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THE HIGH COURT
COMMERCIAL
JUDICIAL REVIEW

KEARNS P.
KELLY J.
CLARKE J.

2010 909 JR

BETWEEN

DELLWAY INVESTMENT LIMITED, METROSPA LIMITED, BERKLEY PROPERTIES LIMITED, MAGINOTGRANGE LIMITED, MAY PROPERTY HOLDINGS LIMITED, SCI 20 PLACE VENDOME, DIRECTDIVIDE TRADING LIMITED, SUBMITQUEST LIMITED, BELFAST OFFICE PROPERTIES LIMITED, THE FORGE LIMITED PARTNERSHIP, FINBROOK INVESTMENTS LIMITED, CONNIS PROPERTY SERVICES LIMITED, FORMCREST CONSTRUCTION LIMITED, CHESTERFIELD (THE PAVEMENTS) SUBSIDIARY LIMITED, ABEY DEVELOPMENTS LIMITED AND PATRICK MCKILLEN

APPLICANTS

AND

NATIONAL ASSET MANAGEMENT AGENCY, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of the Court delivered the 1st November, 2010

1. **Introduction**

1.1 It is hardly surprising that the economic crisis which has affected the country over the last two to three years has generated much debate and controversy, both as to its causes and cures. Likewise, it is hardly surprising that the policy measures put in place to attempt to solve the problem have themselves generated significant controversy. As this is the first occasion in which the courts have been called on to deal with important issues concerning those measures, it is important to start by setting out what the proper role of the courts in such a controversy actually is.

1.2 In opening the case counsel on behalf of the applicants (respectively "Mr. McKillen" and where the context so requires, his companies) emphasised what this case was not about. Counsel was undoubtedly correct when he indicated that the case is not about whether the National Asset Management Agency ("NAMA") is the best or even a good solution to the problems with which the country is faced. It is important to emphasise how the Constitution divides the powers of the State. The executive power of the State is conferred on the government (Article 28.2). The legislative power is conferred on the Oireachtas (Article 15.2). The judicial power is conferred on the courts (Article 34.1).

1.3 While there may from time to time be some debate as to the precise demarcation lines between those powers, the broad thrust of the constitutional arrangement is clear. Within the bounds of what is constitutionally permissible, it is for the government to determine the solutions to any problem, large or small, which the political process may decide requires attention. If the solution determined on by government can be put into practice in exercise of the executive power of the State or under existing legislation then the government may, again subject to the limitation of what may be constitutionally permissible, implement such solutions. To the extent that any solutions decided upon may require legislative intervention then it, of course, follows that the Oireachtas must be persuaded to pass the necessary legislation. Again, subject to the bounds of what is constitutionally permissible, it is for the Oireachtas to determine whether it wishes to pass that legislation and it is no function of the courts to determine what legislation should be passed.

1.4 In addition to determining the limits of what may be constitutionally permissible where measures put in place affect legal rights, the interpretation of any such measures (including if necessary an interpretation consistent with the Constitution under the so-called double construction rule) is, of course, a matter for the courts. Likewise, the question of how legislation, properly interpreted, is to be applied to the facts of any individual case is a judicial matter for the courts.

1.5 The courts do, therefore, have a significant role but it is important to note the limitations of that role. The courts can consider the boundaries of what may be constitutionally permissible, the interpretation of legal measures, and the application of the law to the facts of individual cases. Within the bounds of what is constitutionally permissible, it is no function of the courts to consider whether measures adopted by either Government or the Oireachtas are the best or even a good solution to the problems which they seek to address.

1.6 It is also important to emphasise that within the role properly conferred on the courts by the Constitution, the courts will, in the words of the declaration required of any judge on appointment, fulfil the Courts judicial role "without fear or favour" and will "uphold the Constitution and the laws" (Article 34.5). The Court must, therefore, approach this case without fear or favour either to the State and its authorities or to Mr. McKillen and his companies. The Court's role is to determine the boundaries of what may be constitutionally permissible, to interpret the legislation and any other relevant law, and to apply that law to the facts of this case. It is no more and no less than that.

