Neutral Citation [2013] IEHC 32

The High Court

Commercial

[2012 No. 2762S]

Between

National Asset Loan Management Limited

Plaintiff

And

Cyril Barden

Defendant

Judgment of Mr Justice Charleton delivered on the 4th day of February 2012

1. The plaintiff is an entity within the National Asset Management Agency, the statutory body set up pursuant to the National Asset Management Agency Act 2009 to acquire the bad debts of Irish banks and manage them over a long-term period in an attempt to realise some value while at the same time freeing the banks of the impairment of their ill-judged loans. The defendant is a property developer. In this motion for summary judgment, the plaintiff seeks judgment against the defendant for €10,072,856. This sum represents the loans advanced to him and three others for the development of property in Co Wexford. There are three relevant loans, two of which were made by the Bank of Ireland and the other by Allied Irish Banks. The Bank of Ireland loan is evidenced in a facility letter dated 8 September 2004 and was rolled over by a similar letter on 16 September 2009 and accounts for approximately €2.7 million of the debt. It is the Allied Irish Banks loan with which this application is most concerned. This was granted by way of a facility letter on the 5 February 2007 and accounts for approximately €7.4 million of the debt.

2. Two separate defences are advanced as to why summary judgment should not be granted. The defendant argues, firstly, that the acquisition of the loans from the various banks by the National Asset Management Agency was unlawful. In addition, the defendant also claims as a substantive defence to the repayment of the debt that it is not due under the terms of the contract of loan.

Summary judgment

3. Summary judgment is an exception to the ordinary procedures of the High Court whereby no damages are awarded against any defendant save on the reception of credible oral evidence, or exceptionally affidavit evidence, and where the defendant has an equal right to be heard in live testimony. In the summary judgment procedures, the plaintiff proves the debt on affidavit and, again on affidavit, the defendant sets out the basis of the testimony that would be given; this by way of a plea that instead of granting summary judgment, the court should remit the matter to plenary hearing in the ordinary way. This procedure has given rise to many decided cases as to the circumstances in which it ought to be exercised. In *Harrisrange Limited v. Michael Duncan* [2003] 4 I.R. 1, McKechnie J. analysed the previous authorities. He stated that the power to grant summary judgment should "be exercised with discernible caution" and usefully proposed a set of principles as follows at pages 7-8:

> (ii) In deciding upon this issue the court should look at the entirety of the situation and consider the particular facts of each individual case, there being several ways in which this may best be done,
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> (iii) In so doing the court should assess not only the defendant's response, but also in the context of that response, the cogency of the evidence adduced on behalf of the plaintiff, being mindful at all times of the unavoidable limitations which are inherent on any conflicting affidavit evidence,
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> (iv) Where truly, there are no issues or issues of simplicity only or issues easily determinable, then this procedure is suitable for use,
>
> (v) Where however, there are issues of fact which in themselves are material to success or failure, then their resolution is unsuitable for this procedure,
>
> (vi) Where there are issues of law, this summary process may be appropriate but only so, if it is clear that fuller argument and greater thought, is evidently not required for a better determination of such issues,
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> (vii) The test to be applied, as now formulated is whether the defendant has satisfied the Court that he has a fair or reasonable probability of having a real or bona fide defence; or as it is sometimes put, 'is what the defendant says credible?', which latter phrase I would take as having as against the former an equivalence of both meaning and result,
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> (viii) This test is not the same as and should be not elevated into a threshold of a defendant having to prove that his defence will probably succeed or that success is not improbable, it being sufficient if there is an arguable defence,
>
> (ix) Leave to defend should be granted unless it is very clear that there is no defence,
>
> (x) Leave to defend should not be refused only because the court has reason to doubt the bona fides of the defendant or has reason to doubt whether he has a genuine cause of action,
>
> (xi) Leave should not be granted where the only relevant averment in the totality of the evidence, is a mere assertion of a given situation which is to form the basis of a defence and finally,
>
> (xii) The overriding determinative factor, bearing in mind the constitutional basis of a person's right of access to justice either to assert or respond to litigation, is the achievement of a just result whether that be liberty to enter judgment or

leave to defend, as the case may be.

