Neutral Citation [2013] IEHC 121

THE HIGH COURT

COMMERCIAL

[2012 No. 3733 S]

[2013 No. 6 COM]

BETWEEN

NATIONAL ASSET LOAN MANAGEMENT LIMITED

PLAINTIFF

AND

DAVID CULLEN

DEFENDANT

JUDGMENT of Mr. Justice Kelly delivered on the 22nd day of March, 2013

Introduction

1. In this action, the plaintiff seeks to recover judgment for a sum in excess of €29m against the defendant. The monies are alleged to be due on foot of a number of loan facilities which were advanced to the defendant by the Bank of Ireland (the Bank) between 1996 and 2010. These facilities were allegedly acquired by the plaintiff in 2010 pursuant to Part 6 of the National Asset Management Agency Act 2009 (the Act).

2. On this application for summary judgment it is notable that the defendant has not denied that these monies were advanced to him by the Bank pursuant to the relevant facility letters. His defence consists of a series of legal objections to the plaintiff's entitlement to summary judgment. He contends that he has identified issues which would warrant the court refusing such judgment and adjourning the action to plenary hearing. Before considering these objections, I ought to refer to the test which has to be applied by the court on applications of this sort.

Summary Judgment Test

3. The appropriate test was succinctly formulated by Hardiman J. in *Aer Rianta c.p.t. v. Ryanair Limited* [2001] 4 I.R. 607 in the following terms:-

> *"In my view, the fundamental questions to be posed on an application such as this remain: is it 'very clear' that the defendant has no case? Is there either no issue to be tried or only issues which are simple and easily determined? Do the defendant's affidavits fail to disclose even an arguable defence?"*

4. Subsequently, McKechnie J. in this Court *in Harrisrange Limited v. Duncan* [2003] 4 I.R. 1, set forth a series of issues for consideration in applications of this type. He, inter alia, said:-

> *"(i) the power to grant summary judgment should be exercised with discernible caution;*
>
> *(ii) in deciding upon this issue the court should look at the entirety of the situation and consider the particular facts of each individual case, there being several ways in which this may best be done;*
>
> *(iii) in so doing the court should assess not only the defendant's response, but also in the context of that response, the cogency of the evidence adduced on behalf of the plaintiff, being mindful at all times of the unavoidable limitations which are inherent on any conflicting affidavit evidence;*
>
> *(iv) where truly there are no issues or issues of simplicity only or issues easily determinable, then this procedure is suitable for use;*
>
> *(v) where however, there are issues of fact which, in themselves, are material to success or failure, then their resolution is unsuitable for this procedure;*
>
> *(vi) where there are issues of law, this summary process may be appropriate but only so if it is clear that fuller argument and greater thought is evidently not required for a better determination of such issues;…."*

5. In *Chadwicks Limited v. P. Byrne Roofing Limited* [2005] IEHC 47, Clarke J. specifically recognised that matters of law could be determined on a hearing for summary judgment. He said:-

> *"Where the defence, at least in part, depends on an issue of law then it is a matter for the discretion of the court to determine whether that issue should be tried on the summary motion or remitted for further consideration at plenary hearing dependant, in the main, or whether the issue is sufficiently nett or straightforward to be easily determined within the confines of a summary judgment motion."*

6. That proposition was also recognised by the Supreme Court in *Dankse Bank A/S trading as National Irish Bank v. Durkan New Homes [*2010] IESC 22, where Denham J. made it clear that the court may resolve questions of law on the hearing of an application for summary judgment but that there was no obligation on it so to do. The test at all times remains whether the defendant has established an arguable defence.

The Defences
7. In the third paragraph of his second affidavit, the defendant outlined his defences to the plaintiff's application for summary judgment. They were the same defences outlined in his written submissions and were expanded upon to some extent by his counsel during the course of the hearing. The defences are as follows:-

> (i) an argument that the plaintiff lacks standing to maintain these proceedings;
>
> (ii) an argument that the facilities are not "eligible bank assets" within the meaning of the Act;
>
> (iii) an allegation that the defendant was provided with minimal opportunity of making representations to the Bank prior to the transfer of his loan facilities and was not given the opportunity to repurchase the loan facilities; and
>
> (iv) an argument that the evidence of Mr. Malbasha, who swore the principal grounding affidavit for the plaintiff, is inadmissible.

8. I will consider each of these defences. I will deal with the last one first since the application for judgment must fail if there is no admissible evidence before me. In order to deal with this point I must assume that the other points do not raise an arguable defence. I will of course return to them and deal with them in due course.

Mr. Malbasha's Evidence
9. Mr. Peter Malbasha swore the principal and a number of supplemental affidavits in support of this application for judgment.

10. He is an officer of the National Treasury Management Agency assigned to the National Assets Management Agency as an asset recovery manager. In his affidavits he made it clear that he swore them on the plaintiff's behalf and with its authority. He did so from facts within his own knowledge, save where otherwise appeared and where so appearing he believed those facts to be true.