1.7 To the extent that questions of European law, which are part of the function of national courts to apply, may be relevant it is, of course, also the function of the courts to apply that law in the course of any determination.

1.8 Finally, it is appropriate to note that this case is limited in one other important respect in its scope. What the Court has already noted represents the boundaries of the Court's role in any case. However, in most litigation it is the function of the court solely to address those issues which the parties choose to raise. In that context, it is important to note that Mr. McKillen does not, primarily, mount a challenge to NAMA and the National Asset Management Agency Act 2009 ("the Act"). Rather, his challenge is more narrowly focused to a number of specific issues to which the Court will shortly turn. While Mr. McKillen does seek, as a fallback position, a declaration that certain aspects of the Act are inconsistent with the Constitution, it was made clear by counsel on behalf of Mr. McKillen that the constitutional challenge aspect of the case was an ultimate fallback position and did not represent the primary claim brought.

1.9 On the basis of the case made on behalf of Mr. McKillen, the constitutional challenge only arises in the event that the Court concludes, contrary to other aspects of Mr. McKillen's case, that the proper interpretation of the Act allows for the transfer of loans currently existing as and between Mr. McKillen and various banks who are within the NAMA scheme in circumstances where such transfer is permitted under the Act, notwithstanding Mr. McKillen's contention that the relevant loans are not impaired and are also permitted in circumstances where Mr. McKillen is not entitled to be consulted or heard prior to the relevant acquisition. Against that general background, it is appropriate to turn first to the issues which do arise.

2. **The Issues**

2.1 In opening the case counsel for Mr. McKillen suggested that there were five issues or groups of issues which arose. The Court did not understand the Attorney General on behalf of NAMA and the State defendants to disagree. In those circumstances, it is appropriate to set out those issues in the order in which counsel placed them.

The Fair Procedures Argument
2.2 Under this heading Mr. McKillen argues that the Act interferes in a significant way with his constitutionally protected rights. In those circumstances it is said that the Act can, and should, be interpreted as affording Mr. McKillen an entitlement to be heard before any decision to acquire loans to Mr. McKillen ("McKillen loans") from qualifying financial institutions is made. NAMA contests the assertion that the acquisition of any McKillen loans amounts to an interference with a constitutionally protected right and also asserts that, on a proper construction of the Act, no entitlement to be heard is either required or can be permitted. It should be pointed out at this stage that the challenge which Mr. McKillen mounts is, strictly speaking, only to some of the loans which NAMA proposes to acquire. This point will be addressed briefly later.

The NAMA Decision
2.3 Under this heading it is said on behalf of Mr. McKillen that NAMA did not take into account appropriate considerations when coming to its conclusion that the McKillen loans should be acquired by NAMA. There was some debate between the parties as to the manner in which it was appropriate to characterise the considerations actually given by NAMA in its decision making process. In addition, there is a dispute between the parties as to what were the proper considerations which NAMA was required to take into account in deciding to include a loan in its acquisition process.

The Timing Issue
2.4 Under this heading Mr. McKillen argues that, on the evidence, the decision to acquire the McKillen loans was taken before NAMA came into existence. On that basis it is said that the decision is not legally capable of ratification and has not, in fact, been either ratified or retaken by NAMA in a legally permissible fashion. NAMA argues that a proper characterisation of the events that occurred does not bear an interpretation which renders the decision to acquire the McKillen loans invalid.

