

An Coimisiún Imscrúdúcháin
(CORPARÁID na hÉIREANN um
RÉITEACH BAINC)



Commission of Investigation
(IRISH BANK RESOLUTION
CORPORATION)

The Hon. Mr. Justice Brian Cregan
Sole Member

SIXTH INTERIM REPORT

27th March 2019

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

1. Introduction

- 1.1. The Commission presented its Fifth Interim Report to An Taoiseach on 23rd November 2018. In that Report, the Commission requested an extension of its timeframe for reporting on the first module of its investigation in relation to the Siteserv transaction to 31st March 2020.
- 1.2. By letter dated 19th December 2018 An Taoiseach replied to the Commission's request for an extension, highlighting concerns in relation to the level of progress, the timeframe proposed by the Commission and the risks of further delays and cost escalations.
- 1.3. An Taoiseach therefore requested a further Interim Report to include:
 - *any interim findings or conclusions which the Commission is in a position to make at this stage;*
 - *any options which the Commission believes would reduce the timeframe and/or cost for production of a final report on the first module of the investigation;*
 - *the Commission's view of risks to completion of the first module of the investigation within the requested new timeframe (i.e. end-March 2020); and*
 - *the Commission's best estimate of the likely final costs of the first module.*
- 1.4. The Commission's timeframe was extended until end-March 2019.
- 1.5. The purpose of this interim report is to address the issues outlined by An Taoiseach in his letter of 19th December 2018 and to request an extension of time for submitting the Commission's final report on its First Module under section 6(6) of the Commissions of Investigation Act 2004 ("the 2004 Act").
- 1.6. In summary, in response to the requirements referred to at 1.3 above, the Commission's position is set out below.

- 1) For the reasons given at paragraph 3.5 below, the Commission is not in a position to make any findings or reach any conclusions at this stage of its investigation.
- 2) After further detailed consideration, the Commission remains of the view that its First Module will be completed by end-March 2020.
- 3) The only significant risk to the completion by the Commission of its First Module by end-March 2020 currently perceived by the Commission is the judicial review proceedings described at Section 5 below.
- 4) The Commission currently estimates that the total cost of its First Module will be €11-14 million.

2. The Commission's work on the Siteserv Transaction

Oral hearings

- 2.1. The Commission commenced oral hearings on 31st October 2017 and has continued with oral hearings since its last Interim Report. The Commission determined that oral hearings were necessary in order to properly investigate the matters within its Terms of Reference whilst protecting the constitutional rights of parties involved.
- 2.2. As at 27th March 2019, the Commission has heard 189 days of evidence in oral hearings. Given the confidential nature of the Commission's work, underpinned by statutory obligations of confidentiality¹, the Commission cannot give details of that evidence in this Interim Report. The Commission has now heard evidence from:
- (i) Mr Neil Collins of KPMG, advisers to Siteserv plc;
 - (ii) Mr Eoin O'Lideadha of KPMG, advisers to Siteserv plc;
 - (iii) Mr Mark Collins of KPMG, advisers to Siteserv plc;
 - (iv) Mr Des Carville (formerly of Davy – advisers to Siteserv plc);
 - (v) Mr Nicholas O'Gorman of Davy, advisers to Siteserv plc;
 - (vi) Mr Denis O'Connor of PwC, advisers on Siteserv plc to IBRC;
 - (vii) Mr Paul Tuite of PwC, advisers on Siteserv plc to IBRC;
 - (viii) Mr Ciaran Bolger of Arthur Cox, legal advisers to Siteserv plc;
 - (ix) Mr Niall Devereux, group finance director of Siteserv plc;
 - (x) Mr Robert Dix, non-executive director of Siteserv plc;
 - (xi) Mr Patrick Jordan, non-executive director of Siteserv plc;
 - (xii) Mr Brian Harvey, CEO of Siteserv plc;

¹ See for example Section 11 of the 2004 Act.