11. The defendant contends, by reference to a decision of Peart J. in *Bank of Scotland Plc v. Stapleton* [2012] IEHC 549, that Mr. Malbasha's evidence is inadmissible. In that case, Peart J. had to address the ability of an employee of a company called Certus to give evidence on behalf of Bank of Scotland Plc of the defendant's indebtedness to that bank. Certus was a company to which Bank of Scotland Plc had outsourced the management of its loan portfolio after a transfer of assets and liabilities from Bank of Scotland Ireland to Bank of Scotland Plc. Peart J. held that the evidence of an employee of Certus was inadmissible. He took the view that the normal and well established rules of evidence could not be bent or relaxed in order to avoid Bank of Scotland Plc the trouble, inconvenience and expense of having to send one of its employees to prove facts necessary for the purpose of proceeding against a borrower. He said:-

> *"Where a bank needs to prove by sworn testimony the amount it is due by a defendant customer, that evidence must be provided by an officer or partner of the bank– in other words an employee of the bank itself, and not some person employed by some other company to whom the task of collecting the debt has been outsourced for whatever reason. To allow otherwise would be akin to a foreign bank engaging a solicitor here to collect the debt, and that solicitor coming to court and giving evidence as to the amount due to the bank, having been authorised to do so by the bank. The evidence is necessarily hearsay and inadmissible. It offends first principles, and in my view there is no basis in law for permitting it."*

12. That case has no application in these proceedings. The facilities in the present case (for the purpose of deciding this point) are owned by the plaintiff (having been transferred to it) and Mr. Malbasha is an officer of the plaintiff. The fact that the instant facilities were originally advanced by the Bank does not preclude the current owner of them from providing evidence in support of its action seeking to recover judgment on foot of them. There is no comparison with the situation which obtained in *Stapleton's* case.

13. In any event, s. 191 of the Act deals with the issue. The section reads:-

> *"(1) In this section 'Act of 1879' means the Bankers' Books Evidence Act 1879.*
>
> *(2) Where –*
>
> > *(a) a copy of an entry in a bankers' book (within the meaning given by section 9(2) of the Act of 1879) falls to be produced in evidence,*
> >
> > *(b) the book is in the custody or under the control of NAMA or a NAMA group entity, and*
> >
> > *(c) an officer of NAMA or a NAMA group entity gives evidence (orally or by affidavit) that –*
> >
> > > *(i) he or she truly believes that the book or record was kept in the ordinary course of the bank's business, and*
> > >
> > > *(ii) the book is in the custody or under the control of NAMA or the NAMA group entity,*
>
> *then the requirement for proof in section 4 of the Act of 1879 shall be taken to have been satisfied.*
>
> *(3) The Act of 1879 has effect in relation to the books and records of NAMA or a NAMA group entity as if –*
>
> > *(a) NAMA or the NAMA group entity were a bank,*
> >
> > *(b) references to bankers' books in that Act were to the ordinary books and records of NAMA or the NAMA group entity, and*
> >
> > *(c) references in that Act to an officer of a bank were references to an officer of NAMA or the NAMA group entity."*

14. This section enables an officer of NAMA or a NAMA group entity such as the plaintiff to put in evidence copies of entries in bankers' books in the same way as an officer of a bank is entitled to do so under the Bankers' Books Evidence Act 1879. As Mr.

Malbasha has complied with the requirements of s. 191 there is, in my view, no question as to the admissibility of his evidence concerning the indebtedness of the defendant to the plaintiff.

15. Finally there has, in addition to the evidence of Mr. Malbasha, been placed before the court an affidavit of one Paula Ryan who is a senior manager in the Bank. She has sworn that the loan facilities, the subject matter of these proceedings, were originally advanced to the defendant by the Bank pursuant to the terms of the relevant facility letters exhibited by Mr. Malbasha. She swears that they were acquired by the plaintiff pursuant to the Act. She goes on to aver that she is personally familiar with certain of the facilities, having been the senior business manager in the Bank assigned to the defendant's loan accounts from 2006 up to approximately 2009. Having read the affidavits of Mr. Malbasha, she expresses herself as being satisfied, to the best of her knowledge, information and belief that the averments contained in those affidavits accurately reflect the Bank's dealings with the defendant and that the statements of account exhibited by Mr. Malbasha accurately reflect the Bank's electronic records of the defendant's loan accounts.

16. Thus, even if there was any substance to the point raised by the defendant (and I do not believe that there was) this affidavit evidence comprehensively defeats it.

17. I hold that this point is devoid of substance and thus cannot amount to an arguable defence to this claim.

Entitlement to Maintain Proceedings

18. In his written submissions the defendant says:-

> *"Although the defendant acknowledges that there may have been a transfer of his loan facilities from the Bank to NAMA, it is submitted that at this juncture there is no evidence whatsoever before this Court that the said loan facilities were subsequently transferred from NAMA to the plaintiff, a NAMA Group entity".*

Thus, it is argued, there is no entitlement on the part of the plaintiff to maintain this action.