The European State Aid Issue
2.5 Under this heading it is agreed between the parties that the European Commission has determined that the acquisition of loans by NAMA under the Act amounts to state aid for the purposes of Article 107 of the Treaty on the Functioning of the European Union ("TFEU"). On the basis of a Commission decision (State Aid Reference No. 725/2009 – 14.4.2010 OJC 94/10) determining that the state aid contained in the Act is permitted under Article 107(2)(b), Mr. McKillen argues that, on a proper construction of that Commission decision, same imposes an obligation on NAMA only to acquire what can properly be described as "impaired loans". NAMA and the State defendants argue that this Court has no jurisdiction to consider the issues raised, that even if the Court has such jurisdiction, a proper interpretation of the relevant Commission decision does not impose the limitation contended for, and that in any event it is appropriate to describe the McKillen loans as impaired.

The Constitutional Issue
2.6 As pointed out earlier this is a fallback position on the part of Mr. McKillen. Under this heading it is argued that, if on a proper construction of the Act (including any relevant European constituent element, if there is one) the Act is to be construed as not allowing Mr. McKillen to be heard on the acquisition of the McKillen loans and/or permits the acquisition of unimpaired loans, then, it is said, the Act is inconsistent with the Constitution in that regard. As Mr. McKillen also raised questions as to the compatibility of the Act with the European Convention on Human Rights it is proposed to deal with those issues at the same time as the constitutional issues.

2.7 Against the background of those issues, it is first appropriate to turn to the procedural history of the case with particular reference to the fact that the hearing before the Court was a so called "telescoped hearing" at which both the question of whether leave to seek judicial review and the substantive question of the entitlement of Mr. McKillen to judicial review, were both debated.

3 **The Telescoped Hearing**

3.1 While it will be necessary to turn in early course to the relevant provisions of the Act generally, it is appropriate at this stage to deal with those aspects of the Act which touch on litigation designed to challenge NAMA decisions. Part 10 of the Act deals with legal proceedings. The third chapter of that Part deals with legal proceedings generally.

3.2 Section 193 regulates applications for judicial review of a decision under the Act.

It reads 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."

3.3 It is to be noted that this section does not purport to alter the usual procedure for obtaining leave to apply for judicial review by means of an *ex parte* application as prescribed by Order 84, rule 20(2) of the Rules of the Superior Courts. The section does, however, alter the standard of proof which has to be achieved in order to obtain leave to apply for such judicial review.

3.4 In a normal case, the standard which has to be met is that prescribed by the Supreme Court in *G. v. Director of Public*

Prosecutions [1994] 1 IR 374. An applicant has to demonstrate an arguable case in law to the effect that he is entitled to the relief which he seeks.

3.5 Here a higher test is prescribed. The Court must be satisfied that the application raises a substantial issue for its determination. The statutory language used here is similar to that which is contained in the Planning and Development Act 2000, and the Illegal Immigrants (Trafficking) Act 2000, where substantial grounds have to be demonstrated before leave to apply for judicial review can be granted.

3.6 The phrase "*substantial grounds*" has been considered judicially on many occasions. All of the decisions return to and approve of the approach of Carroll J. in *McNamara v. An Bord Pleanála* [1995] 2 ILRM 125 where she said:-

> "In order for a ground to be substantial it must be reasonable, it must be arguable, it must weighty. It must not be trivial or tenuous. However, I am not concerned with trying to ascertain what the eventual result will be. I believe I should go no further than satisfy myself that the grounds are 'substantial'. A ground that does not stand any chance of being sustained (for example, where the point has already been decided in another case) could not be said to be substantial."

In the present case it is necessary for the applicants to satisfy this test.

3.7 Very sensibly, no application was made to the Court for leave on an *ex parte* basis. Instead, these proceedings were commenced by the issue of a notice of motion dated 1st July, 2010 which was served on all the respondents. With a common desire that the matters be adjudicated upon as speedily as possible, the parties agreed to what has become known as a "*telescoped*" hearing. Thus the Court proceeded to hear all arguments from all sides on the basis that if leave was granted to apply, then one hearing could be treated as dealing with all matters in issue.

3.8 The adoption of this procedure obviated the necessity for a second hearing should leave be granted to the applicants to apply for judicial review. Such a two-stage procedure would be wasteful of both time and resources. The fact that a single hearing took place, however, does not in any way displace the obligation on the applicants to satisfy the Court that they have substantial grounds in order to obtain leave to apply for judicial review.

