THE HIGH COURT

[RECORD NO. 2014/2799P]

BETWEEN

CAROL MORRISSEY AND JOHN MORRISSEY

PLAINTIFFS

AND

THE NATIONAL ASSET MANAGEMENT AGENCY, CAPITA ASSET SERVICES (IRELAND) LIMITED, THE MINISTER FOR FINANCE, IRELAND AND THE ATTORNEY GENERAL

DEFENDANTS

JUDGMENT of Ms. Justice Ní Raifeartaigh delivered on the 2nd day of July, 2019

Section 1: Preliminary Matters

Nature of the case

1. This case raises issues relating to NAMA's dealings with Mr. Morrissey in connection with a portfolio of loans acquired by NAMA. The loans were originally taken out from Irish Nationwide Building Society ("INBS"). Mr. Morrissey obtained substantial loans in an amount of approximately €27 million from INBS between 2004 and 2006 in connection with his acquisition of seven investment properties. The loans were secured by mortgages over those properties. There were problems with the repayments from as early as 2006. The loans and related security were acquired by NALM in 2010 pursuant to the National Asset Management Agency Act in 2009 ("the Act of 2009") when the loans were in serious default. In 2014, NAMA decided to call in the loans and related security by demanding the outstanding sum of some €32 million and, following non-satisfaction, by appointment of receivers over the properties. The receivers have since sold the seven investment properties and the net sums received by the sales have been applied in reduction of the debt due.

2. A sum of €3.75 million was also borrowed in 2005 to finance the purchase of a family home of both plaintiffs at Palmerston Road, Dublin 6 and the loan was secured upon the house. This loan is also substantially in default. NAMA has not yet taken a decision to enforce against this loan but Mr. and Mrs. Morrissey have requested the Court in these proceedings to declare that NAMA does not have valid security over the family home for reasons that will become apparent in this judgment.

3. Mr. Morrissey responded to NAMA's decision to appoint receivers in January 2014 by issuing a plenary summons on the 27th February, 2014. An appearance was entered on behalf of NAMA and Capita on the 6th March, 2014. NAMA then issued a summary summons bearing Record No. 2014/1104S on the 17th April, 2014 and Mr. Morrissey entered an appearance to those proceedings "under protest" on the 1st May, 2014. NAMA issued a notice of motion dated the 16th May, 2014 seeking liberty to enter final judgment in the sum of approximately €32 million with interest. The High Court subsequently gave directions that both sets of proceedings be dealt with together and fixed a timetable for pleadings, affidavits and discovery. It was agreed that the summary claim of NALM would be dealt with by way of counterclaim in the proceedings against NAMA.

The reliefs sought by the plaintiffs

4. The plenary proceedings brought by the plaintiffs raise a multiplicity of legal issues. The reliefs sought can be summarised and paraphrased as follows:-

> i. Declarations that the acts of the defendants, their servants or agents in the purported exercise of their statutory and non-statutory functions in respect of the second plaintiff's properties, including the family home at 36 Palmerston Rd in Dublin 6, including the failure to act fairly and reasonably in respect of the valuation and disposition of the properties, including the appointment of a receiver, and in threatening further interferences with the plaintiff's constitutional rights, had breached certain constitutional rights of the plaintiffs. The constitutional rights identified included the right to inviolability of the dwelling, rights and duties as spouses, right to property, right to marital autonomy, equality, human dignity, access to the courts and the right to litigate;
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> ii. Damages for breach of constitutional rights, negligence, negligent misrepresentation, breach of statutory duty, breach of section 3 of the European Convention on Human Rights Act 2003, breach of statutory rights under the Guardianship of Infants Act 1964 and "causing loss by unlawful means";
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> iii. An order restraining future breaches of the plaintiff's rights;
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> iv. Orders declaring that sections 17, 182, 192, 189, and 195 of the NAMA Act 2009 do not apply to the plaintiff's claims in respect of their claims of breach of constitutional rights. In the alternative, they seek orders that insofar as these sections of the Act restrict the plaintiff's access to the courts, they are invalid having regard to the Constitution;
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> v. An order that the actions of the defendants breached and threatened further interference with the rights of the second-named plaintiff under Article 41.2 of the Constitution;
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> vi. An order that the actions of the defendants breached and threatened further interference with the first-named plaintiff's right to earn a livelihood under Article 40.3 of the Constitution;
>
> vii. An order that the above-mentioned sections of the Act of 2009 violate Articles 6, 8, 13 and 14 of the European Convention on Human Rights as well as Article 1 of the first protocol thereof;
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> viii. Finally, they seek, if necessary, the leave of the Court for bringing proceedings pursuant to section 182(2) of the Act of 2009.

The plaintiffs' case as set out in the Statement of Claim

5. The Statement of Claim is very lengthy, running to sixty-four pages. Here, I will set out only the broad parameters and repeated

themes within it as it contains detailed factual assertions and a vast number of legal claims. Part 1 identified the parties and set out some general background. Part II claimed that the first named defendant had acted unlawfully with regard to Mr. Morrissey's Business Plan. Part III alleged that the first named defendant unlawfully delegated its authority. Part IV set out complaints concerning alleged unlawful demands as to a business plan letter and Part V dealt with an alleged "further unlawful demand". Part VI dealt with a claim that NAMA had failed to adequately consider loan disposal or other asset management strategies. Part VII was entitled "NAMA and the Irish Property Market" and Part VIII was entitled "NAMA's Lifespan and Debt Redemption Targets". Part IX set out an alleged interference with the independence of NAMA by the Minister for Finance. Part X dealt with the first named defendant's "unlawful decision to take enforcement action" and the appointment of receivers. Part XI addressed "additional claims against the second named defendant". Part XII alleged that because INBS had engaged in unlawful conduct, this rendered bank assets void or a nullity. Part XIII contained the claims regarding the family home at 36 Palmerston Road, Dublin 6. Part XIV dealt with an extension of time issue. Part XV contained challenges to provisions of the NAMA Act 2009 and final sections dealt with the European Convention on Human Rights and the EU Charter of Fundamental Rights.

6. Each of the above sections sets out particular facts and went on to make particularised complaints. Certain themes were repeated – that NAMA had: acted *ultra vires*; had taken into account irrelevant matters; had failed to give meaningful consideration to Mr. Morrissey's proposals and plans or to consider alternative methods of managing his bank assets; had adopted strategies that were not in accordance with its statutory functions; had given reasons for their decisions that were vague, inadequate, invalid, and unintelligible; had not afforded Mr. Morrissey fair procedures; had made errors of fact and failed to ascertain the true facts; had made numerical errors; had unlawfully fettered their discretion; had been unlawfully and improperly influenced by the Minister for Finance; had wrongfully relied upon his alleged lack of cooperation; and had engaged in abuse of power, abuse of process and subjected Mr. Morrissey to economic duress. These are not exhaustive, but I think they capture the flavour of the case and the claims made.

The position of the first and second defendants (NAMA and Capita Asset Services (Ireland) Limited

7. The first and second named defendants raised a number of preliminary objections in their written defence which included the following: (1) that Mrs. Morrissey lacked the standing necessary to maintain her claim where she had no interest in the family home capable of being enforced against NAMA; (2) that the plaintiffs had failed to seek the leave of the Court to bring proceedings pursuant to s. 182 of the National Asset Management Agency Act 2009 ("the Act of 2009"); (3) that the plaintiffs were not entitled to challenge decisions of NAMA or Capita where leave to seek judicial review had not been sought within the time limits prescribed by s. 193(1) of the Act of 2009; (4) that the plaintiffs were estopped from challenging the decisions of NAMA or Capita by reason of their conduct including acquiescence or acceptance of various decisions; (5) that the matters raised in Sections VII, VIII and IX of the Statement of Claim were not justiciable; and (6) that claims relating to legal wrongs allegedly committed by INBS could not be brought by reason of s. 105(2) of the Act of 2009.

8. On the substantive issues, the first and second named defendants pleaded numerous denials corresponding with each of the plaintiffs' claims. These included, among other things, a denial that in deciding to reject Mr. Morrissey's business plan, it failed to have regard to the Act of 2009, fair procedures, constitutional justice or constitutional rights. It denied that any of its conduct was unlawful, coercive or *ultra vires*. It denied that it failed to afford Mr. Morrissey a meaningful opportunity to make representations or submissions during the process. It denied that the decision to take enforcement action on the 20th January, 2014 and/or the appointment of receivers was unlawful. With regard to the claim that INBS had an agreement with Mr. Morrissey, it pleaded that s. 101 prevented any such agreement being enforceable as against NAMA; and that, in any event, none of the terms of the alleged agreement were disclosed to NAMA in writing before the acquisition of the loans.

9. As to the facts, NAMA's case is essentially as follows. It says that it attempted to work consensually with Mr. Morrissey, but experienced a difficult relationship with him because of the manner in which he approached matters. It was submitted that Mr. Morrissey sought to blame INBS for the position in which he found himself; that he felt entitled to link issues relating to his INBS loans and other Anglo loans which were not a matter for NAMA; that he appeared to believe that the loans and mortgaged properties were assets that he should have been entirely free to deal with, including by way of seeking to arrange purchasers on terms he believed appropriate; that he believed the family home was untouchable; and that he threatened to embroil NAMA in litigation if they sought to enforce. NAMA says that its decision to enforce in January 2014 arose in circumstances where Mr. Morrissey had been in receipt of over €200,000 per annum by way of rental income from the investment properties but failed to mandate this income to NAMA and instead retained the bulk of it for his own purposes, including the funding of the litigation against Irish Bank Resolution Corporation Limited ("IBRC"); that, despite repeated requests, he failed to furnish a sworn statement of affairs in the NAMA format, which included a requirement to detail asset transfers; and that he failed to put all of the investment properties for sale on the open market. It submits that an objective evaluation of the facts demonstrates that NAMA acted lawfully at all times, that due process rights were afforded, that there was no bona fide defence to the claim for judgment, and that the security over the family home was valid.

10. The first and second named defendants in their counterclaim referred to their summary proceedings and indicated that by agreement of the parties, the summary proceedings were stayed with summary claim to be dealt with by way of counterclaim in the plenary proceedings.

11. The third, fourth and fifth defendants also put in a full defence denying, *inter alia*, that any of the legislative provisions impugned were invalid having regard to the Constitution or the European Convention on Human Rights. They also denied that the Minister had engaged in any interference with the decision-making process of NAMA.

12. The plaintiffs delivered a reply and defence to the counterclaim of the first and second named defendants.

Section 2: Chronology of Key Events/Correspondence

The Evidence in the Case

13. The hearing of both the plaintiffs' claims and the counterclaim lasted for six days. Pursuant to directions previously given by the Court, numerous affidavits had been sworn and these (together with extensive documentary exhibits) constituted the evidence in the trial. Although the pleadings had previously been prepared by counsel, the plaintiffs were not legally represented and conducted their own case at the hearing, No sworn oral evidence was given by anyone at the hearing, and there was no application to cross-examine any deponent.

14. Before I proceed to set out the chronology in the case, I pause to note the recent clarification by the Supreme Court in *RAS Medical Ltd t/a Park West Clinic v. RCSI* [2019] IESC 4 as to when it was appropriate, and when not, to reach conclusions as to facts in dispute in circumstances where the evidence was solely on affidavit (as it was in the present case). The Supreme Court had sounded a warning note as to the reaching of conclusions adverse to the evidence of a deponent who had not been cross-examined and said:

> "… I am also satisfied that it is inappropriate for either a trial court or an appeal court to reject sworn affidavit evidence by reference either to other sworn affidavit evidence or to documentary materials without giving the deponent concerned an opportunity to answer any reasons why the sworn evidence should not be regarded as credible or reliable. The onus is on a party who wishes to urge on a court that sworn affidavit evidence should not be accepted, in respect of any point of fact material to the court's final determination, to ask the court to take appropriate measures such as granting leave to cross-examine, so that questions concerning the credibility or reliability of the evidence concerned can be put to the witness and the court reach a sustainable conclusion as to the accuracy or otherwise of the evidence concerned." (Clarke C.J. at para 10.4)

The Court must bear the above in mind in the present case, in circumstances where there was no cross-examination despite certain conflicts of fact.

15. The chronology of events set out below is unfortunately very lengthy. This is a necessary feature of this judgment because the essence of the plaintiffs' complaint is that NAMA did not properly engage or give meaningful consideration to Mr. Morrissey's proposals. This cannot be assessed without examining the relevant interactions in detail, and these took place over a number of years. Despite my reluctance to encumber a judgment with such level of factual detail, it seems to be unavoidable in view of the issues raised by the plaintiffs. The chronology has been constructed from: (a) the affidavits sworn in the proceedings together with their exhibits which included the following; (b) contemporaneous correspondence (by letter and email); (c) contemporaneous records kept by entities such as Irish Banking Resolution Corporation or Capita recording their account of what was said at meetings with Mr. Morrissey and his advisers; and (d) documents submitted by Mr. Morrissey to NAMA as well as internal NAMA documents. Mr. Morrissey disputed the accuracy of some of the documents, but as there was no cross-examination by him of their authors, they carry at least some evidential weight and I propose to factor them in to the chronology.

The original loans with INBS

16. Between 2004 and 2006, the second named plaintiff, Mr. Morrissey, drew down approximately €27,278,000 from a series of eighteen loan facilities which were secured by way of mortgage and other security granted by the plaintiff over eight separate properties located primarily in Dublin 6. A sum of €3,750,000 was drawn down in respect of a loan for the purchase of the family home at Palmerston Road, Dublin 6. The offer letter dated 21st September, 2005 set out a sum of €12,031.25 as the monthly repayment in respect of the family home mortgage.

17. Difficulties began to arise on some of the accounts in January 2006. By June 2008, cumulative arrears of €734,538.84 had built up on the eight loan accounts. This was not disputed by the plaintiffs.

18. By letter dated 12th June, 2008, Irish Nationwide Building Society ("INBS") wrote to Mr. Morrissey demanding repayment of the outstanding sum within seven days and requesting that he remit all rental proceeds to the Society in order to reduce his liabilities.

19. By letter dated 5th September, 2008, INBS wrote to Mr. Morrissey saying that it was prepared to defer legal proceedings and/or the appointment of a receiver on a number of conditions including that he continue to pay the full monthly repayment due on the mortgage over the family home (36 Palmerston Road, Dublin 6). By letter dated 2nd October, 2008, Mr. Morrissey replied to INBS proposing that he allocate a market rent of €5,500 in respect of the family home. This was rejected by INBS who, in response by letter dated 9th October, 2008, said that the family home was a separate matter and that he would have to ensure that the repayments on the family home were met from a source other than from rent owing to the other investment properties mortgaged to INBS.

20. On 27th November, 2008, INBS issued a formal demand letter demanding immediate repayment on the loan facilities relating to the seven investment properties. By letter dated 12th December, 2008, INBS said that it would hold off on instituting legal proceedings and the appointment of a receiver if Mr. Morrissey, *inter alia*, continued to meet the repayments on the family home from a source other than rent being generated from the other properties mortgaged to INBS.

