Neutral Citation: [2015] IEHC 260

THE HIGH COURT

[2013 No 3150 S]

BETWEEN

ALLIED IRISH BANK

PLAINTIFF

AND

FRANCIS O'BRIEN AND MICHAEL FINGLETON

DEFENDANTS

JUDGMENT of Ms. Justice Baker delivered on the 27th day of March, 2015

1. The plaintiff in these proceedings seeks summary judgment against the defendants arising out of a loan facility granted to them jointly and severely in or around the month of October 2006. The first defendant has consented to judgment being entered against him for the amounts claimed and the motion for judgment has proceeded against the second defendant only. The second defendant has sworn two replying affidavits in respect of the motion, the first on the 18th June, 2014, and the second on the 31st July, 2014.

2. The motion is grounded on the affidavit of Joe Lyons sworn on the 25th March, 2014 in which is exhibited a facility letter of the 4th October, 2006 addressed to Mr Fingleton at his personal address which contains the terms on which the Bank offered to lend to Mr Fingleton the sum of €4.6 million. A similar letter was sent to the first defendant, a former member of Seanad Éireann, also at his personal address, and the terms of each of the letters are identical. The stated purpose of the loan was the purchase of two tracts of land, one comprising 9.6 acres of zoned agricultural land at Laragh, Co. Monaghan, and the other comprising 6.25 acres of zoned agricultural at Corcagham, Co. Monaghan. The loan was stated to be repayable on demand and at the pleasure of the Bank and was subject to interest roll over for one year and "clearance in full at that time".

3. The letter outlined six special conditions, most of which related to the security to be provided, but special condition three provided that the Bank would have full, joint and several recourse to both borrowers. Charges were to be put in place over the lands intended to be purchased, which were to be held in the sole name of the first defendant, and a charge was to be created by him over other lands stated to be in his name, the precise beneficial interest in which is unclear from the documentation.

4. The interest rate has been a matter of some controversy in the course of the hearing before me and I set out in full the provisions in the letter of sanction relating to interest: "Prime rate vary plus 1.5%, currently 5% per annum".

5. The letter stated that the loan offer was also subject to the Bank's General Terms and Conditions Governing Business Lending contained in a booklet dated March 2006, and a copy was stated to be enclosed. There is in bold print the following statement: "These are legal documents and should be read very carefully".

6. The loan was drawn down and while certain difficulties arose with regard to the putting in place of the charges by way of security, this matter has not been raised as a possible defence in the proceedings.

7. The statement of account exhibited in the grounding affidavit of Joe Lyons shows transactions on the account since the monies were drawn down on the 27th October, 2006 and from this it is apparent that small payments were credited to the account from time to time, the last of which was in June 2009, and interest and surcharge interest has been applied to the outstanding balance from time to time. No argument is raised with regard to the amount of surcharge interest and I note that in general surcharge interest was charged at zero percent, apart from on one or two occasions during the currency of the loan.

8. As at the date of the swearing of the grounding affidavit the amount stated to be owed was the sum of €5,454,279.29, calculated up to the 7th June, 2013.

The defences

9. The two replying affidavits of Mr Fingleton assert that a number of arguable defences exist to the Bank's claim and his counsel has fairly and properly accepted that some of these defences were bound to fail and expressly withdrew them at the commencement of the hearing. Counsel has identified three categories of defence, and counsel for the plaintiff accepts these broad classifications. These grounds of defence are as follows:-

> 1) That there was no consensus *ad idem* for the purposes of the creation of the contract of loan, and that as Mr Fingleton had not been involved in the negotiations leading up to the loan he was unaware of all of the terms and conditions alleged to apply. Counsel makes a more focused point however, and the affidavit of Mr Fingleton asserts that he did not receive the Bank's general conditions at the time of the letter of loan sanction or at any relevant time such that the general conditions do not form part of the contract between himself and the Bank. He argues that this is particularly relevant for the purposes of the calculation of interest on the loan, and for the definition of what is meant by "prime rate" in the special conditions, and that in the circumstances he is not contractually bound to those terms. Mr Fingleton does not deny that he signed the letter of loan sanction, and indeed it is apparent from the documentation exhibited that he signed not only the letter addressed to himself but also that addressed to the first defendant, although he does say that the documents were presented to him by his co-borrower and he signed the last page of the letters of loan sanction without reading the documentation.
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> 2) Mr Fingleton said that he is entitled to the benefit of Consumer Protection Codes, and in particular the Code issued by the Central Bank in 2006. He no longer asserts that he is a "consumer" for the purposes of those Codes but points to the fact that parts of the Code apply to persons defined as "customers" of regulated financial entities, and asserts that he was at all material times a customer for that purpose and entitled to the benefit of that part of the Code in force at the time the contract of loan was concluded.

3) He asserts that the Bank had a duty to invite and consider submissions from him before making demand under the facility and/or before commencing these proceedings. In that context he asserts that certain public law obligations arise having regard to the status of the Bank as a body charged with performing its functions in the public interest pursuant to the s.48 of the Credit Institutions (Stabilisation) Act 2010, that an obligation has arisen to afford him fair procedures, and that as the bank refused to engage with him and to consider the submissions he sought to make, the demand is not properly made. He argues that he has a *bona fide* claim that he was entitled to be heard by the Bank before it made demand on him and that in those circumstances the matter is not properly before the Court.

Mr Fingleton also asserts that he is entitled to a set-off arising from the fact that he claims to have a 25% equitable interest in certain lands owned by a developer, one Jerry Gannon, with whom he had a business relationship, and some of whose land is held as security for the Bank. In the course of argument it was accepted by counsel for the defendant that the argument for a set-off more properly arises as a matter of consideration on an application for a stay of execution in respect of any judgment that might be entered against him.

10. I will consider each of these possible defences in turn but before doing this I turn to consider the law that governs the entry of judgment on foot of a summary summons.

Summary judgment

11. The leading case on the nature of the jurisdiction of the court to grant judgment summarily is the case of *Aer Rianta v. Ryanair* [2001] 4 I.R. 607 and it cannot be doubted that the bar set by that decision of the Supreme Court is relatively low. The Supreme Court identified a range of cases in which summary judgment ought not to be entered, and at one end of the spectrum is what Hardiman J. described as cases which turn "*on a stark conflict of factual evidence".* Any conflict of factual evidence that might influence the court in its decision must be resolved on oral evidence and by giving the other party an opportunity to cross examine. The case must, as Hardiman J. said, be "*a clear one*", and he identified that what a defendant had to show to resist an application for summary judgment is that there is a "*fair and reasonable probability of the defendant's having a real or bona fide defence",* and that this is not "*the same thing as a defence which will probably succeed, or even a defence whose success is not improbable*."