4. Most recently, Denham J. in *Danske Bank v. Durkan New Homes Limited* [2010] IESC 22, (Unreported, Supreme Court, 22nd April, 2010) at paragraphs 14-16 summarised the test to be applied by any court in hearing a motion for summary judgment in this way:

> 14. Several cases were opened before the Court which have addressed this jurisdiction. These included *Bank of Ireland v. Educational Building Society* [1999] 1 I.R. 220 where Murphy J. emphasised that it was appropriate to remit a matter for plenary hearing to determine an issue which is primarily one of law where a defendant identified issues of fact which required to be explored and clarified before the issues of law could be dealt with properly. He stated at p.231:-
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> > "Even if the position was otherwise, once the learned High Court Judge was satisfied that the defendant had "a real or *bona fide* defence", whether based on fact or on law, he was bound to afford them an opportunity of having the issued tried in the appropriate manner."
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> 15. In *Aer Rianta c.p.t. v. Ryanair Limited* [2001] 4 I.R. 607, Hardiman J. reviewed Irish cases and concluded at p.623:-
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> > "In my view, the fundamental questions to be posed on an application such as this remain: is it "very clear" that the defendant has no case? Is there either no issue to be tried or only issues which are simple and easily determined? Do the defendant's affidavits fail to disclose even an arguable defence?"

5. The mere assertion on affidavit of a defence is insufficient. A defence must, if the matter is to be remitted to plenary hearing, have some reasonable foundation. An assertion, for instance, that a cheque was paid in discharge of a debt means little if no bank statements are produced to show the provenance of the funds or when, how or to whom money was remitted. Often, arguments are advanced as to collateral contracts or representations that are claimed to override the express terms of a written contract. It is for each such allegation to be analysed in the context of whatever claim the plaintiff may make in response, bearing in mind that the summary judgment procedure does not involve the weighing of competing facts but rather requires an analysis as to whether a defence that might reasonably be an answer to the plaintiff's claim has been made out. If it is very clear that the defendant has no defence, the court should proceed to enter summary judgment.

6. Where an issue of law arises for determination on a summary judgment application, quite complex issues may fall for decision on the interpretation of the mutual rights and obligations of debtors, creditors and guarantors. It is not necessary for the court to resolve these issues within the context of a summary judgment application if greater knowledge of the facts, which can only be gleaned on hearing oral evidence, is appropriate, or where the decision would benefit from the wider scope of argument that is available through plenary proceedings. It is clear that, in this regard, a court may exercise discretion. In *McGrath v. O'Driscoll* [2007] 1 I.L.R.M. 203, Clarke J. described the law as follows, at p.210:

> So far as questions of law or construction are concerned the court can, on a motion for summary judgment, resolve such questions (including, where appropriate, questions of the construction of documents), but should only do so where the issues which arise are relatively straightforward and where there is no real risk of an injustice being done by determining those questions within the somewhat limited framework of a motion for summary judgment.

7. I turn firstly to the contractual arguments of the defendant whereby he seeks to outline a defence.

Contract of loan

8. The defendant has concentrated on the contract of loan signed by him on the 26 February 2007 and dated 5 February 2007. This was an Allied Irish Banks loan. The two Bank of Ireland loans related to the development of a 22 acre site at Kilmuckridge, Co. Wexford and, as previously stated, that loan was rolled over; first having been granted on 8 September 2004 and then made subject to a new facility on 16 September 2009. The Allied Irish Banks loan of the 5 February 2007 was made under a facility letter specifying an amount of €8,950,000 with an interest rate stated at 1.25% per annum above the prime rate of 5.375% per annum. The purpose of the loan was stated to be to acquire a 4.9 acre site at Belmont Park, Ferrybank, Co. Wexford. In argument, the site was described as larger than this but an exact dimension was not proven and I am told that this was merely the first phase of the site. This is a matter of principle, however. What matters is that the loan was for a site for development. Security was by way of an existing mortgage deed dated 7 September 2005 and this allowed for the appointment of a receiver. On this site, the plan was to develop 258 dwellings on a phased basis. The first phase consisted of 57 houses. That is all of the development that was ever built. Of the 57 houses, 22 were sold prior to the appointment of a receiver. The loan, it follows, did not meet the expectations of either the borrower or the lender. A demand was made by Allied Irish Banks to recover the loan on 8 June 2010. When this was not met, a receiver was appointed on 15 September of that year. Thereafter, three further houses were sold by the receiver leaving 32 vacant houses on the estate. The conditions of the contract of loan are set out under various headings. The condition as to repayment is thus: "On demand at the pleasure of the Bank subject to reductions of €50,000 from the sale of each residential unit, and subject to full review by February 2008. Any residual balance is repayable at the end of the repayment term."

