady Email "*lacked clarity*", and that that "*lack of clarity was evident from the text of [the O'Grady Email]*". Having so found, the logical conclusion might well have been that there was no evidence to support the Allegation that the appellant had signed off on a strategy contained in the O'Grady Email. Remarkably, the Inquiry Member referred to a "*minimum level of subjective knowledge that Mr Guinane had when signing off the [email]*" identified at paragraphs 9.3, 9.4, 9.6, 9.7, 9.8 and 9.10 of the Decision. None of this material, without more, was probative of the core Allegation that the appellant knew that the O'Grady Email sought his approval to implement a strategy that discriminated unfairly between customers, and that the appellant signed off on

that strategy in that knowledge. By way of illustration, paragraph 9.6 is considered in detail below in the context of the Inquiry Member's reframing of the Allegation. Very substantial parts of these findings were based on inference rather than direct evidence; see, *Lawlor v Planning Tribunal* [2010] 1 I.R. 170.

285. It is true that there were inconsistencies in the appellant's account in the Inquiry. At the Inquiry the appellant testified that he thought by signing *"OK with that"* that he was giving approval to all customers coming to the end of the fixed interest rate reverting to their original tracker rate, as set out in their loan letter offer. Earlier, during the investigation in 2019, the Inquiry Member recorded that the appellant had stated he did not think that the treatment of "uncomplaining" customers who paid the then prevailing higher tracker rate was fair. At that time, as the Inquiry Member pointed out, he was giving a response without access to documents.

286. The Inquiry Member also pointed out a number of other inconsistencies in the appellant's submissions. At paragraph 9.52 of his Decision, he referred to written observations prepared by the appellant with his legal advisers on 10 January 2022, in which it was stated that the Central Bank's case was unclear as to whether it was suggested that to avoid an inquiry the appellant ought to have formulated his own counter-proposal, whereby all customers would get the original tracker rate. This submission did appear to contemplate the possibility that the appellant had actually understood the proposal in the email as it was intended and understood by Mr O'Grady.

The fourth point: intention, understanding and state of mind

287. The Inquiry Member addressed the fourth of his five point approach under three sub-headings: intention, understanding, and state of mind. On intention, he stated (at paragraph 9.58) that he had not been referred to, or found, sufficient evidence that supported a view that the appellant intended to cause PTSB to offer the original tracker rate to all customers who contacted PTSB in order to revert to a tracker rate after the expiry of a period at a fixed rate of interest.

288. But then he observed that *"the submissions on behalf of Mr Guinane asked me to accept he was the only person in the central functions of PTSB who was dealing with this issue who did not understand the intention behind the Proposal."* The Inquiry Member continued that the appellant had subsequently failed to identify the problem that had arisen in relation to the treatment of customers with SC706, and, in particular, had not read the compliance reports that had been prepared by the compliance function which would have identified the problem. It is not unknown that people in high positions sometimes rely on a defence of "plausible deniability". Nonetheless, the Inquiry Member, made these observations while later concluding and stating that the appellant had done "nothing dishonest". These two views were incompatible. Further, the Inquiry Member failed to link these findings to the Allegation.

289. The Inquiry Member did not find any evidence that the appellant *"understood the intention behind the Proposal"*. On the contrary, the Inquiry Member found, at paragraph 9.60, that there was a *lack* of clear evidence which pointed to the appellant having formed an intention to cause PTSB to put customers in a position whereby they would not receive the tracker interest rate to which they were legally entitled. Such an approach was within the contemplation of PTSB. However, having considered the evidence, the Inquiry Member concluded:

> *"The evidence relied upon in the Investigation Report in support of such a conclusion is Mr Guinane's action in approving the Proposal at a time when PTSB was financially exposed due to the rapid change in interest rates. No stronger evidence in support of such a conclusion arose in the course of the Inquiry. I do not find this to be a sufficient basis for concluding that Mr Guinane intended to put customers in a position whereby they would not receive the tracker interest rate to which they were legally entitled."*

290. The phraseology of that last sentence in the Inquiry Member's conclusions at paragraph 9.60 is hardly consistent with the concept of a presumption of innocence; an issue of some importance when considering the ASP process more generally.

291. In relation to the appellant's understanding of the O'Grady Email, the Inquiry Member considered (at paragraph 9.70), that the appellant should have asked himself a number of questions when reading the email. These included whether:

(a) PTSB really had the option of making whichever tracker rate it chose available to customers.

(b) Whether it was being suggested that PTSB had a choice over which rate to offer.

(c) How a customer should make contact at the expiry of the fixed rate period, but before the loan defaulted to a variable rate.

(d) The timing of any contact and what precisely was being proposed.

(e) What was meant by the terms "*actually contact*" as opposed to "*contact*".

(f) What customers with *price promise* trackers were covered by the decision that was requested.

292. This discussion of what questions the appellant *might* have posed did not engage with the Allegation which was undoubtedly concerned, only, with the appellant knowingly signing off on and approving the discriminatory strategy implemented by PTSB. Further, when undertaking a task of ascertaining the appellant's "understanding" of the O'Grady Email, it is difficult to understand why the Inquiry Member decided to embark on a process directed at what the appellant *might* have understood, *had he asked* certain questions that were not asked at the time.

The three minute time elapse

293. That the appellant decided to *"sign off"* on the proposal within three minutes seems to have been a highly significant element in the Inquiry Member's

finding (paragraph 9.74). The Inquiry Member stated that the O'Grady Email gave the appellant the answers to the two questions that were raised at the ExCo meeting. The only concern recorded at the ExCo meeting had been about the exposure of PTSB that might arise from giving effect to SC706. On receipt of the *"Proposal Email"* the appellant could have readily understood that the exposure of PTSB was low, as it should not rise beyond 400 customers in the short term. It might have been enough for him to agree to the proposal, and to do so within three minutes of being reminded by the email.

294. The Inquiry Member's analysis of the appellant's state of mind during the critical three-minute period ran to nine pages, beginning at paragraph 9.78 of his Decision. There, he found that the appellant's lack of care and attention made it unclear whether he intended that the actions and strategy carried out by PTSB were to follow from (what the Inquiry Member referred to as) "his sign off". The Inquiry Member found that the appellant's awareness of "the Proposal", the definition of which is addressed below, and the circumstances in which it had arisen, were such that the actions of PTSB were a foreseeable consequence of *"approving the Proposal."* The Inquiry Member noted that matters moved swiftly within PTSB thereafter. (paragraph 9.79).

295. The Inquiry Member concluded that the appellant's action "in signing off the Proposal" when he had a good understanding of the risk to customers, and without adequate scrutiny and understanding was, on the face of it, reckless. (paragraph 9.82). The appellant should have sought clarification on what he was approving and had he asked any question of Mr O'Grady, the appellant would have understood that "the Proposal" involved charging customers with the same contractual rights at different rates.

296. On at least three occasions (paragraphs 9.66, 9.84 and 9.90 of the Decision) the Inquiry Member recited objections made by counsel for the appellant that the true issue was whether the appellant had signed off on any decision or strategy other than that the customers who contacted PTSB would receive their original tracker rate. As stated earlier, the Inquiry Member dismissed these objections, and simply did not engage with them. He did not give any reason for making

findings that were, in substance, quite distinct from those in the Allegation. This issue is further dealt with under the heading of fair procedures.

Paragraph 9.84 and paragraph 9.85

297. As it demonstrates a fatal error in the Inquiry Member's reasoning, it is appropriate to restate his approach to a submission (recorded at paragraph 9.84) by counsel for the appellant that:

> *"[t]he allegation is very clear; is that [the appellant] signed off on this strategy and he did so in the full knowledge of the factual position and the [privileged legal advice redacted]."*

298. In response the Inquiry Member, remarkably, stated (at paragraph 9.85, emphasis is that of the Inquiry Member).

> *"I do not accept this characterisation of the SPC. The outline of the SPC states:*
>
> > *Mr Guinane participated in PTSB's contravention of Chapter 1 General principle 1 of the 2006 Code, a prescribed contravention by signing off on the proposal made to him on 19 January 2009 i.e. the strategy to only give the more favourable rate back to those customers who specifically requested that their original and lower interest rate or queried or complained."*

299. He continued (paragraph 9.85):

> *"The SPC alleges that Mr Guinane signed off on the Proposal and it sets out the "strategy" behind the Proposal and which was pursued following the signing off of* (sic) *the Proposal. It does not state that Mr Guinane was fully aware of the strategy. It states that he signed off on the Proposal that would implement this strategy. The significance of his understanding lies in whether, if he did not know what the Proposal would entail, he can be said to have participated in any prescribed contravention that it gave rise to, and in addition, whether he can be*

culpable or blameworthy if he was unaware of the consequences or that those consequences could lead to a prescribed contravention."

300. This passage, just quoted, is simply not possible to explain. Neither the SPC alleged against PTSB, nor the Allegation against the Appellant, *"set out"* the *"strategy" "behind"* what the Inquiry Member defined as *"the Proposal"*. It is abundantly clear that the gravamen of the Allegation was that the appellant's participation was predicated on *approval* of the strategy *contained in* the O'Grady Email. The Inquiry Member specifically found that that email did not contain the strategy, but rather should have been understood as a harbinger of, or presaging, the strategy. Yet, this is what the Allegation which he drafted stated. The matter is not simply one of semantics. The gravamen, or substance of the Allegation, was based on the proposition that the O'Grady Email actually contained the strategy. If this was not so. the case against the appellant, as set out in the Allegation, was hanging by a thread. The Tribunal has not been able to find any section in the Decision under appeal where the Inquiry Member seriously engaged with that fundamental question.

301. What the Inquiry Member wrote in paragraph 9.85 is in stark contradiction with what he had himself written in the Allegation. What he wrote there reflected what was contained in the Investigation Report, namely, that the appellant had approved the strategy contained in the so-called "proposal" of 16 January 2009. Not only this, but he had done so in full awareness of the impact of his decision on 400 customers. But additionally, the Allegation stated that he had participated in the contravention by PTSB, with all the attributes and adjectives described by the Inquiry Member in his finding on that issue.

302. What had emerged in the evidence was divorced from the substance of the Allegation. While a case might have been made that the appellant may have been negligent, that was not the case in the Allegation that had been advanced against him, and which he had come to meet. If the Allegation had been one of negligence, carelessness or recklessness, it is a reasonable assumption that the matter might very well have been dealt with at various levels in the Bank on an entirely different basis, as touched on earlier. This would have included

whether or not there might have been a negotiation with the Bank with regard to settlement; or if an inquiry did proceed, the nature of the cross-examination of Mr O'Grady; and the fact that the appellant ultimately was rendered liable for his own doubtless very substantial costs. It would be very surprising if the costs of this did not comfortably, run into a large six figure sum.

