4-12-2011

Dellway Investments Limited et al. v. NAMA and The Attorney General. The Supreme Court of Ireland 396 (2010)

Nial Fennelly

THE SUPREME COURT

2010 No. 396

Murray C.J.

Denham J.

Hardiman J.

Fennelly J.

Macken J.

Finnegan J.

McKechnie J.

BETWEEN:

DELLWAY INVESTMENTS LIMITED, METROSPA LIMITED,
BERKLEY PROPERTIES LIMITED, MAGINOTGRANGE LIMITED,
MAY PROPERTY HOLDINGS LIMITED, SCI 20 PLACE VENDOME,
DIRECTDIVIDE TRADING LIMITED, SUBMITQUEST LIMITED,
BELFAST OFFICE PROPERTIES LIMITED,
THE FORGE LIMITED PARTNERSHIP,
FINBROOK INVESTMENTS LIMITED,
CONNIS PROPERTY SERVICES LIMITED,
FORMCREST CONSTRUCTION LIMITED,
CHESTERFIELD (THE PAVEMENTS) SUBSIDIARY LIMITED,
ABBEY DEVELOPMENTS LIMITED AND PATRICK McKILLEN

Appellants

- and -

NATIONAL ASSET MANAGEMENT AGENCY, IRELAND
AND THE ATTORNEY GENERAL

Respondents

JUDGMENT of Mr. Justice Fennelly delivered the 12th day of April 2011.

1. The Court has already decided in its judgment of 3rd February 2011 that NAMA has not to date made any decision to acquire the eligible bank assets represented by the appellants' loans. This raises the question of whether the outstanding issues (other than the issue relating to state aid) are moot. The Court has already expressed the view that the issue concerning relevant considerations to be taken into account on the making of any NAMA decision, the second ground in the application for judicial review, is moot. There was controversy at the hearing as to what the actual grounds were on which the former purported NAMA decision was made. The Court would have been merely speculating as to which version of those grounds NAMA would adopt when making a future decision. It could not, therefore, adjudicate on the alternative hypotheses.

2. On the other hand, NAMA informed the Court on 9th February that it proposed to make a decision as to whether it would acquire eligible bank assets comprising the loans of the appellants. Furthermore, the Court has been informed that the Board of NAMA has, on 1st March, 2011, decided to acquire those loans, although that decision is not before the Court.

3. As the Chief Justice put it in his *ex tempore* judgment in *O'Brien v Personal Injuries Assessment Board* [2007] 1 I.R. 328, *"[t]he question is whether this appeal can be considered moot in the sense of being purely hypothetical or academic."* He referred to *"the reluctance or refusal of courts to try issues which are abstract, hypothetical or academic…"* The Chief Justice cited the dictum of Hardiman J. in *G. v. Collins* [2005] 1 I.L.R.M. 1 to the effect that*"proceedings may be said to be moot where there is no longer any legal dispute between the parties"*. In that case, the applicant (the respondent on the appeal) had obtained a declaration from the High Court to the effect that the respondent (P.I.A.B., the appellant on the appeal), had acted unlawfully in the exercise of its statutory powers by refusing to deal with the applicant's duly appointed solicitor in connection with his claim for damages for personal injuries. Some time after the High Court judgment, the applicant received notice from P.I.A.B. authorising him to institute proceedings in respect of his claim for personal injuries against his employer, so that he was no longer obliged to deal

with that body. The Chief Justice held, at page 333, that it was *"quite evident that the respondent has a real current interest in the issues pending on appeal before this Court for the purpose of a final determination of the controversy between the parties regarding the exercise of its statutory powers and of course the substantial question of costs."*

4. In *Condon v. Minister for Labour* [1981] I.R. 62, an association of bank officials challenged the constitutionality of temporary legislation restricting the pay and conditions of service of bank employees. The particular legislation under challenge had expired by the time the case came on for hearing. The State argued that the entire case was moot and appealed a decision of the High Court ruling against it to this Court, which was unanimous in holding that the proceedings were not moot. O'Higgins C.J. said at page 70:-

> *"Serious consequences could ensue if this Court pronounced that temporary legislation of this kind should be immune from judicial review merely because it had expired before the question of its validity could be examined. All legislation passed by the Oireachtas is presumed to be valid. If the Oireachtas were free to enact temporary legislation creating offences and providing for serious penalties (as this legislation does) and if that legislation, on its expiry, escaped examination in the Courts, a form of legislative intimidation could be exercised. However, a more serious aspect is that, by permitting such to happen, this Court would be failing to exercise that vigilance and care upon which constitutional rights and guarantees depend for their protection. In my view, this Court could not countenance such a development."*

5. Kenny J. reviewed a number of decisions of the Supreme Court of the United States. He quoted, for example, the view of Marshall J. in *United States v. Phosphate Export Association* 393 U.S. (1968) 199, at page 203, that:— *"[a] case might become moot if subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur,"* and other authorities to like effect. He summed the matter up as follows on page 72:-

> *"When an issue arises as to whether the court should decline to entertain a case because the legislation attacked is no longer in force, the question to be asked is whether similar legislation is likely to be introduced in the future. Unless the court is satisfied that such legislation will not be introduced again, it should decide the case even though the Act is not in force."*

6. The outstanding issue of whether the appellants are entitled to be heard in the context of a future decision by NAMA to acquire from financial institutions the credit facilities granted to them is clearly not a moot question. It is not, recalling the language of the Chief Justice, *"abstract, hypothetical or academic*."It remains a live issue. In fact, neither party has contended that the issue is moot. It is appropriate, therefore, that this Court rule upon it.

7. The appellants claim that they have the right to be heard by NAMA before it makes a decision to acquire their loans from the banks which have lent to them. It is common case that they were denied that right at the time of an earlier purported decision. NAMA has maintained throughout and still maintains that they do not have such a right.

8. In view of the complexity of the issues and the number of parties, it is best to make some remarks about nomenclature. The appellant companies are very closely identified with Mr. McKillen. Technically it is appropriate to refer to the appellants. However, on occasion it is more descriptive to refer to Mr. McKillen or to the McKillen loans. The loans were, in the main, made to the appellants by Bank of Ireland and, as the case set out, it was only concerned with those loans. As the case went on, references to AngloIrish Bank came into the case. Nothing turns on any distinction between these entities for the purposes of this judgment. I will use the statutory term, "financial institution" or the more familiar word, "bank" interchangeably. Similarly, I will use either the statutory term, "credit facility" or the more common one, "loan" interchangeably. It is also necessary to find a shorthand term for the decision made by NAMA pursuant to section 84 of the National Asset Management Agency Act 2009 ("the Act of 2009") to acquire from a financial institution the credit facilities it has advanced to any particular debtor. I will use the expression "acquisition decision."

9. By way of preliminary observation, I suggest that it is important to bear in mind that the purpose of the right to be heard is to enable the person potentially affected by the contemplated decision to make representations to the decision-maker concerning the effects any decision will have on him with a view to persuading the latter to make or not to make the decision or to make it in certain terms.

10. It follows that analysis of the right to be heard requires particular focus on:

- effects: The manner and extent to which any proposed decision will potentially affect rights or interests of the person claiming the right; and

- representations: The nature of the representations which the person wishes to make and, in particular, whether any proposed representations are such as relate to the grounds on which the decision-maker may make his decision. In other words, is the decision-maker permitted in law to have regard to representations of the sort the person proposes to make?

The Appellants' Claim in Judicial Review

11. Mr. McKillen claimed, in the appellants' statement grounding the application for judicial review, that NAMA's procedures lack natural and constitutional justice in denying him the right to make representations:

a) to the effect that his loans are not eligible bank assets;

b) that NAMA, in its discretion, ought not to acquire the loans;

c) to be allowed a reasonable time to refinance his borrowings; and

d) as to the value at which credit facilities will be transferred.

12. These grounds appear in the first version of the appellants' statement of grounds of 1st July, 2010. They were not subsequently amended or extended.

13. Mr. McKillen, in his grounding affidavit sworn on 30th June, 2010, said that the appellants wished to make representations in relation to a number of aspects of the proposed transfer of credit facilities to NAMA. The first, related to a) in the above list, was that the credit facilities are not eligible bank assets. This issue has never been pursued and can now be ignored. Counsel for the appellants said that it is accepted for the purposes of the litigation, that the McKillen loans represent eligible bank assets. (see also the High Court judgment at paragraphs 5.14 to 5.15).

14. The principal concern of Mr. McKillen, expressed at paragraph 34 of his affidavit, is that the acquisition of the McKillen loans by NAMA would have a "devastating effect on" the appellants, that the loans are not "distressed" and that they did not "appear to fall within the principal purposes of the 2009 Act." At a later point he said (paragraph 55) that the appellants would "suffer serious injustice and prejudice in the event that the transfer proceeds…"

15. In substance, the appellants' case has been pursued only by reference to the fact that NAMA has a discretion whether or not to acquire the loans (ground b) in the statement of grounds). Hence, implicitly, NAMA should exercise its discretion not to acquire because of what is claimed to be the devastating effect on Mr. McKillen if they are to be acquired.