The alleged agreement in respect of the family home

21. By letter dated 5th February, 2009, Mr. Morrissey wrote to INBS and offered to pay €5,000 per month in respect of the family home. The letter said that they had no other source but rent from which to make the payments on the family home mortgage. This proposal was accepted by INBS on a temporary basis. Their letter of 27th March, 2009 stated: "You pay the sum of €5,000.00 monthly towards the mortgage on your PPR 36 Palmerston Road. Although this sum will not discharge the interest due on the mortgage, the Society is prepared to accept same in part discharge of the repayments until October 2009".

22. In his affidavit, Mr. Morrissey said that he had reached an agreement with INBS that payments be reduced on the family home mortgage to €4,000 per month, and later to €3,200 per month. There is no written evidence of any such agreement. The contemporaneous correspondence (described below) includes letters from or on behalf of the Morrisseys in which they inform INBS of the reduced sums they will pay in respect of the family home mortgage (described below), but there is no written record of INBS' agreement to the reduced sums other than the above letter which clearly envisaged a temporary arrangement until October 2009 only.

23. On 12th October, 2009, Messrs Baker Tilly Ryan Glennon ("Baker Tilly"), acting as accountants on behalf of Mr. Morrissey, wrote to INBS outlining that their services had been engaged and requesting a meeting "to explore opportunities for restructuring the Irish Nationwide financed portfolio". A formal restructuring proposal was made on 23rd November, 2009.

24. On 17th February, 2010, a meeting took place between Mr. Morrissey and INBS in which the Society refused Mr. Morrissey's proposals in relation to a debt write down, structure or refinance with INBS. On 13th April, 2010, INBS wrote to Mr. Morrissey setting out the payments he had made in the form of rent in respect of the family home for the year to date and confirmed that the Society had agreed to hold enforcement action until the end of 2010 on the condition that an agreement be reached in relation to the payment of rents to the Society.

25. By letter dated 1st December, 2010, INBS wrote to Mr. Morrissey notifying him that arrears of €841,353.23 had accrued and that these should be cleared within seven days.

26. By letter dated 17th December, 2010, Mr. Brian Hyland of Baker Tilly wrote to Mr. Shane McGowan of INBS enclosing a cheque representing a rental payment for the relevant properties. The letter went on to say: "As you will see from the attached schedules one of the properties namely 36 Palmerston Road, Rathmines, Dublin 6 is the principal private residence of John Cearuil and their

children. We propose to continue a payment of €4,000 per month throughout 2011."

27. A letter dated 15th November, 2011 from Mrs. Morrissey to INBS stated: "Please find attached a cheque for €9,600 representing the agreed net payments due (€3,200 per month) on the above account for August, September and October 2011." Later letters use a similar formula.

28. By letter dated 24th May, 2013, Irish Banking Resolution Corporation (which had, by that date, taken over the role of service provided to NAMA) responded to Mr. Morrissey stating "as previously advised IBRC (In Special Liquidation)/NAMA has no agreement with you regarding payments on your principal private residence. *The participating institution dispute that an alleged agreement was ever in existence* and note that the offer letter dated 21st September, 2005 sets out monthly repayments of €12,031.25 in respect of the principal loan amount (€3,750,000). (emphasis added)

Acquisition of loans and assets by NALM

29. Meanwhile, in December 2009, the National Asset Management Agency ("NAMA") had been established pursuant to the provisions of the National Asset Management Agency Act 2009 ("the Act of 2009"). INBS was subsequently designated a participating institution by the Minister for Finance and directed by NAMA to provide relevant services in respect of acquired bank assets in accordance with section 131(3) of the 2009 Act.

30. Mr. Morrissey's loan facilities were acquired by National Asset Loan Management Limited, now National Asset Loan Management Designated Activity Company on 10th December, 2010. Following NAMA's acquisition of the loan facilities, INBS initially continued to manage the loan facilities as service provider to NAMA. There was no challenge in these proceedings to the acquisition of the loans by NAMA.

Statement of Affairs and business plan of 31st May, 2011

31. On 18th February, 2011, Mr. Morrissey – through INBS – furnished NAMA with a statement of affairs which revealed that he was significantly indebted to a number of separate financial institutions with liabilities in excess of €88 million. By letter dated 28th March, 2011, INBS wrote to Mr. Morrissey requesting the submission of a business plan setting out a full account of his financial affairs and an asset value maximisation strategy in relation to the eight properties secured by the loan facilities. The deadline for submission of same was initially 29th April, 2011 and was subsequently extended, on consent, to 13th May, 2011.

32. On 31st May, 2011, a formal business plan was submitted by Mr. Morrissey which acknowledged his indebtedness in respect of all properties (including the family home).

33. On 8th June, 2011, a recommendation was made by INBS to NAMA to appoint statutory receivers to the investment properties and a formal decision confirming same was taken on 20th June, 2011. However, despite this decision, NAMA met Mr. Morrissey to hear his views in mid-2011.

IBRC takes over role of managing the facilities from INBS

34. On 1st July, 2011, the business of INBS transferred to Anglo Irish Bank Corporation Limited pursuant to a Transfer Order issued by the High Court. On 3rd October, 2011, Anglo Irish Bank Corporation Limited changed its name to Irish Bank Resolution Corporation Limited ("IBRC") and from this point on, IBRC took over the role of managing Mr. Morrissey's loan facilities as service provider to NAMA.

35. On 12th December, 2011, IBRC issued a demand letter to Mr. Morrissey requiring immediate repayment of the amount of €28,834,043.53 arising from the loan facilities relating to the seven investment properties. This was responded to by Baker Tilly by letter of 15th December, 2011 which pointed out that Mr. Morrissey was still awaiting a response to the business plan he had lodged with NAMA more than six months previously.

Meeting of 16th February, 2012

36. On 16th February, 2012, a meeting was held between Mr. Morrissey, together with his advisor from Baker Tilly, and representatives of IBRC. The meeting note prepared by Mr. Shane McGowan of IBRC records that Mr. Morrissey opened the meeting with discussions about his litigation with Anglo, and stated that he believed that the timing of the demand letter from IBRC for his NAMA debt was connected with this litigation and that Anglo/IBRC could not get summary judgment against him and "therefore they decided to come after him from another angle on his NAMA debt". The IBRC representatives told him that this was "merely a coincidence" and that they were not aware of the summary judgment proceedings outcome in question. They then enquired about the NAMA portfolio rent which was "outstanding since December 2010". Mr. Morrissey is recorded as saying that he "held the rental income in an attempt to bring NAMA to the table" and that 40% of the rents were being used for insurance and maintenance of properties, a small amount was being apportioned to live on in additional to his capital D income, and "the remainder of the rents [were being] used to fund his Anglo defence". He was told that this was "not acceptable" to NAMA and that he had left them with no alternative but to issue demand letters and move to the appointment of a receiver. Mr. Morrissey is recorded as saying that he would not vacate the family home and that he would fully resist NAMA in giving up his family home. He said that he might be able to formulate a strategy to extract his family home from the NAMA portfolio by substituting it with a property of similar value in his Bank of Scotland portfolio. He was requested to submit a proposal in writing together with a Sworn Statement of Affairs in the NAMA format and he advised that he would arrange the latter with his advisors.

37. Following the meeting, Mr. Morrissey wrote to IBRC by letter dated 27th February, 2012 stating that the business plan had been recast to address NAMA's goals and concerns. It proposed that, on receipt of the relevant bank account details, Mr. Morrissey would write to the tenants of five of the investment properties to mandate rentals directly to IBRC; that he would continue to manage the properties on an interim basis; and that he was focusing on keeping the portfolio together so it could re-capitalised and restructured into a corporate entity as a going concern designed around a strong beginning, which would represent for NAMA a better option than a fire sale.

38. On 18th April, 2012, IBRC wrote to Mr. Morrissey again requesting a Sworn Statement of Affairs in the NAMA format.

Letter of 15th May, 2012 from NAMA expressing dissatisfaction with existing business plan

39. By letter dated 15th May, 2012, NAMA informed Mr. Morrissey that, following an assessment by IBRC, it was not satisfied that the business plan met with NAMA's statutory objectives. There were particular concerns surrounding the proposed timelines for disposal of

assets which were said to be "not within NAMA guidelines" and the proposed debt write down which was also said to be "not within NAMA guidelines". It said that if there was to be any basis for considering the possibility of supporting the connection, a number of issues would need to be addressed. This was followed by a detailed list of the issues.

40. By reply dated 29th May, 2012, Mr. Morrissey wrote to IBRC saying that he had spent much of the previous twelve months working on attracting third party investors to fund a new company which would take over his portfolio of loan facilities and that he had not been afforded the opportunity to meet with NAMA to discuss his business plan. A meeting was scheduled for the following day (30th May, 2012) to discuss the contents of the letter of 15th May, 2012.

Meeting of 30th May, 2012

41. Mr. Morrissey averred that there was no discussion at the meeting in relation to his business plan and that the principal item under discussion was IBRC's "conflict of interest".

42. The minutes of the meeting kept by IBRC record that Mr. Shane McGowan reiterated that the debtor was required to mandate all rental income on various properties immediately and to place the properties on the market. It was also stated that IBRC (non-NAMA) and IBRC (NAMA) were different entities and had no contact concerning Mr. Morrissey's affairs. It was stated that "the two main issues" with the portfolio were the timing of the assets sales and the family home. Mr. Morrissey's adviser said that the immediate sale of all assets would realise a greater loss than a staggered asset disposal. Mr. Morrissey raised the issue of his ongoing litigation with IBRC (non-NAMA) and advised that he was considering taking litigation against INBS for legacy issues, on the basis that he had been told at a certain point that development finance would not be forthcoming to him unless former CEO Michael Fingleton could be joined in personally on the projects. The notes record that IBRC (non-NAMA) were not aware of any of this and could not comment and "attempted to bring [Mr. Morrissey] back to the main point of dealing with IBRC (NAMA) debt reduction". Mr. Morrissey was advised that NAMA would prefer to deal with him on a consensual basis but that if this was not achievable, they would have to appoint a receiver. They said that they would welcome strategies and proposals from him for the disposal of assets, and that if rental income was mandated immediately, there may be some basis for working consensually with him.

43. The notes also record that Mr. Morrissey said that the gross rental income was €240,000 per annum and that the expenses of running the properties were €40,000, which left a net income of €200,000 per annum. He said that if he were to manage the properties during an asset disposal period, he would requirement a management fee of €3,000 per month. Regarding the Signed Statement of Affairs, he advised that he would have to consult his legal advisers and that he might be able to provide a copy of one given to the courts in December 2011. The note records that the meeting concluded with an agreement that he should provide certain listed information by the 7th June, 2012 which included:

> "1. Proposal for the mandating of all rental income achieved on the properties, reasonable expenses to be deducted etc.
>
> 2. Proposal for the disposal of assets and debt reduction including a timeframe for various stages of disposals.
>
> 3. Proposal for the management of the assets during the disposal period and any management fee proposed for same.
>
> 4. Proposal for completing the requirement of a Sworn Statement of Affairs in the required NAMA format."

Mr. Morrissey's proposal of 8th June, 2011

44. By letter dated 8th June, 2012, Baker Tilly wrote to IBRC outlining that Mr. Morrissey was willing to instruct tenants of five out of the seven properties to pay rent directly to IBRC/NAMA and to forward a schedule of all rental property controlled by him. It stated that Mr. Morrissey was of the view that six properties could be marketed for sale per year without disturbing the market. It said that NAMA was already in receipt of a Sworn Statement of Affairs, attached as an Appendix to the Business Plan already sent in. An offer was made to send NAMA a copy of the affidavit covering the Statement of Affairs he had filed in the Anglo proceedings.

45. By response dated 19th June, 2012, IBRC (NAMA) provided that in order to progress matters, Mr. Morrissey was required to return a signed business plan together with covering letter.

46. On 4th July, 2012, IBRC wrote to Mr. Morrissey again reiterating that his business plan did not meet NAMA's statutory objectives, and reminded Mr. Morrissey of his outstanding requirements, including a requirement that all rental income be mandated and a that a Sworn Statement of Affairs be provided by 14th July, 2012.

47. By email dated 15th July, 2012, Mr. Morrissey responded to IBRC's letter of 19th June expressing concern about signing a document which would not simultaneously bind both parties and alleging that this business plan had received little more than cursory consideration. It also reiterated Mr. Morrissey's "deep concerns" about IBRC continuing to act as manager of the properties because it would be a party to information that it would not be entitled to receive in the Anglo proceedings. It said that he would be happy to provide substantially all of the information required by NAMA but only in the context of a definitive overall agreement.

48. A letter from IBRC on 27th November, 2012 stated that a signed business plan letter was a fundamental requirement of the NAMA process and that no progress could be made without it.

Decision of NAMA to commission PWC report

49. An internal meeting was held in NAMA's offices on 12th December, 2012. NAMA recommended that IBRC undertake an independent review of Mr. Morrissey's business plan in order to obtain an independent evaluation with regard to the substance of same. PricewaterhouseCoopers ("PwC") was instructed to carry out the independent business review on 21st February, 2013.

Mr. Morrissey's proposal of 4th January, 2013

50. On 4th January, 2013, a letter was sent on behalf of Mr. Morrissey attaching the signed business plan letter dated 15th May, 2012 with seven conditions added by him including, *inter alia*, a legal standstill agreement until December 2013. It further set out that he was willing to place *three* of the investment properties on the market for sale and to mandate the rents from *three* of the investment properties to NAMA, subject to acceptance of his proposal. The letter stated that NAMA was already in receipt of a Sworn Statement of Affairs and that Mr. Morrissey was willing to provide them with a copy of the Affidavit of Means filed with the Commercial Court in *IBRC v. Morrissey*. Another one of the conditions sought by Mr. Morrissey was "that the issue of overcharging by IBRC (as determined by Nuevabridge Ltd.) be addressed and reviewed, with any credit due being applied against the agreed quarterly

payments due on the PDH" (the family home).

51. IBRC replied by letter dated 12th February, 2013, rejecting his conditions and stating that should he fail to put all of the properties on the market for sale immediately, mandate all gross rental income to NAMA immediately, as well as submit a schedule of all properties and expenses together with a signed business plan letter within seven days, IBRC would have no alternative but to deem him uncooperative and make an enforcement recommendation to NAMA. It also stated, among other things, that any overcharging issue was a matter for IBRC non-NAMA.

From IBRC to IBRC (In Special Liquidation)

52. The Minister for Finance, pursuant to the Irish Bank Resolution Corporation Act 2013, appointed Joint Special Liquidators and ordered the winding up of IBRC which then became known as IBRC (In Special Liquidation) from 7th February, 2013 onwards.

53. By letter dated 5th March, 2013, IBRC (In Special Liquidation) wrote to Mr. Morrissey reiterating that he had previously been advised of the power available to NAMA should he continue to be uncooperative and withhold rental income.