12. Various formulae have been used to describe the test and in essence the test is that a court has to be satisfied that it is clear, or perhaps very clear, that a defendant has no case and that there is no issue to be tried, or that the issues are clear and can be resolved without oral evidence.

13. Clarke J. in *G.E Capital Woodchester Limited & Anor. v. Aktiv Kapital & Ors.* [2009] IEHC 512 stressed the latitude a court should in general afford a defendant and that an indulgence would be given to a defendant who could show that certain evidence helpful to his defence was likely to exist but was not yet available to him until discovery or interrogatories. He made the point however that it was not open to the defendant on a summary judgment application "*to make a vague and generalised contention which would amount to nothing more than an assertion that something useful to his case might turn up on discovery or the like*". The test requires that there be a credible basis for an assertion, and a perhaps fair way to characterise the test when there is a conflict of fact is that a defendant's stated defence must be taken at its height, and on the basis that facts alleged will be proven by him or her.

14. The matter is different however where the defence urged by a defendant is based on legal argument and Clarke J. in *Chadwicks Ltd. v. Byrne Roofing Ltd.* [2005] IEHC 47 took the view that when the defence depended on an issue of law it was a matter for the court to determine whether that issue could be tried on a summary motion or whether it required to be remitted for further consideration at a plenary hearing. Issues involving mixed questions of fact and law would in general not fall within the category of what he described as a "*sufficiently nett or straight forward*" legal question.

15. The matters sought to be raised by the second defendant in defence are similar in characterisation to those identified by Charleton J. in *Danske Bank v. Durkan New Homes* [2009] IEHC 278 where he gave the example of a case involving a construction of a document which might involve a question of law, and Charleton J. went further perhaps than Clarke J. had gone in the earlier cases in saying that it was "*the obligation of the court to resolve*" a question of law arising on affidavit evidence, rather than having the matter remitted to plenary hearing. While the Supreme Court on appeal in that case [2010] IESC 22, rejected the suggestion that there might be an obligation on the court to resolve a question of law, it accepted that the court may do so, and stressed that the test for the court was whether the defendant had a established an arguable defence.

16. The court then has a discretion whether to enter upon a hearing of a summary motion when legal questions are raised and may remit the entire matter for plenary hearing even if no issues of fact are in dispute, or even if the issues of fact are to be resolved in favour of a defendant.

17. There is nothing straight forward or simple about the legal arguments that are made by the defendant in this case but they are in my view questions that can be resolved at this stage on a summary application and I take the view that the issues may be resolved by me without a plenary hearing and that no injustice would be caused to the second defendant by my so doing. In that regard I note that full arguments were made by counsel for both sides and each of them fully argued the relevant legal points with the assistance of a substantial number of authorities and statutory provisions.

18. I will consider the various defences raised by the defendant in the context of this test as I deal with each one of them.

The terms of the contract

19. Mr Fingleton asserts that he did not receive the Bank's general conditions applicable to commercial lending, and that as a result he did not know the basis of the calculation of interest. Mr Joe Lyons in his replying affidavit accepts that he cannot say with certainty that these conditions were sent to Mr Fingleton, although he says that it was the general practice of the Bank to enclose the general conditions with a letter of sanction. Counsel points me to the fact that, and this can be no more than anecdotally useful to the defendants, that in the case of *AIB plc v. Galvin Developments & Ors* [2011] IEHC 314, Finlay Geoghegan J. accepted that in that case the bank's general terms and conditions were not enclosed with the letter of loan sanction, notwithstanding that they were mentioned in exactly the same terms as in the letter of loan sanction in this case. Finlay Geoghegan J. was prepared to accept that they were not enclosed, and noted that AIB witnesses could not say that they were enclosed. In that regard counsel for the plaintiff accepts that I may proceed for the purposes of this application on the assumption that Mr Fingleton did not receive the Bank's general conditions of commercial lending but counsel for the plaintiff argues that this absence or gap does not give the second defendant an arguable ground of defence.

20. The general terms and conditions have been exhibited in affidavits before me and I note in particular that clause 5 deals with the determination of the applicable interest rates and identifies various categories of rates including premium business, market related,

and the one relevant to the loan sanction in issue in this case, "prime" interest rates. Prime interest rates are referred to in a number of places in the general conditions but no identified interest rate is of course contained therein as this rate changes and is stated to change weekly or more or less frequently, and the various rates are stated to be, and are in fact, advertised in nationally circulating newspapers. Mr Fingleton does not state on affidavit that he was unaware from time to time of what the precise interest rates were on the facility but he does say that the Bank "failed to furnish me with the full details of the interest rate terms applicable to the facility". He says he is "confident in my recollection that the terms in respect of the calculation of the prime rate were not given or sent to me".

21. Mr Fingleton's argument with regard to the fact, and it is accepted by me as a fact for the purposes of this motion, that he did not receive the general conditions of lending, is that he denies that the Bank's claim for interest is properly calculated or properly claimed in that he was unaware of the contractual rate said to be applicable to his loan. When pressed, his counsel accepts that it is possible to sever the claim for interest from that for the principal sum due, and an approximate figure of €1,200,000 is claimed by the Bank in respect of interest.

22. It seems to me that I can resolve this part of the claim without remitting the claim to plenary hearing. In that regard I note and follow the statement of Finlay Geoghegan J. in *AIB plc v. Galvin Developments*, which I mention above, to the effect that the incorporation of the bank's general terms and conditions was done by means of the well established principle of contract law that terms may be incorporated into a contract by express reference. I adopt the following *dicta* by her in that case, in which the defendants had also sought to rely on the failure of the bank to furnish the general conditions, as follows:-

> *"It is a well-established principle of contract law that terms may be incorporated into a written agreement signed by the parties by express reference. The failure to enclose a copy of the conditions does not preclude their incorporation by express reference. See, inter alia, Sweeney v. Mulcahy [1993] ILRM 289, and Leo Laboratories Ltd. v. Crompton B.V. [2005] 2 I.R. 225. In my judgment, the agreement between AIB and GDK and the Galvin Brothers, respectively, in September 2008, in relation to all the facilities the subject matter of these proceedings, included, by express reference, AIB's General Terms and Conditions Governing Business Lending."*

23. The learned judge had noted that there was an express reference to the general terms and conditions in the letter of loan sanction, and the self same reference is contained in the Bank's letter of sanction in this case. The general conditions were in my view incorporated by express reference in the facility letters signed by Mr Fingleton.