19. This submission seems to suggest that the facilities in question must first be acquired by NAMA and then transferred to the plaintiff. The defendant says that there is no evidence of this two stage process.

20. I will examine the statutory scheme which applies to the transfer of eligible assets and then consider the evidence placed before the court in respect of the transfer of the instant facilities.

21. Section 87 of the Act deals with the preparation by NAMA of an acquisition schedule. Subsections (1) and (2) of that section read as follows:-

> *"(1) When NAMA has identified an eligible bank asset of a participating institution that NAMA proposes to acquire, and has determined the acquisition value of that asset, NAMA shall serve on the institution a schedule (referred to in this Act as an 'acquisition schedule').*
>
> *(2) NAMA may nominate a NAMA group entity as the entity that is to acquire a bank asset identified for acquisition." (My emphasis)*

22. Subsection (3) prescribes what is to be contained in an acquisition schedule.

23. The effect of service of such an acquisition schedule is provided for in s. 90 of the Act. Section 90(1) provides as follows:-

> *"(1) Subject to subsection (7), the service of an acquisition schedule on a participating institution in accordance with section 87 or 89 operates by virtue of this Act to effect the acquisition of each bank asset specified in the acquisition schedule by NAMA or the specified NAMA group entity, on the date of acquisition specified in the acquisition schedule as the date of acquisition of the bank asset, notwithstanding that the consideration for the acquisition has not been paid." (My emphasis)*

24. Chapter 2 of Part 6 of the Act deals with the effects of the acquisition of bank assets. Section 99 provides as follows:-

> *"(1) After NAMA or a NAMA group entity acquires a bank asset, and subject to section 101 and any exclusion of obligations and liabilities from the acquisition set out in the acquisition schedule –*
>
> *(a) NAMA and the NAMA group entity each have and may exercise all the rights and powers, and subject to this Act is bound by all of the obligations, of the participating institution from which the bank asset was acquired in relation to –*
>
> *(i) the bank asset,*
>
> *(ii) the debtor concerned and any guarantor, surety or other person concerned,*
>
> *(iii) any receiver, liquidator, or examiner concerned, and*
>
> *(iv) the Official Assignee in Bankruptcy,*
>
> *and*
>
> *(b) the participating institution ceases to have those rights and obligations except to any extent to which this Act provides otherwise.*
>
> *(2) The reference in subsection (1) to the rights, powers or obligations of a participating institution in relation to a bank asset is a reference to the rights, powers or obligations, as the case may be –*
>
> *(a) derived from the bank asset, and*
>
> *(b) arising under any law or in equity or by way of contract.*

(3) In particular, NAMA and the NAMA group entity may each -

(a) take any action, including court action, that the participating institution could have taken to protect, perfect or enforce any security, right, interest, obligation or liability,

(b) realise any security that the participating institution could have realised,

(c) call up any guarantee that the participating institution could have called up,

(d) participate to the same extent as the participating institution could have participated in any resolution, workout, restructuring, arrangement, reorganisation, scheme or insolvency proceeding in relation to the bank asset, and

(e) exercise any powers conferred by any document that forms part of the bank asset of reviewing or amending any term or condition of any part of the bank asset." (My emphasis)

25. Having set out the above statutory provisions, I now turn to the evidence relating to the transfer from the Bank to the plaintiff. In his second supplement affidavit, Mr. Malbasha avers that the facilities were acquired by the plaintiff in October 2010 and that the defendant was notified of that acquisition and was, on request, furnished with evidence of it. The acquisition was made by means of an acquisition schedule prepared on 28th October, 2010. He exhibited a copy of that schedule.

26. The schedule is headed:-

"National Asset Management Agency Act 2009

Acquisition Schedule"

The relevant part of it reads as follows:-

"This instrument is made on 28th October, 2010, by the National Asset Management Agency, a statutory corporation established pursuant to the Act (NAMA), National Asset Loan Management Limited, a company incorporated in Ireland (Registered No. 480246) (the transferee) and the participating institutions in respect of each designated bank asset described herein (together the designated 'bank assets' which shall exclude the excluded obligations).

This instrument is an acquisition schedule under s. 87 of the Act and in accordance with the ss. 90 and 91 of the Act, the transferee acquires each of the designated bank assets on and subject to, and with the benefit of, the Act and the terms and conditions set out in this instrument."

27. In the title to the schedule, the participating institutions are identified as, *inter alia*, the Bank.

28. For understandable reasons the schedule which was exhibited in copy form in Mr. Malbasha's affidavit was redacted so as to exclude the identity of other borrowers who were affected by it. In the unredacted part it is quite clear that the schedule sought to transfer the defendant's assets pursuant to the statutory provisions.

