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THE HIGH COURT

COMMERCIAL

2012 NUMBER 1475S

BETWEEN:

NATIONAL ASSET LOAN MANAGEMENT LTD

PLAINTIFF

AND

DENNIS MCMAHON, PAUL O'BRIEN AND SÉAMUS DOWNES

DEFENDANTS

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2012 NUMBER 4456S

BETWEEN:

NATIONAL ASSET LOAN MANAGEMENT LTD

PLAINTIFF

AND

SÉAMUS DOWNES

DEFENDANT

Judgment of Mr Justice Charleton delivered on the 16th of January 2014

1. The plaintiff National Asset Loan Management Limited brings two distinct causes of action against the defendant Séamus Downes. He is now the only defendant left in these proceedings. Other proceedings have been compromised. All of the defendants were solicitors and were partners in a practice in Limerick up to the end of August 2006. Having acquired the debts and obligations of the defendants in both cases from AIB Bank, these proceedings are ostensibly brought by the plaintiff pursuant to its duty under the National Asset Management Agency Act 2009, s. 10, to obtain from same "the best achievable financial return for the State". All of the debts and obligations relate to property.

2. In the first of these proceedings, 2012 no. 1475S, the obligation of the defendant is as a primary debtor. The property in question was a set of six shops, two now amalgamated, at Castletroy in Limerick. The property was apparently built in the 1950s. The relevant letter of sanction is dated 22nd October, 2010. It lists the three defendants as the borrowers and advances the sum of €1,722,941.99. The security listed is a legal charge from the defendants dated 7th February, 2008 over the property (folio 67311). The repayment conditions are stated to be "[o]n demand at the pleasure of the bank, subject to refinancing/repayment in full by 01/03/2011. In the interim, interest to be provided for as it falls due [on] foot of your working account." The purpose of the loan was stated to be: "Continuation of existing facility originally sanctioned to fund the purchase of commercial property at Dublin Road, Castletroy, Limerick." The letter was signed by the defendants on 12th November, 2010. The arrangement in fact pursued by the defendants was to rent the premises and all of that income was paid to the bank. The return exceeded interest on the loan. The net result is that, despite the later appointment of a receiver, this debt has been reduced to about €1.3 million.

3. In second of these proceedings, 2012 no. 4456S, the defendant is pursued on a limited guarantee dated 13th June, 2003. The maximum amount recoverable under that guarantee is €5,840,000. The guarantee is in respect of Mount Kennett Investment Company. This was an investment vehicle used by the three solicitor partners in their role as property investors. It was an unlimited company, not carrying the advantage of limited liability, but being free of the obligation in consequence to file annual accounts in the Companies Registration Office and though on dissolution a deficit would have to be paid by the shareholders, any surplus would go to them as well. The three defendants in 2012 no 1475S were equal shareholders.

4. Multiple defences have been raised, including that sections 84 and 147 of the National Asset Management Agency Act 2009 are unconstitutional. In accordance with law, this will be dealt with after the other issues are disposed of. Since the preponderance of the evidence concerned the guarantee liability in 2012 no. 4456S, those issues are considered first.

The guarantee and construction

5. Mount Kennett Investment Company had a registered office at Mount Kennett House, Henry Street, Limerick. It had extensive borrowings. On 24th June, 2009, a loan letter was sent from AIB Bank to the company. That letter was also addressed to the three directors. Seven facilities are included. Firstly, an overdraft of €110,000 as working capital, required to be reviewed by 30th November 2009. Secondly, a loan extension of €1,419,000 to purchase 36 Pembroke Road, Ballsbridge, Dublin, required to be repaid over fifteen years by repayments of €25,000 per quarter. Thirdly, a loan of €1,075,143 to continue an existing facility to purchase a 3400-square-foot supermarket in Ashdown Village, Limerick, to be repaid by way of monthly capital and interest repayments of €7,084.58 until the

amount was cleared in full. Fourthly, continuation of a loan of €3,300,000 to fund the purchase of a ground floor and basement at Ormston House, Patrick Street, Limerick, to be reviewed or repaid by 30th November, 2009. Fifthly, continuation of an existing facility to fund the purchase of commercial shop units and overhead apartments at Father Russell Road, Limerick, to be repaid over seven years by way of monthly capital and interest repayments until the facility was cleared in full. Sixthly, the renewal of an existing facility to fund the purchase of industrial units at East Way Business Park in Limerick, to be reviewed or renewed by 30th November,2009. Lastly, the seventh facility was for €926,761 which continued an existing facility to sanction the purchase of three "section 50 apartments" at Courtbrack Avenue, Limerick. As it happens, none of these facilities were repaid and nor were they favourably reviewed. It is important to note that the security listed legal charges over the relevant properties and three equal guarantees, described as letters of guarantee in the document, for an amount of €5,840,000 "for the obligations of Mount Kennett Investment Company." The iteration of this amount is important in the context of the defence raised by the defendant.

6. The company had purchased these various properties over a number of years. On Father Russell Road the first drawdown was on 3rd April, 2001; on Eastway Business Park the first drawdown was on 14th May, 2002; on Courtbrack Avenue the first drawdown was on 12th September, 2003; on Ashdown Village the first drawdown was on 1st March, 2004; on Ormston House the first drawdown was an 25th January, 2005; and on Pembroke Road the first drawdown was on 25th April, 2005. The defendant claims to be excluded from liability under the guarantee on two properties; Bedford Row and Pembroke Road. On the first, there is a clear agreement by AIB Bank that his responsibility does not extend to this property; see letter from Christine Crowley of AIB Bank to Paul O'Brien of 4th January, 2007. As to the second, given the sometimes less than complete nature of the documentation received by the plaintiff from AIB Bank, and the evidence of the defendant, and the honest and balanced evidence from Tommy Lenahan of AIB Bank, it becomes probable that there was a similar exclusion. On the expiry of the credit facilities, however, the amount due on foot of the guarantee exceeded its limit. The work done by the plaintiff in settling the relevant accounts is both reliable and comprehensive. Any issue of the application of rents by the receiver depends upon the wording of the documentation underpinning the loans and guarantee. Even were it proved that sums of rent had been received by the plaintiff, and this has not been proved beyond a vague stab at an estimate upon which no court could rely, the proper application of funds depends upon the precise wording of whatever contracts the defendant has entered into. This calls for a comment.

Contracts and proof

7. The decade prior to 2008 in Ireland was characterised by the movement of capital and business expertise from the productive economy to speculation on property prices. During that decade and since, property prices were excluded from the index of inflation. That may be questioned since rising property prices have not been demonstrated to assist the economy. People buy houses and apartments to live in and businesses buy and rent premises. Monthly rent or repayments are a definite part of expenditure of business and families. There have been cases where the banks, who were lending money unwisely to fuel the property inflation that has been so destructive of Ireland's stability, were less than careful in the documentation of credit facilities. In the absence of written contracts that reflect the agreement of parties to loan transactions, courts will be left at large to attempt to construe on oral evidence as to what obligations were entered into, or how these were qualified, or whether the expectations of the parties translated into legal obligations. In this regard, banking transactions are no different to any other form of commercial contract. Where parties do not reduce their agreements to writing, experience has shown that the result is that anything may be alleged and anything may be denied and that the attempts to solidify by way of competing testimony over many days as to what the contract probably was will be a far less satisfactory solution than if the obligations had been written down. In consequence, the experience of the common law has been directed towards respect for written documents that are assented to by parties to a contract. Hence, the parole evidence rule will tend towards the exclusion of oral collateral obligations where the ostensible circumstance is of a finalised written contract to cover all mutual responsibilities. Contract terms will be given a plain meaning, or a specialist technical meaning where that is appropriate, and will be construed by the courts in such a way as to give a commonsense result that reflects the intention of the parties to do business with each other. The factual matrix within which a contract occurs can influence how the rights and obligations of the parties are to be seen; but this background cannot be allowed to overwhelm the plain colours of what those contracting agreed to. Often contracts turn out to be unwise. The law never looks to the adequacy of the bargain unless there has been undue influence or such improvidence as will allow, in those rare cases, intervention after the fact into a bargain that the parties believed to be to their mutual advantage at the time they signed the contract. Courts cannot later substitute what would seem like a fair rent or a fair return for services or goods were the parties have agreed otherwise. Certainly, times change and the false optimism of 2003 has been shown to be utterly hollow a decade later. As a matter of law, that does not matter: for just as the parties could not look forward nor does the law enable the courts to look backward. It would be unfair were this to be possible since then parties contracting today would never know in the future how their obligations might be altered by a judge looking askance at what they had agreed. Parties enter into contracts because one of them has something to offer and the other has something to gain. The law leaves it to them to settle the final bargain through give-and-take. The process of objective negotiation is to be respected. It will, therefore, be rare for a court to be enabled to say that a contract is so improvident as to require intervention or that it is not the deed of the defendant; the defence of *non est factum*. This defence depends on extraordinary circumstances being present whereby it may be said that the defendant exercised reasonable care in entering into the contract which was understood to be, and was, of a radically different nature to that expected. Similarly, while tortious misrepresentations are often pleaded in the context of contracts, the modern tendency has been to give effect to a written document that ostensibly was designed to reflect the complete intentions of the parties. Often contracts contain just such a provision; this contract contains the entire agreement of the parties, or some such words. In many instances it is hard to see why any such provision is needed. For these reasons, and based on sound precedent, the law therefore will look to a written contract in preference to anything else; and often exclusively there.

8. It follows that the primary port of call as to the issues in this guarantee is the written document of 13th June, 2003. The first defence offered by the defendant is that he never entered into that guarantee and he blames misconduct by officials of AIB Bank.