24. I consider that no injustice would be done to the second defendant were I to now come to a conclusion with regard to his argument that the non availability of the general terms and conditions at the time of the contract offer him an arguable or bona fide defence. I have read the general conditions and nothing in those conditions, apart from the provisions relating to the determination of the interest rates from time to time, is relevant to the defence raised by Mr Fingleton, and he can identify no term or condition contained in the general terms on which he might rely in defence. In particular I note that the specific contractual terms identified in the letter of loan sanction made this facility repayable on demand, albeit there was a short interest roll-up period, which expired after one year. I note also that the interest rate is identified as being 1.25% over prime rate, stated as then being 5%. Mr Fingleton has not argued before me, nor could it be credibly said having regard to the evidence before me, that interest ever came to be applied at a rate greater than prime rate plus the 1.2% additional rate agreed expressly to apply to the loan. The relevant applicable rate is identified in each and every Bank statement which was sent to Mr Fingleton at the address in the facility letter and the address that he identifies as his residential address in his replying affidavits. The interest rates changed very frequently indeed and I note by way of example that the rate was changed on the 11th December 2007, 18th December 2007, 28th December 2007, 2nd January 2008, 8th January 2008 and the 15th January 2008. Only on two occasions did the rate fall to be applied above 6.125%, the rates expressly first identified in the letter of sanction. Nowhere in his affidavit does the applicant, the second defendant, assert that he did not receive the bank statements, and I reject the argument by Mr Fingleton that he did not understand, nor contractually agree to the variation of the rates from time to time in accordance with the Bank's "prime" rate. Those rates were identified on a very frequent basis in bank statements which appear to have been sent at least once a year and which identify changes in the interest rates, and on any given page of the statements the rate is shown as varying up to 10 or 15 times in a year.

25. Mr Fingleton does not assert that he did not agree to pay interest on his loan, he does not assert that the rate was fixed, he does not assert that a different rate of interest was applicable. He does not assert that what was applied by the Bank was a rate other than the prime interest rate plus 1.25%. He was the chief executive of a major Irish bank at the time of this loan facility and, while I would not be prepared to extrapolate much with regard to his knowledge of the plaintiff Bank's internal affairs and interest calculations from that mere fact alone, it cannot be a matter of insignificance that the second defendant would well have understood the contents of his annual statements of account, the fact that the interest rate which was applied to his loan varied and was described as being a "prime rate", and the fact that the prime rates were advertised in national newspapers from time to time. Even were it to be accepted that, even accepting as I do, he did not receive the general terms and conditions of commercial lending, nothing in those general terms adds to the characterisation of the interest rate as prime plus 1.25%, nor does anything in the general conditions add to the way in which that rate is calculated, save to say that the rate varies from time to time, and the fact that the rate varies is clear on the letter of loan sanction itself.

26. Taking the second defendant's case at its height, then, it seems to me that he has not made an arguable defence that the plaintiff is not entitled to charge interest on the monies advanced, and at the rates claimed and the non availability of the general conditions add nothing of substance to the terms of the loan as contained in the letter of offer.

27. Before I conclude my observations with regard to this ground of defence I note that counsel made an argument, albeit perhaps with less force than other arguments he made, that the absence of the general conditions had the effect that there was no consensus *ad idem* between the Bank and the second defendant, such that the second defendant is not contractually bound, and that there was no contract or that no terms and conditions of lending were agreed. In that regard I adopt the dicta of Finlay Geoghegan J. in *AIB plc v. Galvin Developments*, cited above, and I hold that as a matter of law, and without needing to hear any further oral evidence on the matter, the general terms and conditions were incorporated by reference in this contract. I also find assistance from the judgment of Clarke J. in *ACC Bank plc v. Kelly & Anor.* [2011] IEHC 7 where the court, albeit on a full plenary hearing, considered *inter alia* the argument that the defendants were unaware that their loan was a demand facility. At para. 7.5 Clarke J. noted the position of a person who signs a document without adequately reading it and makes the following comment:-

> *By signing a commercial banking arrangement, a borrower agrees to be bound by the terms of that arrangement and if the borrower has not taken the trouble to adequately read the document or be adequately informed as to its meaning then the borrower must accept the consequences of having signed a commercially binding agreement in those circumstances. After all, those are the terms on which the borrower gets the money. The borrower has taken the money. The borrower cannot then turn around and say that the terms were not properly understood unless the relevant*

financial institution has been guilty of legal wrongdoing in the way in which the contract came to be signed such as by misrepresenting its contents or the like."

28. This is not a case where Mr Fingleton seriously contends that he did not read or understand the letter of loan sanction, and he accepts that he did sign the banking documentation which incorporated by express reference the general terms and conditions of the bank for its commercial lending. These were the terms as was starkly put by Clarke J. in *ACC Bank plc v. Kelly & Anor.*, on which "*the borrower gets the money*". It is often said in the context of summary judgments that if a defendant gets money from a bank, it must repay that money, but that of course would be a simplistic approach to the question of the terms and conditions of a loan. Absent any frailty of understanding or capacity, if a defendant gets money from a bank on foot of a contract the terms of which are reduced to writing and signed by that person, then not only can it be said that the defendant gets the money, but he gets the money on those terms and conditions even if he did not bother to read those conditions, or even if certain conditions are incorporated by reference in that document and he does not choose to seek those documents before signing.

29. This is not a contract that is required to be made in writing, but it was a contract in respect of which many of the terms were reduced to writing. Some of the terms would in the normal way have been negotiated, and Mr Fingleton asserts that it was the first defendant who negotiated the terms and conditions. I have no doubt having regard to the amount of the loan and the particular status of the first defendant as a member of the Oireachtas and the second defendant as the chief executive of a large bank in Ireland, that the loan facility and the applicable interest rates were negotiated and agreed in as favourable terms as were available. In that regard I note that while the land was to be purchased by the two borrowers jointly the legal title was to be held by the first defendant only. Complex arrangements needed to be put in place in those circumstances to properly protect the interests of Mr Fingleton in the purchase, and those complex arrangements could not have been reached and agreed to by the Bank without some negotiations and agreement on the somewhat unusual terms on which the borrowing was to happen. The loan was a full recourse loan and Mr Fingleton, and the first defendant, would have had reason to seek to protect their private assets from any claim of the Bank, which further supports my view that the second defendant must be held to be bound by the general conditions of the Bank's commercial lending, and these conditions were ones in which he had or ought to have had a personal interest.