- (xiii) Mr John Sheridan of Key Capital, advisers to Rutland, one of the underbidders for the former operating subsidiaries of Siteserv plc;
- (xiv) Mr Tony Mulderry, adviser to Gores Group and Granahan McCourt, together one of the underbidders for the former operating subsidiaries of Siteserv plc;
- (xv) Mr Dan O'Connor, adviser to Anchorage, one of the underbidders for the former operating subsidiaries of Siteserv plc;
- (xvi) Mr Niall McFadden;
- (xvii) Mr Dermot Hayes, a business associate of Mr Denis O'Brien and an employee of a company owned and controlled by Mr O'Brien;
- (xviii) Mr Liam McGrath, a business associate of Mr Denis O'Brien and an employee of a company owned and controlled by Mr O'Brien;
- (xix) Mr Leslie Buckley, a business associate of Mr Denis O'Brien and an investor in the purchase of the former operating subsidiaries of Siteserv plc;
- (xx) Mr Denis O'Brien, the owner and/or controller of the purchaser of the former operating subsidiaries of Siteserv plc;
- (xxi) Mr Walter Hobbs, IBRC's observer in the sales process;
- (xxii) Mr Karl Cleere, a former executive of IBRC who dealt with the Siteserv plc account;
- (xxiii) Mr Pat Walsh, a former executive of IBRC who dealt with the Siteserv plc account.

2.3. All relevant IBRC witnesses have now been scheduled to give their oral evidence by the end of May 2019.

2.4. The Commission will also require evidence from some further witnesses and may be required to hear from certain witnesses again. These are factored into its timetable as set out in Section 4.

3. The Scope of the Commission's Investigation

- 3.1. The scope of the Commission's investigation responds to its Terms of Reference. Those Terms of Reference require it to consider, inter alia, whether it can be concluded that the Siteserv transaction was "not commercially sound" in respect of: (i) the manner in which it was conducted; (ii) the decisions made; and (iii) the outcomes achieved. They also require an investigation into whether there is prima facie evidence of material deficiencies in the performance of their functions by those acting on behalf of IBRC.
- 3.2. Thus, these Terms of Reference require an investigation broader in scope than might appear at first sight to be needed, covering the life-cycle of the Siteserv transaction.
- 3.3. The scope of the Commission's work includes the following matters:
- (i) the background to the Siteserv transaction, in particular the options considered by Siteserv and IBRC from Spring 2010 onwards in view of Siteserv's increasingly parlous financial position;
 - (ii) IBRC's refinancing of Siteserv in Summer 2011, and its influence on subsequent progress towards (what became) the Siteserv transaction;
 - (iii) the basis for the decision to sell the operating subsidiaries of Siteserv plc;
 - (iv) Siteserv and its advisers, rather than IBRC, occupying the lead roles in the sale process and the role played by and on behalf of IBRC in the sale process;
 - (v) the generation of, and choice of, potential bidders for Siteserv, including the exclusion of trade players, and the basis on which interested bidders were admitted to the process;
 - (vi) the structuring of, and conduct of, the sale process;
 - (vii) the evaluation of bids in the first round of the sale process;
 - (viii) the selection of bids to take forward to the second round;
 - (ix) the evaluation of bids in the second round of the sale process;
 - (x) the process by which the eventual buyer was chosen as preferred bidder;

- (xi) negotiations with the preferred bidder leading to the sale;
- (xii) the treatment of underbidders in the process;
- (xiii) the payment to Siteserv shareholders as part of the sales process;
- (xiv) the approval of the transaction by the shareholders of Siteserv plc;
- (xv) the financial arrangements that determined the quantum of the write-off by IBRC;
- (xvi) the financial outcomes for various parties arising from the sale of its operating subsidiaries by Siteserv plc and its subsequent liquidation;
- (xvii) post-closing arrangements, particularly up until mid-2013;
- (xviii) any conflicts of interest in the sales process;
- (xix) the roles of, and conduct of, advisers and others in the sale process;
- (xx) any evidence of the Siteserv transaction being tainted, such that it might be not commercially sound; and
- (xxi) any evidence that executives or directors of IBRC might have performed their functions in a materially deficient manner.

3.4. The Commission's Terms of Reference reflect the serious concerns raised and serious allegations made in the Dáil in relation to the Siteserv transaction, particularly by Deputy Catherine Murphy and Deputy Pearse Doherty. In turn, the scope of the Commission's work reflects its Terms of Reference, thus giving rise to an investigation:

- (i) covering a period of over three years from Spring 2010, not just a few months leading to the Siteserv transaction;
- (ii) involving a substantial cast of characters (the Commission has received witness statements from more than 70 parties); and
- (iii) relating to a company, Siteserv, that owed approximately €160 million to IBRC at the time.

Interim findings

- 3.5. The Commission is continuing to hear evidence from key witnesses in relation to the Siteserv transaction. It is carrying out this exercise on a witness by witness basis, hearing evidence on all relevant issues when each witness attends to give evidence. The Commission has not therefore concluded the evidence on any particular issue. Accordingly, the Commission's mind remains open and, in the interests of fair procedures, must remain so until the oral evidence is concluded and the Commission has had adequate opportunity to carefully consider and weigh all the evidence. It is therefore simply not in a position to make any interim findings or conclusions at this stage.