54. By letter dated 13th March, 2013, Baker Tilly replied to IBRC (In Special Liquidation) questioning the characterisation of Mr .Morrissey as uncooperative, and referring to "some considerable delay" on the part of IBRC in responding to Mr. Morrissey who had "sought merely to protect his position in a situation where the financial institution that provided the facilities, through no fault of his own, has gone bankrupt". The letter discussed the conditions, provided some clarifications and said that Mr. Morrissey had now "substantially agreed to all of these conditions". It said that it anticipated "continuing to make the agreed payments on the family home". The letter went on to say that Mr. Morrissey had recently been approached by "two separate credible third parties who have expressed an interest in purchasing all of Mr. Morrissey's loans, including his loans with NAMA".

The PWC report to NAMA

55. The draft independent business review ("the review") carried out by PwC was received in March 2013 and sent to NAMA for comment. In the review, PwC noted that there was a lack of detail in Mr. Morrissey's business plan and concluded that NAMA had two options: (1) to support Mr. Morrissey and allow him to auction the properties as proposed in the business plan; or (2) to appoint a receiver. PwC came to the conclusion that the second option was the best solution for NAMA on the basis that it would "result in increased control over the assets/associated income particularly when the borrower has been uncooperative" and would allow for "greater control, management and transparency in the sale process". The review also concluded that Mr. Morrissey's statement of affairs was out of date and that his net loss position, therefore, could be greater than previously known; it recommended that NAMA seek a second charge over the assets not yet under receivership.

56. IBRC wrote on 8th April, 2013 again reminding Mr. Morrissey that he had yet to put the properties on the market, and requesting him to mandate the rental income and submit the signed business plan letter. They requested that he complete a Form A request in relation to the two interested parties. The letter also referred to the suggestion that there was an agreement in place in relation to payments on the family home and stated that neither IBRC (In Special Liquidation) nor NAMA had any agreement with Mr. Morrissey regarding payments on the family home.

57. Mr. Morrissey then wrote to IBRC (In Special Liquidation) on 3rd May, 2013 attaching a redrafted and signed copy of the business plan letter which described the alleged agreement with respect to the family home and asserted that the agreement, which permitted net payments of €3,200 per month, predated both IBRC and NAMA and that it would continue to be adhered to once the "interest overcharging" credit had been agreed and fully utilised. Thus, Mr. Morrissey was at this point (unilaterally) proposing to depart from the alleged agreement in respect of the family home repayments on the basis of deductions for alleged interest overcharging by INBS.

58. This was replied to by IBRC (In Special Liquidation) by letter of 24th May, 2013 in which it again stated that neither it nor NAMA had an agreement with Mr. Morrissey regarding payments on the family home. The letter further enclosed a statement of account confirming the amount of rental income received which, according to IBRC (In Special Liquidation), did not represent fulfilment of the condition that all rents from the secured properties be mandated to NAMA. It also referred to the position regarding the placing of properties on the market.

59. By email dated 22nd May, 2013, Mr. Morrissey emailed IBRC (In Special Liquidation) describing an approach by a third party to purchase the loan facilities and seeking guidance as to how this should be managed. A follow-up email of 29th May, 2013 explained that Mr. Morrissey was proceeding to empty all of the investment properties to ready them for sale and that, as a result, there would be no mandating of rentals going forward as the tenancies would have ceased to exist. A follow-up letter was sent by Mr. Morrissey on 19th June, 2013 which made reference to serving the tenants with termination notices and requested resolution of the issue of reserve prices.

60. On 11th July, 2013, a Notification of Decision issued from NAMA to IBRC (In Special Liquidation) approving its recommendation to issue a letter seeking representations from Mr. Morrissey in relation to the seven investment properties. This was communicated to Mr. Morrissey by letter dated 15th July, 2013 which explained that IBRC (In Special Liquidation) was recommending that, in light of Mr. Morrissey's failure to comply with requests to place all of the properties on the market for open sale, a decision be made to take enforcement action up to and including the appointment of statutory receivers. The letter requested that representations be made within seven days. By reply dated 22nd July, 2013, the then solicitors for Mr. Morrissey wrote to IBRC (In Special Liquidation) asserting that, contrary to the contents of the letter dated 15th May, 2013, the investment properties had already been placed on the market for sale as previously advised notwithstanding that reserve prices were yet to be confirmed by NAMA.

Meeting of 25th July, 2013

61. A meeting was arranged for 25th July, 2013 to provide Mr. Morrissey with an opportunity to make representations in advance of NAMA's decision to enforce. Mr. Morrissey alleges that he was not afforded any meaningful opportunity to make submissions or representations. A detailed meeting note was kept by IBRC (NAMA). The note records that Mr. Morrissey opened the meeting by asking Mr. Mark Ryan of IBRC (NAMA) to introduce each of the attendees and to explain the separation between IBRC Bank and the "IBRC NAMA unit". The note provides that it was explained to Mr. Morrissey that the IBRC Bank was completely separate to the IBRC NAMA unit. Mr. Morrissey then commented that he had made a proposal in January 2013 "to sell all properties to include the deduction of costs along with a sales strategy" which did not receive a response. It was explained to Mr. Morrissey that he had only agreed to place *three* properties on the market, and that he had been asked on numerous occasions to mandate all rental income to the participating institution, to which Mr. Morrissey replied that the IBRC bank had restricted him from doing so, and that he had been served with a High Court order to that effect. Mr. Morrissey was advised that if he wished to proceed, he would need to "provide an

in depth explanation on the missing rent of approx. €500k, then put forward an agreement to place all properties on the open market and adhere to the NAMA process (Form A, B, tender for sales agents) etc." Mr. Morrissey stated that all missing rent had been used on legal fees and that there were invoices to confirm same to which Mark O'Donnell of IBRC (NAMA) commented that "NAMA will not look favourably on the rent leakage as they did not consent to using NAMA's money to pay for outstanding legal fees." Thus, it was clear that Mr. Morrissey was using rent from the properties connected to the INBS loans to fund his litigation in respect of his Anglo loans.

62. The note records that Mr. Morrissey then said that he was told in January 2013 to "empty all properties in an attempt to get the assets on the market for sale". IBRC (NAMA) responded by saying that at no point in time did they instruct Mr. Morrissey to empty the properties and said that two things were required from Mr. Morrissey: (1) to mandate all rent to the participating institution (i.e., IBRC); and (2) to agree to sell all properties. IBRC (NAMA) referred to NAMA's policy and guidance in which there are certain procedures which must be adhered to. Mr. Morrissey asked to be guided through the process and drew comparisons with the Bank of Scotland process. Mr. Morrissey was then asked to present his proposal to agree to sell all properties, including details of the tender process and an explanation on the missing rent. He was also asked to include any sales costs which would need to be deducted from the gross sales prices. He was also told that the meeting was not a decision-making forum and that the ultimate decision lay with NAMA. Mr. Morrissey stated that any decision to appoint a receiver would be contested. Mr. Sean Tobin replied that he had agreed to work consensually with IBRC at the meeting of 30th May, 2012 but that nothing had happened since that time to the reflect the agreement. Mr. Morrissey then agreed to liaise with the IBRC team and to submit a Form A proposal by the week ending 2nd August outlining a sales proposal along with supporting documentation in relation to the rent used to pay for legal costs.

63. Following the meeting, Mr. Mark Ryan of IBRC (In Special Liquidation) emailed Mr. Morrissey requesting that all properties be placed on the open market for sale and that gross rental income be mandated to NAMA.

Notice of Recommendation to take enforcement action and invitation to make representations of 15th July 2013

64. By letter dated the 15th July, 2013, IBRC (In Special Liquidation) wrote to Mr. Morrissey informing him that it was recommending that a decision be taken to take enforcement action, including the appointment of statutory receivers, and requesting representations from him within seven days.

65. On 31st July, 2013, Mr. Morrissey wrote to IBRC (In Special Liquidation) stating that he was willing to ensure that either all of the properties would be vacated with a view to their immediate sale, or some of them would continue to be rented with a monthly reconciliation in respect of rental income. He mentioned that he had been using rental income to fund "legal and restructuring costs" but said that he did not have a "readily available schedule of the rents received of the same 30-month period" because the properties were in his personal name and reconciliations were carried out only once a year for the purposes of the November personal tax filing. He submitted a completed "Borrower Credit Proposal Form A" in which he sought approval to place all of the investment properties on the market for sale; it also sought consent to reserve prices being placed on the properties in accordance with prices set out by Mr. Morrissey in his email of 28th July, 2013. It is noteworthy that at this stage, Mr. Morrissey appeared to have agreed with work with NAMA with a view to the sale of the properties and the mandating of rental income.

The Capita Phase

66. On 12th August, 2013, Capita Asset Services (Ireland) Limited ("Capita") took over the role of service provider to NAMA in respect of Mr. Morrissey's loan facilities. Mr. Morrissey was notified by this change by way of email dated 14th August, 2013.

67. On 20th August, 2013, the independent business review was finalised by PwC.

68. On 29th August, 2013, a meeting was held between Capita and Mr. Morrissey following which Mr. Morrissey sent an email explaining that although he was willing to facilitate the immediate sale of the properties, he wanted to set individual reserve prices. He also said that he had been working with a number of potential portfolio buyers.

69. By letter dated 9th September, 2013, Capita responded by saying that NAMA was not willing to permit Mr. Morrissey to set individual reserve prices, but that it gave approval for the seven investment properties to be placed on the market, each with an individual reserve price, the cumulative price of which was €6.43 million. It also approved the appointment of sales agents for the properties, solicitors to act in the sales, and approved sale by private treaty.

70. By email of 20th September, 2013, Mr. Morrissey wrote to Capita listing twelve potential bidders for some or all of the loans and requested guidance on how such bids should be conveyed to NAMA.

71. On 30th September, 2013, Mr. Morrissey submitted a completed "Borrower Credit Proposal Form A" to Capita seeking approval from NAMA for the sale of "all John Morrissey loans" together with underlying security packages. Thirteen potential purchasers were listed. This proposal included the sale of the loan attaching to the family home. It stated that preliminary marketing had taken place and that bidding levels had risen to the point where the tender price was expected to be in the range of €7.4 to €7.5 million, and that this was greater than his previous estimate of €6, 664,273.13 provided on 24th September 2013 (with a price for the family home of €830,293.33).

Meeting of 2nd October, 2013

72. NAMA and Capita met with Mr. Morrissey on 2nd October, 2013. There is a conflict of fact as to what was said at this meeting. I will start with the NAMA meeting note, which records as follows. NAMA stated at the outset that Mr. Morrissey had failed to comply with his undertaking to mandate all rental income to NAMA. This was followed by a discussion of Mr. Morrissey's explanation as to why this had happened, and Mr. Ben O'Donoghue of Capita said that NAMA were ready to appoint an insolvency practitioner because Mr. Morrissey had been "uncooperative with all requests to date". The note records that Mr. Morrissey was asked if he would sign the sales contracts if he were to receive "excellent offers on two of the properties". Mr. Morrissey replied that he would sign the initial contracts "but would not lose leverage over the IBRC legal matters progressing through the courts and the matter of his PDH"; that this leverage would reduce as the litigation progressed over the next 12-18 months but that he would not sign the final contracts until this matter was agreed. The note records that "as one final means of demonstrating a willingness to cooperate with NAMA", Mr. Morrissey was asked to forward a sworn commitment – which he agreed to do – by close of business on 4th October, 2013 stating that:

> "1. Any and all tenants have been directed to mandate gross rental monies to the accounts provided in NAMA's Notification of Decision of the 9th September 2013.

2. That all the properties above will be on the market by Friday 11th October 2013. For the avoidance of doubt, the properties must have Sales boards erected, be advertised on Lisney website and also on the myhome.ie portal.

3. That should a purchaser be approved by NAMA for any of the above properties, you will execute any sales contract NAMA require you to and that your cooperation shall not be dependent on nor subject to any caveats raised by you."

73. The note goes on to record that Mr. Morrissey asked for an update on his Form A and, in particular, the proposal to sell his loans as part of a loan sale as there were numerous parties interested in acquiring his loans. It continues:

> "[Ben O'Donoghue] advised [Mr. Morrissey] that he could not process the Form A as there was no offer or decision to make. An indication of offer was outlined at up to €7.5m but no one party had offered this to acquire [Mr. Morrissey's] loans. [Michael Broderick] advised [Mr. Morrissey] that NAMA own the [Mr. Morrissey] loans and it is not up to [Mr. Morrissey] to decide to sell his loans. NAMA decide this. However [Michael Broderick] advised that there is a procedure for loan sales where a loan sales broker is appointed and all requests to acquire loans are directed to NAMA. [Michael Broderick] advised that NAMA do not carry out loan sales below €10m as the transaction costs were too high. [Mr. Morrissey] outlined his proposal for Lisney to act for him on the disposal of his loan sales. [Michael Broderick] advised [Mr. Morrissey] that Lisney are not a loan sales broker and that this was rejected. [Brian Hyland] discussed the proposal that Lisney market all properties and should the interested party have an interest in acquiring all assets as part of a loan sale, that this could be considered by NAMA. [Michael Broderick] advised that this would have to include the PDH [family home] and that the PDH would have to be openly marketed. [Mr. Morrissey] rejected this and advised that his family would not agree to the house being openly marketed. [Brian Hyland] noted NAMA policy that all properties had to be openly marketed. [Ben O'Donoghue] asked [Mr. Morrissey] how he intends to deal with the matter of the debtors PDH. [Mr. Morrissey] stated that any means of foreclosing, selling or otherwise on the PDH and he would litigate immediately. [Brian Hyland] asked [Mr. Morrissey] to calm down before advising that the PDH would have to be discussed as part of the overall settlement and asked what the options were."

74. I turn now to the affidavit evidence concerning the verbal exchange concerning the family home. With regard to the discussion of the family home, Mr. Morrissey alleges that Mr. Ben O'Donoghue of Capita explained that "optically", NAMA needed "a result" and that the family home "would have to be sold". Mr Morrissey also alleges that he was informed that his wife "would not be allowed to purchase the family home, even at full market value in an open auction situation, *should such an event arise*".