Taking advice on interpretation

303. The case which the Inquiry Member built by inference is evident in the paragraphs which follow. The Decision stated (at paragraph 9.86) that after the substantive Inquiry hearing had concluded:

> *"…it became clear that the advice and extensive submissions on how "participation" should be interpreted in the context of the 1942 Act had made only limited reference to the question of whether participation could arise from a lack of care. Mr Guinane and Enforcement had focused on other aspects of this issue. I therefore sought specific advice from the [second] LPT and thereafter, invited submissions from Mr Guinane and Enforcement on the question of whether a person concerned in the management of an RFSP who recklessly or negligently (or carelessly) takes an active part in a series of acts by that RFSP that gives rise to a prescribed contravention by the RFSP of a regulatory requirement imposed under the 1942 Act can be found to have participated in that prescribed contravention. I also requested advice and submissions on the meaning of "recklessness" in both a civil and criminal law context, and any guidance on the extent to which it is to be assessed on the basis of a subjective or an objective test."*

304. The phraseology of the statement is noteworthy. The Inquiry Member did not seek advice as to whether it was open to him to make a finding of recklessness, negligence or carelessness against the appellant, but rather on a hypothesis. The question was open-ended and deprived of context. The Allegation had nothing to do with recklessness, negligence or carelessness. The Allegation was of a far greater gravity.

305. At paragraph 9.92, the Inquiry Member again cited the gravamen of what

counsel for the appellant submitted was the Allegation but did not advert to it thereafter. He merely concluded (at paragraph 9.93), that the appellant *"had sufficient knowledge to understand that his decision in response to the Proposal would have a material impact on a group of customers."* The Inquiry Member referred to the potential for a failure to take care to cause a *"material financial impact"* and to the risk of *"harm"* to customers being apparent, a far more serious failing and appeared reckless. (paragraph 9.93). The Inquiry Member appears not to have taken on board that the *"potential for the decision on the Proposal to harm customers"* was only *"foreseeable"* by the appellant if he understood that "the Proposal" for a discriminatory strategy was actually contained in the O'Grady Email. On the contrary, if, consistent with the advice that the exposure to PTSB was low, the appellant understood that the original tracker rate should be offered to all customers who contacted PTSB on expiry of their fixed interest rate terms, then, there would have been no harm to customers.

306. The Inquiry Member then reached his conclusion (at paragraph 9.94):

> *"I conclude that in the particular circumstances of this Inquiry, participation under section 33AO2 and section 33AQ8 of the 1942 Act in a breach of the 2006 Code can arise from conduct that was carried out recklessly or negligently, rather than intentionally."*

307. That this was a hypothesis is self-evident. The Allegation was not mentioned.

308. At that stage, it would be fair to say the reasoning process had lost sight of the substance of the Allegation on which the Inquiry Member was duty bound to make findings on behalf of the Bank.

309. He made no mention of the Allegation in substance. He then proceeded to find (at paragraph 9.95):

> *"I conclude on the balance of probabilities that when Mr Guinane reviewed and responded to the Proposal he considered the "exposure" of PTSB before responding but he did not consider the consequences for customers. Mr Guinane did not form a specific intention with regard to*

the treatment of customers who would be affected by the Proposal. He approved the Proposal without taking any care of, or paying any attention to, the consequences for customers despite being in a position to understand the significance of the proposal for them and the risk that customers could be overcharged."

310. The following insurmountable problems are evident in those two paragraphs. First, as stated, the substance of the Allegation was lost. An important particular of the Allegation was lost with regard to the appellant's specific intention and awareness. Second, what the Inquiry Member relied on was what might be found in *a* contravention. But this was not what it was necessary for him to find in relation to *the* Allegation. This was not appropriate legal reasoning. To be *intra vires*, such reasoning should have asked the question whether the Allegation was made out. This, the Inquiry Member failed to do.

The fifth point: culpability or blameworthiness

311. Turning to the fifth point of the five point approach – the appellant's alleged culpability or blameworthiness - the Inquiry Member stated (at paragraph 9.102), that the appellant's "participation" was not enough on its own to cause the contravention by PTSB, and that it arose in part because the appellant's colleagues and subordinates failed to exercise their own judgement properly. This finding might be seen as a considerable understatement in light of the conclusion reached on PTSB's conduct.

312. The Inquiry Member criticised the appellant for failing to take advice, and instead, having accepted Mr O'Grady's report, in the O'Grady Email, of the legal advice given by PTSB's legal function. Having concluded (at paragraph 9.104), that the appellant had the time and opportunity to consider his decision, but made it quickly and may not have understood the effect of what he was deciding, the Inquiry Member also concluded that the appellant had "*signed off the Proposal"* without taking any care of, or paying any attention to, the consequences for customers, and despite being in a position to understand the risk that customers could be overcharged. Thereafter, the appellant had failed to take any steps to check that customers were being treated fairly and in their

best interests. On this, the Inquiry Member found that the appellant had been aware that his sign off would lead to "the Proposal" being implemented and did not seek any further information about what would happen as a consequence of this sign off. Consequently, the appellant was blameworthy and culpable (paragraph 9.105).

313. It is very difficult to avoid the conclusion that the Inquiry Member reasoned "backwards", from his finding that the appellant was "*blameworthy*" to a conclusion that he had "*participated*" in PTSB's contravention.

314. The proposition that the statutory administrative sanctions procedure should be directed at potentially blameworthy or improper conduct is uncontroversial. The policy aim, however, was achieved by the provision for the imposition of sanctions on commission of a contravention by the regulated financial service provider (RFSP) or participation in such a contravention by a person concerned in the management of the RFSP. Once it is established that a person is "*concerned in the management of*" an RFSP, a separate and distinct question falls for determination. This is whether the "person concerned" "*participated*" in the contravention committed by the RFSP, a question that must be determined by reference to the particulars alleged consequent on an investigation by the Central Bank that resulted in referral to inquiry.

315. The terms "blameworthy" and "culpable" did not form part of the legislative scheme. Merely because the conduct of an individual might be said to be blameworthy was not dispositive of whether that individual had "*participated*" in the prescribed contravention in the manner *alleged against that individual*. The Inquiry Member considered that Mr Guinane was "blameworthy" by reason of his failure to take certain steps. Unfortunately, the inference can only be that the Inquiry Member's concern at the gravity of the contravention by PTSB, and his opinion that had Mr Guinane acted differently that contravention – and consequent harm to consumers - might have been avoided, coloured his analysis of whether, on the evidence, Mr Guinane had "participated", in the manner alleged against him, in the Allegation. The significance of the approach adopted by the Inquiry Member is that it unfortunately confirms

serious errors in law. He acted *ultra vires* his statutory jurisdiction. He also took into account irrelevant matters. The legal consequences of those are further considered below.

The premise: negligence, carelessness or recklessness

Analysis of the premise

316. Thus far, this section of the Tribunal's decision has outlined the quite detailed way the Inquiry Member carried out his analysis. However, as has been stated, all this was based upon a false premise that the Allegation concerned negligence, carelessness or recklessness. It did not concern any of these elements.

317. The substance of the Allegation was entirely different. The particulars upon which the Inquiry Member relied in addressing the question of negligence might have been consistent with such a finding, but such a finding was not consistent with the gravamen of the Allegation against the appellant. The case was that he had *participated in PTSB's contravention*, not a hypothetical contravention. The Inquiry Member's profound difficulty in this process is best illustrated by in the way he dealt with what was actually contained in the Allegation at paragraph 9.85 of his Decision (considered above), whereby he contradicted the meaning of the Allegation which he himself had drafted.

The invitation to the parties to make submissions on the "negligence question"

318. The possibility that the Allegation against the appellant might encompass negligence was raised by the Inquiry Member with the parties on 23 August 2024, some four months after the substantive inquiry hearing had concluded on 15 March 2024. During that period, the Inquiry Member had obtained advice from the second LPT. The Inquiry Member recorded (at paragraph 9.86) that he had *"invited submissions from Mr Guinane and Enforcement"* on that advice dated 17 July 2024.

319. The Inquiry Member gave the appellant and Enforcement two weeks, until 6 September 2024, to make submissions on that legal advice. After repeated

requests on behalf of the appellant, the deadline was extended to 20 September 2024.

The appellant's submissions

320. In response to the Inquiry Member's invitation, the appellant made written submissions on 20 September 2024.

321. The Inquiry Member rejected the appellant's submissions that the clear words of the Notice of Inquiry containing the Allegation against the appellant required proof that the appellant was aware of, or knew of, the strategy. As explained in this decision, his reasoning (at paragraph 9.85 of his Decision) did some violence to the plain words used in the Allegation. For this reason, the Inquiry Member must be considered, and this Tribunal so concludes, to have breached his duty to give fair and timely notice and reasons for his Decision.

The position adopted by Enforcement

322. Enforcement chose not to make submissions or submit observations on the Inquiry Member's proposal that the Allegation might encompass negligence.

323. It is uncontroversial to state that a regulator should be fully familiar both with the legislative framework governing it. That proposition takes on additional meaning when one understands that Enforcement and the Inquiry Member are both emanations of the Bank. A person appointed to conduct an inquiry may be an employee of the Bank or, as occurred here, may be an external appointment. In either case, the decision of a person or persons appointed to carry out an inquiry is a decision of the Bank.

324. The Bank ought to have known that the legislative scheme for inquiries meant that it was not permissible for the Inquiry Member to introduce a concept – negligence – which had not been identified in the Bank's investigation, and consequently, was not any part of *either* the *grounds* on which the Bank formed its *reasonable suspicion* and made its *decision* to hold the Inquiry *or* the gravamen of the Allegation against the appellant. When the issue of negligence was raised in August 2024, Enforcement ought to have informed the Inquiry

Member accordingly. Had Enforcement done so, the errors may have been avoided, and the appellant spared an adverse finding, with the attendant personal and financial costs, costs which have persisted in the two-year period since August 2024.

Tribunal analysis of the Inquiry Member's five point approach

325. The Inquiry Member concluded (at paragraph 9.107) that the five point approach, which he had adopted, was consistent with many of the positions advanced on the appellant's behalf. This was not correct. It was incorrect in relation to the essential case advanced by the appellant regarding the nature of the Allegation. The Inquiry Member went on to state that he agreed with counsel for the appellant that the Allegation was not to be decided on the basis of strict liability and that a mental element was required. He then went on to *agree* that in the circumstances of the Inquiry, when considering if the appellant was reckless, his subjective knowledge should be taken into account. But again, this was not the substance of the Allegation. The five point process did not accord with the clear principles of interpretation set out in *Heather Hill* case.