The blank guarantee

9. The guarantee occurred within a particular context. The facility letter of 12th June, 2003 addressed to the company is now missing. The defendant has given credible evidence, which has not been contradicted by the witnesses from AIB Bank, that the purpose of the loan was the purchase of shares in one of the McInerney construction-related enterprises. The amount involved was €3 million. Therefore the guarantee, the defendant has testified, was for that purpose and that purpose alone. While he has claimed that this latest investment came against a background of earlier investments in property, these were not to be included in the guarantee: the guarantee was to be limited to €3 million and not the €5,840,000 on its face. AIB Bank organised a sleight of hand, the defendant alleges: the guarantee was signed with the limit deliberately left blank and in consequence officials of AIB Bank inserted the incorrect figure later, effectively to suit themselves. It is impossible to accept this.

10. Tommy Lenahan who was the senior manager with AIB Bank in Limerick testified that at the time of the guarantee, the company had an existing exposure to property investments in the sum of €2.9 million and that with the new loan requiring security, he wrote the relevant figures on the guarantee in digits and in words and issued the document to the defendant for signature. He simply said that he would not have issued a blank guarantee and did not. The defendant reasoned that as the existing exposure for €2.9 million was for property, then on a seemingly endless upward trend, that no guarantee had ever been sought by AIB Bank; on the other

hand, as shares were an uncertain investment, it was only in respect of these shares that a guarantee was sought. When, however, these proceedings were commenced by plenary summons dated the 28th November, 2012, the defendant moved to have the case admitted to the commercial list and, in that regard, swore an affidavit dated 5th December, 2012. This diminishes the weight that can be attached to any testimony of the defendant by virtue of its stark contradiction of the case made. While the evidence of Tommy Lenahan was considered and logical, it is understandable that the defendant came across throughout every aspect of his evidence as facing the weight of severe financial problems. In consequence, and understandably, he was confused. In that affidavit, he said by reference to the guarantee: "In June 2003, I was asked to provide a composite guarantee together with Dennis McMahon and Paul O'Brien in respect of borrowings of [Mount Kennett Investment Company] in the amount of €5,840,000 attached to various properties." That part of the defence must therefore be dismissed.

11. In addition, the defendant claims that the sum of money owed by the company is less than the sum guaranteed. There is no evidence to support that contention. Furthermore, it is not for the defendant in the context of the contract that he has entered into to decide what portions of receipts by the plaintiff in respect of the obligations which are guaranteed are set against particular property debts. The figures which it is possible to accept as of 5th November, 2013 are that: all sums in respect of Father Russell Road have been paid; on Eastway Business Park a sum of €1,407,248 is owing; on Courtbrack Avenue €884,369 is owing; on Ashdown €989,122 is owing; on the overdraft €3,834 is owing; on Ormston House €3,489,436 is owing; and that the total outstanding is €6,774,010. These figures are reliable and exceed the limit on the guarantee.

The guarantee obligations

12. In the guarantee dated 13th June, 2003, the name of the customer, meaning the principal creditor, is Mount Kennett Investment Company, and there are three guarantors; namely Paul O'Brien, Dennis McMahon and the defendant; the three former solicitor partners. Clause 20 thereof provides:

> Where this guarantee is executed by more than one individual the agreements and obligations on the Guarantor's part herein contained shall take effect as joint and several agreements and obligations and none of the Guarantors shall be released from liability hereunder by reason of this guarantee ceasing (by any means whatsoever) to be binding is a continuing security on any other Guarantor(s) and generally this guarantee shall operate not only as a joint and several guarantee by all of the Guarantors but also as a separate guarantee by each of them.

Clause 7 is also relevant and provides:

> This guarantee shall be in addition to and shall not be in any way prejudiced or affected by any collateral or other security now or hereafter held by the Bank for all or any part of the money is hereby guaranteed, nor shall such collateral or other security or any lien to which the Bank may otherwise be entitled or the liability of any person or persons not parties hereto for all any part of the money is hereby secured be in any wise prejudiced or affected by this present guarantee. The Bank shall have full power at its discretion to give time for payment to or make any arrangement with any such other person or persons without prejudice to this present guarantee or any liability hereunder. Without prejudice to the next following clause thereof all monies received by the Bank from the Guarantor or from the Customer or by any other person or persons liable to pay the same may be applied by the Bank to any account or item of account or to any transaction to which the same may be applicable as the Bank in its absolute discretion sees fit.

13. Throughout the course of the hearing, various figures were given as to the indebtedness of the other guarantors of Mount Kennett Investment Company. These ranged in the evidence of the defendant over a dizzying variety from €17 million to €70 million to €300 million. What matters to this issue, however, is the amount of debt of the company itself, and this is set out above as to the relevant obligations. Weight in terms of testimony does require mention of this issue. While noting that the confusion of the defendant renders his evidence untenable, this is not in any way a comment by the Court as to his honesty. It is clear that the defendant is a person of integrity; but it is also clear that faced as he is with the mountain of obligations generated by his former business, as opposed to professional, relationships. In consequence, he could gain no sure foothold to even begin to explain his position. Whereas an argument was advanced that the obligations of the other defendants did not rest pursuant to the guarantee on the defendant, that argument is clearly untenable. A similar observation must be made in relation to the claim that AIB Bank and the plaintiff did not properly divvy up and distribute the obligations of the company and the other guarantors appropriately. This is untenable. Clause 6 of the guarantee provides:

> The Bank shall be at liberty without obtaining any consent from the Guarantor and without thereby affecting its rights or the Guarantor's liability hereunder at any time:-
>
> (i) to determine, in large or vary any credit to the Customer;
>
> (ii) to vary, exchange, abstain from perfecting, release or allow the postponement of the priority of any securities (including guarantees) for or on account of the money is intended to be hereby secured or any part thereof and held which may hereafter be held by the Bank from the Customer or any other person (including any signatory of this guarantee and in respect of any obligation whatsoever including or any part of the liability hereunder by any such signatory);
>
> (iii) to renew bills and promissory notes in any manner;
>
> (iv) to compound with, give time for payment to, except compositions from and make any other arrangements with the Customer or any obligant on any bills, notes, obligations or securities whatsoever held one which may hereafter be held by the Bank for and on behalf of the Customer; and
>
> (v) to enforce in whatever order it thinks fit all rights to recover and all securities and guarantees (including this guarantee) for the above-mentioned liabilities of the Customer.

14. The Court has scoured the evidence of the defendant to see whether there is any way that a defence is mandated to the operation of these clear words. No such testimony exists in any reliable form. Furthermore, any argument that later securities somehow dispose of the relevant guarantee is also undermined by the clear obligations of the parties as therein set out. Clause 4 provides:

> If this guarantee is determined or called in by demand made by the Bank or ceases from any cause whatsoever to be binding is a continuing security, the Bank may open a new account or accounts with the Customer or any other person for whose liabilities this guarantee is available security; if the Bank does not open a new account it shall nevertheless be

> treated as if it had done so at the time of determination are calling in what the guarantee ceasing to be a continuing security and as from that time all payments made by the Bank shall be credited to or treated as having been credited to the new account and shall not operate to reduce the amount for which this guarantee is available security at that time.

15. One of the arguments advanced in this regard was in relation to the letter of sanction from AIB Bank dated 22nd October, 2010 in which the borrower is listed as Mount Kennett Investment Company and deals with seven relevant facilities in a similar manner to the letter of 24th June, 2009. The argument of the plaintiff is that this facility and the guarantee obligation due on foot on of it never came into effect due to a defect in signature. Whether there is agreement are not, it is clear from the text of the letter of sanction that it is not in substitution for prior guarantees and does not cancel these out. At one point, an argument was advanced to witnesses for the plaintiff and AIB Bank that in a separate set of proceedings judgment was obtained on foot of this letter against Paul O'Brien and Dennis McMahon. This submission did not help an already impenetrable defence. This did not happen. Judgment in that regard was pursuant to a concurrent summary summons issued on 20th March, 2012 and which specifically refers to the letter of sanction dated 24th June, 2009. That proceeding is 2012 no. 1027S. The plaintiff was the plaintiff in this action and the defendants were listed as Mount Kennett Investment Company, Jonathan Costello, Ruaraí Costello, Thomas Costello, Paul O'Brien, Dennis McMahon and John Costello. Somehow, in addition, an estoppel is supposed to emerge by reason of the absence of this defendant from those proceedings. More than that is required for an estoppel. The relevant letter provides: "[t]his Letter of Sanction is in replacement of and not in addition to all previous letters of Sanction to the Borrower". There is no provision whereby guarantees are cancelled or removed. It is claimed that in some way the demand made on foot of this guarantee, which was dated 25th September, 2012, was not valid. The reality is that clause 3.2 of the guarantee provides that save as previously determined by clause 3.1 thereof, the obligations between AIB Bank and the three guarantors can only be brought to an end by an agreement in writing to that effect. In that regard, the relevant clause provides:

> Without prejudice to the Bank's right of payment on demand hereunder this guarantee may be determined by the Guarantor and the Guarantor's obligations terminated hereunder by:-
>
> (i) giving six months notice in writing to the Bank of the Guarantor's desire to discontinue this guarantee and terminate the Guarantor's obligations hereunder and
>
> (ii) paying to the Bank:-
>
> (a) within seven days of the expiration of the aforesaid period of six calendar months the amount (if any) which as at the close of business on the last business day of the aforesaid period of six calendar months would have been due in accordance with the terms of this guarantee had payment of the same been demanded by the Bank on such day: and
>
> (b) within seven days of the same coming payable by the Customer the amount (if any) of all obligations whatsoever of the Customer to the Bank which were at the expiration of the said period of six calendar months future or contingent obligations arising out of the transactions entered into between the Customer and the Bank either before or after the giving of such notice.