75. Mr. Ben O'Donoghue, in his affidavit, gave his version of events in the following terms:

> "20. At the October Meeting, it was explained to Mr Morrissey that his total indebtedness stood in excess of approximately €36,000,000 at the time and that the sale of all the security (excluding 36 Palmerston Road) would leave a residual debt of greater than €25m. In these circumstances, I told Mr Morrissey that NAMA would not be prepared to allow him remain in 36 Palmerston Rd – which also remained NAMA security – without any proposal from Mr Morrissey to address this level of remaining indebtedness.
>
> 21. It was explained to Mr Morrissey that 36 Palmerston Rd would be considered by NAMA to be a "trophy home" and that NAMA would not agree to allow Mr Morrissey remaining in such a high value home when the property formed part of NAMA's security package and the associated loan was not being serviced but was in very significant default. NAMA's duty to the taxpayer to recover as much money as possible was explained to Mr Morrissey. I accept that I questioned how "optically" it would look to the taxpayer if NAMA was to allow Mr Morrissey and his family to continue residing in 36 Palmerston Rd whilst owing NAMA over circa €25m in residual debt (ie: the debt remaining after the Investment Properties have been sold and the proceeds remitted). NAMA holds a first legal mortgage over 36 Palmerston Road and the amount outstanding on the loan secured by this property is in excess of over €4.7 million.
>
> 22. As such, I told Mr Morrissey that in the absence of proposals from Mr Morrissey to address this residual debt, 36 Palmerston Rd would also have to be sold and the proceeds applied in debt reduction. I suggested that NAMA might be prepared to allow Mr Morrissey to move his family to another property within the portfolio, namely 3 lower Churchtown Road, and to nominate that as his principal dwelling house and that we may be able to come to some arrangement with him in the event he agreed to allow 36 Palmerston Rd to be consensually sold and in consideration of his full cooperation. I should say that at 2 October 2013, 36 Palmerston Road had an approximate value of circa €1,800,000 to €2,000,000, while 3 Lower Churchtown Road had an approximate value of circa €800,000.
>
> 23. Mr Morrissey became extremely agitated and stated that under no circumstances would he agree to sell 36 Palmerston road or even to allow the viewing of the property to potential purchasers. Mr Hyland of Baker Tilly queried whether Mr Morrissey's family or wife would be allowed to purchase the house from NAMA. Mr Morrissey had previously suggested that a price of circa €830,000 was a fair price for 36 Palmerston Rd based on arrangement he claimed was being offered by the Special Liquidators of IBRC and calculated by Mr Morrissey as follows:

Calculation of 36 Palmerston

Road Buyout Price

> Annual payment 38,400.00
>
> Special Liquidator Discount Rate 4.50%
>
> Capitalized Amount 853,333.33
>
> Special Liquidator Expense
>
> Allowance 2.70%
>
> Buyout Price 830,293.33
>
> 24. Notwithstanding the fact that IBRC (In Special Liquidation) and NAMA are completely different entities and

notwithstanding the fact that Mr Morrissey could produce no evidence of transactions occurring at "buyout prices" such as the one suggested by him, I explained that NAMA and Capita believed that 36 Palmerston Road to be worth far more than €830,000 and was in fact perhaps the most valuable piece of security in Mr Morrissey's portfolio. 36 Palmerston Road was estimated to be worth over €1,000,000 in excess of the value Mr Morrissey was attributing to it.

25. I should also say that Mr Morrissey's "buyout price" was calculated based on an alleged agreement that NAMA would accept lower mortgage repayments of €3,200 per month. While Mr Broderick deals with this issue in his affidavit, I wish to point out that the mortgage loan originally taken out on 36 Palmerston Road was for a principal amount of €3,750,000 and the offer letter dated 21 September 2005 refers to monthly repayments of €12,031.125

26. I further clarified NAMA has a policy of openly marketing all properties as only a full open marketing campaign allows NAMA determine the actual market value of a property and what the market is willing to pay at any given time. Mr Morrissey's assertion that his family would not allow the open marketing and viewing of the property, would preclude NAMA determining the actual market value of the property, and as such, his wife (nor any other party) would not be allowed purchase the property. Mr Morrissey threatened to litigate immediately if NAMA commenced any sale or enforcement action in respect of 36 Palmerston Road. For information purposes, given the default that has occurred, the total debt on 36 Palmerton Road as at 12 September 2014 was €4,861,285.62.

27. I did not say that Mr Morrissey's wife would not be entitled to purchase 36 Palmerston Road, even at full market value in an open auction situation, should such an event arise. Rather, I informed Mr Morrissey that his wife would not be permitted to purchase the property at a figure of €830,293.33 and/or without the property being openly marketed. For information purposes, even on the most conservation valuation of 36 Palmerston Road, the figure of €830,293.33 would not come close to representing its market value. Had Mr Morrissey been prepared to openly market the property and had Mrs Morrissey been prepared to pay full market value, the fact that she is the spouse of Mr Morrissey would not in itself preclude her from purchasing 36 Palmerston Road.

28. Mr Morrissey's assertions as to what I said in the October meeting regarding Mrs Morrissey's ability to purchase the property are presented by him entirely out of the context. The fact remains that to date, neither Mr Morrissey nor Mrs Morrissey have given any viable proposal to Capita/NAMA in respect of 36 Palmerston Road that was even remotely in tune with the proper value of this property."

76. On 3rd October, 2013, Capita wrote to Mr. Morrissey threatening to appoint a statutory receiver should they not receive a sworn commitment by 4th October, 2013 demonstrating a willingness to cooperate with the NAMA process, specifically, that all tenants had been directed to mandate gross rental monies to NAMA; that all properties would be on the market by the 11th October, 2013; and that he would execute any sales contract NAMA required and without caveat if NAMA approved a purchaser. Referencing the Form A proposal of 30th September, 2013 which sought approval to market the loans, the letter confirmed that NAMA rejected the proposal on the basis that it failed "to comply with NAMA's processes and procedures regarding Loan Sales".

77. By reply dated 3rd October, 2013, Mr. Morrissey sent Capita a statutory declaration which confirmed his willingness to mandate all gross rental monies from the investment properties to NAMA; to place all of the investment properties on the market by 11th October, 2013; and that should a purchaser be approved by NAMA for any of the properties, he would execute any sales contract NAMA required and that his cooperation would not be dependent on nor subject to any caveats. It concluded by saying that this affidavit was made at the specific request of Capita and to demonstrate his willingness to comply with the NAMA process. The cover letter to the statutory declaration does not contain any protest or caveat. I note in particular that nothing was said by him in this communication about the alleged comment that NAMA would not allow his wife to buy the family home. I find it very surprising that there is no reference to this at a time when the memory of the meeting was fresh in everybody's mind and having regard to the level of prominence it subsequently attained in the plaintiffs' pleadings and submissions in this case.

78. Capita then wrote a letter specifically relating to the family home. By letter dated 8th October, 2013 with the heading "36 Palmerston Road, Dublin 6", Capita wrote to Mr. Morrissey seeking his proposal as to how he intended to dispose of 36 Palmerston Road, Dublin 6 and remit the sales proceeds to NAMA in order to reduce the outstanding balance owing. The letter pointed out that the facilities to the connection remained in default. Again, I note that there is no reference in this letter to any offer from Mrs. Morrissey to buy the house or any reference to her not being allowed to buy the house because of her status as wife of the debtor.
The Bagnall Loan Purchase proposal

79. On 18th October, 2013, Capita was provided with a letter dated 15th October, 2013 from Bagnall & Associates ("Bagnall") indicating a willingness to make an offer to purchase all of Mr. Morrissey's loans and associated security, including the family home. The letter was addressed to Lisney who passed it on to NAMA. Mr. O'Donoghue said that should Bagnall wish to submit a bid, NAMA would consider it, but pointed out that NAMA had already turned down a request from Mr. Morrissey to market his loans for sale for reasons already explained to him. Meanwhile, discussion continued by email between Lisney and NAMA about interest and bids in respect of the properties, estimated valuations, and other matters. When Lisney reported certain concerns of Mr. Morrissey concerning early sales, Mr. O'Donoghue replied on the 22nd October outlining that NAMA did not share Mr. Morrissey's "anxiety in relation to not bringing the bidding process to a conclusion" and that he "would prefer to see a sale agreed in the short term" but that this was "subject to your recommendation obviously". On the 23rd October, Mr. Byrne of Lisney in an email discussing guide prices commented: "As has been shown with 79 Palmerston Road and 185 Rathgar Road I believe the best way to ultimately test and obtain the maximum market value for these properties is to let the market dictate the value".

80. A letter dated 24th October, 2013 came from Mr. Declan Bagnall, described as Chartered Surveyor of Bagnall Associates, offering to purchase Mr. Morrissey's loans and related security (including the family home) for €7,325,000. As before, the letter was sent to Lisney rather than to NAMA but was passed on. The letter stated that the figure had been discussed with Mr. Morrissey and that "he has estimated that this equates to a gross offer price for the properties of approximately €8,000,000". It went on to list the breakdown of this overall figure, putting a value of €830,000 on the family home. It may be noted that Bagnall's valuation of the family home appears, therefore, to have based upon Mr. Morrissey's own valuation.

81. Between 24th and 25th October, 2013, a series of emails ensued between Capita, Lisney and Mr. Morrissey whereby Bagnall's offer was discussed. Mr. O'Donoghue's immediate reaction was that the offer looked "very light" and that the offer for the family home appeared "particularly poor" but he asked Mr. Byrne of Lisney for his opinion. There then followed a discussion between Mr. O'Donoghue and Mr. Morrissey in which Mr. O'Donoghue pointed out that NAMA was "being asked to take an 8.5% haircut" in circumstances where the property portfolio had a cumulative guide price of €8,000,000 but Bagnall's offer only amounted to €7,325,000. Mr. Morrissey replied to this comment by explaining that a portfolio bid would negate "the VAT and other costs" associated with the sale of the properties on a "one by one" basis. He further explained that the loan bid of €7,325,000 was, in fact,

the net proceeds that NAMA would ultimately receive following the completion of sale as that figure was "approximately equal to combined gross assets sales of €8 million". Mr. O'Donoghue, addressing Mr. Byrne of Lisney, commented that he couldn't "see it working" but would "put it to NAMA" anyway once the relevant information had been provided. Mr. Morrissey commented that it was "a much more efficient structure than the alternative (where NAMA incurs additional unnecessary costs/taxes of approximately €675,000)". Mr. Morrissey concluded by advising Mr. Byrne that before presenting the offer to NAMA, he should provide Mr. Bagnall with "the best offers on [two of the properties] and see if Bagnall's client is willing to increase the offer." He noted that the prices bid by Bagnall on those properties were higher than the individual bids as of that morning.

82. Capita, referring to NAMA's position on debt forgiveness, queried by email on the 25th October whether Mr. Morrissey would be willing to consent to judgment for the difference in amount between the par loan value and the net proceeds of any potential transaction. Mr. Morrissey refused to consent. His response was that if NAMA wanted a judgment, it would "have to go through a High Court process like everybody else" and that he had "a capable legal team that has, to date, successfully resisted over the past four years prolonged efforts by IBRC, Ulster Bank, Investec and AIB to achieve same". He also "reminded" Capita of his counterclaim against INBS, work done on Euribor fraud, and issues with the Irish Bank Resolution Corporation Act 2013 and s. 172 of the NAMA Act "which we remain ready to challenge if necessary". He also alleged that Capita was motivated by "consistent bias" and guilty of the prejudgment of bulk offers. Capita responded to each of his points and suggested that they await the opinion of Lisney.

83. In the meantime, there was email discussion between Mr. Morrissey and Mr. O'Donoghue as to whether there was sufficient information about the financial resources of the third party bidder. Mr. Morrissey sent a letter to NAMA for information purposes. The letter was addressed to Mr. Arnow and confirmed that Mr. Arnow was a client of Deutsche Bank, and that he owned "assets worth not less than $10,000,000.00 with Deutsche Bank as of October 25th, 2013". The letter also said that he "may not rely on this letter as an official statement of account(s)."

84. Mr. Byrne of Lisney responded at some length by email dated 29th October, 2013. His opinion ultimately was that the only way for NAMA to fully maximise the value of each property was to proceed to offer the remaining properties on the open market individually and let the market dictate the value of each property. He estimated the value of the portfolio to be in the region of €7,650,000 to €8,430,000, *excluding* the family home. He commented that over the past few months they had seen a noticeable upswing in activity and values.

85. By email dated 29th October, 2013, Capita wrote to Mr. Morrissey informing him that they would not be pursuing Bagnall's offer and that they did not entertain loan bids less than €10 million.

86. By letter dated 31st October, 2013, the then solicitors for Mr. Morrissey wrote a robustly worded letter to Capita saying that there were "claims and counterclaims between the parties" and that they had agreed with their client that the best solution was to arrange to have a third party purchase his loans from NAMA at a price that provided an "optimal return" to NAMA "while appropriately compensating Mr. Morrissey for the irregular actions and interest overcharging that took place at Irish Nationwide and IBRC". The letter also requested the basis (legislative or other authority) for NAMA's position that it would not consider loan bids of less than €10 million. It also said that Mr. Morrissey recognised that there was a certain momentum to the sales processes currently taking place with regard to two of the properties and was agreeable to those proceeding on certain conditions.

87. By reply dated 4th November, 2013, Capita set out that the loan sale proposal failed to comply with NAMA's procedures and processes on loan sales and that NAMA did not permit a debtor to market his loans for sale because the loans are owned by NAMA. The letter further outlined that if Capita did not receive a completed Form A request or a proposal for full repayment of the loans by 6th November, 2013, the loans would be demanded and enforcement action initiated. It also said that while he had referred to irregular actions and interest overcharging at INBS and IBRC, he had failed to produce any evidence of this despite repeated requests.

88. On the 5th November, 2013, Mr. Byrne of Lisney forwarded an email from Mr. Bagnall with a revised offer of €7.55 million.

89. On 6th November, 2013, Mr Morrissey's then solicitor submitted a Form A request seeking approval to bring the sales processes for certain properties to completion. It asserted that Mr. Morrissey "continues to cooperate fully with NAMA in the sales process for the above properties". It referred to the Bagnall proposal and requested information as to how offers were being compared ("…a fundamental issue that needs resolution when comparing offers and that is the issue of sale of assets versus the more tax efficient sale of loans…we are unfortunately not happy with the responses previously received from Capita on this subject and have written to you on a number of occasions seeking clarity on this key matter and the legal framework within which NAMA's policies have been designed"). It suggested that the sale of the assets, instead of the loans, might result in unnecessary expenses of up to €700,000. Another issue addressed in the letter was that of overcharging; it referred to the lodging of papers in the High Court, and a preliminary forensic investigation of overcharging by INBS which had identified irregularities.

90. An assessment dated 7th November, 2013 decided that the Bagnall bid was unacceptable to NAMA. It said, *inter alia*: "We have been unable to establish who Bagnall's ultimate client is - the Debtor advises that it is a wealthy American investor however we have no evidence of same". It referred to the suggestion that Mr. Morrissey would consent to judgment for the difference between the par value of the loans and the net proceeds of any transaction if NAMA were to consent to the loan sale and recorded his rejection of that suggestion. It set out Lisney's estimates of property values. The assessment said that the bid did not represent value to NAMA for a number of reasons. One of these was: "The Bagnall bid values the Debtor PDH at €830k, Lisney however verbally advise that it is a superior property to 70 Palmerston Road (current bid of €1.83 million) and should command c. €2m on the open market". The other reasons included:

> "2. Lisney estimates if the current market value of the properties are significantly in excess of the Bagnall bid;
>
> 3. Using Lisney estimates, and including 36 Palmerston ~Rd at fair value shows a net return to NAMA of €9.3m, almost €2m in excess of the Bagnall bid;
>
> 4. Acceptance of the Bagnall bid would constitute "Debt Forgiveness" as NAMA's ability to pursue the debtor personally would be foregone through a loan sale;
>
> 5. Acceptance of a bid for the loans, rather than a bid for the individual properties denies the Exchequer c. €600k worth of VAL and €130k in stamp duty that would ordinarily be payable;
>
> 6. Taking the above into account, Capita recommend that aby bid less than €10m (€9.3m + €730k taxes revenue forgone) for the loans does not represent value – particularly given the par debt level of over €35m."