4. Proposed Timetable for Completion of First Module

4.1. As outlined in its last Interim Report, the Commission is structuring its Siteserv investigation into five separate phases to deal with the various issues arising under its Terms of Reference. These phases are as follows:

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

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

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

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

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

4.2. The Commission is currently focusing on Phase 1 - the most time-consuming phase of its work. The Commission will also hear evidence from the relevant IBRC witnesses in relation to Phase 2, as they appear before the Commission between now and end-May.

4.3. The Commission’s revised suggested timetable for a final report to An Taoiseach on its First Module is as follows:

- (i) Oral hearings completed – June 2019;
- (ii) Production of draft report on the First Module (Phases 1 and 2) – 31st October 2019;
- (iii) Review period for relevant parties – 31st December 2019;
- (iv) Production of final report on the First Module (Phases 1 and 2) – 31st January 2020;
- (v) Production of final report on the First Module (Phases 3,4 and 5) – 31st March 2020.

- 4.4. In accordance with legal requirements of due process and the requirements of Section 34 of the 2004 Act (as amended), the Commission's draft report must first be circulated to parties identified in, or identifiable from, the draft and in respect of whom an adverse finding is made. This is to afford them the opportunity to make submissions on it. The Commission expects that review period will require about two months. As set out in paragraph 4.3 above, that two month period is estimated to run to 31st December 2019.
- 4.5. In order to issue a final report to An Taoiseach as quickly as practicable, the timetable in paragraph 4.3 above assumes that the Commission will first report to An Taoiseach on Phase 1 and Phase 2 of its First Module. These two phases comprise the vast bulk of the Commission's First Module. The Commission proposes to use the two month review period for the draft of that report, described in paragraph 4.4. above, to finalise its report on Phases 3, 4 and 5 of its First Module.
- 4.6. Accordingly, at the conclusion of this Interim Report, the Commission is again requesting an extension of the date for submission of its final report on its First Module to 31st March 2020. This is subject to any further delays that may be encountered in light of High Court proceedings which have been issued against the Commission, described in Section 5 next following.

5. Judicial Review Proceedings issued by Island Capital Management Limited

5.1. The Commission is the subject of a challenge by way of judicial review. The Applicant named in the judicial review proceedings, Island Capital Management Limited, is a company linked to the purchaser of the operating subsidiaries of Siteserv plc and related persons and entities who are parties before the Commission. Those parties are represented before the Commission by Arthur Cox who are also the Solicitors on record for the Applicant in the proceedings. Leave to seek judicial review was granted by Order of the High Court dated 8th February 2019.

The Issues in the Proceedings

- 5.2. The judicial review proceedings involve two main issues: firstly, a ruling by the Commission in relation to a claim of privilege over a document; secondly, the interpretation of the Commission's Terms of Reference and in particular its interpretation of the phrase "not commercially sound".
- 5.3. On 30th January 2019, the Commission made a ruling in relation to whether a claim of legal professional privilege over a particular document had already been determined by the Commission in accordance with Section 21 of the 2004 Act, whether the Commission was entitled to retain such a document and whether the Commission was entitled to review the document at a later stage in light of new evidence. The Applicant in the judicial review proceedings claims that the Commission's ruling is erroneous in law and in breach of, inter alia, the Applicant's constitutional rights and rights under EU law.
- 5.4. On 10th January 2019, the Commission provided to all relevant parties a Note on its interpretation of the meaning of "not commercially sound" (a phrase contained in the Commission's Terms of Reference). The Note confirmed that the Commission would apply a test of "reasonableness" in relation to its investigation of the manner in which the Siteserv transaction was conducted, the decisions made and the outcomes achieved. The Applicant takes issue with the definitions relied on in interpreting the phrase "not commercially sound" and in relation to the timing of the issuing of the Note.

The Commission's Opposition

5.5. The Commission is fully defending both issues in the proceedings and has sought to progress the matter before the High Court as expeditiously as possible. The Commission's view is that its ruling in relation to the question of privilege is correct in law. In relation to the Commission's Note on the meaning of "not commercially sound", it is of the view that there is no illegality or unfairness in the timing or content of its interpretation and that the standard of review which the Commission has proposed is fair and reasonable.