16. Furthermore, the agreement was entered into by the defendant on foot of his request that monies would be made available to Mount Kennett Investment Company and in it, pursuant to clause 1, he agreed to pay and satisfy on demand all sums which then were, and which should in the future, be owing to AIB Bank on any account whatsoever whether in respect of Mount Kennett Investment Company or from that company jointly and severally with any other person or persons. It is clear that the capital due on foot of the loan far exceeds the limitation set out in the guarantee. The wording thereof establishes what the parties regarded as an appropriate bargain between them and there is no possibility of interference by the Court absent a tenable defence. It is clear that the clauses bind the defendant into the bargain to repay such monies as were and are owed by Mount Kennett Investment Company and which were not repaid by the primary debtor. In *Bank of Scotland PLC v. Fergus* [2012] IEHC 131 (Unreported, High Court, 30th March, 2012) Finlay Geoghegan J. proffered the test as to whether a guarantee obligation is objectively encompassed by the wording of a written clause. Paragraph 31 of her judgment follows established authority in that regard:

> The applicable principles are not in dispute. Counsel for Mr. Fergus relied upon the treatment of O'Donovan and Philips *The Modern Contract of Guarantee* English Edition (Sweet and Maxwell) of the circumstances in which a guarantee will be construed as encompassing future restructuring arrangements between the principal and the bank. At p. 309, they state:
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> > "The determination of whether or not the guarantee embraces the restructured facility will depend in each case on the precise scope of the guarantee and the effect of the subsequent contractual arrangements between principal debtor and creditor ..."
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> Considerable reference is then made to the decision of the Court of Appeal in *Triodos Bank N.V v. Dobbs* [2005] EWCA Civ. 630, and in particular the judgment of Longmore L.J. The facts of that case were that [the] guarantee at issue was given in respect of all monies due and owing to the bank "under or pursuant to" two specified loan agreements. Subsequently, there was a financial restructuring and the creditor and borrower entered into three new agreements. The Court of Appeal determined that the "replacement" loan agreements did not come within the terms of the guarantee. The reasoning turned on the facts of that case and the terms of the guarantee. O'Donovan and Philips, at p. 312, then state:
>
> > "Finally, the scope of liability of the original guarantee can be drafted in such a way as to encompass future agreements on substantially different terms. The usual 'all monies' clause is the obvious mechanism, or, somewhat more narrowly, the guarantee can be limited to any future loan agreement between creditor and borrower on any term whatsoever. In any event, it is clearly vital to avoid limiting the guarantee to specific and identified loan agreements (as in *Triodos Bank NV. v. Dobbs).*"
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> In my judgment, the guarantee of 1st June, 2006, when objectively construed in accordance with the words used is one which encompasses all future liabilities of the Company to the Bank on whatever account or agreement. It includes, in the terms used by O'Donovan and Philips, the usual "all monies" clause or analogous clauses.

17. In a similar way, the Court cannot be impressed by such evidence of the defendant as addresses his departure from the legal practice involving Paul O'Brien and Dennis McMahon, probably from August 2006, and the argument of non-involvement that thereafter claims to free the defendant of his obligations. In *Irish Bank Resolution Corporation v. Cambourne Investments Inc., Century City Limited and Peter Curistan* [2012] IEHC 262 (Unreported, High Court, 14th June 2012), this Court analysed the relevant law. In so far as a defence of that kind is raised, that analysis does not favour this defendant. That case also dealt with the alteration of the

obligations of the prime debtor without the knowledge of the guarantor, which can undermine the enforceability of a guarantee, and the issue of unilaterally applicable clauses in contracts. None of this assists in establishing a defence here.

18. On the evidence, there is no other vaguely tenable defence apart from that of estoppel.

Estoppel

19. A modern treatment of the law on estoppel, which takes into account the variations in the case law which have tended to make that defence more flexible and in accordance with an appropriate review of the fairness of the situation, is set out in *Snell's Equity*, 32nd Ed., (London, 2010) at para.12-009. In *Revenue Commissioners v Moroney* [1972] I.R. 372 at p. 381 Kenny J. adopted a formulation from the 26th edition of that work which, as can be seen, in its precision, some might claim rigidity, will tend to remove the defence from many situations where it perhaps ought in fairness to apply:

> Where by his words or conduct one party to a transaction makes the other a promise or assurance which is intended to affect the legal relations between them, and the other party acts upon it, altering his position to his detriment, the party making the promise or assurance will not be permitted to act inconsistently with it.

On the other hand, the modern formulation in Snell's Equity reads:

> Where by his words or conduct one party to a transaction freely makes to the other a clear and unequivocal promise or assurance which is intended to affect the legal relations between them (whether contractual or otherwise) or was reasonably understood by the other party to have that effect, and, before it is withdrawn, the other party acts upon it, altering his her position so that it would be inequitable to permit the first party to withdraw the promise, the party making the promise or assurance will not be permitted to act inconsistently with it.

20. Estoppel can arise pursuant to an oral or written representation, and that is the normal situation. It can also arise by virtue of an assumption, perhaps tacit, shared by parties. In that instance, however, there must be conduct which establishes an objective state of affairs whereby the party otherwise bound by the legal relations is placed in circumstances whereby it is understood that a new state of affairs governs the relations between the parties. This clearly requires some action or behaviour or representation by the party who is to be bound by the new state of affairs. People cannot just jump to conclusions that matters must be so, with no foundation in the behaviour of the party whose rights in law are to be estopped, and then claim what is in essence an altered state of obligation. Estoppel is not based on bare assumption. Estoppel is based either on representations or on situations of behaviour that, reasonably construed, clearly withdraw or alter the strictures of legal obligations in such a way that it would be unfair to later enforce these. Where the matter is one of representation, it should be easy to identify the legal term supposedly altered and the representation directed in this regard. Where it is a matter of both parties proceeding on the basis of a common understanding, the mutual convention of the parties may suffice as a foundation for estoppel. If it is so, it is because of that common understanding. In Treitel's *The Law of Contract*, 13th Ed. (London, 2011) at 3.094 the learned editor sets out the law thus:

> Estoppel by convention may arise where both parties to a transaction "act on an assumed state of fact or law, the assumption being either shared by both or made by one and acquiesced in by the other". The parties are then precluded from denying the truth of that assumption, if it would be unjust or "unconscionable" to allow them (or one of them) to go back on it. Such an estoppel differs from estoppel by representation and from promissory estoppel in that it does not depend on any "clear and unequivocal" representation or promise. It can arise where the assumption was based on a mistake spontaneously made by the party relying on it, and acquiesced in by the other party, though the common assumption of the parties, objectively assessed, must itself be "unambiguous and unequivocal".

21. In the current state of the development of the law, that is a good statement. In terms of the shared nature of the assumption of law or fact, the formulation is akin to, but not the same as, the defence in contract of unilateral mistake. Further, as to whether such a situation amounts to an unambiguous and unequivocal retreat from insistence on full legal rights is to be construed according to the perceptions of reasonable people. While the decision of the Supreme Court in *Courtney v. McCarthy* [2008] 2 I.R. 376 is sometimes described as an estoppel by convention, in that case there was in fact the clearest possible representation that legal rights were to be held in abeyance. The plaintiff agreed to sell a site in Ennis, County Clare to the defendant. The sale was due to close on a particular day but, on that day, the vendor's solicitor was out of town. An agreement was made between a colleague of the vendor's solicitor and the purchaser's solicitor to complete the sale on the following day. Later that day vendor's solicitor, returning from out of town, made an inquiry as to why the purchaser's solicitor had not turned up on the day designated by the contract for the closing: then the purchaser was told that the sale had been called off. The purchaser was granted an order of specific performance on the basis that where a party made, by words or conduct, a clear and unambiguous promise or assurance to another party which was intended to affect legal relations between them and was to be acted on accordingly, if such action was taken to the detriment of that party, the party giving the promise or assurance would be estopped from reverting to the previous legal relations between them. Geoghegan J. relied on the authority of *Amalgamated Property Co. v. Texas Bank* [1982] 1 Q.B. 84. At pages 389-390 he set out the law as follows:

> The case related to a bank guarantee given by a company, the validity of which was being disputed by the liquidator of that company. A question arose as to whether even if the guarantee was not valid an estoppel had arisen by virtue of the conduct of the company which precluded denial of the guarantee. Brandon L.J., though forming the view that the guarantee was in fact effective, went on to consider the estoppel question in the event that he was wrong. Two main arguments against the existence of the estoppel had been put forward in the High Court and the Court of Appeal. The first was that since the bank held its mistaken belief as a result of its own error alone and that the company had at most innocently acquiesced in that belief which it also held, there was no representation which could found an estoppel. The second argument was that the bank was seeking to use the estoppel not as a shield but as a sword and that that was not permitted by the law of estoppel. Brandon L.J. rejected both arguments. He expressed the view that the particular estoppel relied on was of the kind described in Spencer Bower and Turner, *Estoppel by Representation* (3rd ed., 1977), at pp. 157 to 160 as "estoppel by convention". He cited the relevant passage of that work as follows:
>
> > This form of estoppel is founded, not on a representation of fact made by a representor and believed by a representee, but on an agreed statement of facts the truth of which has been assumed, by the convention of the parties, as the basis of a transaction into which they are about to enter. When the parties have acted in their transaction upon the agreed assumption that a given state of facts is to be accepted between them as true, then as regards that transaction each will be estopped as against the other from questioning the truth of the statement of facts so assumed.
>
> In this particular case, both parties knew that the contract was lawfully rescinded and both parties accepted that that

was to remain the position subject only to the proviso that both would act on the artificial assumption that the contract was still alive and enforceable if the sale was completed on a particular date and time.

