Neutral Citation Number: [2012] IEHC 297

THE HIGH COURT

JUDICIAL REVIEW

IN THE MATTER OF SECTION 193 OF

THE NATIONAL ASSET MANAGEMENT AGENCY ACT 2009

[2012 55 J.R.]

BETWEEN

TREASURY HOLDINGS, SPENCER DOCK DEVELOPMENT COMPANY LIMITED, SDDC (No. 1) LIMITED, SDDC (No. 2) LIMITED, SDDC (No. 3) LIMITED, SDDC (No. 4) LIMITED, FAXGORE LIMITED, REAL ESTATE OPPORTUNITIES PLC., COOLRED LIMITED, TENDERBROOK LIMITED, WINTERTIDE LIMITED, TWYNHOLM LIMITED, RIGOL LIMITED, RUSHRID LIMITED, IREO IRISH REAL ESTATE OPPORTUNITIES FUND PUBLIC LIMITED COMPANY, CARRYLANE LIMITED, CALLSIDE DEVELOPMENTS LIMITED, RADTIP PROPERTIES LIMITED, SENCODE LIMITED, LORNABAY LIMITED, BALLYMUN SHOPPING CENTRE LIMITED, MONTEVETRO II LIMITED AND TREASURY HOLDINGS CHINA LIMITED

APPLICANTS

AND

THE NATIONAL ASSET MANAGEMENT AGENCY AND NATIONAL ASSET LOAN MANAGEMENT LIMITED

RESPONDENTS

AND

KBC BANK IRELAND PLC, IRISH BANK RESOLUTION CORPORATION LIMITED LUKE CHARLTON AND DAVID HUGHES

NOTICE PARTIES

JUDGMENT of Ms. Justice Finlay Geoghegan delivered on the 31st day July of 2012

1. By order of the High Court of 27th March, 2012, made pursuant to a judgment delivered by me on 22nd March, 2012, leave was granted to the applicants pursuant to ss. 182 and 193 of the National Asset Management Agency Act 2009 ("the Act") and O. 84 of the Rules of the Superior Courts to apply by way of application for:

> "(i) An order of *certiorari* by way of an application for judicial review quashing the purported decision of the First Named Respondent, in performance of its functions under Section 11 of the National Asset Management Agency Act, 2009 (the "Act"), as evidenced in the letter of 9 January 2012 but actually made on 8 December 2011, 'to arrange for demands for repayment to be issued in respect of facilities in default and, failing repayment, to proceed to appoint receivers (including statutory receivers) as appropriate to various properties that comprise security for such facilities.'
>
> . . .
>
> (ii) If necessary or appropriate, an order of *certiorari* quashing the decision of the Respondents of 25 January 2012 to proceed with enforcement in respect of the Applicants' assets, including the appointment of receivers."

on the following grounds:

> (i) The decisions are in the area of public law and are therefore amenable to judicial review;
>
> (ii) The decision of 8th December, 2011, was taken in breach of NAMA's duty to notify Treasury of the proposed decision and to give it an opportunity to be heard prior to the taking of the decision and in breach of Treasury's corresponding rights to receive notification and be heard;
>
> (iii) NAMA, in exercising its discretionary power to take a decision to enforce and proceed with that decision is under a duty to exercise such power in a fair and reasonable manner; and
>
> (iv) NAMA, in taking the decision on 8th December, 2011, failed to exercise its discretionary powers in a fair and

reasonable manner by reason of:

a) the failure to give notice of the proposed decision and to afford an opportunity to be heard; and/or

b) the Credit Committee considering the matter on 6th December, 2011, when Treasury had been given until 7th December, 2011, to respond to concerns relating to the creditors strategy; and/or

c) the failure to take into account relevant considerations on 8th December, 2011, namely, the availability of investors/purchasers for the loans.

2. The applicants are all companies within the Treasury Holdings Group. They will be referred to in this judgment collectively as 'Treasury' or the 'Group'. In some contexts, this will not include the last named applicant which is not indebted to the respondents.

3. The first named respondent, the National Asset Management Agency, is established by s. 9 of the Act, and the second named respondent, National Asset Loan Management Ltd. is a NAMA group entity as provided for by the Act. They are referred to collectively as NAMA in this judgment. Nothing turns on the existence of two separate bodies corporate.

4. KBC Bank Ireland Ltd., the first named notice party, is the only notice party which participated in the hearing. It holds 25% of a syndicated facility in relation to the Spencer Dock Development which was amongst the Treasury facilities taken into NAMA. NAMA, as successor to Allied Irish Banks plc. ("AIB"), and Irish Bank Resolution Corporation Ltd. ("IBRC") holds 75% of the syndicated loan. IBRC is the agent and security trustee for the finance parties and secured beneficiaries under the syndicated loan agreement. Mr. Charleton and Mr. Hughes are the receivers purportedly appointed on 25th January, 2012.

5. By further order of the High Court of 27th March, 2012, the proceedings were admitted to the Commercial List.

6. Since the grant of leave, Treasury delivered an amended statement of grounds dated 27th April, 2012. The grounds relied on are confined to those set out in the order granting leave. On 27th April, 2012, an amended statement of opposition was delivered by NAMA. On 30th April, 2012, an amended statement of opposition was delivered by KBC. The grounds of opposition give rise to the issues to be determined set out below.

7. The evidence comprises the affidavits sworn prior to the application for leave and five affidavits delivered post-leave. In addition, discovery was made by NAMA and it was agreed that the discovery produced, some of which is redacted, be admitted in evidence as *prima facie* truth of the contents of the relevant documents. There was no oral evidence. Whilst notices to cross-examine had been served, the application was withdrawn in the course of the hearing.

8. In the interests of clarity, I have decided that this judgment should be capable of being read and understood without reference to the leave judgment. In the course of the hearing, I gave the parties an opportunity of addressing me on any legal principle or fact which they considered to be incorrectly stated therein. In the interests of efficiency, I have used, where relevant, statements of legal principle was not disputed and summaries of facts used by me in the leave judgment.

Challenged Decisions

9. The first decision challenged is the decision taken by NAMA on 8th December, 2011. Such decision has been referred to throughout as "a decision to enforce". That is consistent with the evidence, and in particular, the minutes of the board meeting of NAMA of 8th December, 2011. The operative part records a resolution to approve the recommendation of the credit committee at its meeting of 6th December, 2011, to "initiate enforcement on the entire Connection". "Connection" is a term used by NAMA to connote all facilities associated with a debtor or group of debtors, in this instance, the Treasury Holdings Group. It is not in dispute that in practical terms, the decision to enforce meant as stated in the letter from NAMA of 9th January, 2012, "to arrange for demands for repayment to be issued in respect of facilities in default and, failing repayment, to proceed to appoint receivers (including statutory receivers) as appropriate to various properties that comprise security for such facilities".

10. The second decision challenged is that taken on 25th January, 2012. As appears from the relief sought, Treasury characterised this as a decision to proceed with enforcement and to appoint receivers. They submit that it is a decision to proceed with the decision to enforce already taken on 8th December, 2011, and as such, its validity is dependent upon the validity of the decision of 8th December, 2011.

11. Counsel for NAMA sought to distance the decision of 25th January, 2012, from that of 8th December, 2011. It is correct as a matter of fact that it was a separate and distinct decision. By reason of the standstill arrangements entered into in early January referred to in greater detail below, NAMA had agreed not to take any further steps in the enforcement process after 11th January, 2012, for a period of 14 days. The decision taken by the Board of NAMA on 25th January, 2012, in accordance with its own minutes was ". . . the Board resolved to proceed with enforcement action to include any necessary service of demands and appointment of receivers . . ."

12. In my judgment, the decision taken on 25th January, 2012, whilst a separate decision taken after the standstill arrangements is a decision which is inextricably linked to and dependent upon the decision of 8th December, 2011. It is a decision to proceed with enforcement which had already been decided upon on 8th December, 2011, but the implementation of which had been stalled or stayed by the standstill arrangements. The decision of 25th January, 2012, was to proceed with enforcement which had already been decided upon on 8th December, 2011. As such, the validity of the decision taken is dependent upon the validity of the decision of 8th December, 2011. The board of NAMA, on 25th January, 2012, did not revisit the question as to whether or not it should enforce against Treasury.

13. For the above reasons, throughout this judgment insofar as I refer to the decision to enforce, it is the decision taken on 8th December, 2011.

Issues

14. The parties are in agreement as to the issues to be determined by the Court. There was some disagreement as to the order in which the issues should be decided. However, that does not have any practical consequence as the parties have asked that the Court determine all the major issues in the case, irrespective of its decision on any of the issues which would preclude Treasury from obtaining the relief sought.

15. I propose considering and determining the principal issues in the proceedings in the following order.

(1) Whether or not the decision to enforce is a decision in the realm of public law, and as such, amendable to judicial review.

(2) Whether Treasury had a right to be heard or, as alternatively put, was NAMA under an obligation to give Treasury an opportunity to be heard prior to taking the decision to enforce.

(3) Whether Treasury was given an opportunity to be heard and heard by NAMA prior to it taking the decision to enforce.

(4) Whether NAMA was under a duty to act fairly and reasonably in taking a decision to enforce. If so, was it in breach of that obligation by reason of its failure to hear Treasury or consider a relevant matter, namely, investor interest in the acquisition of the Treasury loans or underlying secured assets or the timing of the Credit Committee meting on 6th December, 2011.

(5) In relation to the standstill arrangements in January 2012:

(i) do they preclude Treasury from challenging the validity of the NAMA decisions to enforce and appoint receivers in these proceedings; or, if not

(ii) do they constitute a "cure" for any defect in the procedures prior to the decision of 8th December, 2011, or

(iii) if NAMA does not succeed on either of the above two contentions, are they such that the Court should exercise its discretion against granting orders or *certiorari* even if it determines issues (1) to (4) above in favour of Treasury.

(6) Are KBC's contractual rights and decisions made such that the Court should exercise its discretion to refuse *certiorari* of the impugned decisions, even if Treasure is successful on issues (1) to (5).

Legal Framework

16. NAMA, whose decisions are challenged in these proceedings, is a body corporate established by s. 9(1) of the Act "to perform the functions assigned to it by this Act". As such, the issues in the proceedings must be considered in the context of the purposes of the Act; the purposes of NAMA and its functions, powers and practices. Section 2 provides:

"The purposes of this Act are—

(a) to address the serious threat to the economy and the stability of credit institutions in the State generally and the need for the maintenance and stabilisation of the financial system in the State, and

(b) to address the compelling need—

(i) to facilitate the availability of credit in the economy of the State,

(ii) to resolve the problems created by the financial crisis in an expeditious and efficient manner and achieve a recovery in the economy,

(iii) to protect the State's interest in respect of the guarantees issued by the State pursuant to the Credit Institutions (Financial Support) Act 2008 and to underpin the steps taken by the Government in that regard,

(iv) to protect the interests of taxpayers,

(v) to facilitate restructuring of credit institutions of systemic importance to the economy,

(vi) to remove uncertainty about the valuation and location of certain assets of credit institutions of systemic importance to the economy,

(vii) to restore confidence in the banking sector and to underpin the effect of Government support measures in relation to that sector, and

(viii) to contribute to the social and economic development of the State."

17. Section 10 sets out the purposes of NAMA:

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

(a) the acquisition from participating institutions of such eligible bank assets as is appropriate,

(b) dealing expeditiously with the assets acquired by it, and

(c) protecting or otherwise enhancing the value of those assets, in the interests of the State.

(2) So far as possible, NAMA shall, expeditiously and consistently with the achievement of the purposes specified in subsection (1), obtain the best achievable financial return for the State having regard to—

(a) the cost to the Exchequer of acquiring bank assets and dealing with acquired bank assets,

(b) NAMA's cost of capital and other costs, and

(c) any other factor which NAMA considers relevant to the achievement of its purposes."

18. NAMA is required to perform the functions set out in s. 11(1) for the purpose of achieving its purposes. Particular reliance was placed on those set out in s.11(1)(a), (b) and (d) and (6) which provide:

"(1) In order to achieve its purposes, NAMA shall perform the following functions:

(a) acquire, in accordance with Part 6 , such eligible bank assets from participating institutions as it considers necessary or desirable for achieving its purposes;

(b) hold, manage and realise acquired bank assets (including the collection of interest, principal and capital due, the taking or taking over of collateral where necessary and the provision of funds where appropriate);

. . .

(d) take all steps necessary or expedient to protect, enhance or realise the value of acquired bank assets, including —

(i) the disposal of loans or portfolios of loans in the market for the best achievable price,

(ii) the securitisation or refinancing of portfolios of loans, and

(iii) holding, refinancing, realising and disposing of any relevant security.

(6) NAMA shall act in a transparent manner in carrying out its functions under this Act to the extent that to do so is consistent with the proper and efficient and effective discharge of those functions."

19. NAMA, in s. 12(1), is given "all powers necessary or expedient for, or incidental to, the achievement of its purposes and performance of its functions". Sub-section 12(2) sets out 31 express specific powers "without prejudice to the generality of subsection (1)". Reliance was placed in particular upon those set out in s. 12(2)(a) and (k) which provide that NAMA may:-

"(a) provide equity capital and credit facilities on such terms and conditions as NAMA thinks fit,

. . .

(k) enforce any security, guarantee or indemnity."

20. NAMA is required by s. 35(1) of the Act to prepare codes of practice for approval by the Minister in relation to certain specified matters. Reference was made to the "Code of Practice – Risk Management Including With Regard To Debtors" drawn up and approved by the Minister for Finance on 5th July, 2010. This states at para. 1.1 that "NAMA will act at all times to obtain the best achievable financial return for the State". Further, at para. 2.1:

"Credit Risk

NAMA's primary role is to manage the acquired loan portfolio which at the present time is expected to run off over a 7 to 10 year timeframe so as to obtain the best achievable financial return for the State. However, as with a financial institution, the management of these loans has a significant bearing on their subsequent credit performance.

Such management actions which accordingly give rise to a need for explicit credit risk consideration, include but are not limited to:

a) New money - extending further credit to an existing Debtor as a means to support them as part of an agreed recovery plan;

b) Loan restructuring - varying the terms of the acquired loan; and

c) Enforcement and recovery - exercising rights under the loan contracts, such as vesting, sale or enforcement of guarantees, with a view to enhancing NAMA cashflows relative to what could be expected under the loan agreement itself.

. . ."

21. Paragraph 3, under the heading "Key Principles", sets out, *inter alia*:

"3.2 Debtors will be treated in a reasonable manner

In discharging its responsibilities to the taxpayer, NAMA acting commercially intends to deal with Debtors in a reasonable manner, but recognizing Debtors' corresponding obligations to NAMA as described in section 3.3 (Mutual responsibilities). In particular:

a) Under the terms of its mandate and powers including those set out in Section 12 of the Act, NAMA has an interest in facilitating, where prudent, the continuation of the ongoing commercial activities of viable Debtors and other stakeholders, and will endeavor to act accordingly;

b) Respecting Debtors' confidentiality except where disclosure is required by law or in the event of legal pursuit of the Debtor by NAMA to ensure discharge of the debt;

. . .

e) NAMA will put a process in place to assess each Debtor's business plan to evaluate whether it is economically viable. NAMA will meet with the Debtors that are economically viable and review their proposed business plan to assess the

extent to which NAMA may facilitate the ongoing commercial activity of such Debtor and ongoing support from NAMA."