326. In summary, therefore, this section of the Tribunal decision has endeavoured to explain:

(a) that the Inquiry Member made a finding in relation to *an* allegation, but not *the Allegation*;

(b) that the hypothetical allegation on which the Inquiry Member made his finding was one of negligence, carelessness, or recklessness that was not at all what was alleged against the appellant in the *Allegation*.

327. At risk of repetition, the substance of the Allegation has been described earlier and was very grave. The Allegation was that the appellant as Chief Executive Officer of PTSB had participated in a strategy that discriminated between customers by signing off on that strategy when he read the O'Grady Email. The evidence did not bear that out. Whether or not the appellant may have

been careless or negligent is not for this Tribunal to determine.

328. What is abundantly clear, however, is that unfortunately, the description above outlines the manner in which the Inquiry Member acted *ultra vires*; failed to give adequate, fair or timely notice; and failed to give reasons. Each one of these is dealt with in more detail below.

Issue No.2: Re-characterisation of the Allegation

Introduction

329. A second error in the Inquiry Member's reasoning was the way in which he reframed the Allegation. The consequences of this have been considered above in the section of this decision dealing with *Issue No. 1*. It is now important to set out precisely how the Allegation was reframed by the Inquiry Member.

330. The Inquiry Member had the benefit of the legal opinion from the first LPT. He could only have understood that amendment to the Allegation could not alter the substance of the alleged participation by the appellant, in the contravention which the Bank reasonably suspected had been committed (as had been recorded in the Investigation Report). The Tribunal notes that, in an introductory part of his Decision, the Inquiry Member cryptically referred to "other things" contained in the first LPT's decision of 15 October 2021 (paragraph 3.10). The question of jurisdiction was not simply an "other thing". It was fundamental. For there, the first LPT had identified the risk of, and cautioned the Inquiry Member against, changing the particulars of the act amounting to the alleged contravention or the provisions of law of which the contravention was alleged to be in breach.

The Inquiry Member's definition of the "Proposal"

331. As noted earlier, the Allegation in the Notice of Inquiry, although in slightly different language from the Investigation Report, did not alter the substance of the allegation against the appellant. The core elements – that Mr Guinane had made a decision and signed off on a proposal / strategy to discriminate between customers – remained the same. The Inquiry hearing was conducted on that

basis. However, in his Decision, the Inquiry Member reframed or re-characterised the Allegation in a manner that fundamentally altered the scope and nature of the Inquiry. In the glossary included at Appendix 5 of his Decision, the Inquiry Member defined "Proposal" in the following terms:

Proposal Email or Proposal	*Email dated 16 January from Niall O'Grady to David Guinane with the subject line* "Tracker"

332. This definition omitted to say that this email contained the strategy which was what was said in the Allegation by the term "i.e.". By this definition, the Inquiry Member transformed the Inquiry from an inquiry into whether Mr Guinane had *"made the decision"* and *"signed off on" "the strategy"* that PTSB should only give the more favourable tracker rate back to customers who asked for it or who otherwise queried or complained into an inquiry as to whether the appellant had signed off on the O'Grady Email, an email that the Inquiry Member considered to be *"unclear"* and *"open to misunderstanding"*.

333. The question therefore became one as to whether the appellant had responded in the affirmative to the O'Grady Email on the basis that that email was *"unclear"*. In this process, the Inquiry Member decoupled the "sign off" from the "strategy" to discriminate between customers: the question for determination was no longer whether the appellant had positively approved, or *"signed off on"*, a proposal to adopt the discriminatory strategy. By so defining the "Proposal", the Inquiry Member profoundly changed the nature of the Allegation in a way that was at odds with the way in which the Inquiry hearing had been conducted over 13 hearing days (excluding days dedicated to procedural and preliminary legal questions). This interpretation was, however, consistent with his description of what is contained in the Allegation found in paragraph 9.85.

334. There is a conceptual difference between *"responding"* to an Email (the language used in paragraph 9.102 of the Decision) and *"signing off on"* a proposal contained in the Email: the latter requires one to know and understand

what the proposal is and to positively approve it.

335. Further, in reframing the Allegation against the appellant the Inquiry Member did not consider the question whether the appellant, in fact, knew what Mr O'Grady and others in PTSB's Marketing, Compliance and Legal Departments intended to do.

The case made by Enforcement in submissions on the conclusion of the Inquiry hearing

336. Further, and importantly, the Inquiry Member's analysis is at odds with the case made by the Enforcement. This was that the appellant had signed off on the strategy in the knowledge of the strategy. This was demonstrated by the closing written submissions filed on behalf of Enforcement on 12 March 2024. The following are illustrative examples from these submissions (emphasis added):

> *"82.* ***Mr Guinane endorsed an approach which culminated in different cohorts of customers being treated differently****, which was unfair.*
>
> *83. Ultimately,* ***the Person Concerned approved that strategy*** *by email to Mr O'Grady on 19 January 2009. Specifically, three days later in the afternoon of Monday, 19 January 2009, Mr O'Grady again emailed the Person Concerned (copying Ms O'Doherty and Mr O'Connor) requesting a response to his previous email from 16 January 2009, saying "Dave, Can I take it that you are Ok with this". Then, in the afternoon of Monday, 19 January 2009, the Person Concerned responded to Mr O'Grady's email stating: "OK with that"*
>
> …
>
> *86. In summary, therefore,* ***the Person Concerned - having been advised and operating in the knowledge that*** *– [LEGAL ADVICE REDACTED]* ***decided to offer*** *the original, and by then more favourable interest rate, only to those customers who contacted PTSB -before the expiry of the fixed rate period - seeking their original rate (whether by complaint or query or*

otherwise). However, those who contacted the bank and did not raise that issue were treated differently and placed on the prevailing rate which was higher. Therefore, customers who had the same SC706 legal entitlements would be treated differently."

[…]

151. ***The evidence shows that Mr Guinane*** *played a key and decisive role in the commission of the suspected contravention by the Firm. In his role as CEO of the Firm, he* ***signed off on the proposal made to him on 16 January 2009 to only give what was at that time the more favourable tracker rate back to those customers who contacted the Firm to request that lower interest tracker rate or to query or complain, leaving all the remaining customers with SC706 - who rolled off a fixed rate and contacted PTSB seeking a tracker rate - on a higher and less favourable tracker rate****.*

337. The reframing of the Allegation against the appellant is at the heart of this appeal, and, for that reason, it is necessary to now consider paragraph 9.3 of the Decision.

Paragraph 9.3 (by reference to paragraphs 9.6 to 9.11)

338. At paragraph 9.3, the Inquiry Member summarised his findings, stating, at paragraph 9.3(a):

> *"On 19 January 2009, Mr Guinane signed off on the proposal made to him in an email dated 16 January 2009 from Mr O'Grady to Mr Guinane with subject line "Tracker" (****Proposal Email or Proposal****). This proposal set out the position that PTSB would adopt in dealing with customers whose mortgage loan agreements contained SC706 and who wished to revert to a tracker rate".*

339. The words *"to him"* are significant. A straightforward reading of paragraph 9.3(a) would suggest that the Inquiry Member understood the O'Grady Email to include an express statement of the proposed strategy that would, if approved, result in former tracker mortgage-holders coming to the end of a

fixed rate period being treated differently, depending on whether or not they asked for their original tracker rate back.

340. On that reading, if that was what the Inquiry Member had truly found, what would be required to be proved was that the Appellant *"signed off on"* a "Proposal" that comprised the discriminatory strategy. However, the Inquiry Member manifestly did *not* accept that the Allegation required the appellant to know and approve of the strategy and paragraph 9.3(a) must be read in the context of the Decision as a whole.

341. As noted, there are a number of references in the Decision to the O'Grady Email lacking clarity (identified above). But the Inquiry Member found (at paragraph 9.6) that the email was not to be read in isolation. In his Decision, the Inquiry Member enumerated certain matters that the appellant knew, none of which were directed to the issue of who was to get the more favourable rate; certainly, not without more. To illustrate,

(a) That the appellant was familiar with the "price promise" (paragraph 9.6). This simply meant that the appellant was familiar with a tracker rate meaning the ECB rate plus a fixed percentage. This, one would expect of the CEO of a bank.

(b) That the appellant had already been introduced to the issue at ExCo (paragraph.9.7). That is correct, but was not probative of anything beyond that fact. All the evidence was that no-one had any meaningful recollection of what was said at ExCo. The only evidence of what occurred at the ExCo meeting related to the two questions posed by the appellant that Mr O'Grady was asked to check, the answers to which, of themselves, did not indicate any significant problem.

(c) Various matters were listed at paragraph 9.10 of the Decision as matters of which the appellant must have been aware. It is appropriate to set them out in full.

342. Paragraph 9.10 stated:

> *"… I find that Mr Guinane must have been aware that he was now being asked to make a decision that would affect a group of PTSB's customers and that he would be deciding what interest rate certain established customers would pay for their existing mortgage loan agreements. Mr Guinane must also have been aware of the following when considering the specific issue he was asked to decide on in the emails of 16 and 19 January 2009:*
>
> *(a) He would have had a recollection of the discussion at the ExCo meeting on 13 January 2009 and the understanding and knowledge set out at paragraph 9.4 above. The Proposal email starts "As mentioned this summarises the issue we discussed re tracker customer", which refers to the discussion at the ExCo meeting.*
>
> *(b) He would have understood that he was being given information relevant to the "exposure" of PTSB to customers who could have a right to a tracker rate at an interest rate that could be below the interest rate at which PTSB could borrow funds at this time and that this would create the "exposure" for PTSB.*
>
> *(c) This "exposure" was very low.*
>
> *(d) The question of the correct tracker rate that applied to a residential mortgage borrower was a significant one for each individual customer.*
>
> *(e) That interest rates had changed significantly in the period prior to this issue coming to him for decision and that customers leaving a period at a fixed interest rate were likely to be facing a significant increase in their borrowing costs.*
>
> *(f) The margin over the ECB rate in a tracker rate that was then in operation within PTSB was higher than that which would have applied at the time that most of the customers received a letter of approval at the outset of their mortgage loan agreement containing SC706.*
>
> *(g) Given these facts and Mr Guinane's knowledge of interest rates in the customer sector, he would have been aware that it would*

be in the best interests of some, or all, customers to receive the original tracker rate, which was the subject of a "price promise" and not the tracker rate that was then in operation within PTSB.