Brandon L.J. then dealt with the second argument which, as I have already pointed out, was an argument which featured heavily in this case and particularly in the High Court. Counsel for the plaintiff argued strongly that estoppel here was being used as a sword and not a shield. But this is what Brandon L.J. had to say in relation to this alleged principle at pp. 131 to 132 of *Amalgamated Property Co. v. Texas Bank* [1982] 1 Q.B. 84:

> In my view much of the language used in connection with these concepts is no more than a matter of semantics. Let me consider the present case and suppose that the bank had brought an action against the plaintiffs before they went into liquidation to recover moneys owed by A.N.P.P. to Portsoken. In the statement of claim in such an action the bank would have pleaded the contract of loan incorporating the guarantee, and averred that, on the true construction of the guarantee, the plaintiffs were bound to discharge the debt owed by A.N.P.P. to Portsoken. By their defence the plaintiffs would have pleaded that, on the true construction of the guarantee, the plaintiffs were only bound to discharge debts owed by A.N.P.P. to the bank, and not debts owed by A.N.P.P. to Portsoken. Then in their reply the bank would have pleaded that by reason of an estoppel arising from the matters discussed above, the plaintiffs were precluded from questioning the interpretation of the guarantee which both parties had, for the purpose of the transactions between them, assumed to be true.
>
> In this way the bank, while still in form using the estoppel as a shield, would in substance be founding a cause of action on it. This illustrates what I would regard as the true proposition of law, that, while a party cannot in terms found a cause of action on an estoppel, he may, as a result of being able to rely on an estoppel, succeed on a cause of action on which, without being able to rely on that estoppel, he would necessarily have failed. That, in my view, is, in substance, the situation of the bank in the present case.

As I have illustrated earlier in this judgment that is exactly the position which pertains in this case.

22. In contrast to a foundation resting on representation or behaviour of the party to be estopped from reliance on legal obligation, the case here is based on empty assumption. In no sense would it be reasonable to conclude on the evidence heard that a mutually binding and differing state of affairs had come into being and in alteration of the legal relationship between the parties. There is nothing to indicate to anyone that simply because one legal summons does not include a particular defendant that such defendant is released from his legal obligations. In addition, the defendant claims a lack of pursuit of him as an estoppel. This is entirely unconvincing as are the other pieces of happenstance pleaded in aid. The height of the defendant's case may be quoted from his evidence. The defendant was asked whether anybody from AIB Bank indicated to him that the bank was no longer relying on the 2003 guarantee. He replied:

> Paragraph 7, sorry, paragraph F on my witness statement, I have dealt with it: "My solicitor at the time… advised me that the facilities pursuant to the 2010 facility letter had been drawn down, and as a result is was no longer necessary for [my solicitors] to deal with AIB's request for a guarantee to be given by me. To the best of my knowledge, [my solicitors] and the solicitors for AIB ceased at that point.

23. Throughout the evidence on this important point, there is elaboration and detail as to what the essence of the defence being put up might be. Much of it is based upon the idea that the present solicitors for the plaintiff were previously working for the defendant and that a conflict of interest arose because they decided to later act for the plaintiff in respect of the issues upon which advice had been sought from them by the defendant. The evidence of the defendant is that advice had been sought from those solicitors on the very issues which found the claim of estoppel. Notwithstanding that, the defendant gave evidence unsupported by any evidence from his former solicitors. That is unsatisfactory. It is also unsatisfactory, if this happened, for any solicitor to jump from one client to another when the very issues upon which the clients need to be advised are in common. In a situation where a person's own solicitor advises him that a particular legal state of affairs exists, that person is capable of taking that advice or rejecting it. That is especially so in circumstances where the client is a solicitor himself. Advice is different to a representation and is different to a mutually organised state of affairs between parties to a particular legal obligation from which conclusions as to altered obligations can reasonably be drawn. If a person's solicitor advises that person that a guarantee is valid or invalid, the advice may be right or wrong, may be accepted and may be acted upon but the result of that advice cannot be charged against either the creditor or the principal debtor. It may be otherwise if there is communication between the creditor, as the party having the benefit of the guarantee, and the solicitor acting on behalf of the guarantor to the effect that an altered state of affairs that are less than the obligations and rights in the guarantee has come about. Any representation in alteration of legal rights only estopps the maker thereof. What is missing here is a representation from someone other than the defendant or his solicitor. In fact, that is entirely absent in this case. Any representation that was made arose from what the defendant had said his solicitor told him following, as he put it, a full review of the securities that were in place. That cannot give rise to an estoppel. The defendant is to be admired for the frankness of his evidence. In particular, the defendant made it clear that he assumed that such advice could not possibly have been given to him by his solicitor were it not the case that the solicitor had first checked with AIB Bank and received an assurance that established that advice as correct. That, again, and even at its height is not an estoppel. Any lawyer can review obligations under a set of securities and come to a conclusion that these are binding or are flawed in some way or have been altered by collateral obligations or, instead, are in full force and effect. The degree to which inventive argument can be constructed upon even the plainest of points, the extent to which even written contracts can be subject to argument in litigation and the widely differing interpretations of even a recorded telephone conversation that can be urged in litigation, illustrates that lawyers, like doctors, may differ. No one can rely on advice from their own lawyer as founding an estoppel. If a lawyer, as agent, receives a representation from the party to be estopped or his agent then that is a different matter; and that is what happened in *Courtney v McCarthy*. The rational of the law is plain. Insofar as there is a representation underpinning such advice, the party to be charged is entitled, under the hearsay rule, to proof of that from the person receiving the representation; the solicitor who supposedly was receiving the communication. That is also a communication against interest by a party to the case and thus an exception to the hearsay rule. What is needed in any form of estoppel is "a clear and unequivocal promise or assurance". While, perhaps, some authorities might take the approach that it is the unfairness of allowing the party with the legal rights to go back on their stated position, there must still be a stated representation or underlying shared circumstance giving rise to the other party, at a minimum reasonably, concluding that relevant legal rights have been set aside. The proof of any such alleged representation through words or cicrumstances is on the party seeking to rely on it; here, the defendant. Advice as to whether a document may have a particular legal effect from one's own solicitor is not like a representation from the solicitor acting on behalf of the party to be estopped, speaking as an agent and so not infringing the hearsay rule. There can, of course, be an estoppel that can arise based on the representation of the opposing party's solicitor that the contract will not be pursued in a particular respect. A mere assumption that before giving advice a solicitor must have checked the legal state of affairs

with the party entitled to the legal rights in question and must have been told that these were now altered is untenable. Advice is what you pay for in a legal context and representations that can set up an estoppel are declarations moving from the party with the legal rights that these are no longer to be enforced. When it comes to an assumed state of affairs, an assumption on its own is not sufficient unless there is proof that the assumption is shared by both sides or is made by one and acquiesced in by the other. In the context of estoppel by convention, for an estoppel to operate, acquiescence requires knowledge of the state of affairs, and therefore effective consent to any representation based on conduct. That is entirely missing in this case. Another argument of the defendant that an estoppel exists is based on the rate of interest applied to the account supporting the guarantee. But this is also untenable. The evidence from AIB Bank is clear that while a penal rate of interest was not applied to the loans which are underpinned by the guarantee analysed above, at the appropriate time when facilities were not taken up, an appropriate marking was put on the accounts.

24. A complaint is also made that in respect of specific performance proceedings, involving a company called Greenband Limited, that credit should have been given in relation to these accounts, and possibly in relation to Castletroy as well, for a sum of money recovered in lieu of purchase. The full set of heads of agreement entered into between the defendant and Paul O'Brien and Dennis McMahon have been produced to the Court. The agreement entered into between the three former partners in the legal practice is for the distribution as to 25% of the result of that case to the defendant. That is a matter, however, in respect of which neither the plaintiff nor AIB Bank had privity. The relevant clause provides:

> The parties have a contractual interest in the Showgrounds site, Clonmel, County Tipperary subject to a number of conditions in the following proportions: [Dennis McMahon] 25%; [Paul O'Brien] 50%; and [Séamus Downes] 25%. On completion of the purchase of the Showground site to [Dennis McMahon] and [Paul O'Brien] order to the nominee of [same], [Paul O'Brien] shall pay to [Séamus Downes] the sum of €200,000 for all his right, title and interest in the Showgrounds site at Clonmel. [Séamus Downes] shall be entitled also to one-third of the net proceeds of the case taken by the Nominee against [named party] and others seeking specific performance of a contract to purchase the site at Clonmel.

That defence cannot succeed.

Castletroy

25. In respect of the shops in Castletroy, the obligation alleged by the plaintiff against the defendant is as primary debtor. In answer, the defendant again makes an estoppel argument. This is, if anything, even thinner than the case advanced on the guarantee. The argument is that in the context of the acceptance by both the bank and the plaintiff of a loan which carries interest only, the repayment of capital constitutes a state of affairs giving rise to the conscious exploitation by one party of the assumption of the other. Complaints are also made of non-pursuit and of other factors on which extensive, but unclear, evidence has been given. Applying the law as set out above there is nothing upon which the Court can rely that gives rise to either an estoppel by representation or by convention.

26. On the primary debt, the sum lent was subject to a document entitled "The Bank's General Terms and Conditions Governing Business Lending". In addition, there was a mortgage over the property, incorporating the "AIB Mortgage Conditions" and the conditions of loan as set out in the letter of sanction dated 22nd October, 2010.

27. The mortgage itself is dated 7th February, 2008 and is entered into by all three borrowers; namely the defendant, Paul O'Brien and Dennis McMahon. The property is charged with the total debt. This is an aggregate of four factors as set out in clause 2.2:

> (a) all amounts payable by the Mortgagor in respect of any loans or credit of any nature made are granted by the Lender to the Mortgage or now or at any time in the future in whatever currency (including, without limitation, principal, interest, costs and expenses and all amounts payable by the Mortgagor under any letter of offer, loan agreement or contract involving an extension of credit of any nature made by the Lender to or with the Mortgagor now or at any time in the future), in each case, under terms which required the Mortgage or to provide or maintain this Mortgage security therefore; and
>
> (b) all amounts, liabilities, obligations (either actual or contingent) which the Mortgagor may owe to the Lender now or at any time in the future in whatever currency and whether on any current account or otherwise in any manner whatsoever as principal debtor, whether alone or jointly and severally or severally with any other person, in each case, under terms which require the Mortgagor or to provide or maintain this Mortgage security therefore;
>
> (c) all amounts, liabilities, obligations (either actual or contingent) which the Mortgage may owe to the Lender now or at any time in the future in whatever currency and in any manner whatsoever under any guarantee, indemnity or other contract of surety, whether alone or jointly and severally or severally with any other persons; and
>
> (d) all Expenses incurred by the Lender in accordance with the terms of this Mortgage on the basis of a complete, unlimited and unqualified indemnity to the Lender by the Mortgagor and all other amounts which the Mortgagor is liable for under this Mortgage.