9. The special conditions of the contract specify that all the debt due to the bank is to be cleared upon the sale or completion of 75% of the development. The loan was made to this defendant and his three business partners in this venture. Two of these have since been declared bankrupt before the courts of England and Wales.

10. Since the appointment of the receiver, there has been a wealth of correspondence between the parties. It is fair to say that the defendant cooperated with the receiver and used his best efforts to attempt to ensure the security of the relevant estate at Belmont Park and the sale of further units. This, he now says, was without prejudice to the defence which he raises. Unfortunately, that was not even hinted at in the correspondence about the loan and its repayment between him and the bank. In an affidavit sworn in these proceedings on 14 December 2012 the defendant seeks to have this dispute remitted to plenary hearing by expressing his defence in this way:

> The purpose of the AIB loan was to finance the purchase of a site at Belmont Park, Waterford (referenced also as Ferrybank, Waterford) which site was acquired for the purpose of development of 258 residential units. I say that on a true and proper construction of the terms of the AIB loan, AIB was not entitled, and is not entitled to demand repayment. I refer to the letter of sanction dated 5 February 2007 issued by AIB ... I say and am advised that the plaintiff is bound by the terms of the letter of sanction [quoted as above] ... I have reduced the indebtedness as and from the sale of each residential unit by more than €50,000 from each such sale (in fact by approximately €100,000 per sale). I further say that the facility was not reviewed by February 2008. I have been advised that in the circumstances no sums are due to either AIB or the plaintiff save in the event of further sales. I say that prior to the appointment of a receiver 22 of the 258 units have been sold and €2,199,000 remitted to AIB pursuant to the terms of the letter of sanction.

11. An attempt must be made to encapsulate the defence as argued in court. In short, the defendant claims that the bargain with the bank was that he would borrow some €8 million on the understanding that it was to be used to develop the Belmont site and that the sum should not become repayable save on a phased basis when each of the 258 dwellings found a buyer. On this basis, it is inescapable that the venture became one of partnership between the bank and the borrower whereby each would forbear on the obligations of the other. Were that so, the bank would have to wait into the very long term in the hope of the arrival of hundreds of buyers for the houses. The defendant does not make the case that there was any representation outside the terms of the facility letter and nor does he make the case that any estoppel by convention arose due to the bank not insisting on its legal rights for a time when hope of sales remained. Rather, the argument is that no money became repayable from the loan advanced save when the borrower was successful in the sale of each house. This argument, if accepted, would turn the relationship of lender and borrower into a radically different form of business than that which any reasonable person would contemplate as being encapsulated in the facility letter. A commercial arrangement must be given business efficacy in accordance with the intention of the parties as expressed in their agreement. From the correspondence, it is clear that at some point sales began to falter and that the bank exercised forbearance over a period of time. In other cases, this has been referred to as a standstill arrangement. Arguments have been raised in other cases that it gives rise to a situation where the bank cannot rely on its legal entitlements as set out in the contract. Such a situation may arise and it is a question of fact as to whether it occurs, how long it continues for and whether it was ever brought to a close. It is clear from the authorities, however, that a standstill arrangement, or forbearance to sue, does not necessarily operate without limitation of time. It may, rather, be brought to an end by reasonable notice. In *Association of General Practitioners Limited v. Minister for Health* [1995] 2 I.L.R.M. 481, O' Hanlon J. at 492 allowed that a party making an unequivocal representation not to rely on his legal rights may resile from that promise on giving reasonable notice, which does not necessarily have to be formal notice, thereby allowing the party to whom the representation was made "a reasonable opportunity of resuming his position". An analysis as to whether such notice was reasonable will depend on the facts and circumstances of each case. Where forbearance is for a limited period, any representation that the promisor will not rely on his legal rights lasts for that period only. There may be cases where a promise becomes final and irrevocable as a new contract supported by consideration. There may also be cases where a situation becomes incapable of being resiled from but, according to O'Hanlon J., that will only arise if the party to whom the representation was made cannot resume his original position as defined by the documents setting out the contract. *In Zurich Bank v. Jim McConnon* [2011] IEHC 75, (Unreported, High Court, Birmingham J., 4th March, 2011) it was argued by the debtor that a standstill period established a new contract whereby the borrower was not obliged to repay a loan. At pages 13-15 of the unreported judgment, Birmingham J. resolved that issue in this way:

> Counsel on behalf of the defendant has referred to the case of *Central London Property Trust Ltd. v. Hightrees House Limited* [1947] 1 K.B. 130, a case very familiar to every law student of a particular generation and has referred to the discussion of the topic of Promissory Estoppel in McDermott's *Contract Law* (Dublin: Butterworths, 2001). At paragraph 2.104, the author of that text commented:-
>
> > "The key elements of a claim of promissory estoppel are as follows.
> >
> > (i) A pre-existing legal relationship between the parties.
> >
> > (ii) An unambiguous representation.
> >
> > (iii) Reliance by the representee (and possible detriment).
> >
> > (iv) Some element of unfairness or unconscionability.
> >
> > (v) The estoppel is being used not as a cause of action, but as a defence or as a rule of evidence to stop the other party raising a defence.
> >
> > (vi) The remedy is a matter for the court."
>
> The legal argument raised is an interesting one. However the defendant has failed to ground the interesting legal issue, and in this context of this case, largely uncontroversial legal issue in the facts of this case. As Dr. McDermott has pointed out, Cheshire and Fifoot, have suggested of promissory estoppel that:
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> > "Few doctrines are at once so potentially fruitful and so practically unsatisfying. It is more often cited than applied, and more often applied than understood."
>
> In this case, the bank offered a standstill and honoured that offer during both the original and extended standstill period. The defendant places particular emphasis on this phrase that appears in the penultimate sentence of the operative part of the letter of 23rd November, 2009:
>
> > "… and to enable Zurich Bank to devise revised repayment schedules and Loan Offer letters for your two loans based on the findings of the study."
>
> The defendant says that the bank has not met its obligations, whereas he says that in all material respects, he has fully honoured his side of that agreement.
>
> This was a standstill agreement, no more and no less. A standstill was effective until 30th June, 2010. A report with suggestions as to how matters might be progressed was put forward by the defendant but was rejected by the bank by letter dated 20th July, 2010. The bank was not obliged to offer a standstill, but did so. Having done so, the bank was obliged to honour its promise and did so. I can see no basis for suggesting that there was, even arguably, any greater obligation on the part of the bank. It seems to me that the defendant's arguments fundamentally misunderstand the nature of the relationship between the bank and the defendant. The relationship was not that of partners with a common interest, sharing a risk, rather, the relationship was that of lender and borrower.
>
> At the heart of the doctrine of estoppel is the requirement that there would be an element of unfairness or unconscionability in permitting the promisor to welch on what he has offered. Leaving aside that what the bank offered was limited to offering a standstill period, I can find nothing unfair or inequitable or unconscionable in a party that has lent money seeking to be repaid.

I can see no arguable basis for suggesting that an equitable remedy would involve extinguishing the right of a bank that has lent a very large sum of money for a commercial development to be repaid.

12. Then there is the issue as to whether this facility letter correctly describes a contract of loan repayable on demand. In The Governor and Company of the *Bank of Ireland v. AMCD (Property Holdings) Limited and Others* [2001] 2 All E.R. (Comm) 894, an issue of the construction of a loan facility expressed to be on demand came before the High Court of England and Wales. On a review of the authorities, Collins J. decided that a demand facility that is subject to an expectation that sums will be repaid on the occurrence of certain business transactions for which the money is lent is not thereby transformed into a contract to await payment subject to the occurrence of specified events. At paragraph 17, the matter was put thus:

> Since there is no evidence suggesting that the advance was made otherwise than under the facility letter, the next question is whether the amounts due under it were repayable on demand. It is true that the facility envisages that it will be available for draw-down for 12 months from the date of first utilisation and that it will be repaid from the sale of the development within 12 months; and also that it contains a provision that the bank, in the event of non-payment of any money, which has not been remedied within 14 days of written notice, the bank is entitled to make a demand for immediate repayment. But in my judgment it is not arguable that any of these provisions is repugnant to, or overrides in any way, the clear statement that repayment is "on demand". It is trite law that' the parties to a contract are free to determine for themselves what primary obligations they will accept. In this case there is absolutely no warrant for treating the provision headed "Repayment" otherwise than in accordance with its terms. What it plainly says is that the amount advanced will be repayable on demand, but that in the expected ordinary course of events it will be repaid from the sale of the development. No businessman could have understood it in any sense other than that for which the bank contends, namely that the amount advanced would be repayable on demand, but that if all went well the bank would expect to receive repayment from the sale of the development.

13. The situation here is parallel. The loan is repayable on demand. Were it to be the case that the bank jumped ahead of the business situation contemplated to be a success and demanded repayment notwithstanding that sales were progressing in a reasonable fashion it is possible that another argument might succeed. It might also be that a borrower would be entitled to reasonable notice of the change in the attitude of the bank and reasonable time to arrange another facility. While not deciding that issue, as it is not now before me, it is beyond argument that where the expectation of repayment through a business venture has not been met because that venture has failed, or has stalled in circumstances where there is no reasonable expectation that it may turn in the context of whatever time may be reasonable contemplated under the contract, there is nothing to stop the bank treating a repayment on demand facility as just that.

14. The second argument advanced on the contract is that the appointment of the receiver was unlawful. This argument is predicated on the issue just decided; it depends on the repayment term not having been properly activated. On the appointment of the receiver, correspondence ensued, but this issue was not raised either. The appointment of the receiver was expressly made under the mortgage deed. Under clause 8 thereof, the bank was contracted to have the statutory powers conferred on mortgagees by the Conveyancing Acts and the power of sale was to be exercisable without the restriction imposed by section 20 of the Conveyancing Act 1881. Furthermore, the same clause provided that the secured money was deemed to become due within the meaning of and for all the purposes of Conveyancing Acts on the date of execution of the deed. This situation is parallel to that analysed by McGovern J. in *Moran and Moran v. AIB Mortgage Bank and Others* [2012] IEHC 322, (Unreported, High Court, McGovern J., 27th July, 2012) where, as can be seen, the provisions of the mortgage deed under which a receiver was appointed were similar:

> 2. The plaintiffs claim that the power to appoint a receiver is incorporated into the mortgages by reference to the Conveyancing Acts. Under the terms of the mortgages, the Conveyancing Acts include the Conveyancing Act 1881 and "*any statutory modification thereof, whether by way of amendment…or appeal*". The plaintiffs claim that the relevant provisions of the Conveyancing Act 1881 were repealed with effect from 1st December, 2009, by the Land and Conveyancing Law Reform Act 2009 ("the 2009 Act"). Accordingly, the plaintiffs maintain that the power to appoint a receiver incorporated into the mortgages is now solely that contained in the 2009 Act. The plaintiffs claim that the 2009 Act contains specific notice provisions in relation to the appointment of a receiver which have not been complied with by the first and second named defendants, and that as a consequence, the appointment of the third named defendant as Receiver is invalid.
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> 3. Both the AIB and the AIB Mortgage Bank mortgages contain interpretation provisions which provide, *inter alia*:-
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> > *"Reference to any enactment includes reference to any statutory modification thereof, whether by way of amendment, addition, deletion or appeal and re-enactment with or without amendment."*
>
> 4. By Clause 8.01, the AIB mortgage provides, inter alia, as follows:-
>
> > *"The Bank shall have the statutory powers conferred on mortgagees by the Conveyancing Acts with and subject to the following variation and extensions, that is to say:*
> >
> > *(a) The secured monies (whether demanded or not) shall be deemed to become due within the meaning and for all purposes of the Conveyancing Acts on the execution of these presents.*
> >
> > *(b) The power of sale shall be exercisable without the restrictions on its exercise imposed by section 20 of the Act of 1881…"*
>
> 5. The mortgages relevant to this case predate the commencement of the 2009 Act. In each case, the Mortgage Deed expressly provides that the mortgage debt is deemed to have accrued due on the date of execution of the Mortgage Deed. Thus, the right to appoint a receiver accrued prior to 1st December, 2009. Clause 8.02 of the Mortgage Deed and Clause 7.2 of the AIB Mortgage Conditions expressly excluded the restrictions on the exercise of the power of sale imposed by s. 20 of the 1881 Act. Section 20 of the 1881 Act provides:-
>
> > *"A mortgagee shall not exercise the power of sale conferred by this Act unless and until-*
> > > *(i) Notice requiring payment of the mortgage money has been served on the mortgagor, or one of several mortgagors, and default has been made in payment of the mortgage money, or part thereof*