The assessment also contains the following: "The debtor has been very clear that his favoured method of disposing of the properties is via a loan sale to Bagnall & Associates. The Debtor argues that this represents the best return to NAMA due to not having to pay VAT, agency fees etc on the disposal. However, it appears to us that the Debtor's overriding concern is to escape his Personal Guarantees on the loan and secure the release of his PDH, 36 Palmerston Road on favourable (to him) terms… The Debtor expressed his disappointment with the response to his loan sale proposal and was not willing to entertain any discussion in relation to his PDH. Capita/NAMA made a suggestion that perhaps the Debtor would consider nominating 3 Lower Churchtown Rd as his PDH and that NAMA may come to an agreement as part of an overall solution, however the Debtor rejected this proposal and refused to continue any discussion in relation to this."

91. A letter of 8th November, 2013 from Capita to Mr. Morrissey's then solicitor confirmed its refusal to the loan sale and set out the reasons as follows:

> • "NAMA maintains its right to dispose of its loans on its terms and will not entertain a Debtor led Loan Sale process. NAMA has sole discretion as to whether to sell its loan assets or not;
>
> • All decisions to proceed with a Loan Sales process (and the final decision to sell to a preferred bidder) must be approved by the relevant Delegated Authority (DA) in line with DA policy;
>
> • All NAMA Loan Sales, which do not fully recover PAR debt, must be openly marketed;
>
> • If a Loan Sale proposal is approved by the relevant DA, NAMA will conduct a Loan Sale process and will appoint an external loan sale agent from NAMA's panel (the "Loan Sale Agent") to act on ANAM's behalf in the Loan Sale process;
>
> • A Loan Sale will be subject to the qualifying bidders satisfying NAMA fully as to its bona fides (including usual considerations as to ability to fund and conditionality attached to bid etc).

The Bagnall & Associates bid for Mr. Morrissey's loans is unacceptable to NAMA for the following reasons:

> 1. The bid is Debtor led;
>
> 2. The bid has not been made to NAMA – all correspondence to date has been addressed to Lisney who are not a NAMA Loan Sale Agent. Furthermore, the identity of the bidder has not been revealed;
>
> 3. Notwithstanding the above, the quantum of the bid being proposed, is insufficient for NAMA to give due consideration to the proposal. As pointed out to your client at our meeting on 2nd October 2013, a far higher bid would be required before NAMA would consider accepting same, any such bid being subject to the usual NAMA Loan Sales approval process.
>
> 4. NAMA set minimum acceptable monetary levels for Loan Sales, these minimum levels are based upon the likely returns to NAMA after all associated transaction costs have been deducted and differ loan to loan. This bid does not meet the minimum acceptable monetary level associated with your client's loan value;
>
> 5. The loans have not been openly marketed by a NAMA appointed Loan Sale Agent."

Notice of recommendation of enforcement and invitation to make representations (Second)

92. By letter dated 13th November, 2013, Capita wrote to Mr. Morrissey repeating the reasons why the Bagnall bid was rejected and inviting him to make final representations as they were recommending to NAMA that a decision be made to take enforcement action against him.

93. NAMA also continued to engage in relation to the proposed sale of some of the investment properties. I note that as of 19th November, 2013, Mr. Declan Bagnall was corresponding with Mr. Byrne of Lisney by email, seeking to buy either all of the loans or all of the properties and related security in one lot, and suggesting that he was the highest bidder, and that a letter dated 20th November, 2013 from Lisney to Mr. Morrissey set out the details of the best bids and indicating which one they would recommend to NAMA.

Notice of recommendation of enforcement and invitation to make representations (Third)

94. By letter dated 6th January, 2014, Capita placed Mr. Morrissey on notice of outstanding requirements, including a Sworn Statement of Affairs and outstanding rent, and stated that his continued failure to comply with all of the requirements left Capita with no alternative but to recommend enforcement action to NAMA. He was invited to make representations by 9th January, 2014.

95. On 13th January, 2014, Capita prepared a Form C requesting approval from NAMA to proceed with the appointment of a statutory receiver over the seven investment properties. This included all of Mr. Morrissey's submissions and representations from 6th January, 2014.

96. On 16th January, 2014, a Notification of Decision issued from NAMA approving the appointment of Mr. Neil Hughes of Hughes Blake Chartered Accountants as statutory receiver. On 20th January, 2014, a second Notification of Decision issued from NAMA approving the appointment of a second statutory receiver, a Mr. Joseph Walsh.

Letter of demand for €32 million dated 22nd January, 2014

97. By letter dated 22nd January, 2014, NAMA formally wrote to Mr. Morrissey demanding repayment of the sum of €32,131,530.21 owing in respect of the loans attaching to the seven investment properties.

98. The within proceedings issued by way of plenary summons on 27th February, 2014 and the proceedings took their course as described earlier.

Section 3: The plaintiffs' legal claims

99. As described above, the plaintiffs' statement of claim ran to sixty-four pages and raised a wide range of issues, including claims that numerous constitutional rights had been breached as well as a claim that there had been a violation of the European Convention

on Human Rights. The reliefs sought included various types of declaration, damages, and an injunction. The case, both as pleaded and presented at hearing, was rather lacking in focus. Essentially, Mr. Morrissey articulated a wide range of grievances in respect of NAMA's dealing with him without seeking to demonstrate how these grievances translated into precise legal claims or to correlate the precise evidence with the necessary ingredients of each claim. This has presented certain challenges in structuring this judgment but I have decided to deal with the issues raised in the following sequence: (1) the claim for damages in respect of NAMA's decision to enforce in respect of all properties except for the family home; (2) all the issues relating to the family home; (3) miscellaneous (non-constitutional) issues, and (4) any residual constitutional issues arising at the conclusion of the above examinations. It is well established law that constitutional issues should only be dealt with if necessary and after other aspects of the case have been dealt with. As stated by Henchy J. in T*he State (P Woods) v. Attorney General* [1969] I.R. 385 (at page 399): "Because of the constitutional proprieties involved in the judicial review of legislation and the inherent limitations of the judicial review process, the rule has been evolved that a court should not enter upon a question of constitutionality unless it is necessary for the determination of the case before it." This approach has been re-iterated on numerous occasions, including in *Murphy v. Roche* [1987] I.R. 106, *McDaid v. Sheehy* [1991] 1 IR 1 and *Carmody v. Minister for Justice* [2010] 1 IR 635. However, as will be seen, I conclude that in the circumstances of the case and by reason of other conclusions I have reached, it will not be necessary or appropriate in this case to express views on any constitutional issue in the present case.

100. The main parts of my analysis are with regard to (1) and (2) above. Within item (1), the claim for damages in respect of NAMA's decision to enforce in respect of all properties except for the family home, I have created a number of different sub-headings: (a) the issue raised by the plaintiffs with regard to s. 182 of the Act of 2009; (b) whether NAMA breached any rights of fair procedure in the process leading to the decision to enforce; (c) whether the NAMA decision to enforce was substantively unlawful. With regard to (2), the family home section, I deal with a number of distinct factual and legal questions as well as whether s. 101 of the Act of 2009 applies to the situation.

1. The claim for damages in respect of NAMA's decision to enforce in respect of all properties except for the family home
Section 182 and the parameters for bringing a damage claim against NAMA

101. The plaintiffs pleaded and submitted that s. 182 of the National Asset Management Agency Act 2009 ("the Act of 2009") was unconstitutional because it placed unfair restrictions on their right of access to the courts and the right to litigate. Section 182 permits an action for damages against NAMA to be commenced only with leave of the Court within 30 days of the accrual of the cause of action. NAMA formally pleaded that the plaintiffs were precluded from bringing the proceedings by reason of s. 182 of the Act of 2009. However, NAMA put in full submissions responding to each of the issues on the merits and at the trial, submitted that the constitutionality of the provision did not arise in circumstances where, despite the fact that the plaintiffs were manifestly out of time in seeking leave of the Court, the claims had been defended on the merits. Therefore, it seems that NAMA was content to allow the Court proceed to deal with the plaintiffs' claims on their merits and not to press the time-limit issue.

102. I note that the issue of time-limits in connection with the Act of 2009 (albeit in s. 193 and not s. 182) was discussed at some length by Charleton J. in *National Asset Loan Management Ltd v. Barden* [2013] 2 IR 28 and *National Asset Loan Management Ltd v. McMahon* [2015] 2 IR 385. I would have been inclined to take the view that s. 193 would be at least as relevant as s. 182 in the present case, because (as discussed below) much of the plaintiffs' case amounted to a claim based on public law issues. However, by reason of the stance adopted by the defendants, it does not seem to me to be necessary to deal further with the issue of time-limits or the question of leave of the Court in the present case. In circumstances where the defendants appear to have decided not to rely upon s.182 as a defence to the plaintiffs' claims, the constitutionality of the statutory provision does not arise for determination. I will therefore proceed to an assessment of NAMA's conduct in respect of the plaintiffs.

What is the legal nature of the plaintiff's claim for damages?

103. The first issue is to identify the precise nature of the plaintiffs' claim. The plaintiffs pleaded and made numerous submissions concerning alleged unfairness in NAMA's dealings with them. Certain themes repeatedly featured under different headings, as I noted earlier. These included that NAMA: had acted *ultra vires*; had taken into account irrelevant matters; had failed to give meaningful consideration to Mr. Morrissey's proposals; had adopted strategies that were not in accordance with their statutory functions; had given reasons for their decisions which were vague, inadequate, invalid, and unintelligible; had not afforded Mr. Morrissey fair procedures; had engaged in abuse of process; had coerced Mr. Morrissey to enter agreements under economic duress; had made errors of fact and failed to ascertain the true facts; had made numerical errors; had unlawfully fettered their discretion; and had wrongfully relied upon his alleged lack of cooperation. Even this is not an exhaustive list, but I think it captures the main points sufficiently for analysis. What is clear from the matters listed is that the essence of the complaint centred on what would be regarded in law as a public law type of claim, i.e. a claim for damages based upon the alleged unlawfulness of the NAMA decision.

104. However, there appears also to be a negligence claim embedded within the statement of claim. The plaintiff's claim for damages was formally pleaded as one for:

> i. "Breach of constitutional rights;
>
> ii. *Negligence*;
>
> iii. *Negligent Misrepresentation*;
>
> iv. Breach of statutory duty;
>
> v. Breach of Section 3 of the European Convention on Human Rights Act 2003;
>
> vi. Breach of Statutory Rights, under the Guardianship of Infants Act, 1964 as amended;
>
> vii. Causing loss by unlawful means." (emphasis added)

105. The legal parameters of a claim for negligence against a public decision-making body were discussed by the Supreme Court in *Pine Valley Developments Ltd v. Minister for the Environment, Ireland and the Attorney General* [1987] IR 23. That case concerned a Ministerial decision to grant outline planning permission which was later found to be invalid. The plaintiff sought damages for the loss it had suffered by reason of the invalidity of the decision. The Court held that no liability in negligence arose where the Minister had followed the advice given to him in good faith. The issue of the relationship between the advice given to a decision-maker and whether or not a decision can be said to have been negligently reached was also discussed in *Glencar Exploration v. Mayo County Council (No. 2)* [2002] 1 IR 84; so too was the issue of whether the decision-maker, by reason of his statutory duty, owed a duty of

care to the particular plaintiff as distinct from the world at large. This is a crucial issue because in the law of negligence, it is necessary to prove that there was a relationship of sufficient proximity between the plaintiff and the defendant. None of these issues were addressed by the plaintiffs in the present case and there was no attempt to grapple with the numerous questions that would have presented themselves if the plaintiffs had engaged in any serious way with the negligence claim rather than simply pleading it on a formal basis. Accordingly, I reject the claim in negligence on the basis that the plaintiff has failed to satisfy the Court that the necessary ingredients for the tort have been established by the evidence. I will now turn to the main basis for the claim in damages, namely the public law issues.

The public law claim for damages: initial comments

106. Something which was absent from the plaintiffs' case was any imprint of the views of the Supreme Court in such leading cases as *Pine Valley Developments Ltd v. Minister for the Environment, Ireland and the Attorney General* [1987] IR 23, and *Glencar Exploration v. Mayo County Council (No. 2)* [2002] 1 IR 84. These two leading Supreme Court decisions explain the various matters which a plaintiff must establish in order to obtain damages when his or her claim is one for loss allegedly caused by a public body exercising a decision-making function pursuant to statute.

107. Further, the plaintiffs' submission lacked attention to core judicial review principles when assessing the lawfulness of a decision made pursuant to statute by a public body. Key to these judicial review principles is the important distinction drawn by the courts between the procedural rights of an individual in the process leading to the decision, on the one hand, and the test for examining the decision "on its merits", on the other. While the courts are careful to ensure that appropriate procedural rights are afforded to an individual, they are much more circumspect about interfering with decisions of administrative bodies in a substantive sense. This conservative approach to substantive review of such decisions is rooted in the constitutional doctrine of the separation of powers as between the executive and the judicial organs of government, as has been explained in the following terms by Mark De Blacam in *Judicial Review* (3rd edn, Bloomsbury Professional 2017) at pp 110-111:

> "[6.33] While a court must not lose sight of its unique role in determining the legality of a public decision, there are sound reasons for the exercise of restraint in the application of the review principles. If the judges overreach, they commit the error which review has been designed to prevent: they abuse jurisdiction. And in doing so, there is the practical danger that they may end up being responsible for decisions which they are not, by training or experience, qualified to make. Specialist bodies are established by legislation often because their members will have particular knowledge of their fields of activity. That knowledge may not necessarily be imparted to or rest in a judge dealing with a review application. Moreover, decision-making in areas of public policy is quite unlike judicial decision-making. The administrator is often concerned with broad considerations of the public interest, whereas the judge tends to focus on the claims of the parties to the case before him. Judicial review, particularly of executive decisions with a substantial policy element, runs the risk that legitimate claims of third parties may be affected, thought they have no input into the litigation. Where, for example, review is granted the effect of which is to require the state to provide funding for the applicant, it is conceivable that funding in other areas of the respondent's responsibility will be correspondingly reduced. Yet this factor, which is likely to be of the utmost importance to the respondent, may form little or no part of the review application, the concern of the court being only whether the rights of the applicant have been infringed."

108. Mr. Morrissey's submissions frequently appeared to conflate the separate questions of procedural fairness with the substantive correctness of the NAMA decision to enforce, and proceeded on the assumption that if he could establish that NAMA had acted unfairly, he would be automatically entitled to damages. The Court, however, has to engage in a more rigorous analysis. I will be examining his claims by applying the appropriate legal tests to each of the following and separate questions: (1) Did NAMA afford him appropriate *procedural* rights in the process which culminated in the enforcement decision? (2) Does the decision ultimately made by NAMA to enforce satisfy the appropriate legal tests applicable to judicial review of the substance of the decision? (3) If the answer to either of those question is yes, are the plaintiffs entitled to damages?