28. The debts alleged against the other parties to the borrowing, on the defendant's own figures, have been set out previously as involving amounts of up to €300 million. This is significant in that the general conditions load the obligations of the other parties onto the defendant. While this may be regarded as unfortunate, it is what the defendant contracted as an obligation in consequence of obtaining the loan. Clause 3.1 thereof provides:

> Without prejudice to the generality of subclause 2.2 (a) hereinbefore contained or two or more persons constituted the Mortgagor their liability under the Mortgage shall include all monies, obligations and liabilities due owing or incurred by them jointly *inter se* (whether alone or jointly with any other person or persons and whether as principal or surety) and all monies, obligations and liabilities due owing or incurred by each of them (whether alone or jointly with any other person or persons including another or others of them and whether as principal or surety).

Clause 2.2 is an interpretation clause and provides as to subclause (a) thereof:

> Where two or more persons together constitute the Mortgagor the covenants and agreements on the part of the Mortgagor here and expressed or implied by law in the Mortgage shall be deeded to have been entered into jointly and severally by the said persons.

29. It is indeed the case, as the witnesses for both AIB Bank and the plaintiff agreed, that the small set of shops at Castletroy have been performing as a good investment asset and have been returning funds to the lender on a consistent basis. The investment in Castletroy can therefore be regarded, in accordance with banking nomenclature, as a performing loan. The defendant complains that a receiver has been appointed and that money has been wasted. There is no proof that money has been wasted. Insofar as figures have been mentioned in the course of testimony, the expenditure by the receiver seems reasonable. What cannot be discounted is this: if this loan had been backed up by a mortgage to the property, which is the usual situation in the majority of domestic lending for the purchase of family homes, then an argument could be advanced that the equity of redemption should remain with the defendant and that would be because the mortgage was returning funds to the lender and showed every prospect of repayment over a reasonable period. The Court neither is disposed to, nor can in this case, attempt any summary of the rules whereby the equity of redemption extends the protection of the courts to borrowers whose loans are meeting a reasonable expectation on the return appropriate to borrowing on property. It must be remembered, however, that while an inflationary situation gives rise to properties usually being worth more than the borrowing on their mortgage, the converse has been the case in this country since September, 2008. Those are the result of macroeconomic factors; itself a myriad of thousands of bad decisions. In terms of particular bargains, however, there is nothing to stop a bank lending more money than a property is worth, a situation typical in the decade up to that date, and there is also nothing whereby a mortgage deed in respect of several borrowers cannot be secured on a particular property, even if future liabilities may many times exceed the value of the property as of the date of charge. Perhaps codes of conduct, enforceable or not cannot be now decided, would currently prohibit lending beyond the value of security. That latter situation is clearly what applies here. The defendant has taken a personal interest in this performing loan and the property is both attractive and yielding a good return. The management of this property by the defendant has been excellent. But he is not alone. Three people are the borrowers and, on the mortgage, the total debt is not simply that of the defendant because the defendant, through the contract that he entered into in writing, authorised that the Castletroy premises would be charged with the debts of the other parties to the mortgage; namely Paul O'Brien and Dennis McMahon.

Notice of transfer

30. On 8th December, 2008, the mandate in respect of the O'Brien McMahon Downes solicitors' partnership at AIB Bank was changed so as to note the retirement of the defendant from the firm. Notwithstanding that, it is impossible to conclude that the defendant thereby became uninvolved in Mount Kennett Investment Company. The oral and written evidence simply does not support this. On 10th August, 2010, for instance, Paul O'Brien wrote to AIB Bank in relation to certain loans, noting that the relevant letter of sanction had been copied to the other two directors of the company. On 27th August, 2010, the defendant wrote to AIB Bank indicating clearly that he no longer had any interest in 36 Pembroke Road in Ballsbridge and that the letter of sanction which was then under negotiation required amendment. The letter was an indication in relation to the defendant, as he put it, "of my intention to accept the revised facility, insofar as it refers to me, once the corrected documentation issues". On 2nd December, 2010 it is apparent that solicitors had become involved whereby the defendant was seeking from AIB Bank a variation in the letter of sanction of 22nd October, 2010 to Mount Kennett Investment Company, not entered into as previously noted, so that the new amount of the guarantee would cap at €6,671,533.06 and would be "in substitution for and not in addition to all existing guarantees given by [the defendant] to the Bank in respect of the obligations of" the company. On 3rd November, 2010 Paul O'Brien wrote to the other two directors stating that the letter of sanction had lapsed. On 17th December, 2010 there was a final acquisition schedule by the National Assets Management Agency which covered the loans of the company and the three directors. Notice was given by the agency to the defendant in December, 2010. Any contrary evidence is not at all convincing and is improbable. In addition, that notice was repeated in January and it is highly likely that there was notice to the defendant, at the very least by email. Nor could that correspondence be expected to be ignored. The correspondence called for a business plan and gave contact numbers. On 1st March, 2011, Paul O'Brien wrote to the defendant indicating that he had engaged a firm of consultants, detailing plans in relation to the debt relating to co-borrowers and companies. On 16th May, 2011, the defendant wrote to this consultancy firm indicating that he did not believe that he was a qualified borrower within the meaning of the relevant legislation. He also protested that he was not consulted in relation to the treatment of relevant assets in the proposed business plan. He claimed unawareness, lack of consultation, dismissal of his rights and the unfairness of having the Castletroy loan included. On 18th May, 2011, Paul O'Brien again asked the defendant for involvement with the business plan. On 26th May, 2011, the defendant wrote directly to the agency protesting the transfer of the loans and his classification as an associated debtor. He also protested at not having received any correspondence from any bank regarding the transfer of the loans. On 27th May, 2011 the agency replied indicating that there was a guarantee in the amount of €5,840,000 for the debts of the company and that this debt had been transferred "as part of the Paul O'Brien 0852 connection." No judicial review proceedings were taken. In December, 2011 the plaintiffs pursued an enforcement plan; which they weirdly designated "Project Violin". There has been no discussion as to the viability of whatever business plan was submitted. It was clear, however, that the defendant was upset at the notion that he could be required by the plaintiff to submit a statement of affairs and demanded to know what statutory authority supported such a request. The answer is that there is none. Equally, when a person owes a huge amount of money to a bank and it asks for information, ignoring that request is less than sensible. It is also clear from the evidence presented in court, and from the relevant correspondence, that the defendant was aware of the transfer of the loans to the agency, of which the plaintiff is a branch, and that it was clear from the course of dealings, never mind from the text of the legal obligations entered into as set out above, that the loans had been transferred to the agency. He also made it clear that he had a problem with this. The defendant felt subjectively aggrieved at the transfer to the agency and with the agency's request of him for a statement of affairs. That approach was not likely to yield results. Where obligations of millions of euros exist, these need to be dealt with. There is nothing unfair about that.

Capacity of the National Assets Management Agency

31. The plaintiff is part of the National Asset Management Agency. This is the statutory body created under the National Asset Management Agency Act 2009 to acquire the bad debts of Irish banks and manage them over a long-term period in an attempt to realise some value while at the same time freeing the banks of the impairment of their ill-considered loans. The plaintiff, as a creature of statute, can therefore only have such powers as are granted in law. Similarly, as such a statutorily manufactured agency, the means of attacking the decisions and powers of the plaintiff can only be as mandated by statute, unless the legislation is silent whereby general provisions of Order 84 of the Rules of the Superior Courts applies. While the defendant says that there was a failure of the constitutionally guaranteed fair procedures to which he had an entitlement in the acquisition of the loans by the plaintiff, there is ample evidence of notice that was ignored. The defendant also argues that the procedure for acquiring the loans was one in which he should have been involved. Yet, in evidence, the defendant expresses no problem, as he put it, with the plaintiff managing these loans. Since the plaintiff agency is under a duty to consider business plans and to act reasonably, which banks are not, absent codes of conduct enforceable in law, he can only have gained by the transfer of the loans to the agency.