for three months after service; or

(ii) some interest under the mortgage is in arrears and unpaid for two months after becoming due; or

(iii) there has been a breach of some provision contained in the Mortgage Deed or in this Act, and on the part of the mortgagor, or of some person concurring in making the mortgage, to be observed or performed, other than and besides a covenant for payment of the mortgage money or interest thereon."

6. Pursuant to s. 24(1) of the 1881 Act, the restrictions imposed by s. 20 effectively apply also to a power to appoint a receiver. Section 24(1) states:-

"A mortgagee entitled to appoint a receiver under the power in that behalf conferred by this Act shall not appoint a receiver unless he has become entitled to exercise the power of sale conferred by this Act, but may then, by writing under his hand, appoint such person as he thinks fit to be a receiver."

However, the restrictions imposed by s. 20 were varied by the terms of the Mortgage Deeds and the Mortgage Conditions so that the power of sale was exercisable without the restrictions imposed by s. 20 of the 1881 Act. Furthermore, the secured monies were deemed to become due within the meaning and for all purposes of the Conveyancing Acts on the execution of the mortgage. Therefore, as soon as the Deed was executed and the contract entered into, the power of sale was exercisable and, as a result, the right to appoint a receiver had accrued.

15. No difference has been identified between that situation and this. This point cannot therefore succeed.

The powers of the National Asset Management Agency

16. The defendant raises four points which are all basically to the same effect: that the National Asset Management Agency was not entitled to acquire the relevant loans from Allied Irish Banks and Bank of Ireland. In concise form the arguments and counterarguments are as follows. Firstly, the defendant says that there was a failure of the constitutionally guaranteed fair procedures to which he had an entitlement in the acquisition of the loans by the plaintiff. The counterargument is that the defendant had made extensive representations before the acquisition of the loans and was given a further opportunity after the acquisition of the Allied Irish Banks loan to make further representations. Secondly, the defendant says that there was no conclusive and final valuation of his assets prior to the acquisition by the plaintiff. To this, the plaintiff responds that while there is a rigid procedure as between the bank which seeks to offload a loan and the National Asset Management Agency that this, under sections 119 to 122 of the Act of 2009, is not a matter for the debtor. Thirdly, the defendant argues that section 85(4) of the Act of 2009 requires an analysis of the long-term market value of any property as exceeding its value as at the end of 2009. The plaintiff asserts that, as a matter of fact, this criterion was met and further claims that it is only the National Assets Management Agency which, as a matter of law, may determine that. Then, fourthly, the defendant says that the acquisition of the assets was predicated on the bankruptcy before the courts of England and Wales of two of his co-borrowers. This occurred as to one of them in December 2011 and as to the other in February 2012. Since the defendant made a decision to acquire the loans on 8 September 2011, the point is politely described as misplaced.