22. A "bank asset" is defined, in s. 4 of the Act as including, *inter alia* :

> "(a) a credit facility,
>
> (b) any security relating to a credit facility,
>
> (c) every other right arising directly or indirectly in connection with a credit facility . . ."

23. Section 17 provides an immunity to NAMA and certain other persons in the following terms:

> "Without prejudice to any defence otherwise available to, or immunity otherwise enjoyed at law by NAMA, a NAMA group entity or a person specified in section 34 (1), no action for damages shall lie against NAMA, a NAMA group entity or such a person in respect of or arising out of the performance or non-performance in good faith of any of the functions provided for in Parts 4, 5 and 6, or in respect of any decision made in good faith to perform or not to perform any of the functions provided for in Parts 8 and 9."

24. Part 6 of the Act contains detailed provisions in relation to the acquisition of eligible bank assets from participating institutions. The scheme set out includes identification of participating institutions; identification of eligible bank assets; determination of acquisition values and related values; preparation of an acquisition schedule and its service on a participating institution. Counsel for Treasury drew attention to s. 87(3)(b) which permits NAMA in an acquisition schedule to include " a statement of any obligations or liabilities excluded from the acquisition". Those appear to refer to obligations or liabilities of a participating institution and is referred to in s. 99(1) set out below.

25. Section 90(1) of the Act provides, *inter alia*, that the effect of service of an acquisition schedule on a participating institution in accordance with the Act "operates by virtue of this Act to effect acquisition of each bank asset specified in the acquisition schedule by NAMA or the specified NAMA group entity . . .". Sub-sections (3) and (5) contain provisions aimed at ensuring that all benefits of the participating institutions in relation to the eligible bank assets are transferred to NAMA. Section 91 provides a different regime for foreign bank assets.

26. Section 99 provides for the position of NAMA in relation to a bank asset after acquisition. Insofar as relevant to this application, it provides:

> "(1) After NAMA or a NAMA group entity acquires a bank asset, and subject to section 101 and any exclusion of obligations and liabilities from the acquisition set out in the acquisition schedule—
>
> (a) NAMA and the NAMA group entity each have and may exercise all the rights and powers, and subject to this Act is bound by all of the obligations, of the participating institution from which the bank asset was acquired in relation to—
>
> (i) the bank asset,
>
> (ii) the debtor concerned and any guarantor, surety or other person concerned,
>
> (iii) any receiver, liquidator, or examiner concerned, and
>
> . . .
>
> (2) The reference in subsection (1) to the rights, powers or obligations of a participating institution in relation to a bank asset is a reference to the rights, powers or obligations, as the case may be—
>
> (a) derived from the bank asset, and
>
> (b) arising under any law or in equity or by way of contract.
>
> (3) In particular, NAMA and the NAMA group entity may each—
>
> (a) take any action, including court action, that the participating institution could have taken to protect, perfect or enforce any security, right, interest, obligation or liability,
>
> (b) realise any security that the participating institution could have realised,
>
> . . ."

27. Section 147(1) of the Act authorises NAMA to appoint a person as a statutory receiver to the property the subject of an acquired bank asset where, under its terms, either a power of sale or a power to appoint a receiver becomes exercisable. Sub-section (3) provides that 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. Section 148 and Schedule 1 sets out the powers of statutory receivers. A statutory receiver is the agent of the chargor for all purposes in accordance with s. 149 and the chargor is solely responsible, *inter alia*, for the remuneration, acts, omissions, defaults and losses of a statutory receiver.

Facts to 9th January 2011

28. The resolution of issues (1) to (4) above, insofar as they are fact-dependent, require to be determined on the basis of the facts which took place up to and including 8th December, 2011. Some reliance was placed by Treasury upon subsequent facts to 9th January, 2012, the date of communication of the decision to enforce insofar as they were contended to be corroborative of the alleged failure by NAMA to give Treasury an opportunity to be heard in relation to a decision to enforce. I propose, therefore, setting out the facts up to 9th January, 2012, and then considering those issues. The majority of the facts are not in dispute.

29. The Treasury Holdings Group currently consists of 197 Irish registered companies and 44 non-Irish registered companies. Treasury

Holdings, the first named applicant, was formed in 1993 by John Ronan and Richard Barrett. They remain the shareholders of the Group. Treasury Holdings provides management services to companies throughout the Group. It has 45 employees based in its offices in Dublin. The operations of the Group are stated to be interdependent. The Group as a whole employs approximately 400 persons globally. The applicants are part of the Group.

30. Between March and May 2010, facilities held by Treasury from participating institutions were acquired by NAMA. Nine groups of facilities are listed in the grounding affidavit of Mr. Bruder, the managing director of Treasury. The debts acquired had a par value of approximately €1.76bn. The facilities relating to the Spencer Dock Development had been made by a banking syndicate, originally AIB, IBRC and KBC (under their former names). Those advanced by AIB and IBRC have been acquired by NAMA as a result of which it holds 75% of the borrowings. The amount due in respect of the syndicated facilities at the date of demand was approximately €272 million.

31. On 4th May, 2010, Treasury submitted a business plan to NAMA in respect of the acquired facilities and related securities. It was independently assessed on behalf of NAMA. There were significant negotiations and changes made. Ultimately, a business plan was approved and a Memorandum of Understanding ("MoU") was executed between Treasury and NAMA on 13th December, 2010. The MoU is not a legally binding document, save in respect of a reservation of rights and remedies by NAMA and provisions in relation to confidentiality. In accordance with its terms, at para. 2, it:

> "sets out the principal commercial terms and conditions underpinning a potential financial restructuring of the Group's debt by NAMA and a summary of the key commercial objectives against which NAMA would consider, at its sole discretion, offering the revised facilities, described below, in that respect".

It is also expressed, at para. 3, to be subject to:

> "the negotiation and agreement on a detailed financing term sheet, credit approval, satisfactory due diligence and facility documentation. Furthermore, it will be subject to there being, in the sole opinion of NAMA, no material adverse change occurring in the financial position of the Group generally prior to the signing of any formal agreement".

It then sets out, in appendices, potential restructured facilities; a property strategy for realisation on differing dates by 2016; and a strategy in relation to the realisation of development properties by 2017. Each property is given a targeted year of disposal which runs up to 2017. Reliance was placed on this by Treasury in relation to its right to be heard and the alleged effects of a decision to enforce on its interests.

32. The next step, as envisaged by the MoU, was negotiation and agreement on detailed financing term sheets. Prior to setting out the facts in relation to the term sheets, it is necessary to refer briefly to four other transactions, or potential transactions, to which the deponents have repeatedly referred and which undoubtedly affected Treasury and NAMA's relationship and respective views of each other by the autumn of 2011.

33. Firstly, in the period after the identification of Treasury's facilities with participating institutions but prior to their acquisition by NAMA, Treasury, by a series of transactions, in substance, transferred shares in a subsidiary (CREO), then valued at approximately €20m, to Mr. Ronan and Mr. Barrett in consideration of €100,000 and an unsecured loan note for €20 million. NAMA has consistently sought the reversal of this transaction which became known as the "TAIL" transaction. The MoU included non-binding provisions intended to achieve a reversal. Treasury and its shareholders have sought on more than one occasion to renegotiate terms in relation to the reversal and also have resolution of the issue dealt with in the context of Mr. Ronan's MoU rather than the Treasury MoU. Mr. Ronan is separately a debtor within NAMA.

34. Secondly, Treasury contends that it has effectively cooperated with NAMA since its inception. NAMA does not dispute the fact of cooperation but would appear to have a different view of its quality. NAMA has advanced approximately €100m for capital expenditure to Treasury. Amongst the matters referred to by Treasury, as evidence of its positive contribution to advancing the delivery of its business plan as set out in the MoU, is the sale to Google in early 2011 of its office building in Barrow Street, Dublin 4, for approximately €100 million. It also refers to other sales and lettings achieved in 2011. The sale to Google was completed well in advance of the estimated disposal date in the MoU of 2014, and resulted in a repayment of approximately €70m to NAMA.

35. Thirdly, from September 2010 until May 2011, there were negotiations with CIM (a US based private equity firm) in relation to proposals involving the acquisition by CIM from NAMA of Treasury's loans. Negotiations reached an advanced stage but finally broke down in May 2011. Treasury and NAMA blame each other in relation to the breakdown. The detail is not relevant, save to note that it appears to have complicated the relationship between the two parties. Also, Treasury relies upon CIM as a proven ability to produce an investor capable of gaining NAMA Board approval.

36. Fourthly, there were negotiations in 2011 with a third party, Setia, in relation to a syndicated facility secured on the Battersea Power Station site in London. NAMA acquired loans from Bank of Ireland which held 50% of the facility. The other participating lender was Lloyds TSB. All material decisions required agreement of Lloyds and NAMA as syndicate lenders. Ultimately, the negotiations with Setia failed and on 21st November, 2011, NAMA and Lloyds called in the loans and made an initial application to the Jersey courts, where certain of the relevant companies were incorporated, to allow administration of the Battersea-owning companies to take place before the English courts. An application to the English courts was made on 30th November, 2011, and an administrator appointed on 12th December, 2011. Treasury complains of a non-commercial approach by NAMA, whilst NAMA identifies uncertainties and delays surrounding the Setia bid. The detail is not relevant but is a further example of difficulties in the relationship between Treasury and NAMA prior to December 2011.

37. The facts immediately leading to the challenged decision of 8th December, 2011, commence on 23rd September, 2011, with the issue by NAMA, through a senior portfolio manager, Ms. Birmingham, of four draft term sheets, in relation to Treasury Holdings, REO plc. IREO Fund plc. and Harrisrange Ltd., for approval by Treasury. There were six stipulated preconditions to the issue of any finalised term sheets. The first four preconditions sought confirmation of certain matters from Treasury and related persons which had to be given on or before 30th September, 2011. The remaining two required: (i) the presentation by Treasury of a satisfactory strategy in relation to third party creditors for approval by NAMA; and (ii) an appropriate tax efficient strategy to fund the operation of the Group on a day-to-day basis. Both of these had to be provided by Friday 14th October, 2011, together with confirmation that the draft term sheets were in agreed form.

38. On 29th September, 2011, Treasury, through Mr. Rory Williams, General Counsel and a director of Treasury, sent a detailed response raising what, in his view, were "fundamental structural issues arising in the term sheets" which, in Treasury's view, required to be addressed before they could proceed further. This gave rise to an exchange of correspondence through the month of October in relation to the issues raised. There were also exchanges in relation to the TAIL reversal precondition.

39. A meeting was held between Treasury and the syndicate lenders on 4th October, 2011, at which the lenders are stated to have voiced concerns about creditor pressure in respect of the SDCC Group. The syndicated loans did not form part of the draft term sheets.

40. NAMA, in the first affidavit sworn post-leave by Ms. Birmingham disclosed at para. 33 for the first time that Portfolio Management (PM) in a Quarterly Update dated 28th October, 2011, for the Credit Committee and Board in relation to Treasury recommended enforcement against the Treasury connection if Treasury's agreement to the term sheet preconditions was not forthcoming within five working days. The Credit Committee met on 1st November, 2011, and recommended enforcement as set out in the PM paper to the Board. The recommendation for enforcement by PM is summarised as being "due to significant creditor pressure across the Group with depleting cash balances and what NAMA believed to be a serious escalation of non-cooperation by the two principal shareholders and by Treasury/REO in seeking to renegotiate a key aspect of the Treasury MoU". This latter reference is to a request that the reversal of the TAIL transaction be moved from the Treasury MoU to the John Ronan MoU. The Board meeting at which the recommendation was to be considered was due on 10th November, 2011. Treasury, at the time, was unaware that enforcement was under consideration by NAMA or of this recommendation.

41. In the meantime, at Treasury's request, a high level meeting was arranged for 8th November, 2011. The meeting on 8th November was attended by Mr. Daly, Chairman of NAMA, Mr. McDonagh, CEO of NAMA (and a member of the Credit Committee) and Ms. Birmingham on the one side and on the other, Mr. Barrett, Mr. Ronan and Mr. Niall O'Buachalla, Group Finance Director of Treasury. Ms. Birmingham prepared a minute of the meeting which she exhibited. Mr. O'Buachalla exhibited an email sent the next day to certain persons within Treasury setting out his account of the meeting. The issues discussed related to both the Treasury Holdings Group and Mr. Ronan, as distinct debtors within NAMA. The discussion appears to have followed a pre-identified agenda which included "Refinancing Option" and "TAIL".

42. There is one exchange at the meeting which is partly in dispute. It is not in dispute amongst the deponents present at the meeting that Mr. Barrett informed the NAMA representatives of ongoing discussions, in which Treasury were engaged, with third party investors with a view to refinancing the Treasury Group's NAMA loans. Mr. Barrett so deposes at para. 20 of his affidavit and the minutes, prepared by Ms. Birmingham under the heading 'Refinancing Option', state:

> "RB noted that since the CIM deal fell away they had been in discussions with a number of parties and had serious interest on a refinancing with due diligence underway. RB wished to clarify how the Board Policy on tendering would apply".

43. It is also commoncase that there was then a discussion on the NAMA Board policy in relation to a requirement that a bid for a NAMA loan go to competitive tendering. Following that discussion, Mr. Barrett, at para. 23 of his affidavit, avers:

> "Mr. McDonagh then told me that NAMA would not welcome further approaches from Treasury Holdings and investors on foot of negotiations that were taking place until term sheets had been signed between NAMA and the Treasury Holdings Group, and he emphasized NAMA's wish to get term sheets signed with Treasury as soon as possible. We confirmed to the NAMA representatives at that meeting that Treasury was fully engaged in finalising the term sheets and was hopeful that the term sheets could be signed within weeks. Accordingly, I did not identify Hines or Macquarie but did say that the discussions were advanced. Mr. Daly and Mr. McDonagh confirmed that Treasury were seen as cooperative and the relationship was working as it should, emphasising that NAMA was looking to work with cooperative debtors."

44. Ms. Birmingham, at para. 11 of her second affidavit on this issue, states:

> " . . . I was also present at the meeting and Mr. McDonagh did not say that NAMA would not consider proposals put forward by third parties to acquire NAMA's loans unless and until term sheets were signed. Rather, Mr. McDonagh re-stated NAMA's practice in relation to the sale of its loans, outlined the limited exceptions that the Board may consider to that practice and made it clear that the pursuit of third parties to acquire the loans should not be a substitute for nor should it be prioritized over the internal restructuring process, which involved the signing of term sheets."

Ms. Birmingham's minute of the discussion on the refinancing option ends with the words: "Also, BMcD/FD advised that consideration of any such proposal was not a substitute to signing term sheets. JR/RB confirmed their intention to proceed with term sheets as soon as possible".