32. Central to the argument as to capacity is that the loans should not have been acquired; to which the answer by the plaintiff is that such a point cannot under the terms of the Act be traversed in plenary proceedings for debt and is out of time. This Court dealt with that point in *National Asset Management Agency v. Barden* [2013] IEHC 32 (Unreported, High Court, 4th February, 2013). Since this judgment was accepted as correct by Kelly J. in *National Asset Management Agency v. Cullen* [2013] IEHC 121 (Unreported, High Court, 22nd March, 2013), it is appropriate not to reanalyse this issue but merely to quote the relevant part of the judgment. This is to the effect that such issues must be raised on judicial review within a month of notice. Since the defendant is out of time, the

decision governs this issue. The relevant passage of the judgment follows:

> 17. A preliminary point requires to be decided before turning to any of these arguments. The plaintiff argues that these arguments as to the statutory competence of the National Assets Management Agency may only be raised by judicial review. These issues were not canvassed by the defendant as an applicant in judicial review proceedings under Order 84 of the Rules of the Superior Courts. Instead, the challenge to the powers of the defendant was first made in these summary proceedings by way of a proposed defence. In my view, this is impermissible. In addition, time limits apply for the commencement of judicial review proceedings or, where permissible, plenary proceedings where this course may be a legitimate alternative. I am satisfied that, as a matter of fact, a decision was made by the National Assets Management Agency, to acquire these loans on the stated date of 8 September 2011. There is no other evidence on which I could reasonably rely. These defences of the National Assets Management Agency exceeding its statutory powers were first raised by way of defence to these summary proceedings well over a year later. The terms of section 193 of the Act of 2009 are 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.
> (2) The Court may make such order on the hearing of the judicial review as it thinks fit, including an order remitting the matter back to the maker of the decision with such directions as the Court thinks appropriate or necessary.
>
> (3) This section applies to NAMA and a NAMA group entity in the same manner as it applies to any other applicant for judicial review of a decision under or pursuant to this Act.
>
> 18. There has been considerable dispute as to the meaning of this provision. No court has as yet given guidance on this point. There is, however, some excellent commentary on the Act of 2009. In Kennedy, Whelan and Ó Raghallaigh, *The National Asset Management Agency Act 2009: A Reference Guide* (Dublin, 2010) this comment is made at page 752:
>
> > It [is] to be inferred that the process under section 193 operates as the sole means whereby any decision of NAMA or a NAMA group entity may be challenged by way of judicial review. Under the Act, NAMA has extensive decision-making powers, not least its capacity to make decisions regarding the acquisition of eligible bank assets at section 84. Part 7 details the process of review of decisions relating to acquisitions by the expert reviewer. Note that under section 17 NAMA enjoys significant protection in respect of any decision made in good faith to perform or not to perform functions provided for in Parts 8 or 9. The Minister also has decision-making capacity under several provisions in the legislation, including sections 64, 67(2) and 117(1).
>
> 19. In Dodd and Carroll, *NAMA: The Law Relating to the National Asset Management Agency* (Dublin, 2011), the authors leave open the possibility that a challenge might be mounted through a plenary action as well as through an application for judicial review, while considering it unlikely that a collateral challenge would be tolerated: see page 1278. In the absence of a statutory declaration of procedural exclusivity in favour of judicial review, provided the time limits set by statute or by the Rules of the Superior Courts for the commencement of a judicial review remedy are abided by, a plenary summons may be issued in order to seek a public law remedy for an alleged administrative wrong; *O'Donnell v. Corporation of Dún Laoghaire* [1991] I.L.R.M. 301. For the purposes of statutory construction, it is of little use to engage in any comparative analysis with unrelated legislation. Bearing that in mind, nonetheless it is worth noting that under section 5 of the Illegal Immigrants (Trafficking) Act 2000, challenges to asylum decisions are exclusively reserved to the High Court under Order 84 of the Rules of the Superior Courts 1986-2011, such application to be brought within 14 days of the decision to be challenged, subject to an extension for good and sufficient reason. Similarly, under section 50 of the Planning and Development Act 2000, as substituted by section 13 of the Planning and Development (Strategic Infrastructure) Act 2006, a person cannot question the validity of any decision made or other act done by a planning body "otherwise than by way of an application for judicial review" and within strict time limit therein set out.
>
> 20. The purposes of the Act of 2009, which set up the National Assets Management Agency, are set out in section 2 thereof. Those purposes are all related to the economic collapse due to vastly overvalued real property prices that became starkly apparent in 2008. These include addressing the threat to the economy; returning the availability of credit to business; resolving the problems created by the financial crisis generated in the years 2000 to 2008; protecting the State's support of improvident banks; protecting the taxpayer; restructuring credit institutions; bringing certainty into the valuation of the assets of banks; restoring confidence in the banking sector; and contributing to the development of the nation. Under section 10, those purposes are to be fulfilled through the National Assets Management Agency. This is to be done by acquiring bank assets; by dealing expeditiously with those loans; by protecting the value of what is acquired; and by achieving the best possible return from that process for the State. Under section 84, property should not be acquired if the long-term economic value of that property is less than the market value as of the notional date of acquisition. Under section 96, it is the duty of the bank to notify debtors and guarantors within 60 days of the transfer of the assets. The provisions of Part 10 of the Act are more difficult to understand. It is clear that the relevant chapters of the Act contemplate that actions for damages may be brought within particular time limits. 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 in its substance, however, an action for damages. It is an action that seeks to

delay or upset the repayment of a loan. The most that could be achieved by the defence that the assets of the defendant were wrongfully acquired by the National Asset Management Agency, 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 on, 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.

21. Even supposing that decision to be incorrect, these arguments cannot be now raised. 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 the National Asset Management Agency 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 the National Asset Management Agency 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.

22. Given that the Act of 2009 was commenced in the public interest and in circumstances of a national emergency that continues down to the present time, it may be inferred that the intention of the Oireachtas was for reasonable certainty to attend the property transactions of the National Asset Management Agency. Fair dealing and security of title are, as a matter of law, to be obtained with the acquisition of assets. Such acquisitions are not made subject to the ordinary rules under the Statute of Limitations 1957, as amended. Instead, both as to claims for damages and public law challenges which would upset the transfer of assets to a responsible public body set up to reintroduce calm and certainty into the fractured economy, the legislature has required that any perceived wrongs should be litigated within clear time limits and under stringent conditions as to the commencement of judicial review. The courts are required to uphold that statutory intention through ruling out claims that have been brought outside the deliberately short time limits where no good reason is shown to offer indulgence.

33. The defendant also claims that whatever about the loans that were supported by the guarantee of 13th June 2003, the loan to the defendant and Paul O'Brien and Dennis McMahon in respect of Castletroy could never be captured by the plaintiff under the terms of the Act. This, again, is a point in respect of which judicial review should have been taken. But, since there is no relevant prior decision, in deference to the argument so cogently advanced by counsel the point should be considered. The Court is obliged to give to such terms as appear in legislation a plain commonsense meaning or, if a meaning is ascribed to a term by reason of definition within the legislation, then such plain commonsense meaning as the words of the definition require; generally see *Savage Supermarket v An Bord Pleanála* [2011] IEHC 488. This remains so even though the definition is wider than the apparently ordinary meaning of the words used. While this might be counter-intuitive, the reason why a wider definition than an ordinary meaning of a word or phrase is given through definition in legislation is clearly to embrace beyond the scope of the ordinary understanding of a word or phrase. Since that is the will of the legislature as to how a term is to be interpreted, the duty of the courts is to apply the precise terms of even a very extensive definition.

34. This is the principle to be applied in relation to the definition of what is development land for the purposes of the Act. For this, a number of definitions need to be looked at and, of course, the words interpreted in their appropriate context. In section 4, these definitions appear. The relevant ones follow:

" credit facility " includes every kind of financial accommodation (including a loan facility, a line of credit, a hedging facility, a derivative facility, a bond, a letter of credit, a guarantee facility, an invoice discounting facility, a debt factoring facility, a deferred payment arrangement, a leasing facility, a guarantee, an indemnity and any other financial accommodation giving rise to a payment or repayment obligation) provided to a debtor or associated debtor, whether alone or together with another person or persons and whether as part of a syndicate or otherwise;

" credit facility documentation " in relation to a credit facility means the documents, contracts, instruments and agreements containing or evidencing the terms or conditions applicable to, or that otherwise govern or regulate, any aspect of the credit facility or any associated arrangement or transaction entered into in connection with it, including any document issued or entered into by any person that directly or indirectly creates or provides or is expressed to create or provide any security, guarantee or surety or other benefit or collateral in connection with the credit facility or the associated arrangement or transaction;

"credit institution " has the same meaning as it has in the Central Bank Act 1997 ;

"debtor " means a person who is or was indebted or obligated to a participating institution under or in connection with a credit facility;

"debt security " means a note, bill, bond or similar financial instrument;

"designated bank asset " means a bank asset specified in an acquisition schedule that has been served on a participating institution in accordance with section 87 or 89 ;

" 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;

" eligible bank asset " has the meaning given by section 69 (4);

Then we come to eligible bank assets and these are as defined in section 69 of the Act, as amended by section 15(11) of the Central Bank Reform Act 2010:

(1) The Minister may, after consultation with NAMA and the Governor, and considering the purposes of NAMA and the resources available to the Minister, prescribe, by regulation, classes of bank asset as classes of eligible bank asset.

(2) The classes of bank assets prescribed under subsection (1) may include—

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

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

(ii) where the security connected with the credit facility is or includes development land,

(iii) where the security connected with the credit facility is or includes an interest in a company engaged in purchasing, exploiting or developing development land,

(iv) where the credit facility is directly or indirectly guaranteed by a company referred to in subparagraph (iii),

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

(vi) directly or indirectly to a person who is an associated debtor of a debtor to whom a credit facility described in any of subparagraphs (i) to (iii) has been provided,

(b) credit facilities and classes of credit facilities (other than credit facilities referred to in paragraph (a)) relating to debtors or associated debtors of participating institutions (or classes of debtors or associated debtors of participating institutions) where the total amount of indebtedness in respect of such facilities is such that, in the opinion of the Minister, acquisition by NAMA is necessary for the purposes of this Act,

(c) other rights arising directly or indirectly in connection with a credit facility described in paragraph (a) or (b) including—

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

(ii) a benefit to which the participating institution is entitled, and

(iii) any other asset in which the participating institution has an interest,

(d) bank assets associated with bank assets specified in paragraphs (a) and (b), and

(e) any other class of bank asset of a participating institution the acquisition of which the Minister is of opinion, after consultation with the Commission of the European Communities, is necessary for the purposes of this Act.

(3) In forming an opinion for the purpose of subsection (2) (b), the Minister may take into account—

(a) the total number of credit facilities or classes of credit facilities provided by the participating institution to those debtors and associated debtors or classes of debtors and associated debtors, and

(b) the aggregate indebtedness of debtors and associated debtors or classes of debtors or associated debtors referred to in subsection (2) (b) owed to any other participating institution.

(4) A bank asset that is in a class prescribed under subsection (1) is referred to in this Act as an "eligible bank asset".