17. A preliminary point requires to be decided before turning to any of these arguments. The plaintiff argues that these arguments as to the statutory competence of the National Assets Management Agency may only be raised by judicial review. These issues were not canvassed by the defendant as an applicant in judicial review proceedings under Order 84 of the Rules of the Superior Courts. Instead, the challenge to the powers of the defendant was first made in these summary proceedings by way of a proposed defence. In my view, this is impermissible. In addition, time limits apply for the commencement of judicial review proceedings or, where permissible, plenary proceedings where this course may be a legitimate alternative. I am satisfied that, as a matter of fact, a decision was made by the National Assets Management Agency, to acquire these loans on the stated date of 8 September 2011. There is no other evidence on which I could reasonably rely. These defences of the National Assets Management Agency exceeding its statutory powers were first raised by way of defence to these summary proceedings well over a year later. The terms of section 193 of the Act of 2009 are as follows:

(1) Leave shall not be granted for judicial review of a decision under this Act unless—

(a) either—

(i) the application for leave to seek judicial review is made to the Court within one month after the decision is notified to the person concerned, or

(ii) the Court is satisfied that—

(I) there are substantial reasons why the application was not made within that period, and

(II) it is just, in all the circumstances, to grant leave, having regard to the interests of other affected persons and the public interest,

and

(b) the Court is satisfied that the application raises a substantial issue for the Court's determination.

(2) The Court may make such order on the hearing of the judicial review as it thinks fit, including an order remitting the matter back to the maker of the decision with such directions as the Court thinks appropriate or necessary.

(3) This section applies to NAMA and a NAMA group entity in the same manner as it applies to any other applicant for judicial review of a decision under or pursuant to this Act.

18. There has been considerable dispute as to the meaning of this provision. No court has as yet given guidance on this point. There is, however, some excellent commentary on the Act of 2009. In Kennedy, Whelan and Ó Raghallaigh, *The National Asset Management Agency Act 2009: A Reference Guide* (Dublin, 2010) this comment is made at page 752:

It to be inferred that the process under section 193 operates as the sole means whereby any decision of NAMA or a NAMA group entity may be challenged by way of judicial review. Under the Act, NAMA has extensive decision-making powers, not least its capacity to make decisions regarding the acquisition of eligible bank assets at section 84. Part 7 details the process of review of decisions relating to acquisitions by the expert reviewer. Note that under section 17 NAMA enjoys significant protection in respect of any decision made in good faith to perform or not to perform functions provided for in Parts 8 or 9. The Minister also has decision-making capacity under several provisions in the legislation, including sections 64, 67(2) and 117(1).

19. In Dodd and Carroll, *NAMA: The Law Relating to the National Asset Management Agency* (Dublin, 2011), the authors leave open the possibility that a challenge might be mounted through a plenary action as well as through an application for judicial review, while considering it unlikely that a collateral challenge would be tolerated: see page 1278. In the absence of a statutory declaration of procedural exclusivity in favour of judicial review, provided the time limits set by statute or by the Rules of the Superior Courts for the commencement of a judicial review remedy are abided by, a plenary summons may be issued in order to seek a public law remedy for an alleged administrative wrong; *O'Donnell v. Corporation of Dún Laoghaire* [1991] I.L.R.M. 301. For the purposes of statutory construction, it is of little use to engage in any comparative analysis with unrelated legislation. Bearing that in mind, nonetheless it is worth noting that under section 5 of the Illegal Immigrants (Trafficking) Act 2000, challenges to asylum decisions are exclusively reserved to the High Court under Order 84 of the Rules of the Superior Courts 1986-2011, such application to be brought within 14 days of the decision to be challenged, subject to an extension for good and sufficient reason. Similarly, under section 50 of the Planning and Development Act 2000, as substituted by section 13 of the Planning and Development (Strategic Infrastructure) Act 2006, a person cannot question the validity of any decision made or other act done by a planning body "otherwise than by way of an application for judicial review" and within strict time limit therein set out.