What decision is under review?

109. Another point which should be clarified is the nature of the NAMA decision which is being challenged in these proceedings. Although Mr. Morrissey made complaints about NAMA's conduct at many stages of its process, from a legal point of view what is reviewable is the decision to enforce of January 2014. As described in *Treasury Holdings & Ors v. NAMA & Ors* [2012] IEHC 297, the decision to enforce is "a composite decision to make demands and if such demands were not met, to appoint receivers." Matters such as the rejection of Mr. Morrissey's various business plans and the "Bagnall proposal", or the subsequent appointment of receivers, form the background, lead-up and consequence of the decision to enforce and are relevant to that extent; but in public law terms, the decision which is actually amenable to judicial review is the decision to enforce.

110. I should perhaps note what was not challenged in these proceedings. There was no challenge to the original decision to acquire Mr. Morrissey's loans and in any event, he is long out of time for challenging that decision. Similarly, while he continued to complain at the hearing about an alleged conflict of interest between IBRC (NAMA) and IBRC (non-NAMA), no challenge was ever brought to their acting as a service provider and, again, he is long out of time for doing so. His continuing to engage with NAMA without challenging either of those two matters at the relevant time would in any event amount to waiver or acquiescence.

Relevant principles and authorities concerning the public law issues

111. There have been a number of decisions of the Supreme Court and Court of Appeal concerning NAMA which are relevant to these proceedings insofar as they contain discussions of the relevant judicial review/public law principles in that particular context. However, it is true that certain basic judicial review/public law principles also apply in the normal way. The legal micro-climate concerning NAMA operates within the broader climate of judicial review principles. Before proceeding to examine some of the authorities in further detail, I think it may be useful to summarise the principles which emerge from the authorities in short form:

> (a) Certain procedural rights must be afforded certain borrowers before a decision is made by NAMA to acquire any eligible bank assets related to their credit facilities with participating banks, provided the person's interests are affected in the manner described in *Dellway Investments Ltd v. NAMA* [2011] IESC 14. This issue does not arise in the present case.
>
> (b) An individual or entity whose interests are affected to a sufficient degree is entitled to certain procedural rights before a decision is taken to enforce (*Treasury Holdings v. NAMA & Ors* [2012] IEHC 297).
>
> (c) When these procedural rights arise, they include the right to be heard or an opportunity to make representations before any decision is taken to enforce (*Treasury Holdings v. NAMA & Ors* [2012] IEHC 297, *Flynn v. NAMA* [2014] IEHC

408).

(d) These procedural rights include the right to be given the real reasons why a decision to enforce is being contemplated in order that the individual can make meaningful representations (*Flynn v. NAMA* [2014] IEHC 408).

112. In my view, it is also important to state that I do not see anything in those decisions to suggest that the well-established (and narrow) judicial review tests (as set out in *O'Keefe v. An Bord Pleanála* [1993] 1 IR 39, S*tate (Keegan) v. Stardust Victims' Compensation Tribunal* [1986] IR 642 and *Meadows v. Minister for Justice, Equality and Law Reform* [2010] 2 IR 701) for reviewing decisions of administrative bodies on their merits have in any way been altered.

113. None of the above principles were disputed by NAMA nor was it disputed that Mr. Morrissey was entitled to the fair procedures identified in *Dellway and Treasury*. Their contention was that NAMA had taken cognisance of those authorities and that it had afforded Mr. Morrissey the procedural rights in question.

114. I think it appropriate to set out a small number of passages from the relevant authorities by way of further context to the above summary and for further detail as to the approach I must adopt in the present proceedings to the evidence before me.

115. In *State (Keegan) v. Stardust Victims' Compensation Tribunal* [1986] IR 624, the Supreme Court considered the test to be applied when reviewing (the substantive aspects of) decisions of administrative bodies. Henchy J., in rejecting the traditional association of unreasonableness with logic (as stated by Lord Diplock in *Council of Civil Service Unions v. Minister for the Civil Services* [1985] AC 374, at page 410), set out the test in the following way (at page 658):-

> "I would myself consider that the test of unreasonableness or irrationality in judicial review lies in considering *whether the impugned decision plainly and unambiguously flies in the face of fundamental reason and common sense*. If it does, then the decision-maker should be held to have acted *ultra vires*, for the necessarily implied constitutional limitation of jurisdiction in all decision-making which affects rights or duties requires, *inter alia*, that the decision-maker must not flagrantly reject or disregard fundamental reason or common sense in reaching his decision." (emphasis added)

116. In *O'Keeffe v. An Bord Pleanála* [1993] 1 IR 39, Finlay C.J. referred at some length to the decision in *Keegan* and described the appropriate test as whether the applicant has established, to the satisfaction of the Court, that there was no relevant evidence upon which the decision-maker could have reached the decision he did, thus emphasising that the bar to judicial interference with the decision of an administrative body (on the merits) is very high. He explained the reason for this in the planning context:

> "Under the provisions of the Planning Acts the Legislature has unequivocally and firmly placed questions of planning, questions of the balance between development and the environment and the proper convenience and amenities of an area within the jurisdiction of the Planning Authorities and the Board which are expected to have special skill, competence and experience in planning questions. The Court is not vested with that jurisdiction, nor is it expected to, nor can it, exercise discretion with regard to planning matters."

The same can be said of most, if not all, administrative decision-making contexts and is as true for NAMA as it is for decision-makers in many other areas. If the courts were over-eager to intrude into that area of judicial function, this would be considered a breach of the separation of powers under the Constitution. Hence, the narrowness of the test.

117. The question of procedural fairness is, of course, a different matter. The courts have a well-developed jurisprudence on the need for appropriate rights for those affected by decisions in many different contexts. The extent of these rights depends upon the context; and for present purposes, the most relevant authorities are those concerned with procedural rights in the NAMA process. In *Treasury Holdings v. NAMA & Ors* [2012] IEHC 297, the applicants sought judicial review of decisions taken by NAMA to proceed with enforcement against the applicant. Finlay Geoghegan J. first examined the question of whether a decision to enforce was amenable to judicial review and reached the conclusion that Treasury was entitled to be heard before a decision was made to enforce. I note that among the matters she took into account in reaching this conclusion on the facts before her were: that Treasury had an equity of redemption; that it was still in a position to manage and conduct its business; that it continued to earn significant management fees and rental income (albeit that 92% was mandated to NAMA); that one of its developments was in negotiation with BNY Mellon in relation to a potential lease and that it was a party to a master development agreement in relation to the Spencer Dock development; that it continued to employ a skilled workforce; and that enforcement would trigger cross-default clauses in relation to other facilities including the Spencer Dock development project. She also took into account a Memorandum of Understanding reached between NAMA and Treasury towards a future restructuring of the group. She concluded that in view of this specific configuration of facts, Treasury had a "right to be heard" before NAMA took a decision to enforce. As to the content of the right to be heard, she said (at para 112):

> "In *Dellway*, Hardiman J. at p. 84, stated that the obligation on NAMA, if applicable, includes an obligation to notify "of the proposed decision and to sufficient detailed information, including criteria as may be necessary to allow the person to be affected to make the best case he can against the decision which he fears". Counsel for NAMA submits that this requirement of notification goes beyond what is contemplated by the majority of the other judges. Even if this is so in its detail, it appears to me that at minimum, if there is a right to be heard or an obligation to give an opportunity to be heard, then there must be, at minimum, *notification that the proposed decision is under consideration and sufficient information about the reasons for which it is proposed. Absent such information, the right to be heard would be meaningless*. It is unnecessary, on the facts herein, to consider the level of detailed information which it might be necessary for the decision maker to give. This appears to me to *depend upon the individual facts*." (emphasis added)

118. The next section of her judgment in the *Treasury* case is entitled "duty to act in a fair and reasonable manner". Nothing in this suggests a departure from the usual principles concerning the review of the (substantive aspects of) an administrative decision. Finlay Geoghegan J. started by referring to the decisions in *East Donegal Cooperative Mart Ltd v. Attorney General* [1970] IR 317 and *McCormack v. Garda Síochána Complaints Board* [1997] 2 IR 489 to the effect that proceedings, procedures, discretions and adjudications provided for by Acts of the Oireachtas are to be conducted in accordance with the principles of constitutional justice, which place a duty on a decision-making authority to apply fair procedures in the exercise of its statutory powers and functions. She then went on to say that the applicant, when applying for leave to bring the proceedings, had referred to *Zockoll Group Ltd v. Telecom Éireann* [1998] 3 IR 287 and *Deane v. Voluntary Health Insurance Board* [1992] 2 IR 319, but that it had since then clarified that "it was only relying upon the obligation of NAMA to act fairly and reasonably in the *procedure* followed reaching its decision *as distinct from* any obligation to take a decision which is objectively and *substantively* reasonable" (emphasis added). She then went on to consider whether adequate notice of the enforcement decision had been given and whether there had been an adequate opportunity to be heard. This decision cannot possibly be read as seeking to alter in any way the established position regarding judicial review of decisions "on the merits" (as distinct from review of procedural fairness), as discussed in leading authorities such as

O'Keefe, Keegan and *Meadows*. The net point for present purposes is that Finlay Geoghegan J. held that the procedural rights consisted of: (1) notification that the proposed decision is under consideration, and (2) the provision of sufficient information about the reasons for which it is proposed, together with an opportunity to be heard.

119. In *Flynn v. NAMA* [2014] IEHC 408, a number of different issues arose but I am concerned with only one of them, namely, the right to be heard prior to the decision of NAMA to call in the loans and to be told of the real reasons for the proposed decisions so that one can meaningfully exercise the right to be heard. The Court heard oral evidence and concluded, as a matter of fact, that the real reason for calling in the loan was one party's denial of the debt and her failure to put in a statement of affairs. Cregan J. said:

> "The right to be heard necessarily means that the person affected must know the action which is being proposed and the reasons for that action. This gives them an opportunity to make representations on the issue and to rebut, if they can, the reasons for the action. It follows therefore that the person affected must be informed of the real reasons for the proposed action and not be given misleading or spurious reasons. If a person is not given the real reasons for a proposed decision and/or if he is given misleading or spurious reasons, then his representations cannot deal with the actual reasons. In such a case the right to be heard is not vindicated. It becomes a nullity. That is the case here."

120. I also note certain comments of Charleton J. in *NAMA v. McMahon* [2015] 2 IR 385. The case arose out of proceedings brought by NAMA seeking judgment on foot of borrowings and a guarantee which had been acquired by it from AIB under the Act of 2009. Having dealt with a number of legal arguments, including an argument that NAMA was estopped from enforcing the debt, Charleton J. moved on to address whether certain provisions of the Act of 2009 were consistent with the Constitution. He pointed out that an individual interacting with NAMA had certain protections as identified in *Dellway* and *Treasury* and, because the agency was in the sphere of public law, an opportunity to invoke an argument as to fair procedures which were additional to rights in private law. He then said:

> "47. All of these rights are additional to those in private law. They are both substantive and procedural rights and ones which make a difference in terms of the procedures to be applied and the protections that are available to borrowers. There has been no property right of the defendant that has been unjustly attacked. *The defendants has a right to earn a living does not necessarily mean an entitlement to keep the income stream generated from property where those legal rights have been signed away in debt or guarantee obligations. The Court regards the equity of redemption in mortgage contracts as among the most important of property rights. Such rights are like other property rights: entitlements that can be exchanged for value or which can be altered or lost in consequence of legal instruments validly entered into. The property rights in question are respected when proper consideration is given by a lending institution to whether a debt is sustainable and whether the equitable title that remains with a mortgagor can be salvaged by some reasonable arrangement.* But here there has been no unjust tearing apart of property rights because the debt burden was overwhelming and the obligations entered into at arms length and in the clear hope of advantage. There is therefore no warrant for any declaration that any part of these two sections offend against the Constitution." (emphasis added)

This comment points out that while the debtor dealing with NAMA is entitled to certain rights of fair procedure, there is a limit to his or her entitlement. The debtor is not entitled to dictate what should happen but rather is entitled to "*proper consideration [being] given by a lending institution to whether a debt is sustainable and whether the equitable title that remains with a mortgagor can be salvaged by some reasonable arrangement.*" NAMA's obligation to afford certain procedural rights does not displace the courts' reluctance to interfere with decisions on their merits unless the *Keegan, O'Keeffe* or *Meadows* tests have been satisfied. When reviewing NAMA's decision to enforce, the Court is not entitled to simply substitute NAMA's view with its own view of the commercial desirability of one option over another, even if the Court's views were different from that of NAMA.

Application of the law to the facts of present case
Procedural rights: adequate notice of NAMA's thinking and opportunity to present his views

121. It is clear from the chronology of events that NAMA gave Mr. Morrissey numerous opportunities to present his case. These included:-

1. Opportunity to provide to NAMA with a written business plan, which he did on 31st May, 2011;

2. Meeting of 16th February, 2012 between IBRC, Mr. Morrissey and Mr. Hyland of Baker Tilly to discuss business plan of previous May 2011;

3. Opportunity to submit a re-cast business plan after that meeting, which he did on 27th February, 2012;

4. Meeting on 30th May, 2012 between IBRC, Mr. Morrissey and Mr. Hyland of Baker Tilly to discuss NAMA's negative response to the re-cast business plan;

5. Opportunity to present further written proposals which was done on 8th June, 2012;

6. Opportunity to present further written proposals which was done in January 2013;

7. Meeting of 25th July, 2013 between IBRC, Mr. Morrissey, Mr. Black (Mr. Morrissey's solicitor) and Mr. Byrne of Lisney;

8. Letter of Mr. Morrissey dated 31st July, 2013;

9. Meeting between Capita and Mr. Morrissey dated 29th August, 2013;

10. Meeting between Capita and Mr. Morrissey on 2nd October, 2013; and

11. Numerous exchanges by email and in writing concerning the Bagnall proposal in October 2013.

122. In fact, NAMA made decisions to enforce on several occasions but was persuaded not to proceed on each occasion because of submissions made by Mr. Morrissey. Accordingly, this is very far from a situation where a decision-making body reached a decision on a summary basis without giving the affected person an opportunity to present his case. Mr. Morrissey had numerous opportunities to present his views, whether by sending written submission or by participating in meetings, and there is no doubt that he expressed his views forcefully and with the benefit not only of his own considerable professional and business experience but that of his advisers, Baker Tilly.

123. Nor was it a situation where Mr. Morrissey was kept in the dark as to NAMA's real reasons for taking the course that it ultimately did. In particular, he was repeatedly told that one obstacle was that he was not remitting the full rental income from the properties to NAMA and, in particular, that he was not entitled to use these monies to fund his Anglo litigation. He was also repeatedly told that NAMA required him to submit a Sworn Statement of Affairs in appropriate format. I do not find anything on the facts which suggest that there was any concealment of the real reason for enforcement as was the case in *Flynn* described above.