29. It is to be noted that the instrument was made both by NAMA and the plaintiff in these proceedings and in its terms the plaintiff is identified as the transferee.

30. The acquisition schedule conforms precisely with the terms of the statutory provisions which I have quoted. Those provisions provide for a transfer directly to the plaintiff. The plaintiff was identified as the transferee under the acquisition schedule. On the evidence before me, the acquisition was served in accordance with the statutory provisions and the effect of that was that the plaintiff acquired each of the bank assets specified in the schedule.

31. There was also an adjusted valuation schedule dated 2nd June, 2011, which was also put in evidence before me. It was supplementary to the 2010 schedule. While it varied aspects of the 2010 acquisition schedule, such as the values attributed by the plaintiff to the assets contained in it, it did not alter the fact that the facilities were acquired by the plaintiff under the 2010 schedule.

32. There was also put in evidence before the court a certificate dated 6th February, 2013, issued pursuant to s. 108 of the Act.

33. That section reads:-

"(1) NAMA or a NAMA group entity may certify under its seal or common seal, as the case requires, that NAMA or the NAMA group entity holds a bank asset specified in the certificate.

(2) A document purporting to be a certificate issued in accordance with subsection (1) –

(a) shall be taken to be such a certificate, and to have been certified under the seal of NAMA or the NAMA group entity, as the case may be, unless the contrary is proved, and

(b) is conclusive as to the matters set out in it." (My emphasis)

34. The certificate in question reads as follows:-

"National Asset Management Agency Act 2009

(the Act)

Certificate pursuant to s. 108 of the Act

Pursuant to s. 108 of the Act, National Asset Loan Management Limited (a NAMA Group entity under the Act) hereby certifies that the bank assets (as defined in the Act) arising from the credit facilities by the Governor and Company of Bank of Ireland to David Cullen dated 16th October 2002 (renewed on 7 July 2006, 18 July 2007, 30 June, 2010 and 22 July 2010) for the amount of €160,000; 16 October, 2002 for the amount of €12,650,000; 16 October 2002 for the amount of €100,000; 18 July 2007 for the amount of €10,000,000; and 18 March 2008 for the amount of €5,000,000 (and which include the credit facilities, any security relating to such credit facilities, every other right arising directly or indirectly in connection with such credit facilities, every other asset owned by a participating institution, and any other interest in the bank assets) have transferred to it on 28 October 2010 in accordance with Part 6 of the Act and that accordingly that the assets are held by National Asset Loan Management as at the date hereof:-

Dated 6 February 2013

Present when the common seal of National Asset Loan Management Limited was affixed hereto."

35. The seal is authenticated by two signatures, one of Mr. Brendan Smyth and the other Mr. Alan Stewart and the document is marked as approved for sealing.

36. Two objections were raised concerning this certificate. First, it was alleged by the defendant's counsel that the document was defective because it did not contain a seal. This was not a point which had been raised or notified to the plaintiff until the defendant's counsel got to his feet. The document furnished to the defendant and indeed to the court by way of exhibit was a photostat copy of the original certificate. I asked for the original certificate to be produced before the court and it was. It contained an impressed seal which, of course, did not photocopy since it was merely impressed on the paper. This original certificate was then furnished to counsel for the defendant who, after some hesitation, finally admitted that the certificate was indeed validly sealed. Accordingly there was nothing to this point.

37. The second objection was that the certificate is dated 6th February, 2013. Counsel argued that as these proceedings commenced in 2012, the certificate could not, as he put it, "*retrospectively invest the existing plaintiff with the jurisdiction to bring the claim*". That submission demonstrates a fundamental misunderstanding of the certificate. The certificate under the terms of s. 108 is conclusive proof of what is set out in it. The contents of the certificate certify that on 28th October, 2010, the relevant transfer of the defendant's assets to the plaintiff took place. The date of the certificate is not relevant to the transfer which was effected on 28th October, 2010. There is thus, in my view, no deficiency in this certificate and both of the points which are taken in respect of it are without substance.

38. This s. 108 certificate is merely a method of proving what it certifies. Even without it, the transfer has been proven to have effected the transfer on 28th October, 2010.

39. I hold that the points made concerning the plaintiff's entitlement to bring these proceedings are devoid of merit. There is no issue which requires to be dealt with by a plenary hearing.

Eligible Bank Assets

40. The defendant contends that the loan facilities in suit are not eligible bank assets within the meaning of s. 69 of the Act.

41. Section 69 of the Act provides at subsection (1) that the Minister for Finance may prescribe classes of bank assets as eligible bank assets. As is clear from the provisions of s. 87, only eligible bank assets can be the subject of an acquisition schedule.

42. The Minister for Finance prescribed certain classes of bank assets as eligible bank assets in the National Asset Management Agency (Designation of Eligible Bank Assets) Regulations 2009 (the Regulations).

