

Statement re IBRC Commission of Investigation

The Department of Finance (the “Department”) notes the determination of the IBRC Commission of Investigation (the “Commission”) pursuant to Section 21(2) of the Commissions of Investigation Act 2004 (the “Act”) (the “Determination”) which was received on Friday 6 November 2015 and published on Tuesday 10 November 2015¹. This Determination was issued by the Commission, having considered the legal submissions it sought from the former directors of IBRC, the Special Liquidators and the Department; each in their capacity as witnesses to the matters under investigation.

The Department has cooperated fully with the Commission and will continue to do so. The Department has provided, to date, approximately 20,000 pages to the Commission. This process is continuing and is expected to be completed in the coming days in accordance with the directions issued by the Commission

Under the Act, the Commission issued several directions to the Department to provide information which covered Department information and also confidential IBRC and IBRC customer information in the Department’s possession. The Department had received confidential information from various sources outside the Department and this information was confidential at the time of receipt. This confidentiality remained in place when such documentation was sent by the Department to the Commission.

The Department provided, and continues to provide, all information in unredacted form to address fully and comprehensively the directions issued by the Commission. Under the provisions of the Act, it is for the Commission to determine whether confidentiality applies to information received by it. The Commission has determined that “...*the banker-customer duty of confidentiality does apply...*”² to such information having considered the issue of confidentiality in relation to the unredacted documents provided and identified by the Department as containing confidential IBRC customer and IBRC information.

There is an important matter of law concerning information which the Department received from IBRC which carries a duty of confidentiality to the underlying customer of IBRC or IBRC itself. As a witness to the investigation, for the Department not to assert confidentiality would have been incorrect as a matter of law and could have opened the Department to legal action from customers of IBRC or indeed IBRC itself for not respecting and protecting their rights.

The Commission determined that this position is correct as a matter of law and in its Determination stated that “...*if the Department furnished confidential information to the Commission [the Department] could be infringing a customer’s contractual right to confidentiality and could be liable for a breach of contract with the customer and could also be liable for the tort of breach of confidence. In addition, the Department could also be liable for breach of a borrower’s constitutional rights.*”³.

¹[http://www.taoiseach.gov.ie/eng/IBRC Commission/Commission of Investigation into Irish Bank Resoluti on Corporation IBRC .html](http://www.taoiseach.gov.ie/eng/IBRC_Commission/Commission_of_Investigation_into_Irish_Bank_Resoluti_on_Corporation_IBRC_.html)

² Extracted from Section 11.1(iii) of the Commission’s Determination dated 6 November 2015

³ Extracted 8.43 of the Commission’s Determination dated 6 November 2015

The Department made a legal submission to the Commission that notwithstanding confidentiality, the Commission had the power to determine whether to receive this unredacted confidential information in evidence. The Department became aware of the Commission's determination that it could not use this information as evidence on Thursday 5 November when it received the Determination concerning the Special Liquidators' legal submission on confidentiality. As noted earlier, the Department received the Determination concerning its legal submission on Friday 6 November.

The Department has not claimed confidentiality over information which it generated itself.

In relation to legal advice privilege, this is a separate matter. The Department has identified legal advice privilege over documents which it has furnished to the Commission which contained or referred to legal advice furnished to IBRC. The Commission has determined, having reviewed these documents, that "*...it is satisfied that the legal advice privilege does indeed apply to the documents and the information in question*"⁴. It is not possible for the Department to waive this legal privilege as it is not the owner of such privilege.

⁴ Extracted from Section 11.2(ii) of the Commission's Determination dated 6 November 2015