124. The process of ongoing discussion between NAMA and Mr. Morrissey was a difficult one by reason of a number of inflexible positions and unhelpful attitudes he adopted including:-

i. That he was entitled to use some of the rental income to fund his entirely separate Anglo litigation;

ii. That he was absolutely entitled to stay in the family home at Palmerston Road, Dublin 6;

iii. That he was entitled to put information as to his financial circumstances before NAMA in a format of his, rather than its, choice (i.e. the Statement of Affairs issue);

iv. That if NAMA did not do what he wanted them to do, he would involve them in protracted litigation as he had done with Anglo/IBRC;

v. That it was not appropriate for him to furnish the required information to the IBRC (NAMA) on the basis that it had a conflict of interest by reason of his having sued IBRC (non-NAMA) in respect of his Anglo debts;

vi. (After a certain point in time) that he was entitled to cease paying any rent on the family home reason of his view that he had been overcharged by INBS;

vii. That the wrongdoing of Mr. Fingleton in his management of INBS absolved Mr. Morrissey of responsibility for repaying his own debts incurred in respect of loans from INBS.

125. These positions were legally unsound and unhelpful. I do not consider that NAMA was unreasonable both in rejecting those arguments and in considering that Mr. Morrissey's adherence to them rendered him an unsuitable candidate for ongoing co-operation with Mr. Morrissey in a management role with regard to the portfolio as a whole. His attitude contained a fundamental lack of understanding of his legal position as a defaulting debtor whose loans had been acquired by NAMA.

126. It is, of course, theoretically possible for a decision-making body to observe the trappings of fair procedures without observing their substance. Where a body is required to give an opportunity to a person affected to put forward his views, it must then give meaningful consideration to those views. Insofar as Mr. Morrissey makes the case that the hearing rights he was afforded were a mere cosmetic exercise, I would make several points in this regard. First, it is difficult to see why NAMA would have taken the step of obtaining the independent opinion of PwC if they were engaging in a simple cosmetic exercise of merely being seen to afford Mr. Morrissey his procedural rights rather than actually listening to his views. As has been seen, NAMA consulted PwC in February 2013 and they produced a report for NAMA in August 2013. The same is true for the repeated requests for advice from Lisney on various aspects of Mr. Morrissey's proposals, which can be seen particularly around the time of the Bagnall proposal in October 2013. Secondly, it is clear from their internal documents put before the Court that consideration was being given to Mr. Morrissey's proposals on an ongoing basis and that it was not a mere box-ticking exercise. Thirdly, this type of argument must be viewed with caution because it risks a conflation of the issues of procedural fairness and substantive review of the decision itself. It, in essence, says: "NAMA must not have been giving proper consideration to Mr. Morrissey's arguments because the decision it reached was plainly the wrong decision, and therefore while it was pretending to give him procedural rights, this was a cosmetic exercise rather than an exercise of any substance", which of course begs the question of whether the decision was "the wrong decision". It is therefore appropriate to turn now to a review of the decision itself.

The decision to enforce made in January 2014

127. In this exercise, the Court is not entitled to ask: "would I have made a different decision to NAMA?", or "was NAMA's decision the most commercially sensible one to make on the information it had at the time"? In *State (Keegan) v. Stardust Victims' Compensation Tribunal* [1986] IR 642, Henchy J. said that: "[t]he Court cannot interfere with the decision of an administrative decision-making authority merely on the grounds that (a) it is satisfied that on the facts as found it would have raised different inferences and conclusions, or (b) it is satisfied that the case against the decision made by the [decision-making] authority was much stronger than the case for it". Rather, the Court must ask: (a) was the decision "fundamentally at variance with reason or common sense" and, if so, "is indefensible for being in the teeth of plain reason and common sense?" (the tests set out in *Keegan* and *O'Keeffe*); or (b) has the plaintiff satisfied the Court that there was "no relevant material" before it which would justify the conclusion it reached? (the test set out in *O'Keeffe*).

128. My conclusion on the materials laid before me is that the plaintiffs have not satisfied any of those tests. Mr. Morrissey obviously took a different view of what strategy would be the best business decision and strongly believes that NAMA got it wrong. But I could not characterise the decision reached by NAMA – that Mr. Morrissey's various alternative proposals were not the best way forward – as a decision "fundamentally at variance with reason or common sense" or that there was "no relevant material" before it which would justify the conclusion it reached. It was a judgment call based on a number of factors and I do not see that the judgment call fell outside the proper range of NAMA's discretion. To take one example, Mr. Morrissey spent some time trying to persuade the Court that, if one were to take into account the tax aspects of the proposed Bagnall deal as against what NAMA proposed to do, the Bagnall deal was commercially more beneficial. However, it is not the Court's task to decide which option was commercially more beneficial; it is confined to examining whether there was no basis for the decision reached or whether it was utterly lacking in rationality. In my view, that has not been demonstrated by the plaintiffs. Another example is the issue of whether or not NAMA was entitled to apply a €10 million price threshold to the sale of loan portfolios. Mr. Broderick averred that it was NAMA's view, as repeatedly explained to Mr. Morrissey, that accepting offers below this amount was not commercially viable for NAMA. This is precisely the type of expertise that NAMA would have which the Court would not. Further, the issue of co-operation is one which NAMA was entitled to factor into the situation and constituted a relevant dimension over and above the commercial aspects of various courses of action. In this regard, matters such as the withholding of rental income from NAMA and spending it on the Anglo litigation, or threatening to embroil NAMA in litigation if they failed to agree with his suggestions, were aspects of Mr. Morrissey's conduct which NAMA was entitled to take into account in reaching its decision with regard to enforcement. Accordingly, I am of the view that the decision taken by NAMA to enforce does not satisfy the tests for striking down an administrative decision on its merits.

129. In circumstances where I have reached the conclusion that both the process leading up to NAMA's decision and the decision

itself were valid and lawful, the issue of whether damages might follow from an unlawful decision does not arise.

2. The Family Home Issue
130. NAMA had not, at the time of these proceedings, taken any decision to enforce in respect of the family home. The plaintiffs' claims in their plenary proceedings are therefore pre-emptive. The relief sought was "an order declaring that acts of the [defendants] in the purported exercise of their respective statutory and non-statutory functions in respect of the Second Named Plaintiff's properties including (but not limited to) the family home at 36 Palmerston Road, Dublin 6, including the failure to act fairly and reasonably in respect of the valuation and disposition of the said properties, (including the appointment of a Receiver), have engaged in breaches of, and threaten further interferences in the exercise by the Plaintiffs of the Plaintiffs' respective constitutional rights and duties" which are then listed. In addition to damages, what is sought is an order "restraining [the defendants] from conduct that breaches or threatens to interfere with the exercise by the Plaintiffs of their said Constitutional Rights".

131. The list of constitutional rights of the plaintiffs which are alleged to have been breached include:

> "i. Their right to inviolability of their dwelling, under Article 40, Section 5 of the Constitution;
>
> ii. Their rights and duties as spouses, parents and educators of their children under Article 40, section 3, 41 and 42 of the Constitution;
>
> iii. Their right to property, under Article 40, section 3 and 43 of the Constitution;
>
> iv. Their right to marital autonomy, under Article 40, section 3, 41 and 42 of the Constitution;
>
> v. Their right to equality before the law, under Article 40, Section 1 of the Constitution;
>
> vi. Their right to human dignity, under Article 40, Section 1 and 3 of the Constitution;
>
> vii. Their right of access of the courts, under Article 40, Section 3 of the Constitution;
>
> viii. Their right to litigate under Article 40, Section 3 and 43 of the Constitution."

132. The submissions of the plaintiffs concerning the family home rolled together a number of factual issues with legal issues of both a non-constitutional and constitutional nature. I have separated these out into the following factual and legal questions:

> (1) Did Mrs. Morrissey sign the necessary family home protection documentation at the time of the giving of the house as security for the loan (2005)?
>
> (2) Was there an agreement between Mr. Morrissey and INBS that he was entitled to make reduced monthly payments on the family home mortgage (in 2009/2010)?
>
> (3) Is there any written record of any such agreement?
>
> (4) Was NAMA aware of any such agreement when it acquired the loans?
>
> (5) Does s. 101 of the Act of 2009 apply?
>
> (6) If so, is s. 101 of the Act of 2009 constitutionally valid?
>
> (7) Did NAMA refuse to allow Mrs. Morrissey to purchase the family home because she was the wife of the debtor?
>
> (8) If so, was NAMA's decision in that regard unlawful and *ultra vires*?

Factual question No. 1: Did Mrs. Morrissey sign the family home documentation in October and November of 2005?

133. I have examined the documents which include a signed statutory declaration for the purposes of the Family Home Protection Act 1976 ("the Act of 1976") and the signed endorsement of the mortgage. On their face, they clearly bear the signature of Mrs. Morrissey and the witness, solicitor Áine Gleeson. The document containing the endorsement of the mortgage for the purposes of the Act of 1976 clearly contains the declaration that Mrs. Morrissey had taken independent legal advice. The sworn evidence of Mrs. Morrissey in the proceedings before me did not clearly state her position on the facts and was more in the nature of a formal pleading style which equivocated on whether she had signed the documents or not. In one particular paragraph, she said: "I further say that my consent to the mortgage of the family home was necessary and that, if I provided such consent, and if I received independent legal advice prior to providing such consent, which is denied, I provided such consent on the basis that the Irish Nationwide Building Society, its senior managers, servants and agents (i) had conducted, and would during the currency of the said loans conduct, its business in a lawful manner, (ii) had not acted, and during the currency of the said loans would not act, intentionally, recklessly or negligently in the conduct of its business in such a manner as to damage my security of occupation of the family home." In another paragraph, she said: "I say and am advised and believe that if I provided such consent, and if I received independent legal advice prior to providing such consent, which is denied, in entering into the said contracts and in respect of the discharge thereof, the Irish Nationwide Building Society owed me, this deponent, a duty of care, including the duty of care not to foreseeably imperil, directly or indirectly, the Second Named Plaintiff's financial interests or the security of ownership or occupation of the family home and the security for my family of a permanent home within which to raise my four children." When Mrs. Morrissey addressed the Court orally (by way of unsworn submission), she said that she did not remember signing the documents or receiving independent advice. She also told the court that she was a pharmacist who had given up her employment to work in the family home, from which I take it that she had a good education and has no unusual literacy difficulties.

134. In my view, if Mrs. Morrissey wished to firmly dispute that she had signed the documents (which would implicitly raise a question of forgery), she would need to have done much more by way of putting evidence before the Court to raise a doubt as to the truth and accuracy of what appears on the face of the documents. On the basis of the evidence before me, I find that Mrs. Morrissey did in fact sign the documents at the time and that she had received legal advice before doing so, as is stated on the face of the documents.

135. The normal implications of taking out a mortgage on a family home in terms of the consequential impact on constitutional rights

was considered by McKechnie J. in the Supreme Court decision of *Launceston Property Finance Ltd v. Burke and Burke* [2017] IESC 62 in which the appellants, relying on Article 8 of the European Convention on Human Rights and on Articles 40.3.2°, 41 and 43 of the Constitution, unsuccessfully appealed an order for possession made against them. Addressing the interference with the alleged right to a family home, McKechnie J. stated at para 60 of his judgment:-

> "60. The interference with the appellants' property rights in the present case arises as a result of their personal and voluntary decision to enter into a commercial transaction(s) where, as security for money advanced, they committed the properties in question, including the family home, to the Bank."

136. Addressing the provisions of the Constitution relied on in the argument that they give rise to a right to a family home and therefore, corresponding constitutional protection, McKechnie J. concluded that they were of no assistance to the appellants in their appeal:-

> "63. Moreover, I do not see that the cited provisions of the Constitution can avail the appellants in any way. They have defaulted on their contractual obligation to repay the monies advanced to them in accordance with the terms of the mortgage. They remain in default of that obligation. For certain, the referenced Articles of the Constitution provide foundational protection to the appellants' property and family rights, but they cannot and do not insulate the appellants from the obligation to repay their mortgage or the consequences of their failure to do so."

137. There was an attempt by the plaintiffs to construct an argument before me to the effect that when Mrs. Morrissey signed the documents, she could not have foreseen the calamitous events of 2008 and the collapse of the Irish banking system which was to come, and that therefore the overall context in which she had signed the documents had altered so dramatically that it would be unconscionable to allow NAMA to enforce against the family home (if it chose to do so in the future). Needless to say, no legal authority was cited for this unusual proposition. Were there any such principle in Irish law, it would no doubt have been availed of by many a spouse over the decade since the financial collapse in order to resist eviction from the family home. Mrs. Morrissey clearly felt aggrieved by the fact that her family home was now at risk by reason of her husband being a NAMA debtor when she herself was not. However, the risk to the family home was created by her deciding to sign the documents at the relevant time. The Family Home Protection Act 1976 sought to protect spouses against the problem of the family home being put at risk, but if a wife signs away her rights in a private commercial transaction, the courts cannot offer protection if the risk she anticipated unexpectedly becomes far greater by reason of wider events in society at large. In fact, Mrs. Morrissey has been fortunate compared to many others whose property interests in the family home were deeply affected by the banking crisis. She has continued to live in the family home even though the repayments being made constituted a fraction of what had originally been agreed. Further, it will be recalled that NAMA suggested at one point that the family might re-locate to one of the other properties in the portfolio (in the area of Churchtown, Dublin) which was of less value, but this option was rejected by the plaintiffs who insisted that they were entitled to continue living in the property on Palmerston Road in Dublin 6.

Factual question No.2: Was there an enforceable agreement between Mr. Morrissey and INBS to the effect that he was entitled to pay reduced amounts of €4,000 per month, subsequently further reduced to €3,200 per month?

138. Section 101 of the Act of 2009 provides:

101.— (1) If in relation to a bank asset that NAMA or a NAMA group entity has acquired—

> (a) it is alleged that a representation was made to, a consent was given to, an undertaking was given to, or any other obligation was undertaken (by agreement or otherwise) in favour of, the debtor or another person by the participating institution from which the bank asset was acquired or by some person acting or claiming to act on its behalf,
>
> (b) no such representation, consent, undertaking or obligation was disclosed to NAMA in writing, before the service on the participating institution of the relevant acquisition schedule,
>
> (c) the records of the participating institution do not contain a note or memorandum in writing of the terms of any such representation, consent, undertaking or obligation or do not contain a record of any consideration paid in relation to any such representation, undertaking or obligation, and
>
> (d) the representation, consent, undertaking or obligation, if made, given or undertaken, would affect the creditor's rights in relation to the bank asset,

then that representation, consent, undertaking or obligation—

> (i) is not enforceable, and cannot be relied on, by the debtor or any other person against NAMA or the NAMA group entity,
>
> (ii) is enforceable, and can be relied on, by the debtor or any other person, if at all, only against a person other than NAMA or a NAMA group entity, and
>
> (iii) is not enforceable, and cannot be relied on, by NAMA or the NAMA group entity against the debtor.

> (2) A claim based on a representation, consent, undertaking or obligation referred to in subsection (1) gives rise only to a remedy in damages or other relief that does not in any way affect the bank asset, its acquisition, or the interest of NAMA or the NAMA group entity or (for the avoidance of doubt) any property the subject of any security that is part of such a bank asset.
>
> (3) The Court shall not make an order under section 182 in relation to a claim to enforce a representation, undertaking or obligation referred to in subsection (1).