16. This, the fair-procedures part of the claim, is not concerned with the considerations which should influence NAMA in the making of its decision, save in the single respect that it is claimed by the appellants and disputed by NAMA that the interests of the borrower are a relevant consideration. It is important to note that Mr. McKillen is concerned only with the effects of any decision on his own interests, a point to which I will return.

17. The appellants say that, because they have rights which may be affected by any decision of NAMA to acquire their loans, they have a right to be heard by NAMA before any such decision is made. In short, in view of the way in which the appellants

have presented their application for judicial review, they are limited to arguing that they have a right to be heard by NAMA concerning the effects any acquisition decision will or may have on their own interests.

Effects of the Decision on the McKillen Interests

18. The appellants allege probable or potential adverse effects on their constitutionally protected rights under four headings, outlined in written submissions and further explained by Mr. Michael Cush, Senior Counsel, at the hearing of the appeal.

19. Before turning to these, it should be noted that Mr. Cush was at pains to emphasise that the case was being made solely by reference to facts peculiar to Mr McKillen. He said, for example: "I am making a case for Mr. McKillen, not for every borrower who has to deal with NAMA;" and that it was a "fundamental error…..[that the High Court] did not deal with the facts peculiar to Mr McKillen…" At the same time, Mr Cush accepted that the High Court had been correct to decide that it was not part of its function to decide whether the loans were "impaired." (High Court judgment at paragraph 5.11).

20. In so far as the facts specific to Mr. McKillen's case are concerned, Mr. Cush was content to accept the summary set out in the High Court judgment, which, so far as material, was as follows:-

> *5.8 Turning to the background facts specific to Mr. McKillen's case, it is appropriate to start by noting that Mr. McKillen and his companies have an interest in a portfolio of properties with a current value which seems to lie somewhere between €1.7bn and €2.28bn, depending on what valuations are relied on. ……Loans secured on those properties in favour of Irish banks who are participating institutions in NAMA, amount to approximately €2.1bn……..*
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> *5.9 The status of those loans was the subject matter of some controversy in the course of the hearing before the Court. Certain facts can be stated with some degree of confidence. First, it is true to say that it would appear that all*

interest payments due under the loans concerned have been paid to date and, at least in current conditions and at current interest rates, there appears to be sufficient income being generated by the properties concerned to service those loans in the sense of meeting all interest payments due on them. Second, it would appear to be accepted that there are a number of loans in which there have been breaches of so-called loan to value covenants. Under such covenants it is a term of the banking facility concerned that the amount owing remain below a certain specified percentage of the value of the properties used as security for those loans. In general terms, and at least in the case of most of the loans with which these proceedings are concerned, a breach in the loan to value covenant occurs if the bank obtains an independent valuation which shows that, by reference to that valuation, the amount of the relevant loan exceeds the loan to value ratio specified in the facility letter concerned. It would appear that the legal consequences of a breach of such covenant is that it triggers an entitlement on the part of the relevant bank to call in the loan in its entirety. It does not appear that any of Mr. McKillen's loans have, in fact, been formally called in in that way, although it is equally clear that, at least in the case of some of the loans in question, an entitlement on the part of the relevant bank to serve such a notice has arisen. There was some expert testimony, to which it will be necessary to refer to some extent in due course, as to what was likely in practice, as opposed to as a matter of law, to follow from a breach of a loan to value covenant. For completeness, it should also be noted that, in some cases, there would appear also to have been a breach of a similar interest cover covenants which required the maintenance of a specified ratio between the income being generated by a relevant property and the interest payments due under the loan in question.

5.10 In addition, it is clear that, in the case of some of the loans in question, same have expired so that, at least as a matter of law, the full sum due under the relevant loans was immediately payable. There was again expert testimony as to what was likely, in practice, to occur in such circumstances.

5.11 [not relevant at this point]

5.12 Turning to Mr. McKillen's portfolio, same would appear to consist of approximately 62 properties comprising shopping centres, hotels and offices. The total income generated by those assets is of the order of €150m per annum. The properties would appear to be 96% let and it is said, without contradiction, that at least in most cases the lettings are to what have been described as "blue chip tenants on long leases predominantly with a 25 year duration". At an aggregate level, it would appear that there is interest cover of somewhere between 1.7 and 1.8, meaning that the income from the relevant properties is 1.7 to 1.8 times the interest payable at current interest rates. Obviously the interest cover varies in individual cases so that, on a loan by loan basis, the cover can be above or below that average figure.

5.13 One particular feature of Mr. McKillen's business model needs to be noted. Many of the loans in question are for a short term duration. It would appear that there has, in general terms, been a practice for Mr. McKillen to successfully negotiate renewals of such loans from time to time. However, the legal position does also need to be recorded. That legal position is to the effect that adopting a policy of financing long term property investments by short term loans undoubtedly leaves the borrower, to an extent, at the mercy of his banks who are in a position, on a regular basis, to revisit the question of whether they are to lend and, if so, on what terms. A party who, on the other hand, has long term loans, has the added security that, provided the terms of the loan are met, the relevant bank is given no opportunity to re-negotiate the terms of the loan until its expiry. It should also be noted that Mr. McKillen's property portfolio is geographically spread between Ireland, the United Kingdom, France and the USA with, it would appear, approximately 26% by value representing properties in Ireland.

21. The appellants allege that any decision by NAMA to acquire the McKillen loans will have adverse effects on their constitutional rights under the following four headings:

1. effects on the appellants' underlying properties which provide security for loans, *i.e.*, their constitutionally protected property rights;

2. effects on their right to the income stream from their properties, *i.e.*, their constitutionally protected right to earn a livelihood;

3. effects on their bundle of contractual rights, *i.e.*, their contractual relations with their banks;

4. effects on their financial and commercial reputation, in particular on Mr. McKillen's.

22. The arguments related to all these headings are inextricably interrelated; they overlap to a greater or lesser degree, especially in the case of the first two headings. Nonetheless, I will set out each of the headings separately, as that was how they were presented and considered in the High Court.

Effects of Decision to Acquire on Underlying Properties

23. The appellants' properties will not, of course, themselves be the subject matter of any decision by NAMA to acquire loans from credit institutions. The function of the properties, the shopping centres, hotels, office blocks and the like, is to provide security for the loans. Hence, this property interest was also described as the equity of redemption. The High Court (paragraphs 7.16 and 7.17) thought that it was not apparent that the *"equity of redemption would be interfered with."* There was not *"any suggestion that, in general terms, Mr. McKillen's entitlements in respect of his equity of redemption in the various relevant properties, will be at impaired."* The Court was of the view that *"the position of NAMA is the same as the position of the banks from whom relevant loans are acquired."*

24. At paragraph 7.17, the High Court stated:-

> *"Mr. McKillen is entitled to pay off any loan which he owes to NAMA and thus, have the property given as security for that loan released from any*

mortgage in favour of NAMA. In that regard, he is in exactly the same position vis-à-vis NAMA as he would have been vis-à-vis the lending bank, had NAMA not acquired the loan in question. NAMA will only be entitled to decline to release a mortgage or charge over property on the basis of the continuing existence of other loans (i.e. those not then being paid off) if there is some legal nexus between the two loans. For example, if the banks concerned had provided for cross security between one loan and another such that the bank was entitled to rely on a property as security for a loan which was not directly connected to that property, then that entitlement would subsist in NAMA. However, the reason why that entitlement would subsist in NAMA is because it was an entitlement of the bank concerned in the first place. The entitlement to redeem any particular loan is not affected by the loan being acquired by NAMA. Subject to the points to which it will be necessary to return, arising out of NAMA's additional statutory powers, it does not appear to the Court that there is any difference between Mr. McKillen's right to redeem any loan or set of loans from the relevant bank in the event that the loans are not acquired by NAMA or from NAMA in the event that they are acquired."

25. Mr. Cush accepted that this analysis of the effect on the equity of redemption is correct, "so far as it goes." He criticised the High Court for dealing in "abstract legal ideas," while failing to address the specific facts of Mr. McKillen's situation. The essence of the complaint is that the High Court failed to address the evidence as to damage to the value of the properties through association with NAMA. The legal right to enjoyment of an equity of redemption was, he said, hollow in circumstances where the value of that equity had become negative. The fault of the High Court was to decide the matter, not by reference to effects on value, but in accordance with "an abstract legal principle."

26. In short, the appellants did not criticise the legal analysis of the High Court. They did not challenge the conclusion that the acquisition by NAMA of the loans does not affect the legal or equitable rights of Mr. McKillen under the credit facilities. They contended that the acquisition, because it is an acquisition by NAMA, has an effect on the market value of the underlying properties. In response to questions as to whether there is a right to have a value in property Mr. Cush placed particular

emphasis on the decision the High Court and of this Court in *MacPharthaláin v. Commissioners of Public Works* [1992] 1 I.R. 111; [1994] 3 I.R. 353, which I will examine at a later point.