(5) A class of bank asset prescribed under subsection (1) shall be taken not to include a credit facility that entered a participating institution's balance sheet after 31 December 2008. For the avoidance of doubt, where a credit facility entered a participating institution's balance sheet on or before 31 December 2008, but security was taken for the credit facility after that date, and the credit facility is otherwise an eligible bank asset, the credit facility is an eligible bank

asset.

(6) Notwithstanding subsection (5), a bank asset in a prescribed class is an eligible bank asset if, in the opinion of NAMA, the related credit facility entered a participating institution's balance sheet on or before that date even if renegotiated or refinanced after that date. For the purposes of determining whether a credit facility entered a participating institution's balance sheet on or before 31 December 2008, NAMA may take into account the terms of any renegotiation, restructuring or refinancing of a credit facility effected after 31 December 2008.

35. The defendant also complains of the capture of his debts with Paul O'Brien and Dennis McMahon. The answer to that is contained in section 70 of the Act:

(1) For the purposes of this Act, a person is an "associated debtor" of a debtor if the person—

(a) is or was at any time directly or indirectly indebted or otherwise obligated to a participating institution under or in connection with a credit facility, and

(b) is or was at any time—

(i) a body corporate that was a subsidiary of, or a related company (within the meaning given by section 140(5) of the Companies Act 1990) to, the debtor,

(ii) a nominee of the debtor, including a person who may or does in fact act at the express or implied direction or instruction of the debtor or another associated debtor of the debtor,

(iii) acting in the capacity of trustee of a declared or undeclared trust the beneficiaries of which include (directly or indirectly)—

(I) the debtor,

(II) a person referred to in subparagraph (ii), or

(III) a body corporate controlled by the debtor or a person referred to in that subparagraph,

(iv) in partnership, within the meaning of the laws of any relevant place, with the debtor, in relation to a bank asset which at the time of the partnership was, or subsequently became, of a class of bank assets prescribed under section 69 (1),

(v) a body corporate of which the debtor is the sole member, or

(vi) a body corporate controlled by the debtor,

or

(c) a member of any other class of person prescribed by the Minister for the purposes of this subsection.

(2) For the purposes of subsection (1)(b)(vi), a body corporate shall be taken to be controlled by a debtor if the debtor is (whether alone or together with any one or more of the persons mentioned in subparagraphs (i) to (v) of subsection (1)(b), and whether directly or indirectly)—

(a) interested in one-quarter or more of the equity share capital of the body, or

(b) entitled to exercise or control the exercise of one-quarter or more of the voting powers at any general meeting of the body.

(3) In subsection (2)—

(a) "equity share capital " has the same meaning as it has in section 155 of the Companies Act 1963 , and

(b) the reference to voting power exercised by a debtor includes voting power exercised by a nominee of the debtor or another body corporate which that debtor controls.

(4) Section 54 of the Companies Act 1990 applies for the purpose of determining, for the purposes of subsection (2), whether a person holds an interest in shares.

36. In addition, the National Asset Management Agency (Designation of Eligible Bank Assets) Regulations 2009, S.I. 568 of 2009 widens the definition of eligible bank assets considerably in providing at article 2:

The following classes of bank assets are prescribed as classes of eligible bank assets for the purposes of the National Asset Management Agency Act 2009 (No. 34 of 2009):

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

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

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

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

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

partnership referred to in subparagraph (iii), or

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

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

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

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

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

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

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

(ii) a benefit to which the participating institution is entitled, and

(iii) any other asset in which the participating institution has an interest;

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

37. It is not appropriate for any court to attempt to reinterpret plain language if such a parsing exercise leads to a result that is not intended by the Oireachtas. Instead, the duty on the courts is to give effect to legislation in its ordinary and effective terms. Castletroy may have been built in the 1950s and may be typical of the kind of suburban set of shops built at that time. Perhaps an ordinary person on the 15A bus would not regard it as development land, but the legislature clearly does. The legislation goes so far as to provide that any structure on land, even if not recent and even if going as far back as far as the megalithic fertility monument at Newgrange, can be development land. An associated debtor can be a body corporate controlled by the debtor and, in that context, control simply means the exercise of a 25% voting interest at a general meeting. The legislation refers to credit facilities as being the foundation of debt and, indeed, experience has shown the wisdom of this definition. Additionally, as the regulations of 2009 refer to credit facilities "to a debtor with an interest in a body corporate or partnership engaged in purchasing, exploiting or developing development land" the courts have become bound by such definition. This definition is, as it happens, again reflective of reality. So there is no scope for any argument even as to absurd result.

38. In consequence, that main point and the arguments subsidiary to it must be dismissed.

Constitutionality

39. Two sections of the National Asset Management Agency Act 2009 are claimed to be contrary to Bunreacht na hÉireann. These are sections 84 and 147. Essentially similar points are advanced in the submissions in relation to these two sections: that the principles of constitutional and natural justice guaranteed under Article 40.3 are set at naught; that the defendant's property rights under that article and under Article 43.1 and 2 are unjustly attacked; that the defendant has a right to earn a living, which means an entitlement to keep the income stream generated from property; that the equity of redemption can be, and is, part of the property rights in question and is not respected; and that the bundle of the defendant's contractual rights can be unjustly torn apart by the legislation.

40. Having regard to the decision of the Supreme Court in *Re Health (Amendment) (No.2) Bill 2004* [2005] 1 I.R. 105 (at p.201), in an analysis of any unjust attack on property rights the Court must, firstly, examine the nature of the property rights at issue; secondly, it should consider whether the impugned sections consist of the regulation of those rights in accordance with the principles of social justice and whether the legislation seeks to delimit those rights in accordance with the exigencies of the common good; and, thirdly, having considered these issues, it must determine whether injustice is the touchstone of the result, which may emerge in the lack of balance as between the common good and the necessary vindication of the relevant rights.

Section 84 reads:

(1) NAMA may acquire an eligible bank asset of a participating institution if NAMA considers it necessary or desirable to do so having regard to the purposes of this Act and in particular the resources available to the Minister. NAMA is not obliged to acquire any particular, or any, eligible bank asset of such an institution on any grounds.

(2) For the avoidance of doubt, NAMA may acquire, from a participating institution, performing or non-performing eligible bank assets.

(3) For the avoidance of doubt, NAMA may, subject to Chapter 1 of Part 7 , take steps to acquire an eligible bank asset even though the participating institution concerned has indicated in information provided to NAMA under section 80 that it does not consider the bank asset to be an eligible bank asset and that it objects to its acquisition.

(4) Without prejudice to the generality of subsection (1), NAMA may, in deciding whether to acquire a particular eligible bank asset, take into account—

(a) whether any security that is part of the bank asset is adequate,

(b) whether any security that is part of the bank asset has been perfected,

(c) the value of that security,

(d) whether the relevant credit facility documentation is defective or incomplete,

(e) whether the participating institution concerned or any other person has engaged in conduct concerning the bank asset that is or could be prejudicial to the position of NAMA,

(f) whether the participating institution has complied with its contractual and legal obligations and its obligations under this Act in relation to the bank asset, or its eligible bank assets generally,

(g) whether in NAMA's opinion the participating institution has advanced a sufficient quantum of the credit facility concerned,

(h) the quality of the title to any property held as security that is part of the bank asset,

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

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

(k) the performance of the bank asset,

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

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

(n) any other matter that NAMA considers relevant.

(5) Where NAMA determines that the long-term economic value of the property comprised in the security for a credit facility that is an eligible bank asset is less than the market value of the property, NAMA shall not acquire the bank asset.

41. It must be recalled that the purposes of the Act, as set out in section 2, are to address the serious threat to the economy and the stability of credit institutions in the State; to facilitate the availability of credit in the economy; to resolve the most serious financial crisis in the history of the State; to support the guarantees given to the then insolvent Irish banks by the Government in September 2008; to protect the interests of taxpayers; to facilitate restructuring of credit institutions of systemic importance to the economy; to remove uncertainty as to, or effectively to stabilise, the price of assets; to restore confidence to the banking sector; and to contribute to the social and economic development of the State. If the constitutional claims of the defendant were allowed it would have the effect, to quote the submissions of the Attorney General, of defeating the "prime purpose of the Act". Section 11 gives the National Asset Management Agency powers to acquire eligible bank assets; to manage and realise these; to take on such functions as the Minister for Finance directs; and to take all steps necessary to protect, enhance and realise the value of acquired assets.

42. The Court does not propose to go outside the terms of the argument advanced. This is focused on section 84 (3). The argument was so eloquently put by counsel for the defendant as to conjure up the spectre of the plaintiff agency as a kind of monster enabled by legislation to gobble up performing loans and to subject borrowers to authoritarian rigour. The reality has not turned out that way: far from it. Further the legislation neither enables nor permits that kind of despotic burden on those holders of loans transferred to the agency and nor is the section capable of being used in such a way. In *The State (Lynch) v. Cooney* [1982] I.R. 337 at 380, Henchy J. stated in relation to the exercise of discretion conferred by statute:

> It is to be presumed that, when it conferred the power, Parliament intended the power to be exercised only in a manner that would be in conformity with the Constitution and within the limitations of the power as they are to be gathered from the statutory scheme or design.