43. The classes of bank assets so prescribed by the Minister include the following which are to found at Regulation 2(a):-

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

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

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

44. Regulation 2(c) adds the following:-

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

45. The definition of development land is to be found at s. 4 of the Act. It provides:-

"'development land' means land wherever situated (regardless of its zoning or its status under the Planning and Development Acts 2000 to 2007 or any other enactment or applicable law) –

(a) in, on, over or under which works or structures were or are to be constructed, or

(b) where it was intended to make a material change in the use of the land, that was intended to be sold or otherwise exploited."

46. The effect of these provisions, insofar as they are relevant to this case, demonstrates that a loan facility is an eligible bank asset for one of three reasons. Either the facility was provided wholly or partly for the purpose of purchasing or developing development land, or the security for the facility (regardless of its purpose) includes development land or the borrower is a person to whom such facilities have been provided, even if the loan facility in question was not, itself, provided in connection with, or secured against, development land.

47. The relevant facility letters under which the monies in suit were advanced to the defendant were dated as follows:-

23rd July, 1996

1st October, 1997

5th November, 1998

16th October, 2002

7th July, 2006

18th July, 2007

18th March, 2008

30th June, 2010

22nd July, 2010

48. The facility letter of 23rd July, 1996, was in respect of a sum of £1.5m and the purpose of the loan was to assist with the purchase of the freehold property known as 27, 28, 29, 30, Parliament Street and 2, Essex Gate. This was secured by a legal charge/mortgage over these properties.

49. The facility letter of 1st October, 1997, was in respect of four amounts totalling £4,150,000. These monies were advanced to, *inter alia*, finance working capital requirements of the licensed premises known as the Turk's Head Chophouse; the continuation of an existing £1.5m loan account plus an additional £500,000 to take over existing loan facilities in relation to the purchase of 9/10, Upper Exchange Street and 1, Essex Gate; to assist in the building works associated with the conversion of the upper floors of numbers 27 to 30, Parliament Street, and 2, Essex Gate to provide a conference room, lounge and 28 en suite bedrooms; to assist with the purchase of a 178-acre farm at Seafield, Ballymoney, County Wexford. This was secured by mortgages over the Essex Gate/Exchange Street premises and a legal charge over the Ballymoney lands.

50. The facility letter of 5th November, 1998, was for a sum of £7,150,000. The purpose of this was to finance the working capital requirements of the licensed premises known as the Turk's Head, the continuation of an existing loan in respect of the purchase of the Ballymoney premises and the part-financing of the construction of a hotel on the Parliament Street site. This was secured by legal charges of the Essex Gate/Exchange Street and Ballymoney premises and lands.

51. The facility letter of 16th October, 2002, was in respect of a sum of €12,650,000 by way of loan facility to renew an existing loan facility and restructure a commercial loan of €4,097,982 already drawn down in respect of the Ballymoney development, and also a sum of €150,000 by way of overdraft to fund working capital requirements. There was also a further sum of €100,000 by way of overdraft to fund occasional personal requirements. This was secured by the first legal charge over the Turks Head Chophouse in Parliament Street, Dublin.

52. The facility letter of 7th July, 2006, involves three sums. The first is for €12,439,891 by way of loan facility. The second is for €150,000 by way of an overdraft facility. The third is for €20m by way of development loan. The purpose of these facilities was to renew existing facilities and also to assist in the development of 64 apartments at Ballymoney, County Wexford, and a 108-bed hotel at the same address. This was secured by the charge on the Turks Head Chophouse and a first legal charge over the hotel and apartment site at Ballymoney.

53. The facility of 18th July, 2007, consisted of three sums. The first was of €12,464,361 by way of a loan facility. The second was for €150,000 by way of overdraft facility and the third was for €10m by way of a three-year bullet loan facility. The purpose of these was, in the case of the first two, the renewal of existing facilities. In the case of the third, it was to refinance the completed hotel facility at Seafield, Gorey, County Wexford. This was secured by, inter alia, the charges already held.

54. The facility of 18th March, 2008, was for €5m by way of a three-year bullet loan facility. Its purpose was to fund investments. It was secured by the pre-existing security which included the charges over the chophouse and Seafield Hotel, Ballymoney.

55. The letter of 30th June, 2010, notifies the defendant of a reduction in the overdraft limits to €40,000.

56. The letter of 22nd July, 2010, provides for an overdraft facility increase from €40,000 to €160,000. It was secured by pre-existing security.