Effects of Decision to Acquire on McKillen Loans on Income Stream and Right to Earn a Livelihood

27. Any rights of Mr. McKillen in respect of the income from his properties would normally be considered to be part of his property rights. The appellants treat it separately with a view to invoking the constitutional right to earn a livelihood. The response of the High Court to this argument and the appellants' criticism mirror the arguments under the preceding heading. The Court dealt with the matter as follows:-

> *7.20 In that context, it is appropriate to ask the question as to how it can property be said that Mr. McKillen will have his right to earn a livelihood interfered with by his loans "going into NAMA". To the extent that Mr. McKillen's livelihood derives from managing a property portfolio and hoping to make a profit from same, then, at least initially, Mr. McKillen's position will be no different if his loans are acquired by NAMA than if they are not. He will still own the property portfolio. He will still owe the same amount of money, albeit to NAMA instead of to his banks, and will have the same obligation in respect of repayment of those loans and the payment of interest on them as currently exists in favour of his banks.*
>
> *7.21 It is also important to note that NAMA has no additional legal entitlement to require an accelerated payment of a relevant loan over and above that which the bank concerned currently has. It is true that it is anticipated that NAMA will complete its work in the medium term and, thus, ultimately cease to exist. However, that does not mean that NAMA is entitled to call in loans which would not otherwise be due simply because it wants to close its books. To the extent that any party has a long term loan with its existing bank and to the extent that the party concerned does not breach any terms of that loan in a manner which would entitle its bank to call in the loan concerned, then NAMA is likewise prevented from calling in the loan. In those*

circumstances, if NAMA wishes to close its books, it will be required to find a purchaser for the loan concerned. Subject, again, to the additional statutory powers of NAMA to which it will be necessary to return, the Court does not see that there is any legal interference with Mr. McKillen's right to earn a livelihood.

28. Again, Mr. Cush accepted that these two passages constituted a completely correct legal analysis. In response, once more, his emphasis was on the factual evidence, in particular related to the fact that, in some cases, because of the general fall in property values the McKillen companies would find themselves in breach of what are called "loan-to-value covenants" in lending or security documentation. According to Mr. Cush, the appellants' expert evidence showed that banks did not generally exercise their rights under those covenants.

29. He attached great importance to a speech delivered by the Chairman of NAMA, Mr. Frank Daly, on 5th May, 2010, to the Leinster Society of Chartered Accountants, which demonstrated, he said, that on transfer of the loans to NAMA there would be a real and significant change of relationship. Mr. McKillen formerly had a normal commercial banking relationship with his lenders. Now his relationship would be with NAMA which would pursue different declared objectives.

30. Mr. Daly described NAMA as a "work-out vehicle, not a mechanism for liquidation…" It was "not a 'toxic' or 'bad bank' but an asset management agency……" NAMA would pay a price for loans based on the current market value of the underlying property. In many cases that value would be uplifted to reflect NAMA's view of the value it could "realistically expect to realise on the property over a seven to ten year horizon…" After acquisition of their loans, the largest one hundred borrowers (of which, Mr. Cush said, Mr. McKillen was one) would be "intensively managed by NAMA with key credit decisions and relationship management carried out by its staff." Mr. Daly summed up NAMA's objectives as follows:-

"In essence, NAMA's core commercial objective will be to recover for the taxpayer whatever it has paid for the loans in addition to whatever it has invested

to enhance property assets underlying those loans. It is expected to have a lifespan of seven to ten years. When it has achieved its core objective, it will be wound up. It is almost unique in that the more successful it is, the closer it will be to extinction …..… It is unusual among financial institutions in that it starts off with a huge balance sheet and will be working to eliminate it over its life."

31. Mr. Daly also explained that, after their loans had been acquired by NAMA, "borrowers [would] be asked to produce business plans which [would] set out detailed and credible targets for reducing their debt including any asset disposals which [would] contribute to that end." He said that the first ten borrowers had already had meetings with NAMA and that their detailed plans " based on a three-year horizon, must be submitted within a 30-day deadline and [that] NAMA [would] then approve the plans, reject them or refer them back to borrowers for amendment."

32. On 15th March, 2010, NAMA issued a document entitled "NAMA Debt or Business Plan Requirements," accompanied by a "Datapack." This document set out in great detail the instructions to debtors regarding the provision to NAMA of a business plan, as explained by Mr. Daly. That document included, for instance, a requirement that the debtor produce "a summary NAMA full repayment plan setting out… key actions necessary to fully repay NAMA…"

33. These documents, according to Mr. Cush, demonstrate that the NAMA business plan is directed towards realisations within a relatively short time-span. Where the appellants' loan facilities provide for an annual review, NAMA will use that opportunity to seek full repayment of capital within 7 to 10 years as a core term of any new loan. This is fundamentally different from the approach taken by a normal bank and would force the appellants to a total change of investment strategy. Moreover, NAMA's aim to seek the repayment of 25% of all loans within three years is totally at odds with the appellants' business model.

34. It is now necessary to refer to some expert evidence upon which the appellants rely to show the extent of the effects on the business of Mr. McKillen and his companies. This evidence is relevant to two points in particular. Because of his business model of reliance on short term loans, it is conceded that at present and,

indeed, at any point in time, some of his loans will have expired. Consequently, from a strictly legal point of view, he is in default and the loan, if not renewed, is repayable. The second point is that, because of the current widespread fall in property values generally, is it is clear—and it was found as a fact by the High Court—that, in some cases, the appellants are already in breach of loan-to-value covenants in the lending documentation. Before looking at the expert evidence, it is important to note three findings made, in very general terms, by the High Court: firstly, the appellants have not defaulted in respect of any interest payments; secondly, none of the loans have been called in for breach of loan-to-value covenants; thirdly, no loan has been called in because its term has expired. These findings are not to be regarded as permanent or conclusive. Background economic conditions are, to say the least, uncertain. The most that can probably be said is that, to all appearances, Mr. McKillen's position is a lot better than most property owners.

35. I will now mention a small amount of the expert economic and business evidence. It is only fair to say, to Mr. McKillen's credit, that he has produced evidence from experts of the highest quality and of international reputation. Much of what they have to say consists of policy criticism and is not relevant to the legal issues. It is useful only insofar as it tends to show that Mr. McKillen has points to make to NAMA when considering whether it will make an acquisition decision.

36. Mr. Joseph P. Belanger is an economic and business consultant attached to the Brattle Group at Carlisle, Massachusetts. He says that the transfer of the loans to NAMA will result in immediate and lasting adverse economic consequences for Mr. McKillen. He says that there was a reasonable expectation that "existing expired facilities would… be renewed as an administrative matter, but for the interjection of NAMA into the decision process" and that "the parties would routinely update the terms of technical covenants made obsolete by changes in loan amounts, terms and collateral of the renewed credit facilities." He said: "The performing nature of the credit facilities, in combination with the absence of any default notice and the ongoing expectation on the part of both parties as to the administrative renewal of the expired facilities, are characteristic of a satisfactory and desirable banking relationship." He also held a view, shared by others, that it was to be expected that tenants in the appellants' properties would attempt to alter commercial terms as a consequence of

the damage to Mr. McKillen's reputation resulting from his association with NAMA. This would be opportunistic behaviour, not something which tenants have a right to do, but the relationship with NAMA would facilitate actions by tenants, which they would not normally try to take.

37. Mr. Marcus John Sewell Trench is a London-based consultant on risk management and banking. He believes that the benefits of Mr. McKillen's long-standing relationship of trust and mutual respect with his bankers will be lost if loans are transferred to NAMA. He does not accept the contention of NAMA witnesses that the change to NAMA is like "a change of bank manager." He says that frequent and extensive media portrayal describes NAMA as a "bad" or "toxic" bank. He refers to the NAMA business plan requiring significant debt reduction within 2-3 years and that all debts be repaid by 2019. He contrasts NAMA's declared policy with Mr. McKillen's business model, which is to hold property for the long term, to add value to his assets and not to sell them.

38. Dr. Michael I. Cragg, an American economist of distinction, laid particular stress on the long term relationship which Mr. McKillen had established with his bankers.

39. Professor Joseph E. Stiglitz, a world-renowned economist and Nobel Prize winner, considered that NAMA's "incentives for dealing with performing assets like the McKillen loans are fundamentally different than those of a commercial bank." He emphasised, in particular, the "relatively short time horizon and accelerated workout objectives" of the NAMA business plan, especially the need for asset sales in the context of current market conditions which he believes are not likely to recover for at least three years. Like Mr. Belanger, he mentioned the risk that tenants might act opportunistically: in particular, they might stop paying rent because of NAMA's limited ability to find replacement tenants.

40. A summary of this evidence would be that banks renew credit facilities of sound and successful customers, where the interest payments are being fully serviced, on the expiry of the old credit facilities. A well functioning economy requires such implicit understandings. At the time the appellants' credit facilities were drafted, no

one could reasonably have foreseen that an entity such as NAMA could exist – accordingly transfer of the appellants' loans to NAMA is inconsistent with the terms of the credit facilities. Similarly, banks are not interested in exercising their legal rights to call in loans for breach of loan-to-value covenants in a weak market, when the loan is performing. Huge importance is attached to a long-established and successful banking relationship.