139. Mr. Morrissey stated on affidavit that at a succession of meetings in 2009 and 2010, it was agreed between him, Mr. Hyland of Baker Tilly and INBS that "a reduced amount would be payable in respect of the family home". He then repeatedly made legal submissions on the basis of this alleged agreement, stating that there had been an agreement that they would pay a reduced sum of €4,000 per month, and subsequently €3,200 per month. However, the paucity of evidence for the alleged agreement may be noted. There was no suggestion that it was ever recorded in writing; the INBS employee or officer with whom the agreement was allegedly made was never identified; and no further details of the circumstances of the agreement were put forward. No witness from INBS was

ever called to substantiate the existence of any such agreement. It may be noted that any such agreement would represent a rather radical departure from the written terms of the loan facility, which envisaged repayment of approximately €12,000 per month. In my view, the plaintiff has failed to establish to the requisite standard of proof in civil proceedings that there was an agreement between the plaintiffs and INBS involving the essential features of an enforceable contract such as precise terms and the presence of consideration. However, I should state for completeness, that even if s.101 does apply because of the absence of written evidence of an agreement, I would reject the constitutional challenge and followed the opinion - albeit *obiter* - of the Court of Appeal in *National Asset Loan Management DAC v. Breslin* [2017] IECA 283 where Whelan J. had observed the following (at paras 79-80):

> "The 2009 Act enjoys a presumption of constitutionality. The exigencies that brought forth the NAMA Act included a serious threat confronting the state's economy, the risks surrounding stability of credit institutions in the State generally and the need for maintenance and stabilisation of the financial system in the state […]
>
> While the NAMA Act is exceptional, from an historical perspective it is not unique. The Landed Estates Court (Ireland) act 1858, the Settled Land Acts, 1882-1890 and the Land Purchase Acts 1870-1903 and indeed the Succession Act 1965 each in their turn devised mechanisms, on grounds of public policy, which altered long established rights and overreached long assumed expectations in a manner considered necessary and expedient to address concerns affecting national stability."

Whelan J. further observed at para 84:-

> "84. Insofar as it is relevant, I am satisfied that the provisions of sections 101 (1) (i), 105(1) and 108 (2) (b) are proportionate and fall well within the threshold of restriction permissible on the exercise of protected rights under the Constitution and are no more than a proportionate restraint on the exercise of protected rights having due regard to the exigencies of the common good sought to be protected by the provisions of the NAMA Act as set forth in section 10 of that Act."

Factual Question No. 3: Did NAMA refuse to allow Mrs. Morrissey to purchase the family home because she was the wife of the debtor?

140. A central part of the plaintiffs' claim concerning the family home concerned an allegation that NAMA had prohibited Mrs. Morrissey from purchasing the family home. Taking this factual assertion as a foundation, the plaintiffs sought to build upon it a legal claim incorporating all manner of alleged breach of constitutional rights. A fatal flaw in this part of the plaintiffs' case was the fragility of its factual foundation. Did NAMA actually prohibit Mrs. Morrissey from purchasing family home? In my view, the evidence does not establish this fact.

141. The factual basis purporting to underpin the plaintiffs' submissions on this issue appears to be entirely based upon Mr. Morrissey's version of the meeting on the 2nd October, 2013 (referred to in the chronology set out above at paragraph 74). He said that that he was told that his wife would not be allowed to purchase the family home "should such an event arise". Mr. O'Donoghue, as seen above, gave a long description of what was said at the meeting and utterly disputes that this was ever said; in essence, his version is that he indicated that the family home would have to be sold and that the price of €830,000.00 was a substantial undervalue of the home. He said that Mr. Morrissey refused to allow the open marketing and viewing of the property, and this would preclude NAMA from determining the actual market value of the property, and in those particular circumstances, his wife (nor any other party) would not be allowed to purchase the property. He denied having said that Mrs. Morrissey would never be allowed to purchase the house; rather he informed Mr. Morrissey that his wife would not be permitted to purchase the property at the figure of €830,000.00 and/or without the property being openly marketed. He agreed that if price had not been the issue, nothing would have precluded Mrs. Morrissey from purchasing the property.

142. The Court is mindful of the warnings given by the Supreme Court in *RAS Medical Ltd v. RCSI* [2019] IESC 4 not to resolve conflicts of fact on affidavit in circumstances where there has been no cross-examination of the deponents. In my view, I cannot reach a conclusion on what was said to Mr. Morrissey about the hypothetical situation of Mrs. Morrissey purchasing the family home in circumstances where neither Mr. Morrissey nor Mr. O'Donoghue were cross-examined on this issue. I would comment that if this was in fact said by Mr. O'Donoghue at the meeting, it is surprising that it was not immediately raised by Mr. Morrissey in his correspondence the next day, because he was not reticent about expressing his complaints in general. Yet on the day after the meeting, Mr. Morrissey wrote a letter in which he made no mention at all of this alleged comment. More importantly, however, I do not think it is essential to my decision in any event to resolve this narrow issue of fact, i.e., whether a comment was made that she would never be allowed to purchase the house. What is clearly established by the evidence is that what was being discussed at that meeting was the Bagnall proposal which was an offer from a third party, not Mrs. Morrissey. It will be recalled that Mr. Morrissey was, at all times, at pains to point out to NAMA that he was at arm's length from the investor behind the Bagnall proposal. Accordingly, there was in fact no offer to purchase the family home from Mrs. Morrissey on the table at the time of the meeting at which the disputed comment was allegedly made. Consequently, the question of whether NAMA acted *ultra vires* and unlawfully by refusing her offer does not arise; at best, it was a hypothetical scenario which may have been discussed in the course of the meeting, but there was no actual offer made by her nor was any decision made by NAMA to refuse her offer. Indeed, Mr. Morrissey in his own affidavit used the phrase "should such an event arise"; clearly, this shows that, even on his version of the meeting, what was said was in relation to a hypothetical scenario.

143. In that sense, the case made by the plaintiffs in respect of an actual or threatened breach of various constitutional rights is not anchored in any factual situation which arises properly before the Court. As matters stand, the evidence before me is that NAMA refused the Bagnall proposal (which included as part of the package an offer of €830,000 in respect of the family home) and that NAMA refused that offer on the basis of advice it received from Lisney that this significantly undervalued the property. The question of how NAMA would respond if Mrs. Morrissey made an offer to purchase the property at an objectively reasonable market value did not arise, has not yet arisen and may never arise.

144. The Court should not proceed to decide constitutional issues in the absence of a concrete factual situation in which a consideration of the constitutional issues is necessary and appropriate. This is a well-established proposition of constitutional law. As a general rule, a plaintiff who seeks to impugn the constitutionality of legislation must demonstrate that he or she has suffered, or is about to suffer, a distinct loss, and the Court should not decide hypothetical questions of constitutional law. In the leading case of *Cahill v. Sutton* [1980] IR 269, O'Higgins C.J. stated (at pages 276-277):-

> "Where the person who questions the validity of a law can point to no right of his which has by reason of the alleged invalidity, been broken endangered or threatened, then, if nothing more can be advanced, the Courts should not entertain a question so raised. To do so would be to make of the Courts the happy hunting ground of the busy- body and the

crank. Worse still, it would result in a jurisdiction which ought to be prized as the citizens shield and protection, becoming debased and devalued."

At pp 282-283, Henchy J said:

> "On the contrary, the widely accepted practice of courts in other jurisdictions invested with comparable powers of reviewing legislation in the light of constitutional provisions, is to require the person challenging a particular legislative provision to show either that he has been personally affected injuriously by it or that he is in imminent danger of becoming the victim of it. This general rule means that the challenger must adduce circumstances showing that the impugned provision is operating, or is poised to operate, in such a way as to deprive him personally of the benefit of a particular constitutional right. In that way each challenge is judicially assessed in the light of the application of the impugned provision to the challenger's own circumstances. This general, but not absolute, rule of judicial self-restraint has much to commend it. It ensures that normally the controversy will rest on facts which are referable primarily and specifically to the challenger, thus giving concreteness and first-hand reality to what might otherwise be an abstract or hypothetical legal argument. The resulting decision of the court will be either the allowance or the rejection of the challenge in so far as it is based on the facts adduced."

145. In *State (Lynch) v. Cooney* [1982] IR 337, Walsh J. pointed out that the question of standing cannot be detached from the facts of the case (at page 369):

> "The question of whether a person has sufficient interest or not must depend upon the circumstances of every particular case. In each such case the question of sufficient interest is a mixed question of fact and law which must be decided upon legal principles but, it should be added, *there is greater importance is to be attached to the facts because it is only by an examination of the facts that the Court can come to a decision as to whether there is a sufficient interest in the matter to which the application relates*. In so far as it may be thought that such a matter can be deemed to be a question of practice rather than of substantive law it is sufficient to point out that the Rules of the Superior Courts make no reference whatever to this subject. However, such rules as do exist, or appear to exist, regarding what is "sufficient interest" for the purpose of applying for certiorari or a declaratory order are judge-made rules and as such can be changed and altered by judges. More importantly they must be flexible so as to be individually applicable to the particular facts of any given case. Such a question cannot be regarded as a preliminary point unless there is an admission of all the facts necessary to determine the issue. In the absence of any admission in any such case where the point is raised it is necessary for the Court to enter into a sufficient examination of the facts and having heard them to decide whether or not a sufficient interest has been established. In so far as assistance can be got from the decided cases it will be seen that in all of the cases the circumstances of each case decided the question." (emphasis added)

146. In *A v. Governor of Arbour Hill Prison* [2006] 4 IR 88, Hardiman J. said that an applicant "cannot seek to attack the Section on a general or hypothetical basis … he is confined to the actual facts of his case and cannot make up others which would suit him better." He added:

> "The *jus tertii* rule is a very necessary regulation of *locus standi* - standing to sue. It prevents the proliferation of litigation and the expense and uncertainty it causes by requiring that each litigant must show that on the facts of his situation he is personally affected by the law he challenges. It prevents necessary and important laws from being struck down on a purely hypothetical supposition which may never arise in real life and avoids the tax payer having to fund the holding of pointless moots. Once a declaration of inconsistency or invalidity is made, however, its effect appears to me to be, necessarily, universal." (emphasis added)

147. I therefore refuse all the reliefs sought in respect of the family home at 36 Palmerston Road, Dublin 6 on the basis that the legal arguments are premised upon a factual situation which has not arisen; there was no offer by Mrs. Morrissey to purchase the family home and there was no refusal to allow her to purchase it because she was the wife of a debtor whose loans had been taken over by NAMA. What was refused by NAMA was a package offer from a third party investor (Bagnall) which had valued the family home well below what NAMA had been advised by Lisney it was worth. If the alleged comment was made, it can only, in those circumstances, have amounted to a single comment in the course of a meeting in respect of a hypothetical situation which had not yet arisen.

3. Miscellaneous Issues

148. In Part XII of the lengthy statement of claim, it was pleaded that INBS (or certain of its senior managers, servants or agents) had, during the currency of the loans, conducted its business in an unlawful manner, and intentionally, recklessly and negligently conducted its business in such a manner as to foreseeably damage the financial security of the plaintiff and of the family home. This, it was pleaded, was a fundamental breach which entitled the second named plaintiff to repudiate any contract which forms part of the bank assets acquired by NAMA and meant that the acquisition was a void or nullity. This type of argument became a common one on behalf of debtors during the years following the banking collapse in 2008 but it has never been accepted by the courts. No authority was cited in favour of the propositions pleaded on behalf of the plaintiffs in this regard, which is hardly surprising. In the first place, there is no tort of reckless lending (see Charleton J. in *ICS Building Society v. Grant* [2010] IEHC 17). Secondly, the circumstances in which the illegal behaviour of one party to a contract results in the contract being rendered null and void are tightly circumscribed (see *Quinn v. IBRC (in special liquidation)* [2016] 1 IR 1). The plaintiffs have not attempted in any serious way to demonstrate that the evidential threshold in that regard has been reached.

149. In the circumstances, it is hardly necessary for the defendants to rely on s. 105 of the Act of 2009. I note that in a different set of proceedings brought by the second plaintiff in respect of loans from Anglo Irish Bank, similar arguments were made by him in respect of the conduct of officers of the Bank (see *Morrissey v. IBRC & ors* [2017] IECA 162). In that case, Kelly J. (as he then was) said to Mr. Morrissey that "trawling through the newspapers and picking up pieces of information about Mr. Fitzpatrick and his alleged activities and the Maple Ten and what other people in Anglo might have been up to can hardly provide any basis for defence when you have a contractual obligation with the bank…" This comment applies with even greater force in the present case insofar as Mr. Morrissey was seeking to rely on wrongdoing at *Anglo Irish Bank* to resist a debt originally incurred with an entirely separate institution, *INBS*. This absurdity reached a low-point in the proceedings before me when Mr. Morrissey sought to introduce newspaper articles and other materials concerning the conspiracy to defraud committed at Anglo Irish Bank on the 30th September, 2008. It is worth pausing to contemplate that Mr. Morrissey was seeking to rely on this event in late September 2008 to resist enforcement action in respect of a loan he had entered into *with INBS* (not Anglo) between *2004* and *2006* and in respect of which he was starting to default *as early as 2006*. The submission made up in audacity for what it lacked in legal substance.

150. I also have no hesitation in rejecting the claim that there was ministerial interference with NAMA in the carrying out of its statutory functions. I cannot discern anything improper from the evidence before me as to the manner in which the Minister, his

Advisory Committee or NAMA carried out their respective functions, either at a general level, or in respect of NAMA's conduct towards the second-named plaintiff specifically. The plaintiff set out a lengthy narrative at Part IX of his Statement of Claim, alleging that there was unauthorised ministerial commitment on behalf of NAMA, unauthorised interference with NAMA in respect of the disposal of properties in the purported interest of the Irish property market and unauthorised ministerial direction regarding the operation of a NAMA advisory group. Most of this concerned political events rather than matters properly within the parameters of a legal proceeding. Insofar as there is a role for the Court to ensure that a public body such as NAMA confines itself to its statutory functions without outside interference, I cannot see on the evidence before me that NAMA's decision to enforce in January 2014 was causally related to any improper conduct on the part of the Minister. In my view, its decision was directly related to its interactions with Mr. Morrissey over the previous three years and the content of his business plans and alternative proposals, with which it did not ultimately agree.

4. Constitutional challenges to certain provisions of the 2009 Act

151. Given the decisions I have reached in relation to various factual and legal issues as described above, the constitutional issues pleaded by the plaintiffs do not arise for consideration in these proceedings. As noted earlier, the authorities make it clear that the Court should not address constitutional issues unless it is necessary to do so and, in my view, it is not necessary to do so in this case for the reasons set out above.

Conclusion

152. I accordingly propose to refuse all reliefs sought by the plaintiffs in their plenary action, and to grant the reliefs sought by the first and second named defendants in their counterclaim.