20. The purposes of the Act of 2009, which set up the National Assets Management Agency, are set out in section 2 thereof. Those purposes are all related to the economic collapse due to vastly overvalued real property prices that became starkly apparent in 2008. These include addressing the threat to the economy; returning the availability of credit to business; resolving the problems created by the financial crisis generated in the years 2000 to 2008; protecting the State's support of improvident banks; protecting the taxpayer; restructuring credit institutions; bringing certainty into the valuation of the assets of banks; restoring confidence in the banking sector; and contributing to the development of the nation. Under section 10, those purposes are to be fulfilled through the National Assets Management Agency. This is to be done by acquiring bank assets; by dealing expeditiously with those loans; by protecting the value of what is acquired; and by achieving the best possible return from that process for the State. Under section 84, property should not be acquired if the long-term economic value of that property is less than the market value as of the notional date of acquisition. Under section 96, it is the duty of the bank to notify debtors and guarantors within 60 days of the transfer of the assets. The provisions of Part 10 of the Act are more difficult to understand. It is clear that the relevant chapters of the Act contemplate that actions for damages may be brought within particular time limits. Construing, therefore, section 193 within what seems to be its legislative context, both actions in respect of damages and judicial review are made possible under the Act. This action is not in its substance, however, an action for damages. It is an action that seeks to delay or upset the repayment of a loan. The most that could be achieved by the defence that the assets of the defendant were wrongfully acquired by the National Asset Management Agency, is that the Court give leave to the defendant to defend his claim by remitting this action to plenary hearing. He claims that the plaintiff has no entitlement to enforce the debts against him because of an absence of legal entitlement due to wrongful acquisition. That plea is classically the invocation of a public law remedy. Despite it being generally possible to enforce public law rights through a plenary summons within the appropriate time limits, or again within the appropriate time limits through a counterclaim, it seems to me that section 193 has excluded that alternative procedure. No challenge to an action of the plaintiff by way of a public law remedy of *certiorari* or *mandamus* is possible except on the two conditions that are clearly laid out in that section. Firstly, an application for judicial review must be brought within a month of the relevant decision. Secondly, it is implicit that such an application must be brought to the High Court, a conclusion made explicit by the requirements that the judge hearing the application should not give leave to commence proceedings unless an applicant has "a substantial issue for the Court's determination." It would be easier to conclude that a plenary action is an alternative that is open to a party aggrieved by an administrative decision, where no limit is set on the discretion of the court hearing an application for leave to commence judicial review. The reality is, however, that unless the High Court decides that the case is substantial, no action by way of judicial review is mandated. Further, such a decision cannot be made by counsel signing a plenary summons. That is not their function under the Act of 2009 as it is expressly reserved to the High Court. That assessment enabling the commencement of a judicial review application is judicial in nature. It is not merely a matter of ethics at the Bar whereby a plenary summons should not be signed by counsel unless, on the facts that counsel are instructed on, a stateable case is shown. Here the test is not that there should be a stateable case but that a substantial issue is raised. The requirement that the High Court come to the conclusion that an application should be founded on a substantial issue before leave to commence judicial review proceedings is granted renders the alternative of a plenary proceeding incompatible with the intention of the Oireachtas.

21. Even supposing that decision to be incorrect, these arguments cannot be now raised. The time limit for the commencement of proceedings set out in the Act of 2009 would apply to both a judicial review application and to the issuing of a plenary summons. Voluminous correspondence ensued after the decision by the National Asset Management Agency on 8 September 2011 to acquire these loans. That correspondence was redolent with the skilled recitation of arguments that echoed back and forward in a way that could leave no doubt in the mind of anyone reading the exchanges that the defendant was fully aware that he was both aggrieved by the decision to acquire the loans and that this perceived wrong was expressed as a misapplication of public law by the plaintiff. A summary summons was issued by the plaintiff seeking recovery of the debt on 23 July 2012. Whatever might be said about the defendant not being obliged to seek judicial review until he had become aware of the relevant decision of the plaintiff and whatever might also be argued that a swift letter of complaint might allow an extension of time until a reply had been received clarifying why the National Asset Management Agency had chosen to act under its statutory powers, there is nothing before this Court whereby it would have any entitlement to extend the time for challenging that decision up to and including remitting this case to plenary hearing. Specifically, and using the statutory test set out in section 193 of the Act of 2009, no substantial reasons are given why the issue was not commenced in time and there is, furthermore, nothing whatever said about the interests of other affected persons or the public interest.

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

Result
23. The court will therefore enter judgment for the amount claimed in this summary proceeding. As of today the amount is €10,167,801.68. Costs follow the event. There will be a stay on judgment and costs provided a notice of appeal is entered within the time limits prescribed by the Rules of the Superior Courts. Thereafter, the stay will last until 4 June 2013. Any extension will be by order of the Supreme Court.