41. Mr. Cush's complaint is that the High Court completely failed to address this extensive body of expert evidence. While he acknowledged that there was some contrary evidence in affidavits sworn on behalf of the respondents, he noted that the appellants' witnesses were not cross-examined. To be fair, the High Court took the view that the transfer of the McKillen loans to NAMA did not, as can be seen from the paragraphs quoted above, in any way affect the legal rights of the appellants: in simple terms, in the view of the High Court, NAMA is in the same position as the banks; Mr. McKillen still owns his property; he still owes the same amount of money; he still has to pay the interest due on the loans. On this analysis, it can be seen that the High Court did not consider the expert evidence to be relevant. Hence, it made only the briefest reference to Dr. Cragg and Professor Stiglitz and did not mention the evidence of Mr. Belanger or Mr. Trench at all. Mr. Cush's criticism is that the High Court analysis was formalistic, relying excessively on abstract legal principle to the exclusion of any consideration of the effects of the decision.

42. At a later point, it will be necessary to consider whether the High Court was correct to restrict its analysis of the effects of a decision to its effects on legal rights. It is the central point in the case.

Effects of Decision to Acquire McKillen Loans on Contractual Relationships

43. The High Court considered that, in determining whether a constitutionally protected property right in the form of a contractual entitlement, can be said to have been interfered with, it is necessary to analyse the contract involved to determine whether, in fact, the contractual position of the party asserting an infringement has in truth been materially altered by the measure under challenge. It was not satisfied that there was any material alteration in Mr. McKillen's contractual position as a result of

his loans being acquired by NAMA and that NAMA has the same rights *vis-à-vis* any individual loan or set of loans as the bank from whom the loan was acquired previously had. It noted, in particular, that while the terms of the McKillen loans vary to some extent, none are in terms which preclude an assignment by the bank concerned and none are in terms which preclude an assignment only to another bank. The Court held that Mr. McKillen had no constitutionally protected right to whatever expectation he might previously have entertained concerning his banking relationship with the financial institutions from which he had borrowed. Such expectations would include the renewal of expiring loan facilities and non-reliance on loan-to-value covenants, at least in the absence of some serious underlying problem.

44. The appellants submit that NAMA does not operate in the same manner as a bank. It has important non-commercial objectives which fundamentally distinguish it from any other lending institution. Mr. Cush concentrated on what he described as the simple point that, as long as the banks wished to contract with the appellants, they had a *prima facie* right to contract with them. When NAMA takes over the contractual relationship, it interferes with that *prima facie* entitlement. Referring again to the evidence of Professor Stiglitz, Mr. Cush submitted that acquisition represents total and complete interference with the right of freedom of contract.

Effects on Reputation of Decision to Acquire the McKillen Loans

45. The appellants complain that the reputation of Mr. McKillen and his companies will be adversely affected by any decision of NAMA to acquire his loans. They rely on evidence of a widespread perception that NAMA is a “bad bank,” an expression used in such publications as the Financial Times, the New York Times, the Wall Street Journal and the Economist. According to the economist, James Power, "it seems inevitable…… that any business whose assets are transferred into NAMA would suffer reputational damage,” a view apparently shared by Mr. Trench. Professor Stiglitz says that "the principles of information economics indicate that any borrower improperly moved to NAMA will suffer a reputational loss, and certainly a loss of any benefits from a trusting banking relationship."

46. It is accepted, of course, that NAMA is not a bank at all and therefore, in the strict sense, it cannot be a "bad bank." Mr. Cush responds that the High Court confused reputation with fact. Even if the authors of the highly reputable publications just mentioned were mistaken, it is a fact that they described NAMA as a "bad bank." That is what affects the reputation of Mr. McKillen and his companies. The mere fact that the formal structure of the Act of 2009 does not coincide with the general perception of NAMA as a bad bank, does not mean that the general perception amounts to ill-informed comment. The High Court attached insufficient weight to the fact that the majority of loans which transfer to NAMA are bad loans.

The Statutory Context

47. In general terms, the appellants claim that the transfer of the loans made to them by their banks to NAMA would represent a radical interference with their existing contractual arrangements. The relationship between a borrower and his banker is fundamentally different from that between the same borrower and NAMA following transfer.

48. The appellants rely, in addition, on a number of specific provisions of the Act of 2009. It will suffice to mention some of these provisions. Finnegan J has analysed them very thoroughly in the judgment which he is about to deliver. Section 87(3)(b) of the Act requires NAMA, when acquiring an eligible bank asset, to set out *" a statement of any obligations or liabilities excluded from the acquisition…"* This means that NAMA may, at its discretion, decide that any pre-existing obligation or liability, which it considers that it is not appropriate for NAMA to acquire, shall remain with the transferring financial institution. Section 101 excludes enforcement of representations, limitations, undertakings or like statements given by a bank prior to acquisition if not disclosed prior to acquisition; again, this does not prevent their enforcement against the original lending bank. Section 139 provides that NAMA may dispose of acquired bank assets notwithstanding restrictions on such disposals at law or in equity and notwithstanding any contractual requirement to the consent of or notice to any person. The High Court concluded that these provisions did not amount to any limitation of substance to the appellants' rights.

49. Perhaps the provision to which the most importance was attached was that concerning "vesting orders" in sections 152 to 156. Where an asset acquired by NAMA includes a charge over land and a power of sale has become exercisable, NAMA may apply to the court for a vesting order. Subject to provisions regarding notice and advertising and the taking of accounts, the court, if it is satisfied that it is unlikely that the sum secured by the charge can be recovered by a sale within three months and there is no reasonable prospect of the borrower redeeming the charge, is obliged to make an order vesting the property in NAMA, if it applies for one. The effect of the vesting order is to extinguish the equity of redemption. The chargor is entitled, on a later sale of the property by NAMA, to be paid the value of the land determined by the court at the time of making the vesting order "were the land to be sold within three months after the application." The appellants complain that this gives NAMA an advantage over any normal mortgagee in that it is allowed to retain any increase in value which it is able to realise after the vesting.

General Nature of Effects of Decision to Acquire McKillen Loans on Mr. McKillen and his Companies

50. Two general observations can be made about the claimed effects of the decision of NAMA to acquire the McKillen loans.

51. Firstly, the four headings under which the appellants have presented their case for effects on their constitutional rights are clearly not in separate watertight compartments. They are all aspects of their property rights or are closely related to them. The rights in respect of the underlying properties, the rights to the income stream from them and the contractual relationships of the appellants with their banks are inextricably bound together. Any damage to reputation is equally consequential. It is of a commercial character and also relates to the other three headings.

52. Secondly, there are no significant disputes as to fact or, at least, no disputes which affect the issues which the Court has to decide. The High Court's description of the nature of Mr. McKillen's business, as quoted from paragraphs 5.8 to 5.13 of the judgment and set out at paragraph 20 above, was accepted by the appellants. It is not disputed that the various publications cited by the appellants have, in fact, described

NAMA as a “bad bank” or, in some instances, a “toxic bank.” Nor is it seriously disputed that the taking of the McKillen loans into NAMA would adversely affect the business of Mr. McKillen and his companies. This may be so particularly because his short term borrowing model exposes him to NAMA to a greater extent than those who borrow on a long term basis. Nonetheless, there is little dispute that he would be affected.

53. What then has to be considered is whether the appellants have the right to be heard by NAMA before it, in the exercise of its discretion, makes a decision to acquire the loans. As I have already explained, Mr. McKillen indicated clearly the matters in respect of which he wishes to be heard. He wishes to seek to persuade NAMA that it should not acquire his loans because of what he claims are the serious adverse effects acquisition would have on him and on his particular business, and because of the business model he follows. NAMA, on the other hand, submits that the appellants have no right to be heard and that NAMA has no obligation to hear them when considering whether to make a decision to acquire their loans.

NAMA’s Decision

54. This appeal concerns the power of NAMA to decide whether it will acquire an eligible bank asset pursuant to section 84 of the Act of 2009. Mr. McKillen and his companies claim that they have the right to be heard by NAMA before it makes any such decision.

55. Whether the right to be heard exists in the present case requires the determination of two closely related, but nonetheless distinct legal questions. The first issue is whether NAMA, when deciding whether to acquire an asset under section 84, is bound to consider the interests of the borrower. NAMA claims that the power is to be exercised exclusively in the interests of NAMA, having regard to the objectives of the Act, and that, consequently, the borrower’s interests are, so far as NAMA is concerned, irrelevant. If that is so, NAMA need not hear any arguments that the acquisition will have adverse effects on the appellants.

56. The second issue concerns the nature of the effects on the appellants' interests which produce a right to be heard. NAMA contends, and the High Court accepted, that it is necessary to demonstrate that the decision will have direct effects on legal rights, before there is a right to a hearing. If the interests of the borrower are, as a matter of law, irrelevant to NAMA's decision-making, the second question does not arise.