57. The defendant, in his written submission, makes the following argument:

> *"The defendant concedes that although the 2009 Act permits non-land and development loans to be deemed to be land and developments [sic] loans on the basis that they are 'associated' with other loans which are in that category, the application of this statutory function [sic] must be treated with caution."*

58. He cites the observations of Hardiman J. in *Dellway Investment Ltd. & Ors. v. NAMA & Ors.* [2011] 4 I.R. 1, where that judge said:

> *"The effect of this rather artificial statutory scheme is that, in a case such as the present, a whole bundle of assets may fall within the definition of 'eligible bank assets', even though only a small proportion of the total (in fact about one-fortieth) are actually 'land and development' loans on the basis that the other 'L&D' liabilities are associated with them."*

The judge goes on to point to the statutory provisions and says:

> *"By reasons of the statutory provisions referred to above, a vast tranche of loans can be regarded as being in this category even though only a small proportion are actually of the relevant nature."*

There is no doubt but that the judge was correct as to the wide effects of the various statutory definitions.

59. It is submitted that the instant loans were made for multiple purposes and that some have nothing to do with development land. The later loan facilities it is said, only relate to the funding of existing businesses. These supercede the earlier ones and represent the only facilities now outstanding, it is said.

60. On any fair reading of the facility letters, it is clear that the bulk of the monies advanced by the Bank were for the purpose of purchasing and developing properties in both Temple Bar in Dublin and in County Wexford. The defendant argues that the facility letters of 18th July, 2007, and 18th March, 2008, supersede the earlier ones. Moreover, he says that the purpose of the facilities advanced under those letters do not relate to development land.

61. I am unable to agree with this. Each of the letters must be considered if one is to analyse the purpose for which monies were advanced. All have a connection one to another. For example, the defendant makes the point that the letter of 18th July, 2007, is expressed to be for the principal purpose of renewing existing facilities. But those existing facilities are quite clearly connected to development land. Moreover, these loans are secured on the lands by means of pre-existing charges over the Turks Head and Ballymoney premises.

62. It is quite clear that whether or not the purpose of each of the facilities is expressly related to development land, the breadth of the statutory definition of eligible bank assets captures all of the facilities. That is so because a facility is eligible where it is advanced in whole or in part in connection with development land and where, irrespective of its purpose, it is secured against development land. Once the defendant obtained loans meeting these criteria, then any other loan advanced to him is an eligible bank asset, irrespective of its purpose.

63. I am of opinion that no stateable defence has been demonstrated by the defendant by reference to this line of argument. The purposes for which the loans were advanced in the various facility letters and the security provided when construed in the light of the broad statutory definitions, places it beyond argument that the assets here were indeed eligible bank assets. Accordingly, I find against the defendant on this point also. The defendant also fails in respect of this argument on foot of another point which I deal with in the next part of this judgment.

Making Representations

64. The defendant contends that he was not given a sufficient opportunity to make representations prior to the acquisition of the facilities by the plaintiff.

65. The defendant attended a meeting with the Bank on 16th June, 2010. He was accompanied by his son, Stephen. He was certainly made aware at that meeting that his loans were to be acquired by NAMA or a NAMA group entity.

66. The defendant was given formal notification of the decision to acquire the facilities by a letter of 27th October, 2010 from Mr. John Walsh of the Bank. That letter, inter alia, stated:-

> *"We have recently been in contact with you regarding the possible transfer of your loan accounts to the National Asset Management Agency (NAMA).*
>
> *We can now confirm that your above loan accounts with Bank of Ireland group, have been designated as eligible assets, and will, therefore, transfer to NAMA, in accordance with the terms outlined in the National Asset Management Agency Act 2009 (the Act). This letter constitutes notice to you under section 96 of the Act."*

67. On 11th February, 2011, NAMA wrote to the defendant notifying him that the loans had indeed been acquired. That letter, *inter alia*, invited the defendant to contact named persons in NAMA in order to arrange a suitable time to meet. A further letter was written to him on 16th March, indicating that NAMA required the completion of a business plan to show how he might propose to repay the overall indebtedness. These letters were returned marked "*not called for*". On 7th September, 2011, the Bank wrote to the defendant on the plaintiff's behalf again requesting a business plan by 30th September, 2011, and setting out the manner in which that plan was to be prepared. A further letter was sent by the Bank on 4th October, 2011, extending the deadline for the business plan to 14th October, 2011.

68. On 17th October, 2011, the defendant's solicitors, Messrs. Wallis, wrote to the Bank. Much emphasis was placed on this letter during the course of the hearing and therefore I reproduce it here in full. The letter is addressed to Mr. Aidan Devenney of the Bank. It is captioned:-

> *"National Asset Management Agency Act 2009 (the Act) and Bank of Ireland – NAMA Unit*
>
> *Our Client: David Cullen."*

The letter reads:-

> *"Dear Sirs,*
>
> *We refer to the above and your letter of 7th September, 2011, addressed to our client Mr. Cullen. We fail to understand the nature of, and authority for, your role in relation to the National Asset Management Agency.*
>
> *Therefore the purpose of this letter is to request that you identify under what authority you operate pursuant to the provisions of the Act and in particular all necessary statutory and legislative provisions relating to your operation, powers and functions under the Act and the purported delegation of functions under the Act by the National Asset Management Agency to you.*
>
> *Needless to say our client will comply with all necessary statutory obligations arising under the Act if and when required to do so. We await your response."*

69. That letter does not raise any issue concerning the entitlement of NAMA to acquire the defendant's loans. It seeks information on how the Bank continued to deal with the loans given that they had already been acquired by the plaintiff.