30. Accordingly, I reject the argument that the second defendant has an arguable ground of defence arising from the argument that he did not receive the general terms and conditions at the time he signed the letter of loan offer.

The Consumer Protection Code August 2006

31. The second ground of defence for which the second defendant contends is that he was a customer for the purposes of the Consumer Protection Code issued by and in the name of the Irish Financial Services Regulatory Authority pursuant to the powers of the Central Banks Acts 1942 – 1998. That Code applies to customers of regulated financial entities and, also to consumers in the State as therein defined. The second defendant does not make the argument that he is a consumer for the purposes of the Code, but even were he to make this argument the relevant provisions of the Code which are applicable to consumers did not come into force until the 1st July 2007, after the drawdown of the loan, the subject matter of these proceedings.

32. Accordingly, and this is accepted by counsel for the second defendant, he is confined in his argument with regard to the applicability of the Code to chapter one of the Code which is entitled "General Principles", and those general principles apply to customers of a regulated bank.

33. A customer is defined as follows:-

"customer" means any person to whom a regulated entity provides or offers to provide a product or service the subject of this Code, and any person who requests such a product or service"

34. The second defendant was a customer for the purposes of that definition and the Bank is a regulated entity which offered to him the service of lending.

35. Chapter one of the Code is the applicable part and it sets out in twelve numbered paragraphs the general principles which govern the dealings of a regulated entity with its customers. The chapter requires that such a regulated entity "must ensure that in all its dealings" it complies with these general principles. The principles are broadly stated as an obligation to act honestly, fairly, with due care and skill, not to act recklessly or negligently, not to exert undue pressure or undue influence, to correct errors, handle complaints, and to prevent access to basic financial services. The second defendant relies on one element in the list namely that at entry six which I quote in full, and which requires a regulated bank to make :-

*"full disclosure of all relevant material information, including all **charges**, in a way that seeks to inform the **customer**; (emphasis in original)*

36. The second defendant argues that he is a customer for the purposes of the general principles and that the general principles must inform the Bank's dealing with him, such that the Bank had an obligation to make disclosure of relevant information including all charges applicable to the facility. The relevant information which it is asserted that the Bank failed to furnish was information relating to the interest rates applicable to the facility. I have already dealt to some extent with this point above.

37. It is asserted by the second defendant that the precise status of the regulatory codes issued by the Central Bank under the relevant enabling legislation is as yet not clear. I am pointed to a long line of authorities including *Zurich Bank v. McConnon* [2011] IEHC 75, *Stepstone Mortgage Funding v. Fitzell Ltd.* [2012] IEHC 142, *Irish Life and Permanent plc v. Duff* [2013] IEHC 43, *ICS Building Society v. Lambert* [2014] IEHC 581 and my own judgment in *Ryan v. Dankse Bank* [2014] IEHC 236, as illustrations of the extent to which the status of the Code has yet to be definitively determined.

38. I have already noted in my judgment of *Ryan v. Danske Bank* that the two "currents" which can be identified in recent case law evolved in two classes of remedies, those relating to claims for possession by a bank of which *Stepstone Mortgage Funding v. Fitzell Ltd., Irish Life and Permanent plc v. Duff and ICS Building Society v. Lambert* are examples, and those relating to claims for debt where no discretionary element exists at common law and where none can be imported or is required to be imported from the Code.

39. However it seems to me irrespective of any perceived difference in the authorities that this case falls to be considered in the context of the first case of which I am aware where the legal status of the Code came to be considered. This is the judgment of Birmingham J. in *Zurich Bank v. McConnon* and it is of particular note that that judgment related to a loan which had been advanced before the 1st July, 2007 when the 2006 Code came into operation save with regard to the general principles applicable to customers which I have outlined above, and which are the sole elements of that Code on which Mr Fingleton may seek to rely.

40. Laffoy J. in *Stepstone Mortgage Funding v. Fitzell Ltd*. pointed to the fact that Birmingham J.'s comments with regard to the Code were *obiter*, and she correctly so characterised his comments in that Mr McConnon claimed to be, but was held not to be, a consumer for the purposes of the Code. However Birmingham J.'s comments with regard to the position and role of the general conditions of the Code contained in chapter one, are directly referable to the issue that arises in this case, and that defendant also placed reliance on those general principles, arguing that these general conditions implied a term into the contract between the parties, breach of which created rights for the defendant. Birmingham J., assuming for the purposes of the argument that the general conditions in the Code did apply, took the view that they did not assist the defendant as there is nothing in the Code, or in the power of the Financial Regulator to administer sanctions for the contravention of the Code under Part IIIC of the Central Bank Act 1942, to suggest "*that a breach of the code renders the contract null and void or otherwise exempts the borrower from the liability to repay*".

41. Birmingham J. noted the difficulties from the general law of contract with regard to implied terms, and the common law requirement that such a term would pass the "officious bystander" test and went on to say the following which does inform my thinking:-

> *"The only implied term that would assist the defendant would be a term that the Bank was obliged to comply in all respects with the Code and that the consequence of non compliance was that the borrower was exempted from the liability to repay the loan. If one introduces the traditional officious bystander into the equation then it would be seen that such a suggestion has little reality. The notion that a bystander asking whether such a term formed part of the agreement would be hushed by the parties jointly and impatiently snapping "of course" seems more than improbable. In summary I can see no basis for suggesting that any alleged breach of the Code exempts the borrower from repaying his loan."*

42. *Stepstone Mortgage Funding v. Fitzell Ltd*. and *Irish Permanent plc v. Duff* were cases where the specific provisions of the Code dealing with consumers were alleged to have been breached and in *Stepstone Mortgage Funding v. Fitzell Ltd*. the breach was particularly egregious. Mr Fingleton has not argued for any egregious breach of the Code, and relies instead on the argument that the Bank was obliged to furnish him with details of the conditions of his contract, including the charges applicable to the loan. I have already dealt above with the question of whether the general terms and conditions of commercial lending were incorporated by reference into the contract of loan, and I have found that they were, and it seems to me that even if the terms of the Code were incorporated or could be said to be implied into the private contractual arrangement between Mr Fingleton and the plaintiff, he has shown no breach of that Code which would entitle him to defend these proceedings.