45. Mr. McDonagh, in an affidavit sworn on 17th April, 2012, on this issue states:

> "I did not say that NAMA would not consider proposals unless and until term sheets were signed. Rather, I stated that the pursuit of third parties to acquire the loans would not and should not be a substitute for nor it should be prioritised over the NAMA restructuring process, which involved the signing of term sheets."

46. Mr. Barrett, in his earlier affidavit, deposes at para. 26:

> "We came away from the meeting with the feeling that NAMA would finalise the term sheets, after which Treasury would be able to finalise a deal with an appropriate investor."

47. Whilst there may appear to be a dispute about the words used at the meeting, it does not appear to me that there is any real conflict about the message imparted by NAMA. It was that the first priority of NAMA was the signing of term sheets and the interest of third party investors fell to be considered and dealt with thereafter. Ms. Birmingham, at para. 11 of her second affidavit after the passage already quoted above, explains the reason for such an approach:

> "If term sheets were signed it would necessarily mean that both NAMA and Treasury would have agreed the basis upon which the Group's connection would be restructured. The achievement of this status would expedite any future negotiations with interested third parties as it would be clear what would need to be done to conclude a deal. It would also put NAMA in the position of controlling the sale of its assets for the benefit of the tax payer."

48. NAMA does not suggest that at the meeting of 8th November, 2011, its representatives gave any indication to the Treasury persons present of the then current recommendation of the Credit Committee to enforce if term sheet preconditions were not met within five working days.

49. There are three relevant facts which I find in relation to the exchanges at that meeting. Firstly, Treasury, though Mr. Barrett did

inform NAMA that it was in discussions with a number of third parties which had "serious interest on refinancing". Secondly, NAMA did inform Treasury that its priority was the signing of term sheets and the clear implication of the message given was that third party interest would be considered thereafter. Thirdly, NAMA gave no indication that enforcement was under consideration on a contingent basis.

50. The Board of NAMA met on 10th November, 2011. It had before it a document dated 2nd November, 2011, in substantively similar form to the Quarterly Update of 28th October, 2011, and the minutes of the meeting with Treasury Holdings and its shareholders. The Board decided to decline the Treasury proposal to remove the effective economic reversal of the TAIL transaction from the Treasury MoU to the John Ronan MoU. It also decided, in accordance with its minutes:

> "In the absence of satisfactory confirmation from Treasury Holdings in relation to term sheet preconditions within five working days, to approve the commencement of enforcement against Treasury Holdings, REO plc. and SDDC, subject to final legal review and receipt of counsel's opinions and KBC consent (in respect of SDDC)."

51. By letter of 11th November, 2011, NAMA informed Treasury that the proposal made by Treasury, Mr. Barrett and Mr. Ronan in relation to the TAIL transaction discussed at the meeting of 8th November, 2011, was not accepted by the board of NAMA. Further, the letter indicates that having considered the various matters raised by Treasury in relation to the preconditions and draft term sheets issued on 22nd September, 2011, NAMA was restating the preconditions. There were minor amendments in the first four confirmations sought at paras. (a) to (d) inclusive which are not relevant. As before, paras. (e) and (f) required the presentation by Treasury of a satisfactory written strategy for third party creditors for approval by NAMA and an appropriate tax efficient strategy. The letter required fulfilment and delivery in accordance with the preconditions on or before 5pm on Friday 18th November, 2011. It then stated:

> "If preconditions (a) to (f) above have not been fulfilled/delivered upon in full by 5pm on Friday 18 November 2011, NAMA will have no option but to take such action as it deems appropriate.
>
> If preconditions (a) to (f) are fulfilled/delivered upon in full by 5pm on Friday 18 November, 2011, the NAMA Board has thereafter set a deadline of 2 December, 2011 for signing of the Treasury Holdings, REO, IREO and Harrisrange termsheets by the relevant obligors, which we would propose to reissue on receipt of your written confirmation on the above.
>
> Please note that signing of the term sheets by NAMA would be subject to the following being achieved in parallel by 2 December 2011:
>
> (i) NAMA's approval of the detail within the strategies to be furnished under preconditions (e) and (f) above; and
>
> (ii) the execution of assignments of rental income and charge documents in form satisfactory to NAMA over all bank accounts into which rent from NAMA's secured assets is paid and where these accounts are not currently secured - we would propose issuing the relevant draft documents with the revised draft term sheets.
>
> Please note that the MoU, draft termsheets and the contents of this letter are entirely without prejudice to, and shall not be construed as a waiver of, any rights or remedies available to NAMA or any NAMA group entity under any loan agreements, security documents, the National Asset Management Agency Act, 2009 and other legislation and/or otherwise conferred by law, including but not limited to the appointment of receivers. All such rights and remedies are exercised by NAMA at its discretion."

52. The first response from Treasury was a request from Mr. O'Buachalla on 14th November, 2011, for a meeting with Ms. Birmingham and her team to ascertain the nature of NAMA's requirements in relation to the creditor and tax strategies. Such meeting took place on 15th November, 2011, and there was an exchange of emails on 16th November, 2011, in which Mr. O'Buachalla set out his understanding of what was required and this was responded to by Ms. Hughes of NAMA, inserting by way of track changes on an email, certain additional requirements.

53. On 18th November, 2011, Treasury provided the confirmations sought, as to preconditions (a) to (d) (inclusive) as per the letter of 11th November, 2011, including reversal of the TAIL transaction to which confirmation was also given as required, personally, by Mr. Ronan and Mr. Barrett. On 18th November, 2011, Treasury also separately sent the creditors strategy and tax strategy. It is agreed that the matters to be complied with as preconditions (a) to (f) to the reissue of term sheets were completed by 18th November, 2011.

54. On 22nd November, 2011, NAMA issued four revised draft term sheets for approval by Treasury. The covering letter includes the following reservations and conditions:

> "The enclosed draft termsheets are being issued strictly subject to each of the obligors referred to therein continuing in being and continuing to operate on a day-to-day basis without any form of insolvency process. NAMA reserves the right to withdraw any or all draft termsheets in the event of a change in status of any of the obligors such as in NAMA's discretion may impact its ability to continue its day-to-day operations. Without prejudice to their generality, your attention is drawn to clauses 3 and 4 on page 1 of each draft term sheet in this regard.
>
> . . .
>
> Please note as outlined in our letter of 11 November 2011, the issuing by NAMA of the final termsheets for signing will be subject to the following being completed to NAMA's satisfaction by 2 December 2011:
>
> 1. NAMA's approval of the detail within the creditor and tax strategies furnished.
>
> 2. The execution of assignments of rental income and charge documents in form satisfactory to NAMA over all bank accounts into which rent for NAMA's secured assets is paid and where these accounts are not currently secured. We will forward you the relevant documents shortly under separate cover.
>
> . . .
>
> Please note that the MoU, draft termsheets and the contents of this letter are entirely without prejudice to, and shall not be construed as a waiver of, any rights or remedies available to NAMA or any NAMA group entity under any loan

agreements, security documents, the National Asset Management Agency Act, 2009 and other legislation and/or otherwise conferred by law, including but not limited to the appointment of receivers. All such rights and remedies are exercisable by NAMA at its discretion."

The four draft term sheets enclosed run to 124 pages, which is an indication of the complexities involved for all parties.

55. The draft term sheets do not include the syndicated facilities in relation to the Spencer Dock Development. There were parallel communications with the syndicate, and on 24th November, 2011, Treasury sent to IBRC, as agent for the lenders, a creditors strategy for the Spencer Dock Group.

56. On 1st December, 2011, NAMA, through Ms. Birmingham, wrote to Treasury in relation to the creditors strategy submitted and stated:

> "NAMA continues to have serious concerns over the creditor position, which we do not believe are addressed by the TH proposed strategy submitted to NAMA. At a high level, these include the following."

The concerns raised by NAMA were then set out in eight separate paragraphs. The detail is not relevant to the issues on this application. Confirmation was also sought on the current cash balance position across the Group. The email then stated:

> "We are in receipt of the termsheets with your suggested mark-ups which are under consideration, however, as previously advised in our correspondence of 11/11/11 and 22/11/11, NAMA does not propose to issue termsheets, tomorrow, Friday 2 December for signing prior to approval of a group creditor strategy, which remains outstanding.
>
> Please submit a final response to address the matters above by 5.00pm, Tuesday 6th December.
>
> In addition, we await the final executed rental assignment and assignment of bank accounts documentation. We understand that there has been correspondence between our legal advisors today on this and we expect these to be delivered by close of business, Friday, 2 December."

No issue was raised in the proceedings in relation to any non-compliance with the rental and bank account assignments.

57. NAMA, through Ms. Birmingham in her post-leave affidavit of 17th April at para. 54, discloses that on 2nd December, 2011, NAMA PM prepared a detailed update and recommendation paper for the NAMA Credit Committee and NAMA Board. That document with minor redactions has been discovered. In it, the PM team set out its assessment and key concerns as follows:

> "Full or partial insolvency event likely to be inevitable in the short to medium term
>
> • Potential fallout from Battesea may, despite demerger, result in creditor action being taken against the Group.
>
> • Borrower has indicated that they have no legal defence against AIAC litigation.
>
> • Concerns over overall creditor exposure. Unacceptable creditor strategy presented thus far, displaying a lack of serious thought given by Group to how to deal with /negotiate with creditors generally.
>
> • Deteriorating cash position.
>
> • Non NAMA threats i.e. non NAMA banks or creditors and seeking to enforce against TH (TopCo)
>
> • Even if the Borrower agrees termsheets acceptable to NAMA this does not deal with the above issues.

Ultimately, full or partial insolvency event expected to be in NAMA's best financial interest:

> • Potential significant savings (could be up to €28m to 2017) on unsecured rental underwrites in SDDC.
>
> • Likely significant savings (up to €6m on payments to unsecured creditors.
>
> • No upside in supporting Carrylane/Ritz Carlton - only downside through cash burn of Copperlake deposit (€6.7m).
>
> • Protection and ability to offset share €6m SDDC blocked cash.

Other Matters

> • Potentially prejudicing KBC's commercial interest, albeit KBC is a minority lender.
>
> • Ongoing uncertainty concerns from CIE."

58. The same document stated that potential insolvency practitioners had been identified and an initial briefing complete. The potential options were identified as:

> 1. Wait and see approach: Continue attempts to agree consensual strategy/mentor external pressures and review responses to creditor strategy.
>
> 2. Initiate controlled enforcement to Spencer Dock with KBC.
>
> 3. Initiate controlled enforcement on entire Connection in the event that a satisfactory response to address Creditor Strategy queries is not received by 6th December 2011."

Attached was a detailed option assessment by PM of the pros and cons of each option.

59. The recommendation made by NAMA PM in its document was:

"Option 3 is recommended i.e. to initiate enforcement on the entire Connection in absence of satisfactory Creditor Strategy by 6th December for the following reasons:

- A clear commercial rationale to enforce has become more evident based on financial/creditor situation and deteriorating group cash position.
- Enforcement in short to medium term likely to be unavoidable due to external factors.
- An enforcement against the entire Group offers optimum control compared to alternative options.
- NAMA is exercising its entitlement to protect its position as principle secured lender in light of external factors.

If above strategy is approved, Debtor communication/management of pre enforcement action to be subject to legal advice."

60. A Credit Committee meeting was held at 2.00pm on 6th December, 2011. The timing is of some significance as Treasury had been given until 5.00pm on 6th December, 2011 to respond to the queries raised on the creditor strategy. The decision, as recorded in the minutes, was:

"While the decision to implement the enforcement is within the delegated authority of the Committee the Chairman of the Committee stated that it was appropriate to refer the decision to the Board. The Committee Recommended option 3 in the paper to the Board for noting and approval to initiate a controlled enforcement strategy on the entire Connection in event that a satisfactory response to the Creditor Strategy queries are not received by CoB 6 December 2011. The Committee noted that it may be necessary to enforce regardless of the debtors response to protect NAMA's interests in light of actions likely to be taken by other creditors."

61. After the Credit Committee meeting on 6th December, 2011, Treasury requested an extension to 7th December, 2011, for its responses to the creditor strategy concerns. This was acceded to and on 7th December, 2011, Treasury sent NAMA, by the extended deadline, the replies to the queries raised in the form of a response paragraph. There is significant dispute between the deponents as to whether the responses from Treasury should have alleviated the concerns of NAMA or whether, as deposed to by Ms. Birmingham, the information supplied "caused considerable alarm to NAMA". The merits of NAMA's concern or the responses given is not a matter for this Court, and accordingly, I do not propose referring to the detail of either the concerns or the responses. Treasury remained unaware of the enforcement consideration or any concerns other than those raised in relation to creditor strategy.

62. A meeting of the Board of NAMA was held on 8th December, 2011. No further meeting of the Credit Committee, as such, was held subsequent to the receipt of the additional creditors' strategy information from Treasury on 7th December, 2011. Ms. Birmingham deposes that all members of the Credit Committee which sat on 6th December, 2011, were also present at the Board meeting on 8th December, 2011. She was also present as portfolio manager for the items relevant to the Treasury connection. She deposes that the Board considered the paper dated 2nd December, 2011, and the minutes of the Credit Committee meeting held on 6th December, 2011. She also deposes that the Board was updated by her regarding the information provided by Treasury on 7th December, 2011, and had regard to the reasons why the PM team concluded that the creditor strategy was unacceptable.

63. The minutes of the Board meeting of 8th December, 2011, as approved, record the following under the heading 'Treasury Holdings, Matter for Board Approval'.

"A document entitled *'Treasury Holdings'* was circulated prior to the meeting and presented to the Board.

The Board was updated on NAMA interaction with the debtor since the Board meeting on 10th November 2011. An initial Creditor Strategy was submitted to NAMA which was unsatisfactory and NAMA PM requested additional information which was subsequently received on 7th December 2011 but presented a fuller picture to NAMA of the debtor's creditor position, and showed that the creditor position was much higher than TH originally advised.

The Board noted the recommendation, as presented in the document, and the view of the Credit Committee, which had considered the matter at its meeting on 6th December 2011.

The Board noted that a substantial amount of effort had been invested in working with the debtor but that it had failed to produce a satisfactory creditor strategy and that the business is commercially unsustainable with the levels of creditor and non-NAMA bank pressure.

The Board, following careful consideration, and noting the recommendation of the Credit Committee at its meeting on 6th December 2011, resolved to approve the recommendation as presented in the paper to:

Initiate enforcement on the entire Connection (Option 3 per the attached paper) in absence of satisfactory Creditor Strategy (by close of business on 6 December)[1] with debtor communication/management of pre-enforcement action to be subject to legal advice.

The Board discussed the options for the timing of the commencement of enforcement proceedings against the connection and the pros and cons of each. It consequently resolved to delegate to the Executive the authority to initiate proceedings at the time deemed most appropriate in light of the risks. The Board requested that the Chairman and Chairperson of the Credit Committee be kept informed of developments in this regard."

64. Treasury was not aware at that time of the Credit Committee meeting of 6th December, 2011, or the Board meeting of 8th December, 2011. Notwithstanding the wording of the above minute, the decision made by the Board was to enforce.