(h) PTSB had a choice over whether to offer customers their original tracker rate or the tracker rate then applying.

(i) *In the event that a dispute over which tracker rate a customer should receive was referred for a ruling, legal advice was [PRIVILEGED LEGAL ADVICE REDACTED]."*

343. All of the matters set out at paragraph 9.10 might be true. *None* are probative of whether the appellant knew of, and signed off on, the "strategy" to discriminate between PTSB customers depending on whether they asked to revert to their original tracker mortgage or otherwise complained. The matters listed at paragraph 9.10(a) to (i) may well have influenced *PTSB* in the strategy that Marketing, Compliance and Legal pursued. That the exposure was very low might just as equally have informed an understanding by or belief of the appellant that the original tracker rate should be offered to all customers.

344. The crucial point is that none of the matters identified by the Inquiry Member were probative of the Allegation.

Conclusion on re-characterisation of the Allegation

345. The Inquiry Member's error in re-characterising the SPC was at the core of his Decision. It tainted the entire analysis. In his Decision, the Inquiry Member considered whether, and determined that, the appellant signed off on the O'Grady Email, whereas what ought to have been addressed was whether the appellant had signed off on the *strategy*. The latter required that, when replying to Niall O'Grady, the appellant knew or was aware of the strategy. Importantly, it was the signing-off on the strategy that was the Bank's case, as recorded in the Investigation Report, and reflected in the statement of the Allegation in the Notice of Inquiry. The implications for the Inquiry Member's jurisdiction are considered later.

Issue No.3: The Inquiry Member's reliance on events after 19 January 2009

346. A third important aspect of the Inquiry Member's decision making process was his reliance on events occurring after 19 January 2009 to reach his conclusion that the appellant had participated in PTSB's contravention. Unfortunately, this approach did not distinguish between the contravention alleged against, and found to have been committed by, PTSB over a sustained period from 19 January 2009 to April 2010 and the Allegation against the appellant.

347. The Allegation was concerned *only* with the appellant's actions on *one* date, 19 January 2009. Without more, the acts or omissions of *other personnel* within PTSB after that date were not relevant to, or probative of, whether the appellant had "made the decision" to "sign-off on" a proposal / strategy to discriminate between customer cohorts by offering the more favourable tracker mortgage rate only to those customers who expressly raised the issue with the PTSB. Obviously, if the actions of those others showed that the appellant had understood the proposal to contain the strategy, the position would have been different.

348. In oral submissions on behalf of the Bank on Day 8 of the appeal to this Tribunal, senior counsel submitted on this point:

> *"Yes. So when one analyses the decision it is quite clear that the Inquiry Member - this is the chain of reasoning point, I suppose, that I mentioned - the Inquiry Member took the view that, as a matter of fact, the proposal in 19th January 2009 email was in fact the strategy. And why did he come to that view? Because one looks at what occurred immediately thereafter, in the months thereafter. I mean having given this sign-off, this fairly short, terse email, what was in fact pursued was exactly that, a strategy to only give the more favourable rate to those who complained, in simple terms."*

349. That submission required one to determine what *the appellant* knew or understood on 19 January 2009, by reference to what *others in PTSB* did *after* 19 January 2009. The submission did not refer to, or address, whether what Mr O'Grady, and others within PTSB, meant or intended had been

communicated to the appellant. On the contrary, having found that the O'Grady Email was *"unclear"*, the Inquiry Member did not properly engage with the implications of that lack of clarity as to what the appellant was said to have known on 19 January 2009. As noted earlier, the factors the Inquiry Member relied on, to suggest that the email was not read *"in isolation"*, did not resolve this issue.

350. The Inquiry Member's reliance on matters occurring after 19 January 2009 is further illustrated by the following (emphasis added):

(a) Paragraph 9.3, analysed above, where the Inquiry Member had regard to the appellant's conduct during the relevant period and not on the date relevant to the appellant (19 January 2009).

(b) Paragraph 9.12, where he held that the appellant *"could have checked or revisited the position that PTSB had adopted in relation to tracker mortgages or the application of SC706."*

(c) Paragraph 9.12 where he referred to the monthly and quarterly compliance reports for February and March 2009, which it was accepted that the appellant had *not* read. The Inquiry Member stated (emphasis added):

> *"**Had he read them carefully**, or discussed them with others in PTSB, he would have been aware that PTSB was not offering customers with SC706 in their mortgage loan agreements, their original tracker rate when they reverted to a tracker rate, unless they requested this or objected to paying the then current tracker rate. **He could have** read these reports or other compliance reports issued during the Relevant Period **and checked if the approval that he had given on 19 January 2009 was being implemented as he expected.**"*

351. The points identified in relation to paragraph 9.12 are also relevant to the error whereby the Inquiry Member grounded his decision in actions that the

appellant might have taken, but did not, another illustration of taking into account irrelevant matters.

Issue No.4: The Inquiry Member's reliance on actions that the appellant might have taken, but did not

Introduction

352. The fourth aspect of the decision-making process was the Inquiry Member's reliance on actions that Mr Guinane might have taken but did not take. This issue has been touched on earlier. On its terms, the Allegation was not directed to any action that Mr Guinane might have taken but did not. It is difficult to avoid the conclusion that the Inquiry Member considered that had the appellant followed up, the outcome for customers would be different and that the appellant's failure to do so was *"blameworthy"*. That might well have been the case. It was not the question before the Inquiry.

Paragraph 9.12

353. The matters identified above in relation to paragraph 9.12 of the Decision (in the context of analysis of *The Inquiry Member's reliance on events after 19 January 2009*) illustrate the error into which the Inquiry Member fell in suggesting that had the appellant read compliance reports prepared after 19 January 2009, he would have realised that the strategy was *not* to reinstate mortgage holders to their original tracker rate unless they asked for it. Importantly, the conclusion at paragraph 9.12 demonstrated that the Inquiry Member contemplated the possibility that, contrary to the Inquiry Member's findings, the appellant had *not* approved the strategy. Otherwise, why would reading the compliance reports have made any difference? Unfortunately, the Inquiry Member did not seem to engage with the implications of this for the case against the appellant.

Paragraphs 9.82 and 9.102

354. The Inquiry Member criticised the appellant for neither seeking clarification from Mr O'Grady, nor offering any clarification on what he was approving (paragraph 9.82). The appellant was also criticised for not seeking advice, or

suggesting at the ExCo meeting that legal advice be taken, before he responded to the O'Grady Email (paragraph 9.102).

Paragraph 9.104

355. At paragraph 9.104, the Inquiry Member concluded that the appellant's signing off was "*an active cause of the acts that gave rise to the contravention*". He criticised the appellant for failing, after 19 January 2009,

> "*to take any steps to check that customers were being treated fairly and in their best interests. He was aware that his sign off would lead to the Proposal being implemented and he did not seek any further information about would happen as a consequence of this sign off*".

356. On the one hand, this paragraph is predicated on a suggestion that the appellant signed off on a proposal: such a proposition would have required knowledge of the proposal. On the other hand, it required that the appellant needed further information as to what would happen consequent on sign-off. The consequence of sign-off on any proposal is, in normal course, that the proposal so signed-off would be implemented.

357. If the appellant understood the O'Grady Email to propose a course of action that was favourable to consumers, he would have had no need to pursue the matter further. This paragraph further underscores that the Inquiry Member had decoupled the appellant's response to the O'Grady Email ("*OK with that*") from the Allegation that the appellant had "signed off on" the unfair and discriminatory treatment of customers.

358. What is clear is that the Inquiry Member considered that, had the appellant acted *differently*, the strategy pursued by PTSB could have been avoided. That, however, is a separate matter as to whether he approved, or signed off on, the strategy, which was the Allegation. All of this serves to underscore the inherent difficulty in the definition in the glossary of "the Proposal" as the O'Grady Email.

Inductive nature of the reasoning and special meaning of "participate"

359. This description of the Inquiry Member's reasoning process illustrates what can only be described as a highly unusual interpretation process. It was not warranted by or on the legal authorities cited earlier. To all intents and purposes, it appeared to be a special "inductive" reasoning process intended to address the evidence.

360. The fact that the Inquiry Member embarked upon this lengthy and detailed process, begs the question as to whether the Allegation was made out? He was not entitled to embark on an amendment of it or to change the substance of it. Consequently, there appears much force in the appellant's contention that the Allegation had not been made out. It is not entirely unfair to state, as did counsel for the appellant, that having embarked upon one allegation, the Inquiry Member arrived at a conclusion in relation to a substantially different allegation.

Conclusion on the Inquiry Member's reasoning process

361. The foregoing description of the Inquiry Member's reasoning process above demonstrated that:

(a) he impermissibly amended the Allegation made against the appellant;

(b) he gave a special meaning without warrant to the term "participate";

(c) he interpreted what was actually contained in the O'Grady Email by contradicting the Allegation which unequivocally stated that that email contained the *strategy*; and

(d) he relied on matters that did not demonstrate that the appellant was aware that the consequence impact of his alleged "sign-off" of the O'Grady Email would be that PTSB personnel would implement the strategy that discriminated between customers.

362. It will be noted that the Inquiry Member found no evidence that the appellant played any part in the execution of the matter after 19 January 2009.

363. The cause of the Inquiry was three words: its resolution can also be expressed shortly. It is best put it in the form of a question. Did the Inquiry Member

make a finding on whether the appellant had participated in the prescribed contravention *to which the Inquiry related*?

364. He did not.

THE LINK BETWEEN *ULTRA VIRES* AND *KEEGAN* IRRATIONALITY

365. This Tribunal decision has earlier referred to the judgment of Henchy J. in *The State (Holland) v Kennedy,* [1977] I.R. 193, which deals with the question of *ultra vires*. The decision of Henchy J. in the *State (Keegan) v Stardust Victims Compensation Tribunal* [1986] I.R. 642 addresses irrationality and is considered below. These matters are inextricably interlinked in their application to the Inquiry Member's Decision, as is now addressed in the following sections of this decision.

366. Regrettably, the Tribunal must conclude that, by virtue of a flawed reasoning process, the Inquiry Member deprived himself of jurisdiction, that is to say, he acted *ultra vires*. It is by now evident that the Inquiry Member erred in jurisdiction by reformulating the Allegation.