Effect on the Commission's work

- 5.6. The judicial review proceedings are not currently interfering with the conduct of oral hearings by the Commission. However, the proceedings could pose a significant obstacle to the Commission's ability to complete its work by its proposed end date of 31st March 2020. In particular, the Commission will not be in a position to complete its final report until such time as any issues arising in the judicial review proceedings have been finally resolved. Furthermore, the document the subject matter of the privilege ruling, if ultimately admitted into evidence, will need to be considered by the Commission and put to relevant witnesses.
- 5.7. The Commission is nevertheless continuing its investigation without delay in order to advance its work as far as possible.

6. The Cost of the Commission

6.1. There has been speculation as to the likely total cost of the Commission. The Commission's estimate is set out below.

| Item | € million |
|--|--------------|
| Commission's operating costs to date | 5.5 |
| Commission's operating costs to conclusion | 2.0-3.0 |
| Estimated Third Party costs at conclusion | 3.5-5.5 |
| TOTAL ESTIMATED COSTS TO CONCLUSION | 11-14 |

This estimate:

- (i) assumes completion of the Commission's work in accordance with the timetable set out in Section 4;
- (ii) excludes any costs or delays associated with the judicial review proceedings described in Section 5;
- (iii) assumes that the "Guidelines" (described below in paragraph 6.3) are applied and not successfully challenged by any party before the Commission;
- (iv) involves a substantial degree of uncertainty as to the amount of costs actually recoverable by parties before the Commission, given both the difficulties involved in applying those Guidelines and the lack of clarity available to the Commission as at the date of this Interim Report concerning the accrued and/or likely future costs of those parties; and
- (v) includes the fees of the Commission's legal team in the Commission's operating costs above.

6.2. The Commission has noted claims that the Commission's investigation could cost €30 million. The Commission does not know the grounds on which that figure has been estimated and does not believe it to be accurate. One witness before the Commission

has also claimed that the Commission will cost €100 million. In the view of the Commission, that figure is entirely inaccurate.

- 6.3. The power of the Commission to direct the payment of legal costs by An Taoiseach, as specified Minister, is governed by sections 23 and 24 of the 2004 Act and the Guidelines on Payment of Legal Costs and Other Expenses to Persons who become involved with the Commission of Investigation (the “Guidelines”) which were prepared pursuant to section 23 of the 2004 Act. The Guidelines prescribe maximum rates for the attendance of legal advisers at the Commission’s hearings and for other aspects of work done on behalf of witnesses before the Commission. Pursuant to the 2004 Act, legal costs are paid only where the good name or conduct of a witness is called into question or where personal or proprietary rights are at risk of being jeopardised.
- 6.4. Paragraph 15 of the Guidelines provides that there shall be no payment in respect of the following:
 - brief fees,
 - instructions fees, or
 - any other legal costs or expenses, other than those specified.
- 6.5. A number of witnesses before the Commission have expressed their concerns in relation to the costs potentially recoverable by them pursuant to the Guidelines. In their view, the Guidelines do not appear to provide either adequately or at all for many legal fees which are necessarily incurred by them in assisting with the work of the Commission. Whilst the Commission is bound by the Guidelines, it is possible that the parties before the Commission could seek to challenge them at a later date.

7. The other 37 Transactions

- 7.1. At the outset of its investigation, the Commission received from the Special Liquidators of IBRC a schedule of 38 transactions (including Siteserv) which have resulted in a write-off of €10 million or more by IBRC. As such, they fall within the Commission's Terms of Reference.
- 7.2. At the direction of the Oireachtas and pursuant to the Commission's revised Terms of Reference, the Commission has focused in its First Module on the Siteserv transaction.
- 7.3. The Commission will await further direction from the Oireachtas before undertaking any further modules of its investigation.

8. Request for Extension of Time

- 8.1. The Commission's work is progressing and it is seeking to conclude its investigation as expeditiously as possible. As outlined above, the Commission expects to be able to submit to An Taoiseach its final report into Phases 1 and 2 of its First Module by 31st January 2020 and its final report into Phases 3, 4 and 5 by 31st March 2020. The Commission believes that this is a realistic timeframe.
- 8.2. However, the judicial review proceedings represent a threat to the Commission's timeframe and it will not be possible for the Commission to conclude its work until those proceedings are finalised.
- 8.3. Accordingly, the Commission requests an extension of time to 31st March 2020 but this may require further review in light of the judicial review proceedings.

Signed: Brian J. Cregan.

The Hon. Mr. Justice Brian Cregan

27th March 2019