43. The last case in the line of authorities dealing with the effect of the Code is the judgment of McGovern J. in *Freeman & Anor. v. Bank of Scotland & Ors.* [2014] IEHC 284, delivered on the 29th May, 2014. In that case one issue that arose was the Bank's Code of Practice on the transfer of mortgages and a second document entitled "Assets Securitisation" McGovern J., having reviewed the authorities from *Zurich Bank v. McConnon* through to the judgment of Ryan J. in *ACC Bank plc. v. Deacon* [2013] IEHC 427 made the following comment:-

> *"It is clear, therefore, that non-compliance with a statutory code does not relieve a borrower from his obligations under a loan to repay the lender, nor does it deprive the lender of its rights and powers under the loan agreement. If that is the case so far as statutory codes of conduct are concerned, then, a fortiori, the plaintiffs in this action cannot make the case that they are relieved from their obligations under the loan or that the Bank is deprived of its rights under the loan agreements, if there has been a breach by the Bank of what is a voluntary code."*

44. The judgment therein referred of Ryan J. in *ACC Bank plc v. Deacon* also considered *Zurich Bank v. McConnon* and in that case Ryan J. took the view that there was nothing to bring into play the considerations that lead Laffoy J. and Hogan J. in their decisions, quoted above, to refuse relief.

45. In the circumstances and having regard to the authorities I consider that breach of the general conditions in the Code of Conduct of 2006, the only part of that Code applicable at the time the loan was advanced to Mr Fingleton, does not afford him an arguable defence to the claim for judgment, and he has identified no breach of the Code which would be actionable even were it to be shown that the Code had become incorporated into his contract with the Bank. The height of Mr Fingleton's argument is that the Bank failed to furnish him with details of charges applicable to his loan, and as I have already held that the details were incorporated into the signed loan documentation, I am of the view that the Bank has shown sufficient compliance with its obligations under the Code

46. I am not satisfied that the second defendant has shown that he has an arguable defence on this ground.

Was the Bank obliged to afford natural or constitutional justice?

47. The most difficult argument raised by the second defendant is that by virtue of the statutory and other relevant factors which he has identified, the plaintiff Bank is in essence a public body and obliged to afford him natural and constitutional justice and fair procedure in the conduct of these proceedings, and in making demand on him on foot of the loans. His affidavit evidence shows that he sought to communicate with the Bank on a number of occasions, and that in or around July 2013 after receiving the letter of demand he phoned the Bank and asked to speak to the person who issued the letter. On that occasion he was informed that that person was on a course and was unable to speak with him, and that the person who had originally dealt with the facility was on annual leave. He said he made attempts to engage with the plaintiff in August and September 2013, but on each occasion no one was available to speak with him. He said that on the 14th January, 2014 he contacted the plaintiff again and enquired as to who was dealing with the matter. He was told that no identified person could be contacted within the Bank for that purpose. He goes on to say that he was later contacted by an identified official who indicated that the plaintiff did not wish to meet him but that he could contact the Bank through its solicitors. He did this, and he avers to the fact that he was informed by those solicitors that they would pass on his request for a meeting, but that he heard nothing further. The proceedings had already been instituted by then, and the summary summons is dated the 1st October, 2013.

48. The second defendant argues that the bank failed to engage with his submissions, and indeed he goes further and says that the bank failed to invite submissions from him before the letter of demand and the proceedings issued. He asserts that the plaintiff bank is a public body, is almost wholly state owned and must for that reason be amenable to the application of principles of public law and he says, and there can be no denying this, that the service of a letter of demand by the Bank is an adverse decision which can, and did in fact, impact on his property and financial interest. He relies on the judgment of the Supreme Court in *Dellway Investments Ltd. v. NAMA* [2011] 4 IR 1, the judgment of Finlay Geoghegan J. in *Treasury Holdings v. NAMA* [2012] IEHC 297, and the judgment of Cregan J. in *Flynn v. NALM* [2014] IEHC 408

49. He makes the point that the status of the Bank was affected by the Credit Institutions (Stabilisation) Act 2010 (the "Act of

2010") enacted *inter alia* to protect the State's interests in respect of guarantees given by the State to support the relevant financial institutions and that the plaintiff Bank being a bank that obtained the benefit of this guarantee, is by virtue of the Act obliged to "*align its activities with the public interest and other purposes of the Act*."

50. Counsel for the Bank argues that the Bank is not a public body, albeit that it is almost wholly State owned but that even if the Bank is a public or State body in a general sense that not all functions of the Bank can be characterised as public functions, and that the power of the Bank to demand repayment was one that arises from a wholly private contract into which there cannot be imported a public law obligation of fairness. He also points to the fact that shares in the company are traded on the Stock Exchange, and that while it may be a state owned body its private banking functions are not public functions amenable to public law remedies and protections.

51. I will consider the arguments in two parts, first by reference to the Act of 2010 and second by reference to the line of authority on the statutory functions of NAMA and its associated entities.

Discussion on the Credit Institutions (Stabilisation) Act 2010
52. The Act of 2010 was enacted in the context of the financial emergency that befell the State in the aftermath of the collapse of the private banking sector in 2008. The purpose of the Act is recited in the preamble and I set out the relevant recitals

> *"and whereas measures are necessary to address a unique and unprecedented economic crisis which has led to difficult economic circumstances and severe disruption to the economy;*
>
> *and whereas it is necessary, in the public interest, to maintain the stability of those credit institutions and the financial system in the state;*
>
> *and whereas the functions and powers conferred by this act are necessary to secure financial stability and to effect a reorganisation of certain credit institutions;*
>
> *and whereas the considerable financial support provided by the state to certain credit institutions has helped those institutions to meet their financial and regulatory obligations;*
>
> *and whereas the urgent reorganisation of certain credit institutions is of systemic importance to the state;"*

53. The Bank is a relevant credit institution within the meaning of the Act and s.48 provides as follows:-

> *"(1) In the performance of their functions the directors of a relevant institution shall have a duty to have regard to the matters mentioned in section 4 (f).*
>
> *(2) The duty imposed by subsection (1)—*
>
> > *(a) is owed by the directors to the Minister on behalf of the State, and*
> >
> > *(b) takes priority over any other duty of the directors to the extent of any inconsistency.*
>
> *(3) The Minister may make and publish guidelines in relation to the duty imposed by subsection (1). A director may rely on any such guidelines in demonstrating his or her compliance with that duty.*
>
> *(4) If the Minister is of the opinion that it is no longer necessary for this section to apply in relation to a particular relevant institution, he or she may so order.*
>
> *(5) The Minister shall lay a copy of an order under subsection (4) before each House of the Oireachtas as soon as may be after the order is made."*