65. It is agreed that no part of the Board decision of 8th December, 2011, was communicated to Treasury until a partial communication in a letter of 6th January, 2012, and full communication of the decision to enforce at a meeting on 9th January, 2012, and in a letter of the same date, albeit without reference to the fact that it had been taken on 8th December, 2012. Nevertheless, there were communications in the intervening period. Treasury has a particular sense of grievance in relation to the nature of the communications which took place in this period after the decision to enforce had been taken. On the facts, this is understandable. Its

relevance to the legal issues is less clear. Nevertheless, insofar as counsel for NAMA sought to rely on certain of the communications as constituting notice of a potential decision to enforce, and giving Treasury an opportunity to be heard, it is relevant to refer to them.

66. There were email exchanges between Mr. McDonagh and Mr. Barrett between 5th and 14th December, 2011, primarily in relation to a request by Mr. Barrett to purchase from Treasury Holdings the entire share capital of Treasury Holdings China Limited. The initial response was sent by Mr. McDonagh on 8th December, 2011, at 19:52 *i.e.* after the Board meeting. The email makes no reference to a Board meeting on that day nor any decision taken.

67. On 12th December, 2011, Mr. Bruder spoke on the telephone with Ms. Birmingham. He deposes at para. 84 of his first affidavit, "Mary Birmingham advised in the conversation on 12th December, 2011, that NAMA had received everything that they had requested from us in relation to the creditors strategy". This is not disputed.

68. On 15th December, 2011, Mr. Bruder requested a meeting to discuss the potential letting of a building to be constructed on the Spencer Dock Development site to BNY Mellon. This forms part of the property securing the syndicated loans. The meeting was attended by Mr. Paddy Teahon, a director of Treasury, Mr. Niall Kavanagh, Group property manager, and Mr. Bruder on the one side and Ms. Birmingham and Mr. Mulcahy, head of NAMA portfolio management, on the other. There were discussions in relation to the property issues and the creditor strategy for the Spencer Dock Development Group. At the end of the meeting, it is commoncase that Mr. Teahon raised concerns about communications between Treasury and NAMA, and in particular, a failure by Mr. McDonagh to reply to his calls. Mr. Bruder deposes at para. 86 of his first affidavit that:

> "NAMA advised that they were not in a position to provide any detailed feedback with regard to the Creditor Strategy nor are they in a position to advise when such feedback might be forthcoming nor written term sheets would issue from them (not even an indications as to whether we were talking days, weeks or months) but they did undertake to consider the general question of the relationship and the communication between the parties and revert to us after Christmas".

69. The above averment by Mr. Bruder is substantively similar to the exchanges recorded in the minutes of that meeting as prepared by Ms. Birmingham and exhibited by her in which, under the heading of 'Other' she records:

> "PT [Teahon] raised concerns about communication between NAMA and TH making a number of points:
>
> • Term sheets had not been issued
>
> • There were rumours around that NAMA had tendered for receivers
>
> • Whereas the shareholders were happy with outcome of CEO/Chairman meeting from which they took that co-operation in the key issue however subsequent to that Battersea had been enforced.
>
> • In their view NAMA has made 'wrong decisions'.
>
> JB [Bruder] noted that they were seeking to keep third parties and staff on board regardless of rumours.
>
> JM [Mulcahy] noted that thee had been significant communications in this Connection and sometimes parties took different interpretations from meetings.
>
> PT advised he was seeking a meeting with BMcD and had left a number of messages and re-iterated that communication was part of the problem in his view.
>
> JM advised we would take points away and agreed with PT request to re-convene in the new year.
>
> JB then asked for an indication on timing of issuing term sheets.
>
> MB advised NAMA could not give any certainty on timing of issue.
>
> JB queried what he should read into this and MB restated the position advising that it would be wrong of her to give any certainty on this issue."

It is difficult, objectively, to understand the responses given on behalf of NAMA, having regard to the decisions already taken on 8th December, 2011.

70. The next communication was an email received by Mr. Bruder from Ms. Birmingham on Thursday 5th January, 2012. This is not exhibited but Mr. Bruder states that it was "asking whether I would be free to attend a meeting following on from the pre-Christmas meeting with herself and John Mulcahy and proposing a time of 3pm on Monday 9th January, 2012". This description is not disputed. Mr. Bruder deposes that he confirmed the meeting and asked what would be on the agenda but that despite a number of reminders, did not receive a reply until an email of 7.30pm on the evening of Friday 6th January, 2012, which enclosed a letter in the following terms:

> **"0011 Treasury Holdings Connection ("TH")**
> Dear Sirs,
>
> We refer to the Creditor Strategy for Treasury Holdings and REO plc. submitted by you on 18 November and the subsequent responses to queries raised by NAMA received from you on 7 December, 2011.
>
> We wish to advise that having considered fully the information submitted NAMA is not satisfied with the proposed creditor strategy and will not be proceeding with the issue of revised draft term sheets.
>
> Yours faithfully"

Ms. Birmingham deposes that the covering email advised Treasury that the letter would form part of the items for discussion at the meeting on Monday 9th January, 2012, and that a NAMA legal representative would be present and two NAMA executives would also attend the meeting.

71. At the meeting of 9th January, 2012, the NAMA representatives read out a pre-prepared script and handed to the Treasury representatives a letter in the following terms:

> "Dear Sirs,
>
> **NAMA Secured Assets within Treasury Holdings, SDDC Group and REO (Debtor Connection ID 011) (the "Group")**
> We refer to recent correspondence and meetings.
>
> Having considered the matter carefully, NAMA has decided, in performance of its functions under Section 11 of the National Asset Management Agency Act, 2009 (the "Act") and bearing in mind its purposes under Section 10 of the Act, to arrange for demands for repayment to be issued in respect of facilities in default and, failing repayment, to proceed to appoint receivers (including statutory receivers) as appropriate to various properties that comprise security for such facilities.
>
> We believe that this course of action is most consistent with NAMA's obligation to achieve its purposes under the Act.
>
> In arriving at our decision, we have taken account of a range of factors including, but not limited to, the current creditor position, the Group's deteriorating cash position, the ongoing funding required to meet the Group's exposure in terms of its various contractual obligations, the SDDC Syndicate's preference to appoint a receiver over SDDC, the dissatisfactory nature of the Group's proposed Creditor Strategy and the increased risk of third party insolvency actions.
>
> We would appreciate your co-operation, in relation to the work required to be done by the receivers, if and when appointed.
>
> Yours faithfully."

72. On 10th January, 2012, letters were delivered from NAMA to the relevant Treasury companies seeking repayment of the capital amount, interest and costs in relation to the individual facilities by 4pm on 11th January, 2012, failing which it was indicated that NAMA would take all steps available to it under the Act, relevant loan documentation and securities. Similar letters were issued by IBRC as agent and security trustee for the finance parties and secured beneficiaries in relation to the facilities from the syndicate.

73. The fact that the decision to enforce referred to in NAMA's letter of 9th January had been taken by the board of NAMA on 8th December, 2011, was not communicated to Treasury in the exchanges between 5th and 10th January, 2012. It was not communicated until after the commencement of these proceedings.

74. I now propose turning to consider the first four issues, having regard, where relevant, to the facts set out above.

Public Law Decision Amenable to Judicial Review

75. The first issue is whether or not the NAMA decision to enforce is a decision in the area of public law and, as such, amenable to judicial review. It is indisputable that NAMA is a public body established by statute with duties and functions imposed by statute for the public interests purposes set out in the Act. What is in dispute between the parties is whether the decision taken by NAMA on 8th December, 2011, to enforce against Treasury is a decision in the realm of public law, and as such, amenable to judicial review. Treasury contends that it is such. It relies, in doing so, on the decisions of the Supreme Court in *Beirne v. Commissioner of An Garda Síochána* [1993] ILRM 1, and in particular, the judgment of Finlay C.J. and *O'Donnell v. Tipperary (South Riding) County Council* [2005] 2 I.R. 483, per Denham J. (as she then was) with whom the other judges agreed. In accordance with those decisions, Treasury submits that the onus is on NAMA on the statutory scheme and facts herein to establish that the decision taken comes within the exception envisaged by those decisions. Treasury submits that it does not do so.

76. NAMA does not dispute that the onus is on it and contends that a decision to enforce comes within the exception envisaged as it was fundamentally rooted in its rights under the contractual arrangements entered into by Treasury with its tenders. It also seeks to rely upon the decision of the Privy Council in *Mercury Energy Ltd. v. Electricity Corporation of New Zealand Ltd.* [1994] 1 WLR 521 and of the English High Court in *R. (Birminghan and Solihull Taxi Association) v. Birmingham International Airport* [2009] EWHC 1913 (Admin.), to submit that there is a well established principle that enforcement by public bodies of rights rooted in commercial contractual arrangements are not amendable to judicial review, absent fraud, corruption or bad faith.

77. In my judgment, as NAMA is a body established by statute, on which statutory duties, functions and powers have been conferred which it is required to exercise for the purposes set out in s. 10 of the Act, which in turn refer to the purposes of the Act set out in section 2. In such circumstances, the principles set out by Finlay C.J. in *Beirne v. Commissioner of An Garda Síochána* at p. 2 are applicable:

> ". . . The principle which, in general, excludes 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 quite 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 duty 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."

In *O'Donnell v. Tipperary (South Riding) County Council* [2005] 2 I.R. 483, Denham J., delivering the single judgment with which the other members of the Court agreed, cited with approval the above statement of principle and applied it to the facts of that case. As appears, there are two elements to the applicable test. The decision maker must be performing a private duty and its right to make the decision must derive solely from contract or consent of the parties.

78. I have considered the English authorities to which I was referred by the parties including the two cited above and *R(Molinaro) v. Kensington and Chelsea Royal London Borough Council* [2001] EWHC Admin. 896, and *Hampshire County Council v. Supportways* [2006] EWCA Civ. 1035. It does not appear to me necessary to further lengthen this judgment by considering in any detail what is stated therein. Insofar as those judgments, in their analysis of the circumstances in which the exercise by a public body of rights relating to a contract is susceptible to judicial review may differ from the principles set out by the Supreme Court in *Beirne* and *O'Donnell*, it is not a matter for me, as a judge of the High Court, to apply any differing principles. In addition, in my judgment, on a

full analysis of the English judgments, the difference of approach, if any, is minimal, and may be more one of nomenclature than of substance.

79. I have concluded, applying the principles in *Beirne* and *O'Donnell*, that NAMA has failed to establish that its decision to enforce is not a decision amenable to judicial review. In my judgment, on the statutory framework and facts, it fails both limbs of the applicable test set out in *Beirne* and applied in *O'Donnell*.

80. Firstly, in taking the decision to enforce, NAMA is exercising a public function imposed on it by s. 11 of the Act for its statutory purposes set out in s. 10 in the public interest. Its letter of 9th January, 2012, so states:

> "NAMA has decided, in performance of its functions under section 11 of . . . the Act, and bearing in mind its purposes under section 10 of the Act, to arrange for demands of repayments . . ."
>
> The function or duty being discharged by NAMA in taking this decision is in no sense a private duty. It is taken pursuant to the functions given them by Statute for the stated purposes all in the public interest. The provisions of ss. 2, 10 and 11 of the Act and NAMA's Code of Practice all emphasise the public purpose and duty on NAMA in managing the acquired Bank assets to "obtain best actionable financial return for the State".

81. Secondly, the 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.

82. Counsel for Treasury, in my submission, correctly emphasise the necessity to distinguish between the coming into existence of an entitlement pursuant to the contractual document as entered into by Treasury to enforce by making demands, and if not met, to appoint receivers, and the exercise by NAMA of that entitlement which, by operation of law, now devolves to it. NAMA must exercise its discretion to enforce or to take some other permitted step pursuant to s. 11 of the Act for the purposes of achieving its public interest statutory purposes as set out in section 10.

83. In my judgment, the decision of NAMA to enforce taken on 8th December, 2011, was a decision amenable to judicial review. As already stated, that was a composite decision to make demands and if such demands were not met, to appoint receivers. The further decision to proceed with enforcement and to appoint the receivers taken on 25th January, 2012, is likewise and for the same reasons a decision amenable to judicial review.

Right to be Heard

84. The next issue to be determined is whether Treasury had a right to be heard, or, as alternatively put, whether NAMA was under an obligation to give Treasury an opportunity to be heard prior to taking the decision to enforce in December 2011.

85. The parties are in agreement that the principles set out by the Supreme Court in *Dellway Investments & Ors v. NAMA & Ors* [2011] IESC 14, are applicable. There are some differences in the submissions as to what the Court should consider those principles to be. The six judgments delivered put matters in slightly different ways and counsel have sought to identify the majority or applicable common principles. The judgments concerned the right of Mr. McKillen and other applicants to be heard on a decision of NAMA to acquire eligible bank assets pursuant to s. 84 of the Act. In *Dellway*, the seven judges of the Supreme Court were unanimous in concluding that on the facts therein, the applicants had a right to be heard prior to the taking of the decision by NAMA pursuant to s. 84 of the Act.

86. Counsel for Treasury submits that applying the principles set out in *Dellway* to the decision taken by NAMA to enforce, being the exercise of a discretion conferred on it by statute, Treasury had a right to be heard as the decision to enforce has material practical effects on the exercise and enjoyment of the then rights and interests of Treasury.

87. Counsel for NAMA firstly submits that the decision of the Supreme Court in *Dellway* is only authority for the proposition that a decision taken by NAMA pursuant to s. 84 to acquire eligible assets in respect of certain, but not all persons may attract in them a right to be heard. Counsel submits that it is not authority for the proposition that NAMA, in taking any decision post-acquisition, including a decision to enforce, is obliged to give a borrower a right to be heard. Counsel is correct in both those propositions insofar as they go. However, he also submits that by implication, the decision should be understood as meaning that once eligible Bank assets are acquired by NAMA, a borrower has no entitlement to be heard prior to the subsequent exercise by NAMA of its discretionary statutory power to enforce by making demands, and if unpaid, by appointing receivers. In my judgment, the decision cannot be so understood. The Supreme Court in *Dellway* simply did not address either the obligations of NAMA in taking decisions pursuant to its powers after the acquisition of eligible Bank assets, nor the entitlement of a debtor in any particular factual situation to be heard prior to the taking of a decision to enforce.

88. 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 commoncase 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. Such principle was restated in several of the Supreme Court judgments in *Dellway*, deriving both from the well known statements of principle by Walsh J. in *East Donegal Cooperative v. Attorney General* [1970] I.R. 317 at p. 341, and a consideration of the common law principles, in particular, by Hardiman J.

89. However, in *Dellway* in the Supreme Court, as in this application, the issue in dispute was the appropriate criteria or test for determining whether the applicants were affected by the decision taken pursuant to s. 84 of the Act, and whether, in accordance with those criteria, they were affected on the facts therein. In *Dellway*, Fennelly J. at para. 82 identified the dispute in that case in the following terms:-

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

90. Fennelly J. found in favour of the broader criterion. His conclusions are summarised at para. 99 of his judgment:

> "It does not appear to me that it has been established that the right to be heard before a contemplated decision is made

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

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

The problem is with the interpretation of the following statement that '[t]he adverse decision must be such as would directly interfere with those rights, or at least any interference must be so closely connected with any adverse decision so as to warrant that the party concerned be entitled to invoke a right to fair procedures'. If the requirement is that there be direct interference with the legal substance of the rights, the statement is too narrow. It should be capable of including material practical effects on the exercise and enjoyment of the rights. Subject to this qualification, which was crucial to the outcome of the case in the High Court, I would approve the passage at paragraph 7.14 (quoted at paragraph 85 above) as a correct statement of principle."