70. That letter was responded to on 19th October, 2011, by a letter which set out the basis of the Bank's authority to act on the plaintiff's behalf. The letter also referred to previous correspondence in respect of which the defendant had failed to respond. By letter of 27th October, 2011, the defendant's solicitors wrote to the Bank seeking copies of letters already sent to the defendant.

These were furnished to the solicitors on 14th November, 2011.

71. On 21st November, 2011, the defendant furnished the Bank with an authorisation for Messrs. Horwath Bastow Charleton, Accountants, to deal with his affairs with the Bank. The Bank engaged in email correspondence with those accountants throughout January and February 2012. A business plan was submitted by the defendant in early February 2012 and following receipt of it, a meeting was arranged with the defendant to have it reviewed. That meeting took place on 15th February, 2012. The following day, the Bank requested further information and clarification from the accountants concerning the business plan. That was furnished on 24th February, 2012.

72. Following analysis of the business plan, the Bank wrote to the defendant on 16th May, 2012, indicating that the business plan was being rejected and it set out the basis for that rejection. In a separate letter on the same day, representations were invited from the defendant as to why enforcement action should not be taken against him. On 26th June, 2012, the Bank issued a formal letter of demand to the defendant on the plaintiff's behalf.

73. From the above facts it is clear that at no stage prior to the institution of these proceedings did the defendant raise any issue under this heading of complaint. Indeed, it was not until his affidavit of 17th January, 2013 that he sought to raise any objection to the acquisition of the assets. That was in excess of two years after the acquisition had taken place. Moreover, after an initial period of little activity on the defendant's part, he instructed accountants to deal with his affairs and to submit a business plan albeit one that was not acceptable.

74. He now seeks to make complaint about an alleged failure to permit him to make representations.

75. This line of argument can only be, in effect, a challenge to the decision to acquire the facilities. The Act limits the manner in which such a challenge may be brought and prescribes a time limit on such challenges.

76. Section 193(1) provides as follows:-

> *"(1) Leave shall not be granted for judicial review of a decision under this Act unless –*
>
> *(a) either –*
>
> *(i) the application for leave to seek judicial review is made to the Court within one month after the decision is notified to the person concerned, or*
>
> *(ii) the Court is satisfied that –*
>
> *(I) there are substantial reasons why the application was not made within that period, and*
>
> *(II) it is just, in all the circumstances, to grant leave, having regard to the interests of other affected persons and the public interest,*
>
> *and*
>
> *(b) the Court is satisfied that the application raises a substantial issue for the Court's determination."*

77. That section was considered by Charleton J. in *NAMA v. Barden* [2013] IEHC 32. That case also concerned an application for summary judgment. One of the defences raised by the defendant was that the acquisition of loans by NAMA was unlawful. Charleton J. held that the defendant was precluded from raising that defence by virtue of section 193. While that issue did not arise in judicial review proceedings, but rather in a case similar to the present one, he nonetheless considered that the time limit applied. The judge had this to say in relation to a challenge to the acquisition of assets under the Act.

> *"Construing, therefore, section 193 within what seems to be its legislative context, both actions in respect of damages and judicial review are made possible under the Act. This action is not, however, an action for damages. The most that could be achieved by the defence that the assets of the defendant were wrongfully acquired by NAMA, is that the Court give leave to the defendant to defend his claim by remitting this action to plenary hearing. He claims that the plaintiff has no entitlement to enforce the debts against him because of an absence of legal entitlement due to wrongful acquisition. That plea is classically the invocation of a public law remedy. Despite it being generally possible to enforce public law rights through a plenary summons within the appropriate time limits, or again within the appropriate time limits through a counterclaim, it seems to me that section 193 has excluded that alternative procedure. No challenge to an action of the plaintiff by way of a public law remedy of certiorari or mandamus is possible except on the two conditions that are clearly laid out in that section. Firstly, an application for judicial review must be brought within a month of the relevant decision. Secondly, it is implicit that such an application must be brought to the High Court, a conclusion made explicit by the requirements that the judge hearing the application should not give leave to commence proceedings unless an applicant has 'a substantial issue for the Court's determination'. It would be easier to conclude that a plenary action is an alternative that is open to a party aggrieved by an administrative decision, where no limit is set on the discretion of the court hearing an application for leave to commence judicial review. The reality is, however, that unless the High Court decides that the case is substantial, no action by way of judicial review is mandated. Further, such a decision cannot be made by counsel signing a plenary summons. That is not their function under the Act of 2009 as it is expressly reserved to the High Court. That assessment enabling the commencement of a judicial review application is judicial in nature. It is not merely a matter of ethics at the Bar whereby a plenary summons should not be signed by counsel unless, on the facts that counsel are instructed, a stateable case is shown. Here the test is not that there should be a stateable case but that a substantial issue is raised. The requirement that the High Court come to the conclusion that an application should be founded on a substantial issue before leave to commence judicial review proceedings is granted renders the alternative of a plenary proceeding incompatible with the intention of the Oireachtas."*