54. Section 48 requires the directors of the participating institutions, including the AIB to have regard to the matters set out in s. 4 (f) as follows:

> *"(f) to address the compelling need*
>
> > *(i) to facilitate the availability of credit in the economy of the State,*
> >
> > *(ii) to protect the State's interest in respect of the guarantees given by the State under the Act of 2008 and to support the steps taken by the Government in that regard,*
> >
> > *(iii) to protect the interests of taxpayers,*
> >
> > *(iv) to restore confidence in the banking sector and to underpin Government support measures in relation to that sector, and*
> >
> > *(v) to align the activities of the relevant institutions and the duties and responsibilities of their officers and employees with the public interest and the other purposes of this Act"*

55. The status of AIB, or indeed any other one of the pillar banks which received the benefits of the State guarantee, in the light of the Act of 2010 has not been considered by any court. Counsel for the second defendant argues that as the purposes of the Act imposed upon such bodies an obligation to consider the public or general State interest in its commercial activities, that this imports upon the Bank the obligation *inter alia* to comply with the principles of natural and constitutional justice identified by the Supreme Court in *Dellway Investments Ltd. v. NAMA* and by the High Court in the two other cases referred to above. Counsel argues not merely that AIB is *de facto* a publicly owned body, but that the fact it is mandated under the Act of 2010 to exercise its functions having regard to the public interest, and that the obligation on the part of the Bank created by the Act of 2010 to consider the public interest and to align its functions with those of the State, constrains the Bank in the operation of its contractual obligations by considerations of the public interest.

56. The starting point for the distinction between powers and duties which come within the realm of public law is the decision of Finlay C.J. in *Beirne v. Commissioner of An Garda Síochána* [1993] 1 I.L.R.M 1 where he at p. 2 of the judgment of the Supreme Court said the following:-

> *"The principles which in general exclude from the ambit of judicial review decisions made in the realm of private law by persons or Tribunals whose authority derives from contract is, I am satisfied, confined to cases or instances where the duty being performed by the decision making authority is manifestly a private duty and where his right to make it derives solely from contract or solely from consent or the agreement of the parties affected.*
>
> *Where the decision being carried out by a decision making authority, as occurs in this case, is of a nature which might ordinarily be seen as coming within the public domain, that decision can only be excluded from the reach of the jurisdiction in judicial review if it can be shown that it solely and exclusively derived from an individual contract made in private law."*

57. Counsel for the second defendant relies on the judgment of Denham J. in *O'Donnell v. Tipperary (South Riding) County Council* [2005] 2 I.R. 483 as authority for the proposition that two tests must be satisfied to take the decision of a body out of the area of public law, namely the decision maker must be performing a private duty, and its right to make the decision must derive solely from contract or consent. In that case Denham J. held that while it was clear that the employment of the plaintiff as a station officer with the Fire Service was a matter of contract it was also one within the public domain, because the contract had a "*significant public element*".

58. Denham J. expressly referred to *Beirne v. Commissioner for An Garda Síochána* in her decision, but it is to be noted that the question she was asking was whether the duty being performed by the employer, in the first case the Garda Commissioner, and in the second case the Fire Service "*is of a nature which might ordinarily be seen as coming within the public domain*".

59. In *Treasury Holdings v. NAMA* Finlay Geoghegan J. applied the principles from *Beirne v. Commissioner for An Garda Síochána* and *O'Donnell v. Tipperary (South Riding) County Council* and held that the statutory framework which established NAMA was such that it brought NAMA within the realm of public law in the performance of its functions, and she noted that the right to make the decisions impugned in that case did not "*derive solely from contract or the consent or agreement of Treasury*". NAMA's entitlement to exercise the lender's rights, formerly the rights enjoyed by the mortgagee or chargee of the various security documents executed by Treasury which entitled it *inter alia* to appoint a receiver, was a right which NAMA acquired from the participating institution, the lender, by operation of law pursuant to s. 90 of the Act and by virtue of the provisions of s. 99 and in some instances s. 147 of the Act. In particular NAMA was required by the legislation to exercise its discretion to enforce "*for the purpose of achieving its public interest, statutory purposes as set out in s. 10*".

60. Cregan J. followed the judgment of Finlay Geoghegan J. in *Treasury Holdings v. NAMA* in his judgment in *Flynn v. NALM*, and held that the decision of NALM to call in the Flynn loans involved the exercise by that body of a public power, thus bringing into play the right of the plaintiff to be heard, and the duty on the part of NALM to act fairly and in a reasonable manner.

61. The first question I must determine is whether the decisions made by the plaintiff in respect of the defendant are within the public realm. I accept that the State is a majority or almost the full owner of the shareholding in the Bank. The Bank is engaged in commercial activities, but it is not for its commercial duties an entity through which the executive powers of the State are exercised, and it does not advance money on behalf of the State or collect money on behalf of the State. The State collection of monies advanced to the banks has to some extent been hived off to other entities in the form of NAMA and NALM, which has been given the statutory function of recovering monies advanced by the State. NAMA and NALM insofar as they seek to collect debts from customers of participating institutions do so by virtue of a statutory power and as the statutory successor of banks that were at one time commercial private banks.

62. AIB Bank fell into public hands by virtue of the State guarantee, and, put simply, the exchange of shares as part of the consideration for that guarantee. The fact that the Bank's shares continue to trade in the market is not definitive with regard to its legal status but it is not a matter of insignificance. AIB is not a body established by statute, and this distinguishes the factors giving rise to the decisions in *Beirne v. Commissioner of An Garda Síochána* and *O'Donnell v. Tipperary (South Riding) County Council* which informed the decisions in *Dellway v. NAMA, Treasury Holdings v. NAMA and Flynn v. NALM,* each of which depended on the fact that the functions and powers were public functions of bodies established to perform those functions.

63. The law relating to judicial review has advanced even in the intervening years since *O'Donnell v. Tipperary (South Riding) County Council* was decided, but an overriding principle as to the applicability of public law remedies has to be that a body, whether established by statute or otherwise, must perform and be obliged to perform its functions in the public interest, and whether in a given case the decision impugned is one that arises from the exercise of a public power. There are certain classes of functions which might arise within such a body which would be wholly private and not for that reason ones which are obliged to be performed in the public interest.