91. On the facts of that case, Fennelly J. concluded at para. 106 that:

> "The consequence of an acquisition decision is to make a substantial change in the way in which the appellants are in a position to exercise their property rights. Their ability to manage their properties independently is reduced."

92. In the other judgments delivered, Finnegan J. expressly agreed with the judgment of Fennelly J. and Murray C.J. agreed with the "detailed analysis of the potential practical effects on the appellants of such a decision made by Fennelly J . . ."

93. Whilst the other judgments put matters in a slightly different way, it does not appear to me that any of the other judges disagreed with an entitlement to be heard where, at minimum, the decision would have "material practical effects on the exercise and enjoyment of the rights of the applicants". Certain of the judgments refer to "rights and interests" as does the judgment of Fennelly J. rather than rights alone. I am doubtful that anything special turns on this, save that it may imply a broad approach.

94. Even adopting this formulation, there is the additional question as to the nature of the rights and interests which may satisfy this test. Rather than attempt to address this on a theoretical or abstract basis, it appears to me preferable to consider the opposing submissions of the parties on the facts applicable to Treasury in the autumn of 2011. It is commoncase that a person's right to be heard is dependent upon the specific facts applicable to that person. In *Dellway*, Denham J. (as she then was) stated at para. 84:-

> "In light of the constitutional right to be heard, to fair procedures, the question is whether any such right to be heard by the appellants arises implicitly in the Act of 2009 and in the circumstances of the case."

95. Similarly, in this case, the question is whether Treasury, in the circumstances applicable to it in December 2011, had a right to be heard prior to the taking by NAMA of a discretionary decision to enforce in exercise of its functions pursuant to s. 11 of the Act.

96. Treasury accepts, as it must do, that in 2011, it was insolvent and in default in the loans acquired by NAMA. It had so been for some time. It accepts that under the various contractual documents applicable to the facilities acquired by NAMA, that the right to demand repayment and appoint receivers had arisen. Nevertheless, Treasury was, as mortgagor or chargor, in possession of the secured assets. It had a legal right to the equity of redemption. No liquidator or receiver had been appointed to any of the applicant companies. Treasury was in a position to manage and conduct its ongoing business, including in relation to the secured assets subject to the financial constraints and other duties imposed by its contractual obligations. Its business and assets were broadly divided into property and development. In relation to its property, it continued to earn significant management fees and rental income, albeit that 92% of the rental income was mandated to NAMA. Nevertheless, it was in receipt of 8% of its rental income. In relation to its developments, SDDC, in particular, was in negotiation with BNY Mellon in relation to a potential lease and it was a party to a master development agreement in relation to the Spencer Dock development.

97. Treasury also relies upon the fact that it had entered into the MoU with NAMA in December 2010, albeit recognising that it was not a legally binding agreement. Nevertheless, it envisaged, subject to the conditions set out, the offering of revised facilities and it also set out the principal commercial terms and conditions underpinning a financial restructuring of Treasury's debt by NAMA. It also envisaged the disposal of Treasury's properties including development properties on a phased basis by 2017. If implemented, Treasury would have remained in possession of its properties and developments and managed same until their disposal in accordance with the business plan.

98. Treasury, in addition to relying upon the effect of the decision to enforce on its continuing ability to manage its business; to receive its 8% non-mandated rental income and its management fees; to continue to employ its skilled workforce, through the averments of Mr. Bruder, the managing director, relies upon the impact on non-NAMA facilities for companies within the Group by reason of cross-default clauses in many facilities. It is not in dispute that the making of demands and the appointment of receivers pursuant to the decision to enforce triggers an entitlement to other lenders to call in loans not in NAMA and not already in default and the consequent right to call upon guarantees within the Group.

99. In addition, in particular in relation to SDDC, Mr. Bruder has averred that the appointment of a receiver to it would trigger CIE's right to terminate the Master Development Agreement under which the Spencer Dock Development project is held and managed by the group. He avers that this would lead to the immediate loss to Treasury of the project. Further, he avers to the fact that it would have the effect "of ruining SDDC's tender to provide, at Spencer Dock, the new headquarters building for BNY Mellon". He explains that this is a building of c. 175,000 sq.ft. for which SDDC has planning permission, which would hold over 1,000 BNY Mellon employees when complete and which would employ 700 persons during its construction. Mr. Bruder deposed that SDDC was then currently the strong favourite to provide the new HQ which BNY Mellon was seeking. This is the matter in respect of which a meeting was held between NAMA and Treasury on 15th December, 2011 (without, of course, disclosure by NAMA that a decision to enforce had been taken).

100. NAMA submits that as Treasury is insolvent and in default under the various facility agreements and mortgages and charges held by NAMA, that it has no rights which can be adversely effected by the decision to enforce, including the appointment of receivers. It submits that as it is agreed that its indebtedness to NAMA exceeds the value of its secured property, that it has no right to an equity of redemption. Further, insofar as it was, prior to 8th December, 2011, in receipt of rental income which was not mandated to NAMA and in receipt of management fees, it submits that the relevant company within the Treasury Group has no right to such income, but in accordance with the decision in *Re Frederick Inns Ltd. (In Liquidation)* [1994] 1 ILRM 387, it only holds such income as trustee for the creditors of Treasury. It further submits that in entering into the facility agreements with the original lenders and the security documentation, that by contract, Treasury agreed that the loans could be enforced and receivers appointed in certain circumstances which have arisen. It submits that as a consequence, it has by contract deprived itself of any rights which could be adversely affected by a decision to enforce.

101. NAMA also, on the facts, correctly distinguished the factual position of Treasury from that of the applicants in *Dellway*. In the latter case, the loans, for the most part, if not all, were performing loans, it was not in dispute that there was a value to the equity of redemption held by the applicants and the Bank of Ireland had indicated that it was willing to continue doing business with the applicants.

102. Counsel for NAMA also made a 'floodgates' submission. He contended that if the Court were to determine on the facts of this application that Treasury had a right to be heard in advance of a decision to enforce, it would mean that every NAMA debtor had a right to be heard in advance of a decision to enforce.

103. I have come to the conclusion that Treasury did have a right to be heard in December 2011 before NAMA took a decision to enforce by making demands, and if, as was inevitable, such demands were not met, by appointing receivers. If considered from the perspective of NAMA obligations, I am of the view that NAMA was under an obligation by reason of the then factual circumstances to give Treasury an opportunity to be heard prior to taking a decision to enforce.

104. Treasury, in my judgment, did have rights and interests, the practical exercise and enjoyment of which are affected by the decision to enforce. Treasury and each of the applicant companies had custody and control of any assets owned by them, albeit mortgaged or charged to NAMA, and were each managing their respective businesses through its board of directors. The business included management of properties and it was in receipt of management fees and of rental income from leased properties, 8% of which was not mandated to NAMA. In my judgment, the decision in Re Frederick Inns does not mean that Treasury had no property rights in the assets, business or income, rather, the directors had obligations as to how it might use income received and conduct its business by reason of the company's insolvency.

105. I have also concluded that the submissions made on behalf of NAMA, in essence rely upon a requirement that there be an interference with a legal right which was rejected by the Supreme Court in *Dellway.* In my judgment, for so long as no liquidator or receiver was appointed and no mortgagee had gone into possession, Treasury continued to be able to exercise and enjoy its property rights in its business and assets and was affected in its ability to do so by a decision to enforce.

106. In reaching this conclusion, I have also had regard to the particular factual situation between NAMA and Treasury by reason of the approval of the Treasury business plan and MoU entered into in December 2010, and the subsequent engagement between the parties. Whilst the MoU did not give Treasury any legally enforceable right or entitlement to the potential restructured facilities set out in the appendices thereto, it nevertheless was a first step, approved by NAMA, towards a potential financial restructuring of the Group. In accordance with its terms, it set out "the principal commercial terms and conditions underpinning a potential restructuring of the Group's debt by NAMA and a summary of the key commercial objectives against which NAMA would consider, at its sole discretion, offering the revised facilities, described below . . ." It classified Treasury in accordance with its own terminology in its Code as a debtor in respect of which it would potentially facilitate the ongoing commercial activity. Subsequent thereto, Treasury had engaged with NAMA in relation to detailed financing term sheets following the intervening potential acquisition by CIM. Having regard to the functions of NAMA set out in s. 11 of the Act, the entering into an MoU placed Treasury on one of the tracks envisaged for the realisation of Bank assets acquired by NAMA, namely, refinancing of portfolio of loans and the disposal by Treasury over a number of years of the underlying assets. Treasury expended time, money and effort of its executives in dealing with NAMA in negotiation of the term sheets which was the next step in the process towards refinancing of the Treasury loans. In addition, whilst on this track, Treasury had received funding from NAMA. I have had particular regard to the facts from September to November 2011 set out above. From the time NAMA issued draft term sheets, there was significant engagement between NAMA and Treasury all directed to the meeting of preconditions for the issue of term sheets and final agreement on the term sheets. This required significant time, effort and expense from Treasury. Preconditions (a) to (f) were fulfilled by Treasury on 18th November, 2011.

107. Inherent in the decision to enforce taken on 8th December, 2011, was the decision that it was no longer in NAMA's interest to continue to fund the Group. Ms. Birmingham so summarises the decision in my judgment correctly. It was a decision to change from one method by which NAMA is expressly authorised in ss. 11(1)(d)(ii) of the Act to perform its functions (refinancing of portfolios of loans) to another ss. 11(1)(d)(iii) (realising and disposing of any relevant security). In such factual circumstances, having regard to the impact on the practical exercise and enjoyment of the rights of Treasury to manage its business and property, and having regard to the detailed level of engagement between the parties, it appears to me that NAMA was under a duty to give Treasury an opportunity to be heard and Treasury had a concomitant right to be heard in advance of the taking of the decision to enforce.

108. I reject the floodgates argument. The right to be heard is as has been determined fact-specific. On the facts herein, it is dependent upon the nature of the rights held by Treasury in its property and development businesses and the entering into the MoU and subsequent exchanges with NAMA in relation to the potential term sheets.

109. Finally, it defies commonsense in a commercial context to consider that Treasury is not adversely affected by the decision to enforce incorporating, as it does, the inevitable appointment of receivers. Even an insolvent company, if it has significant property and other business interests, including, as in this instance, developments, is able to exercise its rights to manage and control its business through its Board of Directors, albeit must also do so with due regard for the obligations which flow from insolvency. It ceases to be able to do so on the appointment of receivers.

110. The Treasury deponents have deposed, in addition to interference with the conduct of its business, to the adverse reputational effect. Whilst that, of itself, would not, in my judgment, be sufficient to establish a right to be heard, I am satisfied that on the evidence before me, even for a company within NAMA, there is a different perception of those companies to which NAMA offers refinancing and which appear to be working with NAMA, albeit for the purpose of disposing of assets, and those against whom NAMA determines it is necessary to enforce and appoint receivers.

Treasury's Opportunity to be heard prior to 8th December, 2011

111. NAMA submits that even if Treasury had a right to be heard prior to taking the decision of 8th December, 2011, it did in fact give Treasury an opportunity to be heard prior to that date. In summary, its submission is that Treasury is an expert and experienced operator which must have been aware, in the autumn of 2011, that NAMA was considering a potential decision to enforce as an alternative to entering into refinancing term sheets with Treasury. In this part of the judgment, I am only considering any opportunity given to Treasury prior to the taking the decision to enforce on 8th December, 2011.

112. In *Dellway*, Hardiman J. at p. 84, stated that the obligation on NAMA, if applicable, includes an obligation to notify "of the proposed decision and to sufficient detailed information, including criteria as may be necessary to allow the person to be affected to make the best case he can against the decision which he fears". Counsel for NAMA submits that this requirement of notification goes beyond what is contemplated by the majority of the other judges. Even if this is so in its detail, it appears to me that at minimum, if there is a right to be heard or an obligation to give an opportunity to be heard, then there must be, at minimum, notification that the proposed decision is under consideration and sufficient information about the reasons for which it is proposed. Absent such information, the right to be heard would be meaningless. It is unnecessary, on the facts herein, to consider the level of detailed information which it might be necessary for the decision maker to give. This appears to me to depend upon the individual facts. The issue, on the facts herein, is whether NAMA notified Treasury prior to 8th December, 2011, that it was considering taking a decision to enforce.

113. I have concluded that on the facts herein, NAMA did not give any notification to Treasury, even as an experienced commercial operator, that it was considering taking a decision to enforce prior to December 2011. The reservation of rights, very properly included by NAMA at the end of several of its communications, is just that, and is not any notification of an intention to consider taking a decision to enforce. Whilst NAMA, in its letter of 11th November, 2011, stated that if preconditions (a) to (f) had not been fulfilled/delivered upon in full by 5.00pm on Friday 18th November, 2011, "NAMA will have no option but to take such action as it deems appropriate", this is not, in my judgment, sufficient to put Treasury on notice of a proximate consideration of a decision to enforce. More importantly, Treasury did comply with the preconditions. NAMA, on 22nd November, 2011, then issued the four revised term sheets and thereafter, in the subsequent exchanges, I find there was no indication from NAMA of any proximate consideration of or intention to take any decision to enforce.

114. On a full consideration of all the facts, including affidavits, contemporaneous written exchanges and NAMA discovered internal documents, I find as a fact that there was no indication given by NAMA to Treasury of any intention to consider taking a decision to enforce. On the contrary, I find that there was a deliberate policy by NAMA not to disclose a potential decision to enforce prior to 8th December, 2011. This finding is, in my view, corroborated by the exchanges between NAMA and Treasury between 8th December, 2011, and 6th January, 2012.

Duty to Act in a Fair and Reasonable Manner

115. The next issue is whether NAMA was under a duty to act fairly and reasonably in taking a decision to enforce. Further, if so, whether it was in breach of that obligation.

116. As I have determined that NAMA, in taking this decision, was exercising a statutory function, the starting point in relation to the applicable principles is the statement of principle by Walsh J. in *East Donegal Cooperative v. Attorney General* [1970] I.R. 317, at pp. 341 and 343-344.

> "… 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.
>
> . . .
>
> All the powers granted to the Minister by s. 3 which are prefaced or followed by the words 'at his discretion' or 'as he shall think proper' or 'if he so thinks fit' are powers which may be exercised only within the boundaries of the stated objects of the Act; they are powers which cast upon the Minister the duty of acting fairly and judicially in accordance with the principles of constitutional justice, and they do not give him an absolute or an unqualified or an arbitrary power to grant or refuse at his will. Therefore, he is required to consider every case upon its own merits, to hear what the applicant or the licensee (as the case may be) has to say, and to give the latter an opportunity to deal with whatever case may be thought to exist against the granting of a licence or for the refusal of a licence or for the attaching of conditions, or for the amendment or revocation of conditions which have already attached, as the case may be."