57. Section 84, subsections (1) and (2) provide:-

> *84.— (1) NAMA may acquire an eligible bank asset of a participating institution if NAMA considers it necessary or desirable to do so having regard to the purposes of this Act and in particular the resources available to the Minister. NAMA is not obliged to acquire any particular, or any, eligible bank asset of such an institution on any grounds.*
>
> *(2) For the avoidance of doubt, NAMA may acquire from a participating institution, performing or non-performing eligible bank assets.*

58. Patently, the asset to be acquired under this provision belongs, not to the borrower, but to the financial institution. No property of the borrower is acquired. That is not, however, the whole story. The section does not leave the borrower completely out of the picture. The fact that the asset to be acquired does not belong to the borrower does not, as a matter of principle, exclude the possibility that the borrower has a relevant interest in whether or not a decision is made.

59. In order to see whether the borrower has a potential interest, it is necessary, in the first instance, to turn to section 69 of the Act and to the National Asset Management Agency (Designation of Eligible Assets) Regulations 2009 (S.I. No. 568 of 2009) ("the Regulations"), to find a definition of the assets which are prescribed pursuant to that section. Regulation 2 of the Regulations prescribes the following classes of bank assets as classes of eligible bank assets for the purposes of the Act:-

"(a) credit facilities issued, created or otherwise provided by a participating institution –

(i) to a debtor for the direct or indirect purpose, whether in whole or in part, of purchasing, exploiting or developing development land,

(ii) to a debtor for any purpose, where the security connected with the credit facility is or includes development land,

(iii) to a debtor for any purpose, where the security connected with the credit facility is or includes an interest in a body corporate or partnership engaged in purchasing, exploiting or developing development land,

(iv) to a debtor for any purpose, where the credit facility is directly or indirectly guaranteed by a body corporate or partnership referred to in subparagraph (iii), or

(v) directly or indirectly to a debtor who has provided security referred to in subparagraph (ii) or (iii), for any purpose;

(b) credit facilities issued to, created for or otherwise provided to, directly or indirectly, a person who is or was at any time an associated debtor of a debtor referred to in paragraph (a), whether by a participating institution to which the debtor is indebted or by another participating institution;

(c) credit facilities (other than credit facilities referred to in paragraph (a) and credit cards) issued to, created for or otherwise provided to, directly or indirectly, debtor referred to in paragraph (a) for any purpose;

(d) any security relating to credit facilities referred to in paragraphs (a) to (c);

(e) shares or other interest, or options in or over shares or other interests, in the debtors referred to in paragraph (a), in associated debtors, referred to in paragraph (b) or in any other person, which the participating institution acquired in connection with credit facilities referred to in paragraphs (a) to (c);

(f) other bank assets arising directly or indirectly in connection with credit facilities referred to in paragraphs (a) to (c) or security referred to in paragraph (d), including –

(i) a contract to which the participating institution is a party or in which it has an interest,

(ii) a benefit to which the participating institution is entitled, and
(iii) any other asset in which the participating institution has an interest;

(g) financial contracts, including financial contracts within the meaning of section 1 of the Netting of Financial Contracts Act 1995, that relate in whole or in part to bank assets specified in paragraphs (a) to (f), but not including financial contracts between a participating institution and a financial institution (within the meaning of the Central Bank Act 1997).”

60. As one would expect, it can immediately be seen that, in almost every case, the prescribed credit facilities are granted directly or indirectly to a debtor or a person associated with a debtor or are security for other facilities ancillary to such arrangements. There is necessarily, from its very nature, a counter party to every credit facility.

61. The borrower comes into sharper focus, when one looks at the decisions actually made by NAMA. A decision of NAMA pursuant to section 84 specifies a bank asset, in effect a credit facility, belonging to a financial institution. But the decision, in so doing, also identifies the debtor or borrower. It is common case, and it

was fully accepted at the hearing of the appeal, that NAMA acquires loans by reference not merely to the particular financial institution which granted them but, at the same time, by reference to the named borrower or debtor. This can most readily be seen from the first affidavit sworn on behalf of NAMA by Ms. Aideen O'Reilly who spoke of the "scale of the borrowings from the five institutions of the 100 largest borrowers [which] is in the order of €50bn, of which Mr. McKillen's borrowings represent €2bn." Indeed, one of the primary purposes of NAMA is to remove what are perceived to be dangerous or risky loans from the books of the banks. Section 10(2) of the Act provides:

"(1) NAMA's purpose shall be to contribute to the achievement of the purposes specified in section 2 by-

> *(a)the acquisition from participating institutions of such eligible bank assets as is appropriate,*
> *(b) dealing expeditiously with the assets acquired by it, and*
> *(c) protecting or otherwise enhancing the value of the assets, in the interests of the State."*

The acquisition decisions necessarily, therefore, designate the borrowers. Perhaps, it is to labour the obvious to point to other provisions which demonstrate, at least by necessary implication, that acquisition decisions are made by reference to identified credit facilities granted to identified borrowers. Sections 80 to 83 set out elaborate procedures and powers whereby credit institutions are obliged, "in utmost good faith" to provide NAMA with complete information about bank assets. NAMA may demand detailed information, documents, books and records. Section 83 obliges a debtor to provide and furnish all necessary information to his or its credit institution. Section 85 obliges NAMA to identify the credit facilities it proposes to acquire.

62. It would also appear necessarily to follow, at least *prima facie,* that NAMA may take into account the interests of the borrower whose loans or, being absolutely precise, whose lender's interests in loans made to him, are to be acquired by NAMA.

63. NAMA responds, however, to the first question by stating that, on a proper interpretation of the Act, the decision-making power is to be exercised exclusively by

reference to the interests of NAMA and the objectives of the legislation and that the interests of the borrower are irrelevant to those considerations. The High Court appears to have accepted this submission. It held that "NAMA's discretion is, in terms, one which is principally directed towards the fulfilment of the purposes of the Act." (paragraph 6.22). At paragraph 6.25, the Court held:-

> *"That NAMA has a discretion which it can exercise so as not to acquire an eligible bank asset is not doubted. It is necessary to analyse the Act to determine the factors that can or must properly be taken into account by NAMA in the exercise of that discretion. The Court has concluded that the purpose of the discretion, as a matter of statutory construction, is not one which is designed as a means of protecting customers of a participating credit institution. Rather, the discretion is designed to give to NAMA the possibility, at its own discretion, not to acquire assets where there is some good reason (consistent with the overall objectives and purpose of the Act) for not so doing."* (*Emphasis added*).

64. NAMA made both written and oral submissions to this Court in support of the view that it is neither obliged nor empowered to consider the interests of the borrower when making a decision to acquire eligible bank assets under section 84 of the Act. Section 84(1), it is submitted, is so worded that the only statutory requirement imposed on NAMA in deciding whether to acquire eligible bank assets is that it must be satisfied that it is *"necessary or desirable"* to do so *"having regard to the purposes of this Act and in particular the resources available to the Minister."* This, it is said, is inconsistent with the borrower-centred considerations advocated by the appellants.

65. NAMA is not obliged to acquire any particular asset, where it is not desirable for it to do so, a proviso which, it is argued, further demonstrates that the power is exercisable for the benefit of NAMA and not for the benefit of any individual borrower.

66. Section 84(4) lists a number of discretionary considerations which NAMA may take into account when deciding whether to acquire a particular eligible bank

asset. All of these, NAMA argues, suggest that the discretion is there to enable NAMA to exclude assets which it is not in its interests to acquire. The character of the considerations listed show an intention on the part of the Oireachtas that the discretion to exclude eligible assets be exercised for the benefit of NAMA. Section 84(4) is as follows:-

> *"Without prejudice to the generality of subsection (1), NAMA may, in deciding whether to acquire a particular eligible bank asset, take into account—*
>
> *(a) whether any security that is part of the bank asset is adequate,*
>
> *(b) whether any security that is part of the bank asset has been perfected,*
>
> *(c) the value of that security,*
>
> *(d) whether the relevant credit facility documentation is defective or incomplete,*
>
> *(e) whether the participating institution concerned or any other person has engaged in conduct concerning the bank asset that is or could be prejudicial to the position of NAMA,*
>
> *(f) whether the participating institution has complied with its contractual and legal obligations and its obligations under this Act in relation to the bank asset, or its eligible bank assets generally,*
>
> *(g) whether in NAMA's opinion the participating institution has advanced a sufficient quantum of the credit facility concerned,*
>
> *(h) the quality of the title to any property held as security that is part of the bank asset,*

(i) any applicable legal, regulatory or planning requirement that has not been complied with in relation to development land held as security that is part of the bank asset,

(j) any association with another bank asset of a participating institution,

(k) the performance of the bank asset,

(l) any matter disclosed in any due diligence carried out by the participating institution or NAMA,

(m) the type of other eligible bank assets (whether of the participating institution or any other participating institution) that NAMA has acquired or proposes to acquire, and whether not acquiring the particular eligible bank asset concerned would contribute to the achievement of the purposes of this Act, and

(n) any other matter that NAMA considers relevant."

67. All this begs the question, NAMA says, whether there could be other unexpressed, but nonetheless, mandatory considerations. It would appear that NAMA takes the view that even section 84(4)(n) which permits NAMA to take into account *"any other matter that NAMA considers relevant"* does not permit it to include any consideration of the interests of the borrower.