367. The Tribunal will also presently conclude that the Inquiry Decision under appeal was irrational in the *Keegan* sense as understood. The conclusion did not follow from the premise. The reasoning process in the Inquiry was flawed. The Tribunal has asked itself whether there could be any explanation other than one where that reasoning process moved from the evidence, rather than asking the question, whether the Allegation had in fact been made out? The Inquiry Member's decision-making process was not a "*dispassionate application of the law*".

368. The issue of *vires* is first considered in more detail.

JURISDICTION AND/OR *VIRES*

Introduction

369. The conclusions of the Inquiry Member have been considered above. Are these conclusions of the Inquiry Member substantially the same as the Allegation. The clear answer is "no".

The Allegation: meaning of "to sign off on" and "to decide"

370. There can be no doubt that the Allegation, as stated in Annex A, was that Mr Guinane knew of the strategy to, essentially, discriminate between customers and that he positively approved that strategy. References to *"making the decision"* and *"signing off on"* indicate positive approval of a course of action of which the decision-maker is aware. As used and understood in everyday life, the phrase *"to sign off on"* means to agree to, or approve.

371. Lest there be any doubt, the Oxford English Dictionary defines the term as meaning *"to assent or give one's approval to, by or as if by signing an agreement."* Likewise, *"decide"* means *"[t]o arrive at an opinion or conclusion about (a matter under consideration); to make a decision regarding (question, issue, etc., on which there is doubt or dispute), esp. after considering several alternatives."*

Further consideration of aspects of Bank's case before this Tribunal

372. Certain of the Bank's submissions to this Tribunal were considered in the context of *The Inquiry Member's Findings and the Allegation*, under the sub-hearing *The Bank's submissions on the Inquiry Member's jurisdiction.*

373. In that context, the Tribunal recorded that it considered that the Bank's submissions were brave ones (see above, under the sub-heading *The Tribunal's observation on the Bank's submissions*).

374. The Tribunal has also observed that the Allegation was specifically based on what was contained in the *"grounds"*, that is the Investigation Report. The Allegation was set out in the mandatory Notice of Inquiry and the grounds were

stated to be as set out in Annex B, which *"grounds"* are the Investigation Report. A redefinition or *"broadening"* of the words *"prescribed contravention"* had no role to play in conferring jurisdiction on an Inquiry Member he did not have.

375. The Bank's case was that the core legal issue was whether, on the basis of the interpretation of the term *"participation"*, there could be a finding of negligence. Before this Tribunal, counsel for the Bank submitted that there could, and that the appellant's case depended on a mental element being required, which, counsel submitted, was unnecessary. Counsel asserted that the findings of the Inquiry Member were broadly cognate with the concept of strict liability, Transcript, Day 6, page 38. This again was counter to the three jurisdictional documents: the Investigation Report, the Notice and the Allegation based thereon. The Investigation Report stated that the appellant was *"a very senior manager"* in the firm at the time he *"made the decision"* or *"signed off"* or *"approved the strategy"* alleged to be contained in the email of 16 January 2009.

376. It hardly requires reiteration that there was no question of negligence, carelessness or recklessness identified in the Investigation Report, or the Allegation. To the contrary, the Bank's case *there* was that the appellant had participated by being a *"key and decisive element"* in the strategy which depended on his having approved what was said to have been contained in the email of 16 January 2009.

377. The Bank's case was that there could be a finding against an appellant who had full *mens rea*, or one found to be subject to strict liability, as Enforcement had argued at the Inquiry. More broadly, counsel submitted that in the context of this case, the test for strict liability criminal offences was *"cognate to that of negligence"*. The concept of a "s*pectrum"* of criminal contravention possibilities runs entirely counter to the scheme and plain meaning of the governing provisions which allow for no such fluidity.

378. Counsel submitted that the Inquiry Member had correctly taken the view that

"participation" could involve negligence, that he sought legal advice, and made that determination having allowed the parties to comment thereon. That is not the plain meaning of the word *"participation"*. This decision dealt with how the Inquiry Member addressed the question of the meaning of *"participation"* in quite a remarkable way (a topic that was elaborated on in the section of this decision on *The Inquiry Member's Reasoning Process*). This was at variance from the principles laid down by our courts as to how the statute should be interpreted.

379. The Bank submitted that the Inquiry Member took the view that the appellant was negligent, rather than something more serious, and that this finding went back to the elapse of time of three minutes between 2:16pm and 2:19pm on 19 January 2009 and the other factors identified as he found them. Again, none of these issues were set out or mentioned in any of the three jurisdictional documents. Moreover, this finding neither contemplates nor addresses the possibility that the appellant considered that the two queries he had raised at the ExCo meeting had been answered satisfactorily and consequently, there would be no difficulty (exposure to PTSB) in offering all customers who contacted PTSB at the end of their fixed-rate period their original tracker rate.

380. Moreover, it is noteworthy that nowhere in the relevant provisions was there any scope for a finding of *"alternative verdicts"*. Counsel responded that there was a *"spectrum of criminal contravention"* ranging from *mens rea*, to strict liability. Strict liability offences do not require knowledge. Counsel submitted that the fact that the allegation against PTSB was of pursuing a deliberate strategy was simply a description of what PTSB had done; see Transcript, Day 6, pages 34-35. The Tribunal rejects this submission also. The case against the appellant was as set out in the Allegation. It did not allow for a *"spectrum"* of behaviour. Rather, it made specific allegations setting out, *inter alia*, statements regarding the appellant's full awareness in context. It cannot be forgotten that the Inquiry Member's conclusion was, at least ostensibly, based upon the finding that PTSB had engaged in a policy of bad faith.

Closer analysis on jurisdiction (*vires*)

381. A consideration of the Allegation in the light of the Inquiry Member's findings shows that they are directly at variance from the plain words of the Act, what was contained in the Allegation, the Notice of Inquiry and the Investigation Report. They were entirely at variance from the firm and clear advice from the first LPT.

382. At risk of reiteration, at the very outset of the Inquiry the decision-maker had been advised, in terms, that the Allegation could not be altered in any way which altered its substance, or by changing the particulars amounting to the contravention. Yet, that was precisely what he did. It is true that he arrived at a conclusion ostensibly similar to some of the words of the Allegation which he drafted. But he did so by a process which would not withstand scrutiny in a court of law, established under Article 34 of the Constitution.

383. The entire case must be addressed in its full context. The background context was provided by the Investigation Report and, directly, Notice of Inquiry and the Allegation. The true substance of the case has already been outlined. Put another way, it was that the appellant, as Chief Executive of PTSB, played a key and decisive role in sanctioning and approving the strategy by writing *"OK with that"* in response to the O'Grady's Email *and* that that email contained the discriminatory strategy. The substance of the Allegation was that these matters were evidenced by the appellant's position, his function, and the very fact that he had given the approval to the strategy by *"signing off on"* the proposal. That proposal contained the strategy which allowed for overcharging of customers by an *"interpretation"* of condition SC706.

384. The entire gist of the Allegation was that the appellant had been fully aware of, and complicit in, the strategy and its potential impact on customers. Had the Allegation been sustained, the appellant would properly have been subject to the most serious sanctions.

385. Instead, he was subject to what might be called a mild penalty; certainly, from the Decision on Sanction, the Inquiry Member thought so. The penalty was

less than 20% of the potential maximum. The appellant was simply reprimanded. It requires no feat of imagination to conceive of the sanctions that would have been thought appropriate had the substance of the Allegation been made out.

386. The Allegation conveyed, and meant, that the appellant, as Chief Executive, had participated in PTSB's breach of General Principle 1 of the Code. It will be recalled that General Principle 1 requires a regulated entity to ensure that in all its dealings with customers and within the context of its authorisation, it acts *"honestly, fairly or in the best interests of its customers and the integrity of the market"*.

387. The Inquiry Member did not make a finding in relation to the prescribed contravention to which the Inquiry related, as described in the Allegation. Although ostensibly cloaked in the words of the Allegation, the Inquiry Member engaged in the following: an alteration of the meaning of the terms *"participated"* and *"participation"* in order to fit the evidence. The plain meaning of the words in the context, clearly conveyed knowing complicity in the strategy. The evidence did not bear that out. In fact, the evidence as to the appellant's lack of knowledge or awareness of the devising and executing of the strategy was striking.

388. The Inquiry Member in this process set at naught what was actually contained in the Allegation where it was said, plainly, that the "proposal" was contained in the O'Grady Email and that the "proposal" was the "strategy" on which the appellant signed off.

389. As will be seen in greater detail later, the Inquiry Member redefined the meaning of the word *"proposal"* contained in the glossary (Annex 5). This alteration changed the nature of the Allegation so as to reduce that element to a question of whether the appellant had signed off on the *"O'Grady Email"* of 16 January 2009 (rather than on the strategy alleged to be contained therein).

390. This redefinition deprived the term "*proposal"* of its true context and meaning;

(see paragraph 7.6 of the Investigation Report, at paragraph 65). The Inquiry Member engaged in a reasoning process which imported or interpolated the concepts of negligence, carelessness or recklessness which played no part in the allegation to contrary effect. In summary, his findings did not relate to the grave allegation of knowing participation in the prescribed contravention to which the Inquiry related, but instead to a reformulated "*allegation*".

391. As will have been seen, the Inquiry Member actually made a finding that the appellant had no intention to harm customers. This, again, undermined the substance of the Allegation. The fact that the Inquiry Member engaged in this process begs questions. The first of these is why did he engage in this process at all? That question why the Inquiry Member engaged in this process begs a further question. It is this: if the Inquiry Member considered himself entitled to make findings of carelessness, negligence and recklessness, why did he not do so openly and in a way which provided fair and timely notice? It would have been a simple thing for him to have preferred an allegation that simply made a case for negligence, carelessness and recklessness. But he did not do this. Instead, he sought to *reconstitute* or *recalibrate* the Allegation by a process of changing meanings and contexts.

392. But the problem goes even deeper. The fact that the Inquiry Member made these findings was predicated on a reasoning process which was itself beyond his *statutory* powers. His statutory task was simply to determine whether the Allegation was made out and his reasons for the finding. It was not to engage in what the Bank's counsel referred to as a "carefully calibrated" reasoning process designed to justify a reformulation of the allegation. Sections 33AO to 33AQ mandated the Bank to make findings on the Allegation. It was not to reformulate the Allegation. The decision of the Bank was to set out its finding as to whether the person concerned had participated "*in the commission of the prescribed contravention to which the inquiry relates*", and "*the grounds upon which the finding is based*" (section 33AQ(1), discussed above). Thus, it can be said that the edifice of his conclusions was built on what, legally speaking, was sand.