117. Whilst the above statements were made in the context of what might be considered to be an adjudicative function, namely, the granting or refusing of a licence, it is now well established that the principles also apply to the exercise of a discretion given by statute. In *Dellway*, Fennelly J. referred with approval to the clear expression of the principle by Costello P. in *McCormack v. Garda Síochána Complaints Board* [1997] 2 I.R. 489 at pp. 499-500:

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

118. Treasury, at the leave stage, clarified that notwithstanding that it had relied upon the judgment of Kelly J. in *Zockoll Group Ltd. v. Telecom Eireann* [1998] 3 I.R. 287, and the judgment of Blayney J. in *Deane v. Voluntary Health Insurance Board* [1992] 2 I.R. 319, that on this part of the case, it was only relying upon the obligation of NAMA to act fairly and reasonably in the procedure followed reaching its decision as distinct from any obligation to take a decision which is objectively and substantively reasonable. It is therefore unnecessary to refer to those judgments in any detail.

119. I am satisfied, in accordance with the foregoing principles, that NAMA was under an obligation to act fairly and reasonably in the procedures followed in taking the decision to enforce on 8th December, 2011.

120. The first ground upon which leave was granted, and it is contended that NAMA was in breach of such duty, was its failure to

give notice of the proposed decision and to afford Treasury an opportunity to be heard. For the reasons set out in the earlier part of this judgment on the facts pertaining to Treasury in the autumn of 2011, I am satisfied that NAMA, as part of its obligation to act fairly and reasonably, was under an obligation to give Treasury notice of its proposed decision and to afford it an opportunity to be heard and that on the facts, did not either give notice of the proposed decision nor give Treasury an opportunity to be heard.

121. The second ground upon which leave was granted was that "the Credit Committee considering the matter on 6th December, 2011, when Treasury had been given until 7th December, 2011, to respond to concerns relating to the creditors strategy". Leave was granted on that ground on the facts before the Court at the leave application. At the full hearing, counsel for Treasury drew attention to the facts which were not known to the Court or Treasury at the leave application, namely, that NAMA had commenced consideration of enforcement and preparation of a strategy towards enforcement, albeit on a contingent basis, as early as 28th October, 2011. NAMA objected to any expansion of the ground at the stage of the hearing. No expansion was pursued on behalf of Treasury nor granted.

122. On the narrow ground upon which leave was granted, from the full facts as disclosed at the hearing, it appears that the Credit Committee meeting on 6th December, 2011, took place before the original time fixed for Treasury to respond to the concerns relating to the creditors strategy which was close of business on 6th December, 2011, and prior to the receipt of the request for the extension of time until 7th December, 2011, and the granting of same. It appears that it was intended that the Credit Committee consider and determine the adequacy of the Treasury response to the concerns expressed relating to is creditors strategy (either in relation to the term sheets or the contingent enforcement). Hence, the holding of a meeting in advance of the expiry of the time given to Treasury to respond to the concerns expressed is clearly an unfair procedure and in breach of NAMA's obligation to act fairly and reasonably.

123. The third ground is the alleged failure of the Board of NAMA to take into account a relevant consideration on 8th December, 2011, namely, the availability of third party investors/purchasers for the loans. The duty to act fairly and reasonably includes a duty to take into account matters which are relevant and to ignore matters which are irrelevant, see *O'Keeffe v, An Bord Pleanála* [1993] 1 I.R. 39 per Finlay C.J. at pp. 71 and 72.

124. On the facts, having regard to the minutes and notes relating to the Board meeting of 8th December, 2011, now produced, NAMA has failed to establish as a fact that the potential availability of third party investors to purchase the Treasury loans was considered by the Board members prior to the taking of the decision to enforce. Even if some members were aware of the fact, such awareness does not constitute consideration. On the facts, I have found that NAMA was informed at the meeting of 8th November, 2011, that Treasury was then in discussions with a number of third parties which had "serious interest on financing". NAMA had previously had the experience of Treasury producing a potential investor, CIM, which, at one stage, obtained Board approval from NAMA. The potentiality of any investors in December 2011 was a relevant matter for consideration prior to the taking of a decision to enforce and was not then considered by NAMA. The importance of potential investors is that it is perceived by Treasury as a mechanism to exit NAMA. Whilst referred to as 'investors', the likely form of investment was purchase from NAMA of Treasury debts.

125. For each of the above reasons, I am satisfied, therefore, that NAMA acted in breach of its obligation to act fairly and reasonably in the taking of the decision to enforce on 8th December, 2011.

Standstill Arrangements

126. The next set of issues concerns the standstill arrangements entered into in January 2012 and their impact on the entitlement of Treasury to challenge or obtain relief in respect of the breaches by NAMA of its obligations in the taking of the decision to enforce on 8th December, 2011. The issues require detailed consideration of the facts between 10th and 25th January, 2012.

127. Earlier in this judgment, I have set out the meeting held on 9th January, 2012, at which the decision to enforce was communicated, the letter handed over by NAMA to Treasury on that day and the fact that on 10th January, 2012, letters were delivered by NAMA to the relevant Treasury companies seeking repayment of capital, interest and costs in relation to individual facilities by 4.00pm on 11th January, 2012, failing which it was indicated NAMA would take all steps available to it under the Act, relevant loan documentation and securities. Further similar letters were issued by IBRC as agent and security trustee for the finance party and secured beneficiaries in relation to the SDDC facilities from the syndicate. These form the backdrop to what occurred later in the day on 10th January, 2012, and subsequent days.

128. There is little dispute about the primary facts as to what occurred and the exchanges which took place. There is significant dispute about how the Court should construe certain of the exchanges and the impact of those exchanges on the remaining issues in the proceedings. In setting out the relevant facts, insofar as they are not in dispute, they represent my findings on the facts. It must be recalled that there was ultimately no cross-examination of any of the deponents.

129. It is not in dispute that following the receipt of the letter of 9th January, 2012, and the letters of demand of 10th January, 2012, Treasury understood that NAMA intended taking enforcement steps, including appointing receivers upon the expiry of the deadline of 4.00pm on 11th January, 2011.

130. On 10th January, 2012, McCann FitzGerald, solicitors, then acting for Treasury, on its instructions wrote a long letter in which they initially referred to:

> (i) Treasury's surprise at the content of the meeting and letter of 9th January and the letters of demand of 10th January; and
>
> (ii) the potential interest of Hines and Macquarie; the fact that their interest had not previously been disclosed by reason of confidentiality agreements and also the alleged representation made at the meeting of 8th November, 2011, that NAMA would only consider prospective investments after conclusion of term sheets.

They then stated:

> "The first indication that our clients received that NAMA were other than fully prepared to continue supporting our clients with a view to the maximising of returns from the relevant assets occurred a the meeting had yesterday. Our clients had received no prior warning of any kind that this might occur and, in the light of the progress that has been made between the parties in discussions following the signing of a Memorandum of Understanding and the exchanges of draft term sheets, had no reason to believe that NAMA's position might alter.
>
> Having regard to the fact the decisions and actions are matters of public law, and not simply private law matters, NAMA is

obliged as a matter of law to exercise its powers in a fair and reasonable manner. In the particular and unusual circumstances that arise in the case of our client, we are of the view that as an aspect of NAMA's public law obligations, our clients have an entitlement to be heard by NAMA prior to any decision being taken by to appoint statutory receivers. Given NAMA's implied representations both by its conduct and its words concerning our clients it is clear that when the meeting was scheduled for yesterday at 3 pm (notice being given at 7.30pm on Friday evening last) that NAMA had already decided that it would make demands and appoint statutory receivers pursuant to the 2009 Act, that NAMA had already decided its course. No opportunity was given to our clients to reply or make any submission in relation to what was a predetermined decision. Further that decision was in fact a *volte face* by NAMA having regard to what had until then told our clients.

Having regard to NAMA's obligations pursuant to the 2009 Act which includes obligations to *inter alia* '. . .protect or otherwise enhance the value of [the] assets . . .' and to 'obtain the best possible financial return . . .' we believe that our clients must be given opportunity to make a presentation to NAMA concerning the Hines interest and also the Macquarie interest described above. Clearly any agreed disposal of the relevant assets will achieve a better result than might any forced sale through a receivership process. Had NAMA provided any earlier indication that it intended to alter its position of support to our clients these interests would have been disclosed at an earlier point in time and, we believe, would have a clear and material effect on the NAMA's decision making process.

We have advised our clients that they should seek the protection of the Courts by applying to have an examiner appointed to the Group. That application is being prepared currently and will issue prior to 4pm tomorrow Wednesday 11 January 2012 prior to the expiry of those letters of demand served by you today.

However, our clients are prepared, if your clients will agree to a standstill agreement being entered into prior to 1.30pm tomorrow between NAMA and our clients, for a period of 14 days to the effect that NAMA will take no step on foot of the letters of demand already served and that it will not serve any fresh letters of demand or other demands within that period. The period is sought to permit detailed discussion to take place between NAMA and our clients and the two investors, Hines and Macquarie, with a view to an agreement which is satisfactory to our clients and NAMA and Hines and/or Macquarie being achieved. In order to show our clients good faith in this matter we are instructed that should those discussions not prove to be satisfactory from NAMA's point of view then our clients will agree not to object to the appointment of receivers and will not commence any application in that regard seeking to have the group placed in examinership or any like application.

Your reply is sought before 1.30pm tomorrow Wednesday 11 January 2012. Our clients are prepared to meet with you this evening or tomorrow morning in advance of 1.30pm. We intend to refer to this correspondence in the application for the appointment of an examiner if that be necessary.

Yours faithfully."

131. On 11th January, 2012 at 2.06pm NAMA replied to that letter. In its letter, it indicated, initially, that it found it extraordinary that Treasury had not previously informed NAMA of the negotiations with Hines and Macquarie; disputed the assertions that NAMA's demands for repayment were unexpected; and that Treasury had not had a full opportunity to make representations to NAMA. It also disputed the contention in relation to what was said at the meeting of 8th November, 2011. It then stated:

"We note the penultimate paragraph of your letter wherein you have asked NAMA to agree to a standstill for a period of 14 days during which time NAMA will take no steps on foot of the letters of demand already served and that it will not serve any fresh letters of demand or any other demands within that period. We note the purpose of the period of 14 days being to permit detailed discussions to take place between NAMA and your clients and the two prospective investors with a view to an agreement which is satisfactory to all parties being achieved. We hereby agree to a standstill on that basis noting that such agreement is done expressly in reliance on your client's undertaking as set-out in your letter that should the discussions during the 14 day period not prove to be satisfactory from NAMA's point of view that your clients will not object to the appointment of receivers and that they will not commence any application in that regard seeking to have the group placed in examinership or any like application.

Please be advised however that IBRC, as security agent for the SDDC Group facility, has been instructed by the syndicate to take relevant enforcement steps. NAMA has sought the agreement of the other syndicate lender to countermand this instruction but this has not been forthcoming. It does not appear to NAMA, at this point, that NAMA is unilaterally empowered to countermand the original instruction to the security agent.

Yours faithfully."

The "other syndicate lender" referred to in the final paragraph is KBC.

132. There were subsequent oral exchanges in the afternoon of 11th January, 2012, between Treasury and NAMA about concerns raised by Treasury in relation to the syndicate. NAMA confirmed that it had instructed IBRC, as syndicate agent, not to proceed with instructions that they had already been given, but that it could not be certain that this was an effective instruction as NAMA could not control KBC as the other syndicate lender. Treasury decided during the afternoon of 11th January, 2012, not to proceed with the presentation of a petition seeking the appointment of an examiner which had been prepared. Ms. Birmingham deposes that later in the afternoon of 11th January, 2012, Mr. Bruder left a voice message for her, which she retained and quoted in her affidavit in which, having referred to Ms. Birmingham's exchanges with Mr. O'Buachalla in relation to the syndicate position, he expressed the view that it seemed to him to be "a very satisfactory outcome". His message ended as follows:

"That being the case, Mary, I am delighted that we have bought ourselves a window. I am very conscious of the fact that we have a lot of work to do and what I would like to do is agree with you a programme to kick that off, and more particularly, I suppose, some time slots to get into you with one or other or both of our investors so give me a call back when you get the opportunity."

133. Ms. Birmingham, Mr. Bruder, Mr. Williams and Mr. O'Buachalla have all deposed to what occurred on the following day, 12th January, 2012. There does not appear to be any dispute about the primary facts. I would summarise those as follows:

(i) Ms. Birmingham and Mr. Bruder had a phone conversation in the morning. Two issues were discussed. Firstly, organisation of the initial meeting to be held that day to discuss arrangements during the standstill period. Secondly, a

demand from Ms. Birmingham as a precondition to the meeting for an undertaking from Treasury by reason of concerns following an article that morning in the *'Irish Times'* and her perception of the threat of third party creditor pressure which might affect the rights or interests of NAMA during the standstill period. By an email exchange during the morning between Ms. Birmingham and Mr. Bruder, Treasury agreed to give an undertaking and the meeting was set for the offices of William Fry at 2.00pm. A draft of the undertaking was furnished by NAMA to Treasury prior to the meeting.

(ii) Whilst during the morning exchanges Ms. Birmingham had stipulated that the furnishing of the undertaking was to be a precondition to the meeting, its terms were not finalised in advance of the meeting and the meeting commenced without the undertaking having been signed. There were side negotiations in the course of the meeting in relation to the terms of the undertaking and it was signed at the end or subsequent to the meeting.

(iii) At the outset of the meeting, Ms. Birmingham set out what she terms the "ground rules" for the standstill period. It is not in dispute that, as described by her, these included:

1. The obtaining from Treasury of the undertaking then under discussion;

2. NAMA required unfettered access to the interested parties during the evaluation process and NAMA would carry out an internal appraisal process of the offers to determine whether they were satisfactory; and

3. the result of the evaluation process would not be made available to Treasury (see paras. 111 and 112 of Ms. Birmingham's first affidavit).

(iv) Mr. Williams, who was also present, puts in a slightly different way the ground rules stipulated by Ms. Birmingham. However, he also deposes that she informed Treasury that NAMA would not meet with Treasury with the investors and that NAMA would not be reaching agreement with an investor in the standstill period and would use the time to evaluate the bids (see paras. 20 to 22 of Mr.Williams' affidavit of 8th February, 2012).

135. The Treasury deponents have disputed the assertion made by Ms. Birmingham on affidavit that they agreed to the ground rules which she stipulated at the meeting of 12th January, 2012. However, Mr. Williams and Mr. Bruder in their affidavits make clear that they did not dispute the proposed approach as set out by Ms. Birmingham and determined to go along with it. Mr. Williams, at para. 21 of his affidavit, having referred to what Ms. Birmingham said as set out above, states:

> ". . . it is very clear that she had rigid riding instructions and was not going to move an inch from them. So we had the choice of disputing each matter, thus getting into a row with NAMA, probably using up most or all of the standstill period and spoiling the mood from the outset, or going along with it in the expectation that NAMA were acting *bona fide*."