68. In short, NAMA submits that the discretion contained in section 84(1) does not oblige NAMA and, by extension, does not permit NAMA to give consideration to the interests of an individual borrower or to allow him to argue that his loans should not be acquired because to do so would be damaging to his interests. A facility for such a process would be fundamentally at odds with, and indeed undermine, the manner in which the Act must work in order to achieve its objectives and the ultimate goal of ridding the banks' balance sheets of problematic loans thereby addressing the systemic risk to the financial system.

69. NAMA set itself a very high threshold in undertaking to persuade the Court that the interests of a borrower are an irrelevant consideration, when it is contemplating acquiring the loans made to him by his lending bank. This submission is not made on an assessment of what those interests are or how they are affected. The proposition is that, as a matter of statutory construction and regardless of whether the borrower's interests are in fact affected, and even if they may be severely compromised, that it is simply an irrelevant consideration. It could not even fall to be entertained as an "*other matter that NAMA considers relevant*", pursuant to section 84(4)(n).

70. It is noteworthy that the Attorney General responded to a question as to whether the Act excluded Mr. McKillen's right to have his argument considered by submitting that the Act is not structured that way. The Court has not been referred to any provision of the Act which, in terms, purports to preclude NAMA from considering the interests of the borrower.

71. Before proceeding with this analysis, I would note, in addition, the element of finality, set out at a level of detail to which I do not consider it necessary to recount here, in NAMA decisions. Section 87 provides for the service of an acquisition schedule. Section 90 provides for the effects of that step, *i.e*., that it operates to effect the acquisition of each specified bank asset in NAMA. Section 103 provides that no action is to lie against NAMA or any of its entities "*by reason solely of the acquisition of a bank asset.……*"

72. As I have explained, I have decided to consider as a separate matter whether the appellants have shown that their rights or interests are in fact capable of being affected by a NAMA acquisition decision. I am posing, as a first question, whether NAMA and the State are correct in their submission that consideration of the borrower's interest is excluded. I do so, therefore, on the hypothesis that Mr. McKillen's interests are affected.

73. When the question is expressed thus, there can be only one answer. A person whose interests are capable of being affected by a decision of a public body exercising statutory powers, is ordinarily entitled to have notice of the intention to consider the

making of the decision and to have his representations heard by the decision-maker with regard to those effects.

74. As the High Court remarked, it is well settled, at least since the decision of this Court in *East Donegal Co-Operative Ltd. v. Attorney General* [1970] I.R. 317, that an Act of the Oireachtas must be interpreted, so far as possible, in conformity with the constitutional guarantees of fair procedures. For that purpose, the Court will imply into statutory decision-making procedures an obligation to respect fair procedures. The appellants have relied particularly on the case of *MacPharthaláin v Commissioners of Public Works* [1994] 3 I.R. 353. In that case, however, the nature of the right was taken for granted to such an extent that it was not spelled out or discussed in any detail in the judgments.

75. Walsh J. stated in a famous passage at page 341 in *East Donegal*:-

> *"…the presumption of constitutionality carries with it not only the presumption that the constitutional interpretation or construction is the one intended by the Oireachtas but also that the Oireachtas intended that proceedings, procedures, discretions and adjudications which are permitted, provided for, or prescribed by an Act of the Oireachtas are to be conducted in accordance with the principles of constitutional justice. In such a case any departure from those principles would be restrained and corrected by the Courts."*

76. Later, at pages 343 to 344, he said:-

> *"All the powers granted to the Minister by s. 3 which are prefaced or followed by the words "at his discretion" or "as he shall think proper" or "if he so thinks fit" are powers which may be exercised only within the boundaries of the stated objects of the Act; they are powers which cast upon the Minister the duty of acting fairly and judicially in accordance with the principles of constitutional justice, and they do not give him an absolute or an unqualified or an arbitrary power to grant or refuse at his will. Therefore, he is required to consider every case upon its own merits, to hear what the applicant or the*

licensee (as the case may be) has to say, and to give the latter an opportunity to deal with whatever case may be thought to exist against the granting of a licence or for the refusal of a licence or for the attaching of conditions, or for the amendment or revocation of conditions which have already attached, as the case may be."

77. The right to be heard by a decision-maker exercising powers capable of affecting an individual has its origins in the common law rules of natural justice but has come to be recognised as an entrenched constitutional principle. It is implied, as a matter of course, into statutes. The exclusion of the right would require clear words. The principle was particularly clearly expressed by Costello P. in *McCormack v. Garda Siochána Complaints Board* [1997] 2 I.R. 489 at 499-500 as follows:-

"It is now established as part of our constitutional and administrative law that the constitutional presumption that a statute enacted by the Oireachtas intended that proceedings, procedures, discretions and adjudications permitted, provided for, or prescribed by Acts of the Oireachtas are to be conducted in accordance with the principles of constitutional justice. It follows therefore that an administrative decision taken in breach of the principles of constitutional justice will be an ultra vires one and may be the subject of an order of certiorari. Constitutional justice imposes a constitutional duty on a decision-making authority to apply fair procedures in the exercise of its statutory powers and functions."

78. In the light of these principles, I am driven to the conclusion that the Act of 2009 did not exclude consideration of the interests of borrowers where they could show that their interests were liable to be affected by decisions taken pursuant to section 84.

79. That is what now needs to be considered. I am satisfied, however, that NAMA is incorrect in submitting that the Act, as a matter of statutory construction, precludes consideration by NAMA of the interests of a borrower whose loans are being acquired from the financial institution which made the loans.

80. The Attorney General also argued that, by reason especially of the national economic emergency and the urgency of NAMA's work, the exclusion of the right to a hearing was justified. Nobody, of course, doubts the extreme seriousness of the burst of the property bubble, the financial crisis, the crisis in the public finances and the drastic effects of all these on the lives of citizens. However, we do not reach and do not need to consider, and I have not considered, whether the exclusion of the appellants' right to be heard would be justified, if it is not, in fact and in law, excluded. It is not necessary to justify an exclusion, if, as here, there is no exclusion. For that reason, it is not necessary to consider whether the national financial emergency justifies it.

Would a Decision of to acquire the Appellants' Loans have the potential to affect their Interests so as to Entitle them to be Heard by NAMA?

81. I have set out earlier in this judgment the respects in which the appellants claim that their constitutional rights are liable to be affected by a NAMA decision to acquire their loans. The appellants have analysed these effects under four principal headings, which I now repeat:

1. effects on their underlying properties, *i.e.*, their constitutionally protected property rights;

2. effects on their right to the income stream from his properties. i.e., their constitutionally protected right to earn a livelihood;

3. effects on their bundle of contractual rights;

4. effects on their reputation.

82. The parties have offered two theories of the test for entitlement to a hearing. According to NAMA, only interference with a legal right qualifies. The appellants propose a broader criterion for assessment of effects, which would not be limited to cases of probable encroachment on legal rights.

83. The High Court rejected the appellants' arguments essentially because it considered that the appellants' legal position following acquisition would be no different *vis-à-vis* NAMA from what it had been in their relations with their banks

prior to that event. The banks had the right to assign loans without Mr. McKillen's consent; the acquisition did not change the terms of the loans; Mr. McKillen owed the same amount and on the same terms as he did in the case of the banks; NAMA remained bound by the terms of the lending and security documentation. The appellants accepted this analysis "as far as it goes"; they regard it as inadequate because of its preference for abstract legal principle and adherence to a strictly formalistic test over consideration of the practical effects on the appellants' business model in the real world of commerce.

84. The High Court approached the matter as follows (paragraph 7.14 of the judgment):-

> *"The Court is not satisfied that any mere possibility that there might be an indirect consequence for a party's rights affords the party concerned a right to fair procedures. There must be a real risk that a party's rights will be interfered with in the event that there is an adverse decision. The adverse decision must be such as would directly interfere with those rights, or at least any interference must be so closely connected with any adverse decision so as to warrant that the party concerned be entitled to invoke a right to fair procedures. Obviously, the precise application of that general principle requires an analysis of the right which it is said might be interfered with and the manner in which it is said that an adverse decision would interfere with that right."*

85. The Court there excluded mere possibilities and indirect consequences. Subject to that, however, it did not think any effect which did not amount to an interference with legal rights would trigger the right to a hearing. Counsel for the appellants did not quarrel with this passage, except to the extent that it failed to take account of the decision of this Court in *MacPharthaláin v. Commissioners of Public Works*, cited above.

86. It is a surprise to discover a significant area of the law of judicial review that has not been thoroughly explored in a body of case law. There do not appear to be any

cases where the courts have analysed the type of effect of a decision which an applicant must show to justify the right to be heard.