393. In engaging in the decision making, the Inquiry Member failed to *"stay within the bounds of the jurisdiction conferred"* on him by 1942 statute. His findings were devoid of legal validity. (See *The State (Holland) v Kennedy* [1977] I.R. 193 at 201-202).

RATIONALITY: *STATE (KEEGAN) v STARDUST VICTIMS COMPENSATION TRIBUNAL*

Introduction

394. It is well known that in the *State (Keegan) v Stardust Victims Compensation Tribunal* [1986] I.R. 642 Henchy J. made definitive observations concerning the test of unreasonableness or irrationality in judicial review. If there was irrationality, the decision maker should be held to have acted *ultra vires* for the necessarily implied constitutional limitation of jurisdiction in all decision making which affects rights or duties requires *inter alia* that the decision maker must not flagrantly reject or disregard fundamental reason or common sense in reaching his decision (pages 657-658). But significantly, Henchy J. added later:

> *"I think in any event that it was only a particular aspect of logic that could be applicable in testing the validity of a decision when it is subject to judicial review on the ground of unreasonableness,* ***namely whether the conclusion reached in the decision can be said to flow from the premises****. If it plainly does not, it stands to be condemned on the less technical and more understandable test of whether it is fundamentally at variance with reasonable and common sense"*.
> (emphasis added by the Tribunal)

395. The Inquiry Member's reasoning process has been described in detail.

396. What is particularly revealing in the Decision under appeal is the fact that the *"conclusion"* which the Inquiry Member reached, did not *"flow from the premises"*. His reasoning process was inductive in the sense that he defined terms as required by the exigencies of the evidence. In the appellant's case, the *premise* was the Allegation. The Inquiry Member redefined the Allegation

so that its substance was fundamentally altered. He purported to arrive at a decision which was consistent with the Allegation. But this was not so. What actually occurred was the opposite of a rational decision-making process. It moved from the evidence to the Allegation, requiring that premise to be radically altered in order to fit the evidence adduced. His entire process strongly resembles hammering a square peg into a round hole.

397. That the Decision did not follow the premise is starkly illuminated by the Inquiry Member's reliance on the *intention* of *Mr O'Grady* when sending the O'Grady Email. At paragraph 9.5, the Inquiry Member concluded that the *intention* of *Mr O'Grady* in sending the O'Grady Email was to seek approval for a strategy to only give the original and, in most cases, more favourable tracker rate back to those customers who specifically requested their original and lower interest rate, or who queried or complained about the rate they were offered. But like any reader, *the appellant* could only discern Mr O'Grady's intention from the text of the O'Grady Email. There was no evidence that Mr O'Grady had otherwise explained or disclosed his intention. The Inquiry Member found, as a fact, that the O'Grady Email *"was poorly expressed"* and *"lacked clarity"* (paragraph 9.6). None of the matters set out in paragraphs 9.7, 9.8, 9.9 or 9.10 are directed at what the *appellant* understood by the O'Grady Email.

FAIR PROCEDURES

398. In this section of the decision, there is some repetition of material already dealt with under other headings. This section also sets out some particularly relevant statements made by the Inquiry Member himself, both in the hearing and in a decision on publication which is referred to below.

The duty to give fair notice

399. Even were it to be thought that contrary to the Tribunal's conclusion, another view might be taken in relation to the provisions, it cannot be said that the

Inquiry Member gave *"fair and timely"* notice of his intention to make findings of negligence, carelessness or recklessness, at variance from the Allegation.

400. One cannot lose sight of the fact that the requirement to give fair notice is based in the Constitution itself, in the rights which inhere in human persons to their good name and the right to a livelihood. As long ago as *Re Haughey* [1971] I.R. 217, the law concerning fair procedure established under the Constitution protected the rights of persons who were the subject of inquisitorial proceedings, as well as adversarial. These rights derive from Article 40.3 of the Constitution where, as here, the constitutional rights described are at stake.

401. The duty of the Inquiry Member therefore, was to place before the appellant the nature of the issues concerning which the Inquiry Member might make a decision adverse to him fairly, specifically and *in a timely manner*. He did not do so. The Tribunal would add that had the Inquiry Member carried out this duty, the question of whether an Inquiry would ever have proceeded might have loomed very large indeed. Had the appellant been given fair, proper and timely notice, the extent to which the entire Inquiry hinged on fragile direct evidence from Mr O'Grady, his lack of memory of what transpired at the ExCo meeting on 13 January 2009 and the appellant's absence of recollection of the events of 19 January 2009, would surely have raised questions at the outset as to whether an Inquiry based on negligence, carelessness or recklessness, could possibly have been fair.

402. The Allegation did not contain any mention of carelessness, negligence, or recklessness. These were interpolated later. They did not emerge in any significant way until near the end of the Inquiry when there were questions put to the appellant himself in cross-examination by counsel for the Inquiry. (See, for example, questions put to the appellant on the three-minute period within which he responded to Mr O'Grady's email following up on the O'Grady Email; Inquiry Transcript, Day 10, page 111 *et seq*.) What was said on the first day of the substantive hearing was not fair or timely notice. What occurred later was not fair or timely notice. All created prejudice in a number of ways already identified, namely, in potential cross-examination of witnesses,

including Mr O'Grady; the right to call evidence in rebuttal; the costs incurred in the investigation and the Inquiry; and the possibility of settlement. Further, if the Inquiry Member intended to reject the advice of the first LPT, it was incumbent upon him to give fair notice of his intention to do so.

403. However, some insight into the Inquiry Member's thinking and understanding, can be gleaned from observations which he made later. On 15 October 2025, he decided to issue a "Decision on Publication", *inter alia*, dealing with a number of issues, including his finding of bad faith against PTSB.

404. There he responded to PTSB's criticisms on lack of fair notice, in the following terms:

> *"It is not the role of the Inquiry to canvass all possible outcomes that might arise from the evidence and submissions that are heard during the course of the Inquiry in order to point out to the participants all of the potential outcomes on which they wish to make comments."* (pages 11 and 12)

405. He pointed out that PTSB had been represented by counsel throughout the hearing. He then stated:

> *"You and your client were in a position to consider the consequences of this evidence and had the opportunity to question witnesses or to make submissions or submit additional evidence should they wish to do so…."*.

406. This was a fundamental misunderstanding of the law based on the Constitution in relation to the duty to give fair notice to any participant in an Inquiry, whether it was the appellant, or anyone else. (See also *O'Laoire v Medical Council*, unreported, High Court 27 January 1995; *Idiakheua v Minister for Justice, Equality and Law Reform* [2005] IEHC 150, (Clarke J.), pages 8 and 9, *Chawke v Mahon Tribunal* [2014] 1 I.R. 788, paragraph 46). It was also contrary to the advices given to him by the first LPT on 12 December 2021.

Discussion on Day 8 of the Inquiry – 4 March 2024

407. The question of how the parties understood the Allegation also arose in the inquiry hearing, Day 8, on 4 March 2024. On that day, a question arose concerning the correct sequencing of submissions to be made by counsel at the conclusion. The Inquiry Member invited counsel for Enforcement, and counsel for the appellant, if they wished to produce further documentation, if it had not already been referred to. He observed that counsel for Enforcement had been *"restrained"* during the course of the proceedings and this would be an opportunity for them to *"expand or explain"* or say anything they wanted to say about the conclusions that were reached *"in the investigation"*. The words *"expand or explain"* were noteworthy.

408. Counsel on behalf of Enforcement enquired what documentation there might be. The Inquiry Member replied that, if nothing new had emerged, Enforcement might wish to rest on the Investigation Report.

409. But then he added:

> *"… there has also been quite a lot of evidence relating to aspects of the Investigation Report and it might be that has prompted you to think that you can now expand on the rationale behind the report, or indeed that some part of the investigation no longer stands up to scrutiny and therefore Enforcement is not relying on that"*. (paragraph 90, page 72 et seq.).

410. The Tribunal observes the contention that part of the investigation *"no longer stood up to scrutiny"* might beg a question whether parts of the Allegation had also not been made out? To this, counsel for the appellant observed that he found the use of the word *"expand"* as *"somewhat alarming"*. He again submitted, in terms, that the Inquiry was confined *"only to the allegation as it was precisely defined at the outset"*.

The Inquiry Member's reassurance that the Allegation would not be changed

411. The Inquiry Member then responded (emphasis added):

> *"the Inquiry was set up in order to hear* ***a particular allegation****. We are not going to start looking at anything different to that; that would be improper unfair. But insofar as there is any information, evidence, submissions that you are aware that is relevant to the outcome and I'm not aware of, or you are not sure I am, then the Inquiry should not close leaving any of the participants with something they wished that they had said or could have said that would have clarified the evidential or legal position. So* ***that's what I'm targeting here, but its only, [counsel for the appellant], in relation to the specific allegation that is the subject of the Inquiry. That will not be expanded or changed…****".*
>
> (Inquiry Hearing Transcript, Day 8, page 76, lines 24, to page 77, line 9).

412. These graphic observations are critical, and not only on the question of fair notice. It was the Inquiry Member himself who used the words *"particular allegation"* and *"specific allegation"*. The term "specific" reflects the statutory requirement that a notice of inquiry should *specify* the grounds of the Bank's reasonable suspicions; section 33AP(2). The Inquiry Member undertook that the Allegation would not be expanded or changed. But that is precisely what he did do. In doing so, he acted contrary to the statute governing him; and the very clear advice he had received from the first LPT.

The duty to give reasons

413. The duty to give reasons is an aspect of fair procedures. A person affected by a decision is entitled to know, in general terms, why the decision was made. As a matter of principle, a person affected by a decision is entitled to have enough information to consider whether they can or should seek to avail of any appeal, or to bring a judicial review of a decision (although, as noted, since the 2023 Act, judicial review is not available against an inquiry member). The reasons to be provided must be such as to allow a court hearing an appeal, or reviewing a decision, to actually engage properly in such an appeal or review; *Mallak v Minister for Justice,* [2012] IESC 59, [2012] 3 I.R. 297; *Stefan v Minister for Justice, Equality and Law Reform* [2001] 4 I.R. 203; *Náisiunta*

Leictreacht Contradheoir Eireann (NECI) v The Labour Court [2021] IESC 36, [2022] 3 I.R. 515.

414. Reference has already been made to paragraph 9.85 of the Decision. There, the Inquiry Member sought to address the submission from counsel for the appellant that the Allegation was very clear, and was to the effect that Mr Guinane had signed off on the strategy and had done so in the full knowledge of the factual position of the legal advice given to PTSB.