This Treasury approach is confirmed by Mr. Bruder at para. 55 of his affidavit of 4th May, 2012, where he states that Treasury "were left with no option by NAMA other than to accept the ground rules". Mr. Bruder then avers, "However, Treasury's expectation was that although Treasury might be excluded at the outset, it would have to be involved in substantive tripartite meetings with NAMA and the investors. Treasury was, after all, disposing of its properties, NAMA was not the only seller".

136. The further undertaking required of Treasury was given at approximately 5pm in the form of the following letter from Treasury to NAMA:

> **"Treasury Holdings, SDDC Group, REO plc and IREO Irish Real Estate Opportunities plc (together the "Treasury Holdings Group")**
> **Standstill Arrangements**
> Dear Sirs,
>
> We refer to your letter dated 11 January and note your agreement, and the basis of that agreement, to standstill for a period of 14 days from 11 January 2012 (the "Standstill Period").
>
> For the avoidance of doubt, it is acknowledged that the Standstill Period will expire:
>
> (b) at 4 p.m. on Wednesday 25 January 2012, or
>
> (c) upon the service of notification by Treasury Holdings Group in the events specified in 2 below, or
>
> (d) if a petition or application is issued or formal steps (other than the making of a demand) are taken by any creditor to appoint an insolvency official and/or to commence insolvency proceedings in respect of any Treasury Holdings Group company, or seeking the winding up, liquidation, dissolution, examination, administration, reorganisation or moratorium in respect of any such company; or
>
> (e) any proceedings are commenced against Treasury Holdings Group company to enforce a debt in excess of €1,500.000.00;
>
> whichever first occurs.
>
> Further, as regards SDDC, NAMA will not withdraw its instruction to IBRC as security agent (as indicated in the attached letter from NAMA to IBRC dated 11 January 2012) unless and until the Standstill Period expires.
>
> References in this letter to 'Treasury Holdings Group' include, for the avoidance of doubt and unless otherwise stated, any companies within the Treasury Holdings Group.
>
> For the purpose of taking account of and addressing the threat of third party creditor pressure during the Standstill Period, on behalf of the Treasury Holdings Group, we hereby undertake to notify you during the Standstill Period:

1. Immediately on the occurrence of any of the following or any threat of the following affecting any company within the Treasury Holdings Group:

(i) demand(s) for repayment not previously made are served by any creditor of any such company in an amount in excess of €100,000; or

(ii) the holder of any security over any asset of any such company takes any steps to enforce such security; or

(iii) any asset of any such company becomes subject to attachment, sequestration, execution or any similar process in respect of indebtedness; or

(iv) a petition or application is issued or formal steps (other than the making of a demand) are taken by any creditor to appoint an insolvency official and/or to commence insolvency proceedings in respect of any such company, or seeking the winding up, liquidation, dissolution, examination, administration, reorganisation or moratorium in respect of any such company; or

(v) any proceedings are commenced against any such to enforce a judgment debt; or

(vi) any such company (other than any dormant or shelf company owning no assets) ceases to trade of threatens to do so.

2. By a period of not less than 24 hours in advance of the taking of any of the following proposed courses of action:

(i) the convening by any company within the Treasury Holdings Group of any meeting of shareholders, directors or creditors for the purpose of taking or commencing any form of insolvency proceedings, including the liquidation, examinership and/or any proposed composition with creditors; or

(ii) any form of application by any party to apply for examinership or the seeking of court approval of any proposed scheme of arrangement or court protection concerning any company within the Treasury Holdings Group.

We confirm that all notifications will be made (a) in written form by email to Mary Birmingham, NAMA (email mbirmingham@nama.ie and Alan Stewart, NAMA (email astewart@nama.ie) and(b) by telephone to Mary Birmingham, NAMA (tel. (01) 665 0022).

Yours faithfully,

Duly Authorised, for and on behalf of Treasury Holdings Group."

The attached letter of 11th January, 2012, from NAMA to A&L Goodbody, as solicitor for IBRC, stated:

"We hereby confirm our instructions to your client not to take any further steps on foot of the letters of demand delivered on Tuesday 10 January 2012 to certain of the SDDC Group entities for a period of 14 days from the date of this letter and not without further written instruction from us."

Standstill Agreement

137. NAMA, seeks to set up either an agreement with Treasury or a representation made by Treasury in reliance upon which it entered into the standstill agreement, such that Treasury is now precluded, either by reason of contract or estoppel from objecting to or challenging the appointment of the receivers. The onus is on NAMA to establish the agreement or the representation and reliance thereon giving rise to an estoppel. It submits that the undertaking given by Treasury through its solicitors in the letter of 10th January, 2012, either was a term of the standstill agreement concluded on 11th January, 2012, or a representation in reliance on which NAMA entered into the standstill agreement.

138. Treasury does not dispute that it gave the undertaking on 10th January, 2012, but makes a number of submissions in response. First, that the standstill agreement was only concluded on 12th January, 2012, and that the undertaking not to object to the appointment of receivers did not did not then form part of the agreement, or by implication was not then relied upon by NAMA. If, contrary to that contention, it did form part of the standstill agreement or the standstill agreement was entered into in reliance upon it, then it submits that NAMA did not perform its part of the standstill agreement insofar as it did not hold tripartite negotiations or discussions with Treasury and one or other of the investors, with a view to reaching an agreement satisfactory to all parties. It submits that by reason of such failure, the Court should not enforce the undertaking against Treasury or hold that it is estopped by the representation made from pursuing these proceedings or obtaining relief herein.

139. On the first issue, considering the facts set out above and in particular, the exchange of letters of 10th and 11th January , in my judgment, the parties had reached a concluded agreement that NAMA would standstill *i.e.* not take any further or new enforcement steps for a period of 14 days by the evening of 11th January, 2012. As with many agreements reached only in correspondence, there may have been some lack of precision (particularly as to how the discussions during the standstill period would take place), but, in my view, there were certain core elements which had been agreed and which amounted to a concluded agreement. I would identify these as the following:

(i) NAMA agreed that it would standstill for a period of 14 days from 11th January, 2012, *i.e.* that it would take no step on foot of the letters of demand already served and would not serve any fresh letters of demand within that period. Related to that, they instructed IBRC not to take any further steps on foot of the letter of demand delivered to certain of the SDDC Group entities. NAMA's inability to absolutely control what happened in relation to the syndicate does not preclude the existence of a concluded agreement. The agreement was with NAMA as to what it would or would not do.

(ii) The purpose of the standstill period of 14 days was to permit detailed discussions to take place between NAMA and Treasury and the two prospective investors with a view to an agreement satisfactory to all parties being achieved. That

in substance was the common formulation of the purpose of the standstill period in the letters of 10th and 11th January, 2012.

(iii) NAMA agreed to standstill expressly in reliance upon Treasury's representation or undertaking that should the discussions during the 14-day period not prove to be satisfactory from NAMA's point of view, that Treasury would not object to the appointment of receivers and that it would not commence any application in that regard seeking to have the Group placed in examinership or any like application.

140. On 10th/11th January, 2012, there does not appear to have been any *inter partes* communications as to how the detailed discussions between NAMA, Treasury and the prospective investors would take place. The affidavits indicate that Treasury certainly envisaged tripartite discussions similar to discussions which had taken place in the context of the proposal from CIM. It is less clear what view had been formed by NAMA by the evening of 11th January, 2012. Nevertheless, the lack of clarity, in my view, is not such as to preclude the coming into existence of a concluded agreement. That view is supported by Treasury's reaction in not petitioning for examinership on 11th January, 2012, and the phone message from Mr. Bruder.

141. On 12th January, 2012, my conclusion is that NAMA sought and obtained from Treasury agreement, both to a variation of the term as to standstill period, and also the addition of new terms *i.e*. the notification obligations on Treasury during the standstill period set out in the letter of 12th January, 2012. The reason for which I say variation of the period is the first section of the letter of 12th January, 2012, from which it appears that Treasury, on that day, agreed to a potential expiry of the standstill period prior to 14 days upon the happening of one of the occurrences in paras. (b), (c) or (d), all of which related to potential steps by third party creditors or Treasury itself taking an insolvency related step set out in para. (2)(i) or (ii) of the letter. The additional terms are the notification obligations set out which similarly relate to third party creditor steps or an action taken by Treasury as set out in para. (2)(i) or (ii) of the letter.

142. The third aspect of the standstill agreement, which was the subject of communication between the parties on 12th January, 2012, was the manner in which the discussions between NAMA, Treasury and the prospective investors which was the purpose of the standstill period would be conducted. As already pointed out in the letter exchanges of 10th/11th January, 2012, the formulation of "discussions between NAMA and Treasury and the two prospective investors with a view to an agreement which is satisfactory to all parties being achieved" undoubtedly left room for clarification as to how such discussions would take place.

143. It is not in dispute that at the meeting in William Fry, solicitors, commencing at 2.00pm on 12th January, 2012, that Ms. Birmingham, on behalf of NAMA, set out how NAMA intended the discussions would take place, and also made clear that NAMA would be evaluating the bids and would not be sharing the result of that evaluation with Treasury. The Treasury deponents make clear that this was not what they had envisaged. However, the extracts from the affidavits already referred to indicate that they made a commercial judgment and decided not to object. As put by counsel for NAMA, correctly, in my judgment Treasury, at minimum, acquiesced in the "ground rules" set out by NAMA at the meeting on 12th January, 2012, as to how the discussions and evaluation by NAMA of the investor bids would proceed.

144. The evidence is that at no stage throughout the discussions of 12th January, 2012, was there any mention of the undertaking given by Treasury in the letter of 10th January, 2012, and expressly relied upon by NAMA in agreeing to standstill as set out in its letter of 11th January, 2012. The variation in the expiry period, additional obligations in relation to notification agreed to by Treasury and the setting out by NAMA of the ground rules as to how the discussions and evaluation would proceed during the standstill period and the acquiescence by Treasury thereto, do not, either expressly or by implication, alter in any way the undertaking given and the reliance on same by NAMA in entering into the standstill agreement.

145. Much reference was made to the opening sentence of the letter of 12th January, 2012, drafted by NAMA and signed by Treasury, and in particular, the reference to "the basis of that agreement". It does not appear to me that anything turns on the use of those words. The letter in its opening phrase expressly refers to the agreement of NAMA in the letter of 11th January, 2012. It is a reference to an agreement already in existence with 14 days computed from 11 January. As already concluded, that agreement was one entered into expressly in reliance upon the undertaking given by Treasury. The terms of the standstill agreement were being, in some respects, varied and in other respects, added to by the matters referred to in the letter of 12th January, 2012. None of those matters, either expressly or by implication, could be objectively construed as altering the undertaking given by Treasury in the letter of 10th January, 2012, and upon which NAMA expressly relied in entering into the agreement on 11th January, 2012. Some reliance was sought to be placed by counsel for Treasury upon the requirement for notice as set out in para. 2 of the letter of any step taken by any company within the Treasury Holdings Group to commence any form of insolvency proceedings including examinership. However, that was notification in relation to a step which might be taken during the standstill period and cannot be considered to be inconsistent with the undertaking given and relied upon.

146. Finally, I cannot accept on the facts the Treasury submission that the ground rules set out by Ms. Birmingham at the meeting on 12th January, 2012, as to what was to take place during the standstill period was so different to the purpose of the standstill period set out in the letters of 10th and 11th January, 2012, so as to constitute a new and fresh standstill agreement of which the undertaking given by Treasury did not form part. The meeting was held in the context of the standstill agreement already reached on 11th January, 2012. It is clear that NAMA, through Ms. Birmingham, was setting out how the proposed discussions with Treasury and the prospective investors would take place. Emphasis was placed upon the fact that Ms. Birmingham indicated at that meeting that NAMA would not be reaching agreement with an investor during the standstill period but would use the period to evaluate the bids. Having regard to the size and complexity of the Treasury portfolio, this appears to have been no more than commercial commonsense. The intention appears to have been to evaluate the bids within that period and to ascertain whether either proposal was sufficiently attractive to permit NAMA to move on to a further stage of negotiations. Treasury did not, at the time, object to this approach.

147. For the reasons set out above, I have concluded that the standstill agreement was concluded between the parties on 11th January, 2012, and the agreement was entered into by NAMA in reliance upon the representation or undertaking that should the discussions during the 14-day period not prove to be satisfactory from NAMA's point of view, that Treasury would not object to the appointment of receivers and that it would not commence any application in that regard seeking to have the Group placed in examinership or any like application.

148. The final question on this issue is whether, as Treasury contends, by reason of NAMA's failure to hold tri-partite discussions involving Treasury and an investor during the standstill period it is precluded from enforcing the agreement against Treasury or asserting that it is estopped from pursuing these proceedings or obtaining relief.

149. The primary facts as to what occurred between 12th and 25th January, 2012, are not in dispute. They have been set out in the affidavits (particularly of Ms. Birmingham and Mr. O'Buachalla) and the discovered documents. NAMA established two separate project

management teams, one under Ms. Birmingham in relation to the Macquarie proposal and one under Michael Moriarty in relation to the Hines proposal. NAMA retained Price Waterhouse Coopers (PWC) accountants to assist them in the evaluation of the proposals from Hines and Macquarie. There were meetings held between NAMA and representatives of each of Hines and Macquarie. There were telephone and email communications between NAMA and Treasury raising queries relevant to each of the proposals. There were communications between Treasury and each of Hines and Macquarie. There were no meetings or discussions held at which NAMA, Treasury and one or other of Hines and Macquarie participated. Treasury was not given an opportunity of making submissions to NAMA on the Hines and Macquarie proposals.

150. Ultimately, on 25th January, 2012, both a Credit Committee meeting and a Board meeting of NAMA were held. The Board had a recommendation from the Credit Committee based, in turn, upon a recommendation from each of the project management teams and an evaluation by PWC. The Board of NAMA determined to reject each of the offers from Hines and Macquarie which was in accordance with the recommendation of the Credit Committee and that of the project teams and evaluations by PWC.

151. At the same meeting, the Board decided to "proceed with enforcement action". The minute records the decision in the following terms:

> "On the basis of having rejected both offers on hand, the Board resolved to proceed with enforcement action to include any necessary service of demands and appointment of receivers, with decisions in relation to debtor notification, oversight and practical implementation of appropriate enforcement and debtor related action to be delegated to the NAMA Executive."

152. The decision was communicated to NAMA by letter sent by email at 15:55 on 5th January, 2012, in the following terms:

> "Dear Sirs,
>
> We refer to our letter of 9 January wherein we notified you of NAMA's intention to proceed to enforce its security. We refer also to the letter dated 10 January 2012 from McCann FitzGerald, NAMA's reply dated 11 January 2012 and the letter dated 12 January 2012 from the Group, all in relation to the agreed standstill.
>
> We have engaged in detailed discussions with representatives of Hines and Macquarie in relation to their proposals to acquire the NAMA secured assets within the Group during the course of the last 14 days.
>
> NAMA, with the assistance of external advisors has expended considerable time, effort and cost evaluating both proposals.
>
> Having considered the matter carefully, NAMA has decided in performance of its functions under Section 11 of the National Asset Management Agency Act, 2000 ("the Act") and bearing in mind its purposes under Section 10 of the Act, that neither proposal is satisfactory and that NAMA's objectives would be better served by proceeding to enforcement.
>
> Consequently, as this standstill ends at 4 p.m. on 25 January, NAMA will proceed with enforcement of security as outlined in its letter of 9 January 2012. This is the course of action most consistent with NAMA's obligation to achieve its purposes under the Act and, in particular, NAMA's obligation to obtain the best available financial return for the State.
>
> We note from the undertaking given by the Group in McCann FitzGerald's letter dated 10 January 2012 that the Group will not object to the appointment of receivers and will not commence any application in that regard seeking to have the Group placed in examinership or any like application.
>
> Yours sincerely,
>
> Mary Birmingham
>
> Senior Portfolio Manager."