87. In view of the importance attached to it by the appellants, I will commence with *MacPharthaláin.* It is not, in truth, an entirely satisfactory authority. Neither the High Court nor the Supreme Court referred to the distinction relevant in this case between effects on legal rights and effects on the value of the exercise of those rights. There is little citation of authority—none in the Supreme Court judgment, which was delivered *ex tempore.*

88. *MacPharthaláin* concerned the designation as an area of scientific interest by the Wildlife Section of the Office of Public Works of an area of blanket bog near Clifden owned by the applicants. An adjoining area had already been so designated without affecting the applicants. The area was extended from 1987 so as to include the applicants' lands by designation on a map but without notice to them. According to the applicants, the decision affected them adversely, because the designation meant that they could not obtain certain forestry grants which would have otherwise been available. The applicants applied for *certiorari* of the decision. Blayney J., who heard the case in the High Court, found as a fact that that *"such grants* [would] *not be obtainable."* As a result he was *"satisfied also that, as a result of this, the lands are considerably reduced in value."* It followed the applicants' *" personal rights* [had] *been affected."* ([1992] 1 I.R. 111, at page 117)

89. This Court upheld the judgment of Blayney J. on appeal on more or less identical grounds. Finlay C.J., speaking for a unanimous Court, said *"that the learned trial judge could only come to the one conclusion and that was that it was that designation which affected the lands." "That being so,"* he continued, *"it is quite clear in my view that this decision fell within the categories of a decision reviewable by the courts and was of a judicial nature to that extent."* It had not been seriously contested that the decision *"being a decision which affected the rights of these particular landowners, insofar as their land had never before been designated, it was reached in 1987 without giving to them any opportunity to be heard or to object or to make representations on that issue whether in a formal or informal way and as such*

was wanting in the first fundamental requirement of natural justice." (At pages 358 to 359)

90. The judgments of the High Court and the Supreme Court in *MacPharthaláin* held that the decision "affected the rights" of the applicants. Does that mean that the rights themselves have to be infringed in their legal quality or does it include cases where the exercise of the rights is rendered more difficult, less valuable or merely less attractive?

91. A distinction has to made between decisions addressed to or closely connected with named or identifiable individual persons or bodies and decisions made in the general public interest. The High Court cited the following passage from the judgment of Costello P. in *Hempenstall v. The Minister of the Environment* [1994] 2 I.R. 20 at 21:-

> *". . . a change in law which has the effect of reducing property values cannot in itself amount to an infringement of constitutionally protected property rights. There are many instances in which legal changes may adversely affect property values (for example, new zoning regulations in the planning code and new legislation relating to the issue of intoxicating liquor licences) and such changes cannot be impugned as being constitutionally invalid unless some invalidity can be shown to exist apart form the resulting property value diminution."*

92. We are not here, of course, concerned with a legislative measure. Nonetheless, government and other public bodies may adopt decisions having general application, which, while they have effects on individuals, do not impose an obligation on the decision-maker to accord a hearing to affected persons. Planning authorities adopt development plans and designate or "zone" large areas of land for specified types of use. Such decisions are more relevant to this case than zoning regulations, mentioned by Costello J. The legislation provides its own mechanism for publication and objection. Decisions may be challenged on judicial review for want of *vires* or on other grounds. They do not, however, require observance of the rule of *audi alteram partem.*

93. I would add that I do not consider that the mere fact of diminution of property values would normally suffice to establish an individual right to be heard. The decision of a public body to embark on the construction of a bridge, an airport, sewerage works, a new motorway or the like may affect many people, in particular by adversely impacting on property values, but public consultation rather than individual judicial review is the preferred and appropriate means of balancing pubic and private interests. At any rate, I do not think that mere adverse effects on property values flowing from a public law decision can, on its own, trigger the right. I am prompted to recall the analogy with the rules for compensation for compulsory acquisition of property. The rules make a distinction between injurious affection caused by what is done on land taken from the claimant and on land not so taken. In other words, the claimant has to put up with the effects of the compulsory purchase order, insofar as they emerge from land not taken from him (see *Chadwick v. Fingal County Council* [2008] 3 I.R. 66.). Paul Howard constructed his comedy, *"Between Foxrock and a Hard Place,"* which recounts an episode in the life of the infamous Ross O' Carroll-Kelly, around the property-price reduction feared to result from a change in postal districts. The characters saw bribery rather than judicial review as the remedy.

94. The central, and the most difficult, question in the appeal concerns whether the right to be afforded fair procedures in accordance with natural and constitutional justice depends on the contemplated decision amounting to an interference with rights, in the sense of legal rights only, guaranteed by the Constitution.

95. The appellants cited the decision of Murphy J in *Chestvale Properties Ltd v. Glackin* [1993] 3 I.R. 35 to the effect that provisions of the Companies Act 1990 conferring powers on inspectors to demand documents from solicitors and bankers "[did] *impinge to some extent on their property rights insofar as the same consist of mutual contractual obligations between themselves and their bankers and solicitors respectively."* (page 45 of the judgment). Murphy J. held, however, that there was a limited intrusion on constitutional rights which was justified as a means of reconciling the exercise of properties with the common good.

96. Neither party cited the decision of this Court in *Haughey v. Moriarty* [1999] 3 I.R. 1, which seems to me to be a more helpful authority. The applicants had brought a wide-ranging challenge to the Tribunal of Inquiry (Payments to Politicians). One of many complaints was that the Tribunal had infringed their constitutional right to privacy in relation to their banking transactions by addressing orders for wide-ranging discovery to a number of financial institutions without notice to them. Geoghegan J., in the High Court, observed that the rights of the plaintiffs in relation to banking records could be viewed merely as contractual rights to confidentiality or might be protected by the constitutional right to privacy. Both Geoghegan J. and the Supreme Court considered that, in any event, the making of the orders by the Tribunal was justified in the interests of the common good.

97. Nonetheless, it was held both in the High Court and the Supreme Court that the plaintiffs should have been notified and heard before any such order was made. Hamilton C.J., speaking for a unanimous Supreme Court, dealt with the matter as follows at page 75:-

> *"While the Tribunal is entitled to conduct the preliminary stage of its investigations in private, and to make such orders as it considers necessary for the purposes of its functions, that does not mean that in the making of such orders, it was not obliged to follow fair procedures.*
>
> *In the making of such orders the Tribunal had in relation to their making all such powers, rights and privileges as are vested in the High Court or a judge of that court in respect of the making of orders.*
>
> *Fair procedures require that before making such orders, particularly orders of the nature of the orders made in this case, <u>the person or persons likely to be affected thereby should be given notice</u> by the Tribunal of its intention to make such order, and should have been afforded the opportunity prior to the making of such order, of making representations with regard thereto. Such representations could conceivably involve the submission to the Tribunal that the said orders were not necessary for the purpose of the functions of the*

> *Tribunal, that they were too wide and extensive having regard to the terms of reference of the Tribunal and any other relevant matters."* (*Emphasis added*)

98. That passage appears to apply a test based on a person being "affected." The discovery orders encroached on the plaintiffs' rights to have their banking records treated as confidential and, possibly, on a constitutional right to privacy, but did not otherwise affect the legal relationship between them and their banks.

99. It does not appear to me that it has been established that the right to be heard before a contemplated decision is made depends on establishing interference with a specific and identifiable legal right. It is difficult to discern a principled basis for restricting the right in that way. The courts have never laid down rigid rules for determining when the need to observe fair procedures applies. Everything depends on the circumstances and the subject-matter. The fundamental underlying principle is fairness. If a decision made concerning me or my property is liable to affect my interests in a material way, it is fair and reasonable that I should be allowed to put forward reasons why it should not be made or that it should take a particular form. It would be unjust to exclude me from being heard. For the purposes of the right to be heard, I would not draw a sharp line, what is sometimes called a "bright line," of distinction between an effect which modifies the legal content of rights and a substantial effect on the exercise or enjoyment of rights. I would fully endorse the first part of the statement of the High Court, quoted above as follows:-

> *"The Court is not satisfied that any mere possibility that there might be an indirect consequence for a party's rights affords the party concerned a right to fair procedures. There must be a real risk that a party's rights will be interfered with in the event that there is an adverse decision."*

The problem is with the interpretation of the following statement that *"[t]he adverse decision must be such as would directly interfere with those rights, or at least any interference must be so closely connected with any adverse decision so as to warrant that the party concerned be entitled to invoke a right to fair procedures."* If the requirement is that there be direct interference with the legal substance of the rights, the statement is too narrow. It should be capable of including material practical effects

on the exercise and enjoyment of the rights. Subject to this qualification, which was crucial to the outcome of the case in the High Court, I would approve the passage at paragraph 7.14 (quoted at paragraph 85 above) as a correct statement of principle.

100. Before turning to consider the actual effects on their rights alleged by the appellants, it is necessary to consider how the affidavit evidence produced by the appellants should be treated. Should the Court itself assess its strength or weigh its value? Should the Court arrive at a conclusion as to the likely effects on the appellants' business of the NAMA business plan? I do not think it is necessary for the Court to go so far. It suffices, in my view, that there is an apparently credible body of evidence that the appellants' business is likely to be significantly affected. It is not for the Court to decide on the weight to be attached to that evidence or whether it should be accepted at all. That would be to beg the question which arises, which is what NAMA should be required to take it into account when considering in its discretion to make an acquisition decision. I take the same view about the question of whether or not the appellants' loans are impaired. As already noted, the High Court decided that it was not part of its function to decide whether the loans were "impaired," an approach conceded to be correct by the appellants during the hearing of the appeal. There is some controversy as to whether the appellants' loans are, in fact, impaired and as to the extent of any impairment. These are not matters that could be resolved without very close scrutiny of the lending documentation and the financial evidence. I have referred earlier to some general and tentative conclusions of the High Court regarding compliance with loan-to-value covenants. These are matters in respect of which the appellants would, no doubt, wish to make representations to NAMA.