415. What occurred then must be seen, now, from the standpoint of fair procedures and the duty to give reasons. While already set out, the words stand repetition. The Inquiry Member stated (underlining is the Inquiry Member's emphasis):

> *"9.85 I do not accept this characterisation of the SPC". The outline of the SPC states:*
>
> > *"… Mr Guinane participated in PTSB's contravention of Chapter 1, General Principle 1 of the 2006 Code (a prescribed contravention) by signing off on the proposal made to him on 19 January 2009 i.e. the strategy to only give the more favourable rate back to those customers who specifically requested their original and lower interest rate or queried or complained."*

416. He continued:

> *"The SPC alleges that Mr Guinane signed off the Proposal and it sets out the "strategy"* ***behind the proposal*** *and which was pursued following the sign-off of the proposal. It does not state that Mr Guinane was fully aware of the strategy. It states that he signed off on the Proposal that would implement the strategy."*.
>
> (emphasis in bold added by the Tribunal)

417. With all respect to the Inquiry Member, the passage quoted does some violence to the English language, and indeed the Latin term "*i.e.*" as understood in common English usage. The *Outline of the Specified Prescribed Contravention* (at Annex A to the Notice of Inquiry) did indeed allege that the

appellant had signed off the proposal. It did not state that the Allegation set out the "*strategy*" behind the proposal and which was pursued following the sign off on the *"Proposal"* (as that capitalised term was (re-)defined by the Inquiry Member). Rather, it stated, in terms, that the strategy had been contained *"in the proposal"* by usage of the letters *"i.e."* which represent the Latin phrase *"id est"*, literally translated as "that is", and universally understood to mean "that is to say". But at no stage did the Inquiry Member ever engage with the fundamental issue which went to jurisdiction, which was the nature and substance of the Allegation. It was the duty of the Inquiry Member to give reasons for his not applying or following the advice of the first LPT. He did not give reasons for the absence of any decision on that issue. This, too, was a breach of fair procedures. The decision now turns to a series of matters upon which observations are appropriate.

PTSB

418. In the light of the findings and conclusions made and recommended in this decision, the Tribunal does not consider that it need make any separate finding in relation to the Inquiry Member's conclusion that PTSB had acted in bad faith. PTSB did not appeal this finding. Instead, during the course of the appeal to the Tribunal, it made an application to set out certain factual material. The Tribunal did not consider that this was a satisfactory or fair procedure. In the event neither PTSB nor the Central Bank asked the Tribunal to make any order. These circumstances, in themselves, would pose insurmountable difficulty in the Tribunal making any order in response to that application. But it does seem to be the case that PTSB was not on notice of the Inquiry Member's intention to actually make an adverse finding of bad faith. A passage from his Decision on publication has been cited earlier. It was not suggested that this finding could be severed from the main body of his decision. In any event, in the light of the conclusions which the Tribunal recommends to the High Court, it would follow that the findings made by the decision-maker on this issue would also be void.

STANDARD OF PROOF

419. The Tribunal would also wish to make a number of brief observations on submissions of the appellant on the standard of proof.

420. The Tribunal is a creature of statute. It is bound by judgments of the Superior Courts. Thus, it follows that the Tribunal could not accept any submission made on behalf of the appellant to the effect that a High Court judgment was *"wrongly decided"*. The Tribunal accepts as binding the judgment of Noonan J. in *McCaffrey v The Central Bank of Ireland and Attorney General* [2017] IEHC 546 (Noonan J.). There, that judge held the standard of proof in administrative sanctions was on the balance of probabilities.

421. Additionally, apart from an assertion of a distinction between what was decided in *McCaffrey,* and the decision in *O'Laoire v The Medical Council* unreported, High Court 27 January 1995; Supreme Court, unreported, 25 July 1997, no other grounds were advanced for holding the decision in *McCaffrey* was wrongly decided or incorrect. (See also *O'Keeffe v Ferris* [1997] 3 I.R. 463; *Georgopoulos v Beaumont Hospital Board* [1998] 3 I.R. 132). To repeat, the Tribunal was, and is, bound by decisions of the Superior Courts.

INFERENCE

422. The Tribunal would add, however, that a striking feature of the Inquiry Member's Decision shows the extent to which many of the conclusions were based upon inference. While inquiries of many types do act to proceed upon that basis, they will also proceed upon the proper application of the law relating to probability. (See *Ahern v Bus Eireann* [2006] IEHC 207; *Platt v OBH Luxury Accommodation* [2017] 2 I.R. 32; and particularly *Lawlor v Planning Tribunal* [2010] 1 I.R. 170, at paragraph 29).

423. The Tribunal does not however, make any adverse finding on this point.

DELAY

424. The Tribunal received detailed submissions from both sides in relation to the question of the elapse of time between the year 2010 and the initiation of the investigation in 2018. It cannot be gainsaid that, by the time the Notice of Inquiry was issued in December 2021, a period of over 12 years had elapsed from January 2009. *Prima facie*, this was a substantial elapse of time. Were it a civil *inter partes* proceeding, a significant issue would have arisen as to whether, on such delay, a civil case would now be permitted to proceed by the courts.

425. In this connection, counsel for the appellant referred the Tribunal to the decision of the Supreme Court in *Kirwan v Connors* [2025] IESC 21. This was clearly a most significant judgment, a harbinger of a new approach in relation to delay in civil litigation.

426. But the Inquiry was not an adversarial *inter partes* proceeding. Furthermore, as is the case with an inquiry, the Tribunal must apply applicable case law. That case law is clear. In *Fingleton v The Central Bank of Ireland* [2016] IEHC 1, Noonan J. dealt with the extensive investigation which the Central Bank carried out into the Irish Nationwide Building Society and certain persons concerned in its management. The investigation in that case had commenced in 2010. It covered a period of four years and two months from 1 August 2004 up to 30 September 2008. A vast amount of material had had to be considered. There were over 200 statutory requests for information.

427. Applying the *dicta* of the Supreme Court in *Kennedy v DPP* [2012] IESC 34, [2012] 3 I.R. 744, (O'Donnell J. giving judgment), Noonan J. held that there had been insufficient evidence in *Fingleton* upon which to hold that there was a delay such that an inquiry should not take place. He held the applicant had not satisfied him that there had been any undue delay by the Central Bank in the matter, still less any that was blameworthy.

428. It is unnecessary to go into the very full judgment of the Supreme Court in

DPP v Kennedy [2012] IESC 34, [2012] 3 I.R. 744. What is necessary, rather, is to extract one key principle involved. It is whether it could be shown there was blameworthy delay. It is true that, at the very outset of the Inquiry, the Inquiry Member apologised for the elapse of time that had already taken place since the inception of the investigation in 2018. There had also, in fairness, been delay of some considerable months because the appellant had to retain new solicitors. Nonetheless, it must be said that the Inquiry lasted from 2022 to 2025. There was a real discovery issue. There may have been other court related issues; the Inquiry was one of the first of its kind. But three years was a considerable time for an administrative sanction inquiry to be completed.

429. That said, the Tribunal is not satisfied that there was blameworthy delay in bringing the Inquiry. The timescale involved in this process has been described earlier. It is true that there was a significant elapse of time between the years 2010, when the Financial Regulator was involved, and 2015, when the investigation into PTSB commenced. Arguably, what was found by the Financial Regulator might have been a red flag, but there was insufficient evidence of this. The key question however, was whether it was established as a matter of probability that the appellant had suffered irretrievable prejudice, such that the decision could be made on judicial review grounds that the Inquiry should not proceed.

430. The Inquiry Member adverted to: the significant volume of contemporaneous documentation; that many of the witnesses who worked with PTSB had already given information to inquiries and audits held within PTSB; the existence of transcripts of interviews from those inquiries, audits and investigations; the records of correspondence during the relevant period; and his conclusion that it was not clear that the delay which had taken place could have been avoided by more active or diligent conduct from Enforcement or from the Inquiry.

431. The Inquiry Member concluded that he did not consider there was exceptional failure by the Bank to act expeditiously or an unreasonable failure to investigate potential regulatory breaches within a reasonable period of time after the contraventions came to light in 2010. He also adverted to the

remediation process which took place in 2010; that the report from KPMG did not include certain documentation that came to light in 2010, and stated that he was "struck" by the extent to which a number of witnesses within PTSB were able, in giving evidence, to distinguish between the answers that they were giving based on documents they had seen and the recollection that these documents had triggered was to bring clarity.

432. Were it necessary to determine the issue on simple "delay criteria", (as in *Kennedy above)* the Tribunal is not convinced that the Inquiry Member erred in law in holding that the delay in question was such that the Inquiry could not have proceeded. The issue herein is quite distinct from a *lis inter partes*. There is a strong public interest in ensuring that regulatory proceedings of this type should proceed to conclusion, a matter mentioned by Murray J. in the course of his judgment in *Kirwan v Connors*.

433. It must be said however, that this conclusion, as matters evolved, could have become very marginal. The Inquiry Member's conclusion was premised on a characterisation that in some senses the Inquiry had been a "documents case" or one based on documents. But to a significant extent, the real and ultimate question became one of a matter of recollection. The case hinged on the scant recollections of Mr O'Grady regarding the ExCo meeting and his evidence regarding his email; the appellant's absence of recollection of the ExCo meeting; and his absence of recollection of what was in his mind in the three minute period on 19 January 2009. It is very arguable that had the case been characterised as one involving carelessness, negligence or recklessness, based on such fragile recollections of two witnesses on what transpired to be a key issue, it must be doubtful whether it could be said that the Inquiry could have fairly proceeded. The question might even be seen in the context of the duty to give fair notice of the true issues as discussed earlier.

434. Were it necessary, the Tribunal might also have given consideration as to whether this administrative sanction process, already lasting some eight years against an individual person, the appellant, might be inherently unfair, and perhaps "equality of arms" issues. The Tribunal observes that the appellant

was fortunate to be defended by determined lawyers who engaged with the case throughout the lengthy process of investigation, Inquiry and this appeal. Others might not be so fortunate.

NEMO IUDEX IN CAUSA SUA

435. One final feature of the procedure should be mentioned. The principle *nemo iudex in causa sua* is well known. It means no person shall be a judge in their own cause. It is true that the concept of natural justice can be described as imprecise and flexible. It may vary from case to case.