64. An example of this is found in the case law concerning schools and some discussion was had in the course of the hearing before me that, while the Minister for Education pays the salary of teachers, that fact alone does not make the relationship between the Minister and the teacher one of public law, and it is the tripartite relationship that exists as a result of the Education Act 1998 that creates a public law element, albeit such element is not found in regard to each and every part of the school's relationship with its staff. Certain bodies which have a public element in their functions, such as schools, operate in general in the public interest as was noted by McGovern J. in *Blackrock College v. Browne* [2013] IEHC 607 but that fact of itself does not import a public law element in all facets of the operation of the school.

65. I delivered judgment in *Conroy v. Board of Management of Gorey Community School* [2015] IEHC 103 in which I held that a chaplain in a school could not avail of public law remedies notwithstanding that his salary was paid by the State and that he was employed in a community school. That decision was based on a view that the Minister for Education had no role in the appointment of a chaplain, in the fixing of terms of and conditions for the appointment of a chaplain, or in the assessment of the qualifications and duties of such a chaplain. That judgment distinguished the considered reasoning of O'Malley J in *Kelly v. Board of Management of St Joseph's National School* [2013] IEHC 392 where she held that a public law element arose from the interplay between the Minister for Education acting as protector of the public interest and the mandatory statutory disciplinary procedures for teaching staff.

66. A distinction drawn by the ECJ in the case of *Foster v British Gas plc (CaseC-188/89)* [1990] ECR I-3313 is useful by way of analogy. Mrs. Foster argued that British Gas was part of the British State as board members were appointed by the UK government, and it was required to submit periodic reports to the Secretary of State. The ECJ held that the question of what was a state body

would depend on whether the organisation was subject to the authority or control of the state, and whether it provided a public service. The following extract from the judgment is illuminating:-

> *"18 On the basis of those considerations, the Court has held in a series of cases that unconditional and sufficiently precise provisions of a directive could be relied on against organizations or bodies which were subject to the authority or control of the State or had special powers beyond those which result from the normal rules applicable to relations between individuals*
>
> *19 The Court has accordingly held that provisions of a directive could be relied on against tax authorities (the judgments in Case 8/81 Becker, cited above, and in Case C-221/88 ECSC v Acciaierie e Ferriere Busseni (in liquidation) [1990] ECR I-495), local or regional authorities (judgment in Case 103/88 Fratelli Costanzo v Comune di Milano [1989] ECR 1839), constitutionally independent authorities responsible for the maintenance of public order and safety (judgment in Case 222/84 Johnston v Chief Constable of the Royal Ulster Constabulary [1986] ECR 1651), and public authorities providing public health services (judgment in Case 152/84 Marshall, cited above).*
>
> *20 It follows from the foregoing that a body, whatever its legal form, which has been made responsible, pursuant to a measure adopted by the State, for providing a public service under the control of the State and has for that purpose special powers beyond those which result from the normal rules applicable in relations between individuals is included in any event among the bodies against which the provisions of a directive capable of having direct effect may be relied upon."*

67. Finlay Geoghegan J. in *Treasury Holdings v. NAMA* noted the judgment of Williams J. in *R (Birmingham and Solihull Taxi Association and Ors.) v. Birmingham International Airport Ltd and Passenger Transport Solutions UK Ltd.* [2009] EWHC 1913 (Admin) is a useful statement of principle. She considered that the law stated therein was broadly similar to that found in the Irish authorities, and that any difference was minimal. She did not need to take her discussion any further as the decisions of NAMA arose from wholly statutory powers, unlike those the subject matter of this judgment. In the present context the statement of principle by the English High court is of assistance and I quote:-

> *"In my judgment, those authorities establish, in general, that when a public body exercises rights under a contract, apparently in conformity with the terms of the contract, its decisions so to do will be susceptible to judicial review only if an abuse of power can be established. I use the phrase 'abuse of power' in the way explained by Elias J (as he then was), in Molinaro. For the avoidance of doubt, I would accept that a decision to terminate the licence enjoyed by the first claimant for an improper motive was an abuse of power (see Hampshire County Council para [38]) but, as I have found such an allegation has not been made out in this case. As I have endeavoured to explain, I have considerable reservations about whether a failure to consult or to provide an opportunity to make representations could amount to an abuse of power in the context of this case for the obvious reason that the licence itself does not require such steps to be taken."*

68. I consider that while AIB is almost entirely wholly owned by the State, in that the State is the majority shareholding in the Bank, that the powers and functions sought to be exercised by AIB in this case are not public powers, nor are they powers derived under statute, or which became vested in AIB as a result of any statutory enactment, or, to borrow from the judgment of the ECJ in *Foster v British Gas plc*, they are not "*special powers*" beyond those normally found in the bank/customer contractual relationship . AIB is seeking to enforce private contractual rights which it derives wholly from the loan documents which Mr Fingleton executed. In particular certain provisions of the loan contract entitle the Bank to make demand and that right is in no way tempered by, or conferred on AIB by any statute, and in particular does not derive from the statutory framework which now imposes upon the directors of AIB an obligation to consider the public interest in the conduct of its business. The Bank may have an obligation to account to the Minister in respect of certain of its activities, it may have an obligation to protect the interest of the State in respect of the bank guarantees, to protect the interests of taxpayers, to restore interest in the bank etc., but these are obligations owed to the Minister, or by implication to the State. That fact does not mean that all functions of the Bank are public functions, and in the absence of any conflict between the Bank's private contractual rights, and the Minister's entitlement to have the State interest considered in the context of the banking activity, I can see no basis on which there can be imported into the contract between the second defendant and the Bank, public law or constitutional terms, or an obligation to act fairly. I consider that the Bank's claim in these proceedings may fairly be said to be characterised as those defined by Finlay C.J. in *Beirne v. Commissioner of An Garda Síochána* as "*decisions made in the realm of private law by persons or Tribunals whose authority derives from contract*".

69. Whilst I accept that certain of the functions of the Bank may now by virtue of the Act of 2010 be deemed to be public functions, I do not accept that the public nature of the duties imposed on the directors of the Bank to have regard to the interest of the taxpayer are such that the Bank exercises or performs a public function in all matters relating to the operation of private bank accounts, and the recovery of commercial and non state loans by it.

70. Accordingly, I am not persuaded by the second defendant's argument that there is imported into the private contractual banking and day-to-day relationship between the Bank and its customers the principles of public law. I do not say this merely on account of the fact that the contrary proposition could be said to be inconvenient for banking relationships, or indeed that such an argument has not been successfully made in earlier cases, but rather because the Bank is and remains a private commercial entity engaged in the ordinary business of banking, and while the directors in the overall management of the Bank have an obligation to consider the State interests and the interests of the taxpayer that public interest element was imposed upon the directors in their general management of the bank and not in its day-to-day private contractual dealings and does not to my mind penetrate into, or retrospectively inform, the contractual arrangements that the Bank had at the time the Act came into force.