The real question in an issue as to constitutional interpretation is not necessarily determined by what is happening on the ground, but whether that accords with the contemplated statutory scheme. If there is any denial of property rights, are there arguments of social order, founded on prudence, justice and charity, as in the Preamble to the Constitution, which justify as proportionate this interference by the State in the private banking affairs of individuals? It would be contrary to the experience of this nation over the last decade were bank management to be given a final decision as to whether a loan must be transferred into the agency. As a matter of historical reality, it has emerged clearly in multiple cases before this division of the High Court, that Anglo Irish Bank plc, now in liquidation as Irish Bank Resolution Corporation, led a charge of ill-considered lending which was so successful in capturing what was called 'market share' as to cause panic among competing lenders and spook them into charging into imprudent lending. That bank exercised false leadership at a time when the policy of restraint, so necessary because of the temptations inherent in the profit motive, seemed to defer to the market. Anglo Irish Bank's chimeral pursuit of profit was temporarily apparently profitable. By following chase, other banks exacerbated the property overvaluation that crashed like a giant wave on the Irish taxpayer from September 2008. Social anguish has been the result. Since persons involved in banking at the highest level seem most responsible for this, it would be astonishing were the Oireachtas to give a final decision to any participating bank as to what assets should be transferred to the agency. To have done so would have been to have undermined the very scheme of the Act. Furthermore, what is alleged to be the unjust purpose and result of the section simply cannot be read into the legislation. There is nothing in the text of the section which requires the balance between rights to property and exigency of the common good to be construed in so lopsided a way as to lead to a finding of unconstitutionality. In accordance with *McDonald v. Bord na gCon* [1965] I.R. 217, the approach of the Court is one of respectful construction that gives effect to the decision of the Oireachtas but which also construes the legislation in accordance with the presumed intention of the legislature to act in accordance with the Constitution. Walsh J. stated the applicable principle, at p. 239:

> […] an Act of the Oireachtas is presumed to be constitutional until the contrary is clearly established. One practical effect of this presumption is that if in respect of any provision or provisions of the Act two or more constructions are reasonably open, one of which is constitutional and the other or others are unconstitutional, it must be presumed that the Oireachtas intended only the constitutional construction and a Court called upon to adjudicate upon the constitutionality of the statutory provision should uphold the constitutional construction. It is only when there is no construction

reasonably open which is not repugnant to the Constitution that the provision should be held to be repugnant.

If there are any means whereby this Court may be able to construe section 84 and/or section 147 as constitutional then it must do so. In fact, neither in its text, nor in its application nor in any reasonably open interpretation is there any constitutional infirmity to the section.

43. Section 147 of the Act provides:

> (1) Where any of the following occurs under the terms of an acquired bank asset:
>
> (a) a power of sale becomes exercisable;
>
> (b) a power to appoint a receiver becomes exercisable;
>
> then NAMA may appoint any person, including an officer of NAMA, as a statutory receiver of the property the subject of the bank asset.
>
> (2) NAMA may remove a statutory receiver and may appoint a new statutory receiver in the place of a statutory receiver removed.
>
> (3) The appointment of a statutory receiver is not subject to the restrictions in the Conveyancing Act 1881 or the Land and Conveyancing Law Reform Act 2009 on the appointment of a receiver.
>
> (4) NAMA may fix the remuneration of a statutory receiver. A maximum rate imposed by law (including that specified in section 24(6) of the Conveyancing Act 1881 or prescribed by regulations under section 108(7) of the Land and Conveyancing Law Reform Act 2009) does not apply.
>
> (5) NAMA's power to appoint a statutory receiver under this Chapter does not affect any powers to appoint a receiver pursuant to any contractual power in any bank asset acquired by NAMA.
>
> (6) The powers of NAMA under this section are exercisable by NAMA (and only by NAMA) in relation to a bank asset held by a NAMA group entity.

44. The relevant section of the Conveyancing Act 1881 required a three-month demand before the appointment of a receiver. This was dispensed with in the legislation.

45. In relation to both sections put under scrutiny for possible constitutional infringement, the Court is guided by the decision of the Supreme Court in *Dellway Investments Limited v. NAMA* [2011] 4 I.R. 1. There Finnegan J. at pp. 360-377 made it clear that the special treatment of mortgagees and the commercial consequences of the transfer of a mortgage to the agency gave rise to a right to be heard on the part of the borrower. This interpretation sprang from the decision of the Supreme Court in *East Donegal Co-operative Livestock Mart Limited v. Attorney General* [1970] I.R. 317, in which Walsh J. stated (at p.341):

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

There is no aspect of this section which gives rise to any real risk that the rights of a citizen would be interfered with in an unjust manner due to an absence of a fair approach. Expressly, on section 147, is to be noted that Finlay Geoghegan J. has already held in *Treasury Holdings v. NAMA* [2012] IEHC 297 (Unreported, High Court, 31st July, 2011) that, on the specific facts of that case, the applicant borrowers did have a right to be notified and to be heard prior to enforcement action, in that case including the appointment of statutory receivers. This followed, however, an ostensible situation of preference for refinancing to any approach of realisation and disposal. In every single case before this division of the High Court over five years, in the experience of this Court, every bank which has proposed to appoint a receiver has always given notice; albeit sometimes very short. That does not mean, however, that such notice is always mandated by law, or by the relevant deed of charge. There may be some situations akin to an emergency involving a real risk of the destruction or disposal of assets, such as an immediate threat that the asset will be encumbered by illegal alienation, where the power to appoint a receiver might legitimately be made without notice. What may be called to mind her are such developments in common law remedies that were based on situations of pressing need such as *Mareva Compania Naviera SA v International Bulkcarriers SA: The Mareva* [1980] 1 All ER 213 for restraint of disposal of assets injunctions and *Anton Piller KG v Manufacturing Processes Limited* [1976] Ch 55 about the entitlement of the courts to order the search of premises and seizure of materials in aid of litigation. The former is often made ex parte and the latter almost always is. So, sometimes actions without notice, but with a return date for hearing each side, can be a necessary part of the armoury of a court. What can happen may often be something which experience does not illuminate in advance. That is why there is a reluctance to move in judicial decision-making from the specific facts of a case towards hypothetical situations that are not necessarily in issue. In fact, what happened in this case was that notice that a receiver might be appointed was given, but without a time limit. On the evidence, the appointment envisaged was clearly imminent. Given the nature of the borrowings engaged in by the company of which this particular defendant was a director, and the debts charged in respect of the relevant mortgage, it was an empty exercise for the agency to give anything more than relatively short notice. The Court is not prepared to conclude, further, that rights are protected only by notice. Nor is the Court driven to decide that a right to fair procedures applies to every instance where the agency is proposing to exercise its powers. Prudence is also a constitutionally mandated principle. While, as in the *Dellway* case at p. 332, Fennelly J. penetratingly analysed the acquisition decision by the agency as one which made a substantial change in the way in which debtors are in a position to exercise their property rights, and that this involved a reduction in their ability to manage their properties independently, it must surely only be to those aspects of the powers mandated in the legislation which have that effect that require the application of fair procedures. There can be circumstances where appointing a receiver without notice is unfair to the property rights of a person whose debts and charged properties are being managed by the agency, but may also be circumstances where the agency is entitled to take swift action following a fair assessment of a business plan, or where the request for submissions about where the borrower proposes to go from here, is ignored or is treated deceitfully, and where it may be said that a proper balance in the rights of the borrower and the rights of the State, as the manager of distressed assets, is achieved by immediate action without notice.

46. The power to appoint receivers under the Act of 2009 furthers the statutory objectives of the agency. Those powers are essential to its functions. Powers of possession and sale are an invariable part of every mortgage deed. Castletroy is a mortgaged property. In that statutory context, there is nothing beyond the ordinary protections which banks and borrowers would agree is an appropriate safeguard to the lending of money to be found in section 147. Furthermore, acquisition of assets under section 84 is subject to the relevant safeguard. As with any provision of law in favour of a citizen, and as with all but the most fundamental of rights, it may be lost by exercises in head-burying, through ignoring letters or failing to deal with reasonable requests; and may find life with the general duty of the agency to deal reasonably and to consult with debtors in consequence that a plan which might not be accepted by a bank could be accepted by the agency because of its ability to take a longer-term view and because of its duty to act reasonably. Added to that, there is an extra safeguard. Any action by the agency under section 84 and section 147 may be analysed also in the context of public law, since the agency has devolved upon it in statutory form some of the panoply of powers of the State that are not dependent on legislation, but which were exercised in September 2008 in order to save the banking system; in that regard see *Prendergast v. Higher Education Authority* [2010] 1 I.R. 490. In a private context, a borrower does not have the entitlement to challenge a bank where the borrower's loan is transferred from one bank to another or to a firm of factors, or even where a sympathetic bank manager retires to be replaced by a worrier who can make no decisions. Nor, in the sphere of ordinary borrowing, has a borrower much chance to challenge a bank outside the area of contract where a decision is made by the bank to appoint a receiver or otherwise to enforce a charge. This is so even though the decision is apparently unfair and the circumstances of the exercise of the power, while consistent with the contractual obligations settled by negotiation and carefully set out in a written document, may be so patently unreasonable as to fly in the face of fundamental reason and common sense. Perhaps it might be argued that no business contract contemplates an unreasonable end? But such an argument would not be easy to bring home. Because the agency is in the sphere of public law, upon notice, a borrower has one month in accordance with the terms of the legislation, previously quoted, to invoke an argument as to fair procedures, which may in some circumstances be valid, as in the *Treasury Holdings* case; an argument as to whether fair opportunities were given to deal with debt in accordance with the strictures that the legislature has placed on the agency; an argument as to consistency with the legislation of any particular action; and an argument as to whether in all the circumstances an unreasonable step in enforcement of debt has been taken. Judicial review as a banking remedy is open only to those whose debts are within the agency. It is a swift remedy and one that is relatively low in cost, since applications are dealt with on affidavit and expert reports, being essentially the creature of plenary hearings, very rarely make any appearance.

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 defendant's 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.

Conclusion

48. There will be judgment for the plaintiff in respect of both actions. The appropriate amounts as of the date hereof will be reflected in the order of the Court. The argument so elegantly advanced by counsel for the Attorney General has greatly helped the clarification of important and genuine points of law that are likely to return repeatedly and for this reason will not result in any order as to costs; though the Attorney General is to be thanked for her participation through counsel in the case. As both cases have been heard together, there will be one order as to costs and all reserved costs against the defendant in the two sets of proceedings in favour of National Asset Loan Management Ltd, which order will be made in 2012 no. 4456S, but the plaintiff will also be allowed the costs of pleading in 2012 no. 1475S.