101. The appellants' case for effects on their interests can be summarised as follows. Their experts say that the mere fact of transfer of the loans to NAMA will result in immediate and lasting adverse economic consequences for the appellants. It is not like a mere change of bank manager. Professor Stiglitz contends that NAMA's "incentives for dealing with performing assets like the McKillen loans are fundamentally different than those of a commercial bank."

102. As shown by the NAMA business plan, NAMA sees itself as a "work-out" vehicle, or, in accordance with its title, an asset management agency. Borrowers are required to produce business plans including detailed and credible targets for reducing their debt including any asset disposals which would contribute to that end. There was a reasonable expectation that existing expired facilities would be routinely renewed as an administrative matter, whereas NAMA will be able to and is likely to rely on the legal fact of expiry. In a normal profitable and performing banking relationship, a lending bank would not, in practice, rely on breach of loan-to-value covenants to call in loans. NAMA has a core commercial objective of recovering for the taxpayer whatever it has paid for the loans in addition to whatever it has invested to enhance property assets underlying those loans. It is expected to have a lifespan of seven to ten years. This objective is incompatible with Mr. McKillen's business model, which is to invest long-term and to enhance his portfolio. It is significant that the European Commission saw a distinction between a bank and NAMA so far as its relation with a borrower is concerned. It said at paragraph 44 of its Decision, which I dealt with more fully in my earlier judgment on the issue of State Aid:

"Some of the powers granted to NAMA are not available or go beyond those available to traditional market players operating on the real estate financing market in Ireland. According to Irish authorities such powers are essential for the discharge by NAMA of the obligations imposed on it by statute. They are essential for NAMA's fundamental purpose of acquiring assets in order to address a serious threat to the economy and to the systemic stability of credit institutions in the State."

103. It is also the case that NAMA has a number of statutory powers, summarised above, which would not be available to a bank. There has been much debate about whether any of these provisions would be likely to have a real and practical effect on the appellants. The fact remains, that NAMA has powers which a bank does not have. It seems clear that section 87(3)(b) of the Act of 2009 enables NAMA, when acquiring an asset, to set out *" a statement of any obligations or liabilities excluded*

from the acquisition…" This qualifies the general assumption that NAMA takes over all the bank's obligations and liabilities. The High Court was of the view that this procedure did not in any way interfere with any rights which the borrower might otherwise have against the bank and that the only limitation is that those rights cannot be enforced against NAMA. That Court took a similar view in relation to section 101 of the Act, which excludes enforcement against NAMA of representations, limitations, undertakings or like statements given by a bank prior to acquisition if not disclosed prior to acquisition. Any such matter, if enforceable at all, is enforceable only against the transferring bank. Mr. Cush made the point, in argument, that these and other provisions, definitely put NAMA in a different, an enhanced, position compared to the position of the bank. It is difficult to dispute that. It is a matter of degree. The High Court did not consider such provisions significant.

104. The legal provisions of the Act which were, perhaps, most specifically highlighted were those in Chapter 4 of Part 9 concerning the right of NAMA, in certain circumstances, to apply for a vesting order, vesting mortgaged or charged property in NAMA and extinguishing the equity of redemption. The High Court analysed these provisions very carefully (see paragraphs 7.47 to 7.51). The Court pointed out that *"the entitlement of NAMA to seek and obtain a vesting order only arises where NAMA would be entitled to sell the property itself and where there would be no reasonable prospect of that sale covering the debt and where the borrower concerned has no reasonable prospect of being able to otherwise discharge the debt."* It acknowledged that, *"at a formal level, there appears to be a very limited effect on the legal entitlement of a borrower in those circumstances,"* but *"found it difficult to characterise any change in a borrower's position in those circumstances as being a diminution in the borrower's rights,"* essentially because that *"any interest which the borrower might have in those circumstances is of the aspirational or "hope" nature.."* Thus, applying the test it had set for itself, as quoted above, this consequence was *"insufficient to give rise to a constitutionally protected right such as would engage an entitlement to fair procedures."*

105. Finnegan J has analysed in his judgment today the foregoing and a number of other provisions of the Act conferring specific powers on NAMA. He has demonstrated that, at the very least, NAMA has powers which were not available to

the financial institutions. Their precise effects cannot be judged in the abstract or apart from the context of a particular dispute. It is not possible to pass judgment definitively on these provisions. I believe, however, that, when considered in their entirety they show that the transfer of loans to NAMA has the potential to affect borrowers, at least to a sufficient extent to require NAMA to accord a hearing to the appellants prior to making an acquisition decision.

106. I have endeavoured above to give a brief summary of the appellants' case for effects on their interests. There is dispute about the correctness of some of Mr. McKillen's claims, in particular, about the extent to which his loans are impaired. The central point is, in my view, that the transfer to NAMA puts the appellants and Mr. McKillen in a fundamentally different situation. NAMA, a statutory body, with statutory powers and objectives replaces his banks with which he has had, up to now, a commercial relationship. His long-term business model is not compatible with NAMA's statutory remit, which is essentially short-term. Where NAMA is in a position to rely on default by any of the appellants under their loan agreements, it is not only likely to but obliged to take action in pursuance of its statutory objectives, where a bank either would, or at least might, not do so. The consequence of an acquisition decision is to make a substantial change in the way in which the appellants are in a position to exercise their property rights. Their ability to manage their properties independently is reduced.

107. NAMA relies on the fact that each bank has the right to transfer the loans without consulting the appellants. They say that each bank has voluntarily sought the protection of NAMA and that it is that fact that enables NAMA to make acquisition decisions. I cannot accept that analogy. It is undoubtedly correct that the banks voluntarily applied to be included in the NAMA scheme. That occurred because of the severe banking crisis which followed the burst of the property bubble and placed them in a financially weak position. However, the acquisition decision is made pursuant to a statutory power under section 84 and is made for a statutory purpose. It is not to be compared with the voluntary assignment of loans.

108. NAMA also relies on the general economic and banking crisis. It says that the appellants' banking relationship was never going to be the same following the

crisis which led to the grant by the State of the banking guarantee in September, 2008. It has to be acknowledged that there is great force in that argument, which was accepted by the High Court in the following terms at paragraph 5.5:-

> *"..in the absence of some significant executive and legislative response to those problems, it is almost certain that the existing banks operating in Ireland (including those with whom Mr. McKillen had long standing banking relationships) would have ceased to function or, at least, function in any way remotely resembling the traditional model of a bank."*

109. Mr. McKillen, however, has a number of points to make which suggest that even this powerful consideration should not operate to deprive him of the comparatively modest facility of the right to be heard. He maintains that he has invested very little in Irish property, in none at all since 1998; that only a very small proportion of his loans (2.5% to 5%) are land and development loans; and that, in the main, his loans are performing. He has pointed to some evidence to the effect that his banks continue to want to do business with him. These are points which McKillen should be entitled to put to NAMA. The banking crisis does not deprive him of that right. In some respects, it strengthens it: he wishes to say that his position is different from other borrowers.

110. I have come to the conclusion that the appellants have the right to be heard by NAMA before it makes any acquisition decision in respect of their loans. That right relates, as I have already emphasised, only to representations with regard to the effects any acquisition decision is likely to have on their particular interests. It does not extend to making representations concerning the considerations, other than effects on the appellants, to which NAMA will have regard when considering whether to make a decision. I would emphasise that the right is to make representations. This is not a case where the decision maker will be proposing to deprive the subject of a proposed decision of an office or employment, a licence or other legal right or privilege. In such cases, where it is proposed to make a decision adverse to the holder, the law requires that notice be given of any intention to rely on any misconduct or breach of the terms of the relevant license or other legal instrument. (see for example State (*Gleeson) v Minister for Defence* [1976] 280.) In the present circumstances, it is

the appellants and, in particular, Mr McKillen, who, as explained in the application for judicial review, wish to advance reasons why the decision should not be made by reason of matters peculiar to them.

111. I would not dictate the form or extent of any facility which NAMA should extend to the appellants. I do not suggest that they are entitled to an oral hearing before the Board of NAMA or any officer of NAMA. All these are matters to be decided by NAMA, in consultation with its advisers. NAMA is clearly entitled to have regard to any element of urgency attending the decision-making process. I would endorse the following passage from de Smith's, *Judicial Review*, 6th Edition, Sweet & Maxwell (London, 2007) at page 377:-

> "The content of procedural fairness is infinitely flexible. It is not possible to lay down rigid rules and everything depends on the subject-matter. The requirements necessary to achieve fairness range from mere consultation at the lower end, upwards through an entitlement to make written representations, to make oral representations, to a fully fledged hearing with most of the characteristics of a judicial trial at the other extreme. What is required in any particular case is incapable of definition in abstract terms."

112. I would allow the appeal and make a declaration to the effect that NAMA is obliged to permit the appellants to make representations regarding the effect that any acquisition decision is likely to have on them.