436. It is nonetheless relevant to note that prior to the hearing the Inquiry Member promulgated a *"hearing protocol"* among other matters. Protocol 26 provided that the LPT was to *"lead the examination of witnesses"* on behalf of the Inquiry Member in accordance with the witness schedule. The protocol also provided that the person concerned and Enforcement were to have the right to cross-examine witnesses. The Inquiry Member might also examine or raise any supplementary questions of the witness himself. The LPT was permitted to reexamine witnesses.

437. This was not what occurred in some instances. What is said here is not to be taken in the spirit of criticism. Sometimes it is inevitable that lines of demarcation may become blurred. On a number of occasions the LPT did actually engage in cross-examination. This was clearly at the request of the Inquiry Member. The function of a legal practitioner is to provide independent and impartial advice to an Inquiry Member. As a matter of fact, therefore, the protocol was not fully observed. The second LPT cross-examined both Niall O'Grady and the appellant.

438. In the course of cross-examination of Mr O'Grady, counsel for the appellant objected to this course of action. He submitted this was not in accordance with the protocol. The Tribunal Member did not deliver a decision on that important legal question. Instead, he deferred consideration of it to another occasion. In fact, this matter was never concluded. But on the occasion when the objection

did arise, the LPT stated that he understood his own role to be to *"give voice to questions"* which the Inquiry Member would have wished the witnesses to respond to.

439. The Inquiry Member did not demur. He did not rule on an issue which was of some significance in the Inquiry. He appeared to acquiesce in what, to all intents and purposes, might have been perceived as something more than a submission by the LPT on the role he was being asked to perform.

440. In the circumstances, however, the Tribunal was not convinced that, on the facts of this case, the degree of prejudice was such as would warrant a quashing order in itself. The extent to which fair procedures should be applied is contextual. What occurred did not directly impinge on the decision making. This was not a situation which was in any way comparable to that which arose in *Prendeville v Medical Council* [2007] IEHC 427; [2008] 3 I.R. 122, where advice was given in the absence of the parties.

CONCLUSION AND ORDERS

441. The Tribunal therefore, makes four findings in this decision.

Ultra vires

442. The Inquiry Member, and therefore, the Bank, contravened sections 33AO to 33AQ of the Central Bank Act, 1942, as amended, which set out the statutory boundaries, which permitted the Bank to conduct an inquiry into a suspected prescribed contravention. Any such inquiry is an inquiry into an allegation notified to the person against whom the allegation is made by a notice of inquiry issued. A notice of inquiry must specify the grounds for the Bank's reasonable suspicion that a suspected prescribed contravention has occurred. Those sections do <u>not</u> permit an allegation to be amended in a way that alters the substance of that allegation.

443. As explained, the Bank had conducted an investigation into the appellant's suspected participation in a suspected contravention by PTSB. The results of

that investigation were recorded in the Investigation Report. The Investigation Report formed the *reasonable grounds* on which the Bank *suspected* that the appellant had participated in PTSB's contravention of the Code. By the Notice of Inquiry, the appellant was notified of the Allegation preferred against him.

444. At an early stage, the Inquiry Member was advised of the limitations on his jurisdiction, and the prohibition on amending either the substance or the particulars of allegation. The Inquiry Member did not follow that advice by the legal adviser who had been appointed to advise him at the outset of the Inquiry.

445. The Allegation against the appellant in the Notice of Inquiry reflected the content of the Investigation Report. This set out that the appellant approved a strategy whereby PTSB would only offer a cohort of customers who had initially taken out a tracker mortgage and had switched to a fixed interest rate for a fixed period of time to return to their original, and more favourable, tracker interest rate, only *if* they specifically requested it. As part of the strategy, and on expiry of a fixed rate period, customers would be placed on the tracker mortgage rate then prevailing.

446. PTSB allowed customers to revert to the original tracker rate as contained in their mortgage offer letters *only if* they expressly asked for their original tracker rate back, or if they complained when offered the then prevailing tracker rate. This approach by PTSB was referred to as *the strategy*. This *strategy* was identified in the Notice of Inquiry, which issued to the appellant. This action was a contravention of the Consumer Protection Code, 2006: it discriminated between customers in the same position, based only on whether they had the financial literacy and ability to request their original rate, or to complain, if they perceived they were being treated unfairly.

447. The Inquiry Member found that PTSB had implemented this strategy, and, consequently, had committed a prescribed contravention. The question was whether the appellant had *participated* in PTSB's contravention.

448. The Allegation that the appellant had *"signed off on"* the strategy meant that the appellant knew, and understood, what the strategy was, and, in that knowledge and understanding, had approved it so that the strategy might be implemented.

449. However, in the course of his Decision, the Inquiry Member reframed the Allegation. He broke the link between the "sign off" and the "strategy" which was the essence of the Allegation against the appellant. Instead, the Inquiry Member reframed the Allegation so it became one that the appellant had acted negligently.

450. The essence of the Inquiry Member's decision therefore became one that by responding to an email *"OK with that"*, the appellant had caused or permitted personnel within PTSB's Marketing, Legal and Compliance functions to implement the *strategy* to the detriment of PTSB's customers. The Inquiry Member criticised the appellant's "failure" to ask certain questions, to make follow-up enquiries, or to take other steps which might have shown him what was happening to PTSB customers.

451. The *grounds* for the Bank's decision to hold the Inquiry were that the appellant knew of the strategy. This was the basis of the Allegation. His alleged *participation* in PTSB's prescribed contravention was in *signing off on* the strategy in response to an email containing a *"proposal"*.

452. As reframed by the Inquiry Member, those critical elements of knowledge and approval of the *strategy* were excised from the Allegation. The meaning of the Allegation, as originally notified to the appellant was fundamentally altered in the ultimate Decision. The consequence was that the Inquiry Member deprived himself of the jurisdiction otherwise conferred by statute. It followed that his Decision must be found to be *ultra vires* on foot of this Tribunal's jurisdiction. Further, as noted, the Bank did not sufficiently ensure that the Inquiry Member acted within jurisdiction.

***"Keegan"* irrationality**

453. The Inquiry Member's conclusions were predicated on his profoundly altered allegation. Accordingly, the conclusion could not be said to *"flow from the premise"*. The "premise" was the Allegation as articulated in the Notice of Inquiry which reflected the grounds upon which the Bank had formed a reasonable suspicion and had decided to hold the Inquiry. The process of reasoning was flawed and did not accord with law and precedent. Accordingly, the Decision was unreasonable in the judicial review sense, as being fundamentally at variance with reason and common sense.

Fair notice

454. This Tribunal decision describes the way the question of negligence was first raised. Notwithstanding assurances by the Inquiry Member during the hearing that the Allegation against the appellant would not be changed, he concluded that *recklessness, negligence and carelessness* were potentially encapsulated in the Allegation. He so concluded, even though the Notice of Inquiry made no reference to any of these concepts.

455. The possibility that the Allegation against the appellant might encompass negligence was raised by the Inquiry Member with the parties on 23 August 2024, some four months after the substantive inquiry hearing had concluded on 15 March 2024. During that four-month period the Inquiry Member had taken legal advice from the second LPT, which has been considered above.

456. In essence, these questions on recklessness, negligence and carelessness were raised at a time and in a manner that was contrary to the Inquiry Member's duty to give fair and timely notice to the appellant of the case that he was required to meet.

Failure to give reasons

457. The Inquiry Member was under a duty to give reasons for decisions, which he made or declined to make on issues raised by counsel for the applicant, *inter alia*, on the question of jurisdiction. In particular, he was required to give reasons for his departure from both the terms of the Allegation and the advice

of the first LPT on the statutory limitation on amending an allegation to which an inquiry relates. These were matters that went to the Inquiry Member's jurisdiction. Any reasons, had they been given, would have been required to set out the legal basis for the Inquiry Member's actions. No reasons were given.

458. The failure to give reasons was also breach of fair procedures.

Synopsis

459. The constitutional status of the Administrative Sanctions Procedure is not a matter for this Tribunal. It was accepted on all sides that whether or not the Inquiry fell under the rubric of Article 37 of the Constitution, the Inquiry Member was under a duty to exercise the "*fundamental components of independence, impartiality, dispassionate application of the law, openness and above all fairness*"; *Zalewski v The Workplace Relations Commission* [2021] IESC 24, at paragraph 139; [2022] 1 I.R. 421, 506.

460. Regrettably, this Inquiry by the Central Bank fell significantly below those fundamental principles. Justice is a matter of substance as well as form. It is not the function of this Tribunal to inquire why these things happened, but rather to record that they did occur. The inquiry process in this case does raise other questions, but these are not necessary for the decision.

461. The Tribunal concludes that the Inquiry Member acted *ultra vires*, irrationally (in the *Keegan* sense) and in breach of constitutional fair procedure in his failure to give timely or adequate notice and to give adequate reasons for his decision.

462. These findings – *ultra vires, Keegan* irrationality and breach of constitutional fair procedures - individually and collectively are, in the view of the Tribunal, dispositive of the case.

463. The question as to whether this decision is subject to confirmation by the High Court will be dealt with separately.

Orders

Irish Financial Services Tribunal Rules

464. Rule 9 of the Irish Financial Services Appeals Tribunal Rules (S.I. No. 224 of 2008 provides that where the Tribunal proposes to make an order or give a direction of its own motion, it shall, where it considers it necessary, specify to the party or parties to the proceedings the order it proposes to make or direction it proposes to give and the reasons therefor. Rule 9 further provides that where possible, it shall afford the parties to the proceedings an opportunity to make submissions on the proposed order or direction and consider the submissions (if any) made prior to making the order or giving the direction concerned.

Costs

465. The question of costs will be dealt with in a separate decision, having heard submissions.

Confidentiality

466. The Tribunal will make an order that no detail of this decision will be made public until further order of the Tribunal or order of the High Court. The parties' attention is also drawn to section 57AN of the 1942 Act and, in particular, section 57AN(1)(g), (h) and (i), which confer on the Tribunal the power to report on certain matters to the High Court, including where a person makes unauthorised disclosure of information.

Substitution for order and recommendation

467. Pursuant to section 57(2)(c) of the 1942 Act, the Tribunal's jurisdiction allows it to substitute an appropriate decision that the Bank could lawfully have made in relation to the matter concerned. The Tribunal's decision is that the Allegation has not been made out and that the Inquiry Member should have so found.

468. The Tribunal would recommend, therefore, that this appeal be allowed, and the Allegation should be dismissed for the reasons set out above. (See section 57Z(2) Central Bank Act, 1942). The errors of law in the Inquiry Member's Decision are manifest from the record and were fundamental so as to deprive the decision of its basis.

Dated this 21st day of September 2026



Mr Justice John MacMenamin

Chairperson