153. That letter elicited a response from the current solicitors for NAMA, DAC Beachcroft, in the following terms:

> "Dear Madam,
>
> We act on behalf of the above named entities who have instructed us in relation to the decision which was communicated to them this afternoon by NAMA.
>
> We refer to your email of today's date (sent at 15.55). We note what you say in relation to our agreement not to object to the appointment of a Receiver. However, that offer was superseded by the Standstill Agreement entered into on 12 January 2012.
>
> Accordingly, we are instructed to seek injunctive relief restraining NAMA and NALM from taking any further steps in respect of the letters of demand which were issued to the aforementioned entities on the 10 and 11 January 2012.
>
> We are instructed to bring an application to Court today seeking short service and we will serve copies of these papers upon you later this afternoon and inform you of any Order made.
>
> In the interim however we trust that you will take no further steps on foot of these letters of demand.
>
> Yours faithfully."

154. Counsel for NAMA drew attention to the fact that the contention of Treasury now under consideration that NAMA was in breach of the standstill agreement was not made in the above letter. Whilst a relevant fact it is not determinative of the issue.

155. The submission is that NAMA, on the above facts, in the manner in which it conducted the negotiations and evaluation of the proposals from Hines and Macquarie, was in breach of the agreed purpose of the standstill as set out in the letters of 10th and 11th January, 2012. Treasury submits that it was a term that there be tripartite discussions between NAMA, Treasury and one of the prospective investors and that no such discussions took place and that in consequence, as NAMA is in breach of the standstill

agreement, it is not entitled to assert the undertaking against Treasury. It is important to note it was never contended that the discussions, communications and evaluation were not in accordance with the "ground rules " set out by Ms Bermingham on 12th January.

156. On the facts and on the law, I cannot accept such submission. Firstly, construing the letters of 10th and 11th January, 2012, objectively in the context even of the prior history between the parties, it does not appear to me that in specifying that the purpose of the fourteen-day period was to permit "detailed discussions between" NAMA and Treasury and the two investors "with a view to an agreement being satisfactory to all parties being achieved", required, of necessity, contemporaneous tripartite discussions. Secondly, even if I am incorrect in this, for the reasons already set out, on 12th January, 2012, NAMA, through Ms. Birmingham, made clear to Treasury the manner in which it intended to hold discussions and conduct the evaluation of the proposals from Hines and Macquarie during the 14 day period. Treasury did not object to and acquiesced in the proposed methodology on 12th January, 2012, and further participated insofar as they were requested to do so in the subsequent discussions and evaluation conducted by NAMA. To put it another way, Treasury, at the meeting of 12th January, 2012, elected to proceed with the discussions and evaluation during the standstill period in accordance with the 'ground rules' set out by Ms. Birmingham rather than assert that such 'ground rules' were in breach of the agreement reached by exchange of letters of 10th and 11th January, 2012. Having so elected and having permitted the discussions and evaluation to proceed during the 14 days on that basis and having participated when requested, it cannot now assert that the ground rules in which it acquiesced were in breach of the standstill agreement.

157. Counsel for NAMA put its entitlement to enforce the undertaking given by Treasury either on the basis of agreement or estoppel. On balance it appears to me most appropriately to fall within an estoppel by representation as explained by Griffin J. in *Doran v. Thompson Ltd.* [1978] I.R. 223 at 230:

> "Where one party has, by his words or conduct, made to the other a clear and unambiguous promise or assurance which was intended to affect the legal relations between them and to be acted on accordingly, and the other party has acted on it by altering his position to his detriment, it is well settled that the one who gave the promise or assurance cannot afterwards be allowed to revert to their previous legal relations as if no such promise or assurance had been made by him, and that he may be restrained in equity from acting inconsistently with such promise or assurance."

It is not in dispute that Treasury gave a clear and unambiguous assurance which was intended to affect its legal relations with NAMA who acted on it and altered its position to its detriment by committing significant resources and incurring expense in evaluating the Hines and Macquarie proposals. It follows that Treasury may or should now be restrained in equity from acting inconsistently with such assurance. In the context of the present proceedings the decision as to whether it should be restrained must also, in my view, be taken in accordance with certain constitutional and public law principles.

158. Treasury submits that insofar as it may be held to have agreed not to challenge the appointment of receivers in such a way as precludes or bars it from maintaining the present proceedings, that such agreement is void at common law. It relies, in particular, upon a decision of the Court of Appeal in England in *Soulsbury v. Soulsbury* [2007] EWCA Civ. 969 and the judgment of Ward L.J. at para. 17, referring in turn to *Hyman v. Hyman* [1929] AC 601. Those judgments consider a potential ouster of the jurisdiction of the courts in the particular context of a claim for maintenance where special considerations apply deriving, in part, from the Court's supervisory role in relation to ancillary relief in divorce cases and the public interest in same.

159. Nevertheless an agreement which purports to remove any recourse to the courts in the event a dispute arises may be void at common law. However on the facts, I have concluded that this is not such a case. I accept the submission of counsel for NAMA that the Court should, on the facts herein, consider the undertaking not to commence proceedings to have been given by Treasury after a dispute had arisen and as part of a procedure agreed upon to remedy the then complaint of Treasury that NAMA was in breach of its public law obligations in failing to give it an opportunity to be heard prior to the taking of the decision to enforce against it as communicated in the letter of 9th January, 2012. He further submits that public policy favours the courts upholding such alternative dispute resolution procedures. It is unnecessary to consider that latter submission herein.

160. Treasury in response relies upon the right of access to the courts being a constitutional right in this jurisdiction in accordance with well established principles: see *Macauley v. Minister for Post and Telegraphs* [1966] I.R. 345. Even if the undertaking given by Treasury is to be considered as a waiver of its constitutional right of access, it is not *per se* excluded: see *Murphy v. Stewart* [1973] I.R. 97. Rather, as stated by Walsh J. in the Supreme Court in that case (albeit obiter), it would have to be shown "that the person who has claimed to have done so had a clear knowledge of what he was doing and with that knowledge, deliberately and freely decided to make such a surrender or waiver". As the non-contest undertaking may constitute a waiver or surrender of Treasury's right of access to the courts to challenge the decision appointing receivers, it appears to me that to be enforceable the Court must be satisfied that Treasury had knowledge of what it was doing and freely decided to make such waiver.

161. This approach is confirmed by a further well established public policy principle relied upon by NAMA that an applicant may, by its conduct, be estopped from raising a complaint in judicial review proceedings by waiver or acquiescence. Counsel for NAMA drew attention to the principle, as ever elegantly stated by Henchy J. in the context of an allegation of bias in *Corrigan v. Irish Land Commission* [1977] I.R. 317 at p. 326:

> "The rule that a litigant will be held estopped from raising a complaint as to bias when, with knowledge of all the relevant circumstances, he expressly or impliedly abandoned it at the hearing, is founded, I believe, on public policy. It would be obviously inconsistent with the due administration of justice if a litigant were to be allowed to conceal a complaint of that nature in the hope that the tribunal will decide in his favour, while reserving to himself the right, if the tribunal gives an adverse decision, to raise the complaint of disqualification. That is something the law will not and should not allow. The complainant cannot blow hot and blow cold; he cannot approbate and then reprobate; he cannot have it both ways.
>
> In this case the appellant, acting through his lawyers, chose to submit without demur to the jurisdiction of the two lay commissioners notwithstanding the known fact that it was they who had signed the certificate. If those commissioners had decided the objection in his favour, I have no doubt that the appellant would have had no complaint to make about their possible bias. He would gladly and unquestioningly have accepted their decision. It is only because their decision turned out to be adverse to him that it was belatedly decided to raise the complaint of possible bias. In my view the appellant is debarred by his prior conduct from doing so. To put the matter in sporting parlance—having elected to play on under the advantage rule in the hope of scoring but having failed to do so, he cannot now be heard to claim a foul."

162. NAMA submits by analogy that, in circumstances where Treasury, with legal advice and knowledge of the alleged breach of its right to be heard prior to the decision to enforce, sought and was granted a standstill period for the purpose of discussions with investors upon a representation that if such discussions did not prove satisfactory to NAMA, that it (Treasury) would not object to

the appointment of a receiver or commence proceedings in that regard, that Treasury is now estopped from pursuing such proceedings and the Court should not now permit Treasury pursue its original complaint of a breach of its right to be heard or grant it relief in respect thereof.

163. Properly and correctly, Treasury did not contend that the present application for orders of *certiorari* falls outside the scope of the undertaking given in the letter of the 10th January 2012. In these proceedings, the primary decision challenged is the decision to enforce. As previously determined, this was a composite decision, namely, a decision to make a demand, and if unpaid, appoint receivers. Treasury maintained throughout that it was inevitable that once a decision to enforce was made, that receivers would be appointed. Treasury has not, in the course of the proceedings, sought to distinguish between the undertaking not to object to the appointment of receivers or commence proceedings in that regard from the challenge made in these proceedings to the decision to enforce. That is correct as the inevitable consequential appointment of the receivers formed part of the decision to enforce.

164. The decision to enforce was communicated in the letter of 9th January, 2012. That followed the letter of 6th January, 2012, in which the decision not to proceed with the issue of revised draft term sheets was communicated. NAMA, in the letter of 9th January, 2012, set out in summary form the factors taken into account in arriving at its decision to enforce. On 10th January, 2012, Treasury had been in receipt of legal advice and it is clear from the McCann Fitzgerald letter that it was contending for public law obligations of NAMA and its right to be heard. It was not, of course, aware that the decision had been taken as long ago as 8th December, 2011. However, for present purposes, it does not appear to me that anything turns on the fact that it was not aware of the date upon which the decision was taken. It was aware of the principal reasons for which it was taken. Aware of and asserting its right to be heard, it sought and obtained the standstill period for a specified purpose. To obtain this, it gave the express and clear undertaking that it would not object to the appointment of the receivers or commence proceedings in the specified circumstances. NAMA in reliance on the undertaking agreed to standstill and acted to its detriment in applying resources to and incurring expense in the evaluation process. Treasury then participated without objection in the process, albeit on terms that were not satisfactory to it. Nevertheless, at no point throughout the standstill period or the process did it object to the manner in which the discussions or evaluation were taking place. It undoubtedly continued to hope that the discussions with either Hines or Macquarie would prove satisfactory to NAMA and that in such event, discussions would move to the next stage and the appointment of receivers would be prevented.

165. Returning to the phraseology used by Henchy J. in *Corrigan v. Irish Land Commission*, if NAMA had determined that the proposals of one or other of the prospective investors was satisfactory to it, then Treasury would gladly and unquestionably have accepted that position and moved on to the next phase and attempted to reach a final agreement. If this Court were now to permit Treasury to pursue its complaint against the decision to enforce, incorporating as it does the decision to appoint receivers, notwithstanding the undertaking given with the benefit of legal advice and knowledge of the alleged breach of its rights it appears to me that it would be doing precisely what Henchy J. in *Corrigan* says the Court will not and should not allow.

166. Accordingly the principles relating to estoppel when applied in accordance with the above constitutional and public law principles require a conclusion that on the facts herein Treasury is estopped from pursuing its claim for orders of *certiorari*.

Conclusion on Standstill and Estoppel
167. I have concluded that in accordance with the foregoing principles and on the finding of facts herein, the Court must hold that Treasury is estopped from pursuing its claim for the orders of *certiorari* of the decisions of 8th December, 2011, and 25th January, 2012.

Discretion
168. Having regard to the conclusion reached that Treasury is estopped, it is unnecessary for me to consider the additional submissions made by NAMA and those made by KBC against the exercise of discretion in favour of granting orders of *certiorari*. Nevertheless, having regard to my consideration of the earlier issues and the conclusions reached that NAMA took the decision to enforce in breach of Treasury's right to be heard and its duty to act fairly and reasonably it appears to me that I should set out how I would have exercised the Courts discretion in relation to the orders of *certiorari* if Treasury were not estopped from pursuing same. For similar reasons to those underlying my decision on estoppel, I have concluded that on the facts found in relation to the standstill arrangements, the Court would be required to exercise its discretion against granting orders of *certiorari*.

Conclusions
169. In summary, the conclusions reached on the issues identified in paragraph 15 and determined are as follows.

(1) The decision to enforce taken by NAMA on 8th December, 2011, is a decision in the realm of public law, and as such, amendable to judicial review.

(2) On the facts herein, in December 2011, Treasury had a right to be heard or, as alternatively put, NAMA was under an obligation to give Treasury an opportunity to be heard prior to taking the decision to enforce.

(3) Treasury was not given an opportunity to be heard and heard by NAMA prior to it taking the decision to enforce.

(4) NAMA was under a duty to act fairly and reasonably in taking the decision to enforce. Further it was in breach of that obligation by reason of its failure to hear Treasury; its failure to consider a relevant matter, namely, investor interest in the acquisition of the Treasury loans or underlying secured assets and the unfair procedure in the timing of the Credit Committee meting on 6th December, 2011.

(5) In relation to the standstill arrangements in January 2012:

(i) The standstill agreement was concluded on 11th January 2012.

(ii) NAMA entered into the standstill agreement expressly in reliance upon Treasury's representation or undertaking that should the discussions during the 14-day period not prove to be satisfactory from NAMA's point of view, that Treasury would not object to the appointment of receivers and that it would not commence any application in that regard seeking to have the Group placed in examinership or any like application.

(iii) In reliance on the representation NAMA acted to its detriment in entering into the standstill agreement and committing resources to and incurring expense in evaluating the Hines and Macquarie proposals.

(iv) Treasury acquiesced in the 'ground rules' set out by NAMA on 12th January, 2012, and participated without objection insofar as it was required to do so in the discussions and evaluation by NAMA of the proposals from Hines and Macquarie during the standstill period.

(6) In accordance with the applicable constitutional, public law and equitable principles set out in the judgment and on the finding of facts made, the Court must hold that Treasury is estopped from pursuing its claim herein for the orders of *certiorari* of the decisions of 8th December, 2011, and 25th January, 2012.

(7) If Treasury were not now estopped from pursuing its claim the Court would exercise its discretion against granting orders of *certiorari* of the decisions of 8th December, 2011, and 25th January, 2012.

Relief

170. There will be an order dismissing the applicants' claim for orders of *certiorari* of the decisions of 8th December, 2011, and 25th January, 2012.

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1. Extension to 2pm, 7th December, agreed following Debtor request for additional time (request for additional time was received 5pm, 5th December 2011)