78. In addition, Charleton J. considered that the time limit prescribed in s. 193 applied to the defence raised in Barden's case. He said:-

> *"The time limit for the commencement of proceedings set out in the Act of 2009 would apply to both a judicial review application and to the issuing of a plenary summons. Voluminous correspondence ensued after the decision by NAMA on 8 September 2011 to acquire these loans. That correspondence was redolent with the skilled recitation of arguments*

that echoed back and forward in a way that could leave no doubt in the mind of anyone reading the exchanges that the defendant was fully aware that he was both aggrieved by the decision to acquire the loans and that this perceived wrong was expressed as a misapplication of public law by the plaintiff. A summary summons was issued by the plaintiff seeking recovery of the debt on 23 July 2012. Whatever might be said about the defendant not being obliged to seek judicial review until he had become aware of the relevant decision of the plaintiff and whatever might also be argued that a swift letter of complaint might allow an extension of time until a reply had been received clarifying why NAMA had chosen to act under its statutory powers, there is nothing before this Court whereby it would have any entitlement to extend the time for challenging that decision up to and including remitting this case to plenary hearing. Specifically, and using the statutory test set out in section 193 of the Act of 2009, no substantial reasons are given why the issue was not commenced in time and there is, furthermore, nothing whatever said about the interests of other affected persons or the public interest."

79. In my view, the reasoning of Charleton J. is directly applicable to this issue. Indeed, it is also applicable to the earlier question raised concerning the eligibility of the facilities for acquisition. I have, however, already dealt with that argument. But this line of reasoning is equally applicable to it and further demonstrates that that point is devoid of substance.

80. Returning to the present point, I am of opinion, for the reasons stated by Charleton J. in Barden's case, that this defence is without merit or substance. Indeed, the raising of it is inconsistent with the stance which has been taken to date by the defendant and his cooperation with the plaintiff by, *inter alia*, submitting a business plan. Unlike the *Barden* case, there was no correspondence expressing dissatisfaction with the acquisition of the loans. The opposite was the case. The letter of 17th October, 2011, from his solicitors acknowledged that the defendant would "*comply with all necessary statutory obligations arising under the Act if and when required to do so*". He thereafter engaged through his accountants in providing the business plan and made representations to NAMA when that plan was rejected.

81. Moreover there is no evidence put before me which would justify any extension of the period which is prescribed under s. 193 of the Act. Neither has evidence been adduced to deal with the other important issues identified in section 193 if time were to be extended.

82. As part and parcel of the complaint which he makes under this alleged line of defence, the defendant contends that he ought to have been given an opportunity to redeem or refinance the facilities or to acquire them on the same terms as the plaintiff. In this regard, he has not adduced any evidence to suggest that he would have been in a position to do any of those things. Indeed, the evidence is all the other way. The proposition was described by Mr. Malbasha in his second supplemental affidavit as being "*fanciful*". There, he points out that at meetings held between the Bank and the defendant in June and July 2010, it was clear that the defendant was suffering cash flow difficulties at the time. He was unable to provide additional security to the Bank. The business plan submitted by the defendant to NAMA in February 2012, indicated that his sole income at that time was €100,000 per annum of which he proposed to pay €50,000 in reduction of his debts to the plaintiff. The business plan contained an assertion that in September 2009, the defendant owed his wife a sum in excess of €10m and remained indebted to her, in February 2012, in the sum of approximately €2m, having transferred certain properties to her. On his own version of events, it is clear, the defendant would not have been able to refinance or redeem the facilities at the time they were acquired by the plaintiff. Indeed, it is interesting to note that the defendant's complaint concerning the plaintiff's alleged failure to facilitate a proposal for the refinancing or redeeming of the facilities was first made by him at the same time as he was commencing bankruptcy proceedings in the United Kingdom.

83. For all of these reasons, I am satisfied that this final line of defence is one which is not arguable and it is very clear that the defendant has no case.

Disposal

84. Using the test prescribed by Hardiman J. in *Aer Rianta cpt v. Ryanair Limited* [2001] 4 I.R. 607, I pose myself the question: is it very clear that the defendant has no case? I answer that in the affirmative in respect of each of the purported defences relied upon by him.

85. The plaintiff succeeds and there will be judgment against the defendant for the full amount claimed namely €29,129,405.90 together with continuing interest.