71. Further, the context and recited purposes for which the 2010 obligations on the Bank were imposed are not such in my mind that require the Bank to engage with public law type of propriety in all of its relationships with its customers. Indeed one could say that the various Codes of Conduct issued by the Central Bank, especially the Code issued in 2012 after the Act of 2010 was already in force, impose certain obligations on unregulated entities, and that there would have been no requirement to impose such were they to be implied or imposed as a matter of public law, arising from the Act of 2010.

72. Finally I reject the associated argument advanced by the second defendant that the plaintiff is an "organ of State" for the purposes of the European Convention on Human Rights Act, 2003, such that certain rights would arise in favour of the second defendant against any body so characterised as an organ of State.

73. An organ of State is defined in s. 1 of the Act of 2003 as follows:-

> *"organ of the State" includes a tribunal or any other body (other than the President or the Oireachtas or either House of the Oireachtas or a Committee of either such House or a Joint Committee of both such Houses or a court) which is established by law or through which any of the legislative, executive or judicial powers of the State are exercised;*

74. The Bank is not a tribunal or other body established by law, and is not one through which any of the powers of the State are exercised.

Discussion: the Dellway principles

75. Counsel for the second defendant relies primarily on the decision of Cregan J. in *Flynn v. NALM*, and the decision in that case that as the defendants, NAMA and NALM, had failed to provide an opportunity to the plaintiff to be heard and had failed to act fairly and reasonably, Cregan J. held that the demand was neither valid nor lawful. He came to that decision following an analysis of the decision of Finlay Geoghegan J. in *Treasury Holdings v. NAMA* where Finlay Geoghegan J. held that the powers and duties exercised by NAMA in regard to the Treasury Holdings loans were decisions taken "*exercising a public function imposed on it by s. 11 of the Act for its statutory purpose as set out in s. 10 in the public interest*", and that the statutory framework brought the NAMA claims within the public arena, and that the function or duty being discharged by NAMA in taking a decision to enforce the loans of Treasury Holdings "*is no sense a private duty*", but was "*taken pursuant to the functions given to them by Statute for the stated purposes or in the public interest*".

76. *Treasury Holdings v NAMA* and the judgment of Cregan J. in *Flynn v. NALM* were both cases where the lending institution was a creature of statute, and where its functions and powers to enforce repayment of loans were wholly created by statute, and vested in it by s.99 of the Act. In that regard I regard it as important that Finlay Geoghegan J. pointed to the fact that the right to enforce the loans did not "*derive solely from contract or the consent or agreement of Treasury*", and said as follows:-

> *"[T]he right to make this decision does not derive solely from contract or the consent or agreement of Treasury. Whilst it is true that NAMA may not enforce against Treasury unless the relevant contractual conditions which permit the lender to enforce have been met, NAMA's entitlement to enforce does not derive solely from the contracts entered into by Treasury with the participating banks. NAMA's entitlement to exercise the lender's rights under the contractual provisions arises from its acquisition by operation of law pursuant to s. 90 of the Act, and the provisions of s. 99, and in some instances, s. 147 of the Act."*

77. I pause here to stress the distinction between the powers of AIB to enforce the loans granted to Mr Fingleton which derived from contract, and the powers of NAMA to enforce which arose partly from the contractual nexus which had come into place before NAMA was established, but also from the statutory provisions which established NAMA and which vested in it various powers, some of which were more extensive and far reaching than those provided for in the contract.

78. Finlay Geoghegan J. took the view that the decision of NAMA to enforce was a decision amenable to judicial review and summarised the relevant authority in the Supreme Court decision of *Dellway Investments v. NAMA* with regard to the question before her as follows:-

> *"If I am correct in deciding that NAMA, in making the decision to enforce, was taking a discretionary decision pursuant to a power conferred on it by statute, it is common case that the existence of a duty on it to give Treasury an opportunity to be heard or Treasury's right to be heard, is dependent upon its status as a person who is or may be affected by such decision."*

79. Cregan J. in *Flynn v. NALM* in the light of that authority came to the following conclusion:-

> *"In the present case I am of the view that all members of the Flynn family were also clearly adversely affected by the decision of NALM to call in the loans, to enforce its security against them and if necessary to appoint receivers.*
>
> *Clearly, as they are adversely affected by the decision to enforce, it follows therefore in the light of the principles set out in Dellway and in Treasury Holdings that they have a right to be heard."*

Cregan J. was dealing with one of the statutory entities established by NAMA under its statutory powers contained in the NAMA Act of 2009. Cregan J. held as follows:-

> *"Given my findings about the need to give reasons, the right to be heard and the duty to act fairly and reasonably, I am of the view that NALM has failed to provide a full opportunity to the Flynns to be heard. It has therefore failed in its duty to act in a reasonable manner. It follows that the letter of demand of 5th February, 2013 was not a proper valid or lawful demand. It must therefore be set aside. It follows that the Flynns are not in default on their loan at this point in time because the loan has not been properly, lawfully or validly called in."*

80. Both the decision of Finlay Geoghegan J. and that of Cregan J. were made in the context of powers which were created by statute, and of decisions taken by bodies which were wholly the creature of statute, and which were in addition mandated to act in the public interest in all of their activities, and under s. 10(2) to "*obtain the best achievable financial return for the State*".

81. The judgment of Finlay Geoghegan J. in *Treasury Holdings v. NAMA* as well as the judgment of the Supreme Court in *Dellway Investments Ltd. v. NAMA* were made in the context of a discretionary power conferred on a body by statute, and that the obligation to exercise its discretionary power in the context of a requirement of fairness arose because of the way by which the body was constituted.

82. I reject the argument that there is implied into the Bank's contractual arrangement with its clients or customers an obligation akin to the public law obligation that arises in respect of the statutory bodies NALM and NAMA. Those bodies are quite clearly public bodies and have express public law powers which carry public law duties. The Bank is not such and it relies in this case on contractual powers and not on special powers conferred by statute, and the argument by analogy from the line of cases commencing with *Dellway Investments Ltd. v. NAMA* is not applicable to the service by the Bank on Mr Fingleton of the demand for payment.

Conclusion

83. I conclude accordingly that the second defendant has not raised an arguable defence to the claim and that it is proper for me to enter judgment in favour of the Bank on the motion for summary judgment.