3.9 The Court will indicate whether this statutory threshold has been surmounted by the applicants when considering the respective grounds advanced by them.

4. **The Act**

The Purpose of the Act
4.1 In the first instance the purposes of the Act must be distinguished from the purposes of NAMA itself. The Act, in its long title, sets out that its purpose is to:-

> "address a serious threat to the economy and to the systemic stability of credit institutions in the State generally by providing, in particular, for the establishment of a body to be known as the National Asset Management Agency […]."

4.2 These purposes are then described in more detail at Section 2 and are in the following terms:-

> "(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 interest 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."

4.3 The purpose of NAMA itself is, in general terms, to obtain the best achievable financial return for the State. In so doing, NAMA is to contribute to the achievement of the purposes of the Act, as set out above, by expeditiously acquiring eligible assets from participating institutions, thus removing uncertainty about those assets and the effect of that uncertainty on credit institutions. In addition, NAMA is to deal with those assets and to protect or otherwise enhance the value of those assets, in the interests of the State.

The Acquisition Process
4.4 The acquisition process whereby NAMA acquires an "eligible bank asset" constitutes a number of steps. They are:-

> (a) First a credit institution must apply under s. 62 of the Act, within 60 days of the establishment day, to the Minister to be designated as a "participating institution" under s. 67. There were five applicant institutions, namely Bank of Ireland ("BOI"), Allied Irish Bank, Anglo Irish Bank ("Anglo"), Irish Nationwide Building Society and Educational Building Society.

The criteria for the designation of an applicant credit institution as a participating institution are provided for in s. 67(2) and are in the following terms:-

"(a) the applicant credit institution is systemically important to the financial system in the State.

(b) the acquisition of bank assets from the applicant credit institution or its subsidiaries is necessary to achieve the purposes of this Act, having regard to –

(i) support that

(I) is available to,

(II) has been received by, or

(III) reasonably be expected, or might reasonably have been expected, to be or to have been available to, the applicant credit institution or its subsidiaries from the State, any other Member State or a member of the group of the applicant credit institution,

(ii) the financial situation and stability of the applicant credit institution and its subsidiaries,

(iii) the financial situation and stability of the applicant credit institution's group in the event that bank assets are not acquired from the applicant credit institution or its subsidiaries, and

(iv) the resources available to NAMA and the Minister, and

(c) the applicant credit institution has complied with all of its applicable obligations under this Act."

(b) Having made such an application, a relevant institution is required, under s. 80 of the Act, to provide NAMA with information both as to facts relevant to whether a particular asset is an eligible asset or any circumstance that might be material to a decision by NAMA to acquire the relevant asset or in order to decide on its acquisition value.

(c) As it happens each of the applicant credit institutions were, in fact, designated by the Minister under s. 67.

(d) The Minister, after consultation with NAMA, the Governor (of the Central Bank) and the Regulatory Authority (now the Financial Regulator), is entitled to designate "eligible bank assets" under s. 69. The National Asset Management Agency (Designation of Eligible Assets) Regulations 2009 (S.I. 568 of 2009) ("the Regulations"), provides for such designation from among the assets of the participating institutions. In fact the assets designated as eligible bank assets under the Regulations are in largely the same form as specified in s. 69(2)(a) of the Act. Eligible bank assets, in broad terms, are those assets which are connected with development land. The definition also incorporates associated debtors thereby casting the net, so to speak, very widely.

Under the Regulations eligible bank assets are defined, in s. 2, as follows:-

"(a) credit facilities issued, created or otherwise provided by a participating institution –
(i) to a debtor for the direct or indirect purpose, whether in whole or in part, of purchasing, exploiting or developing development land,

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

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

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

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

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

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

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

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

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

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

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

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

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

While the detail of the definition of development land for the purposes of the Act and the Regulation is not, in itself, relevant to any of the issues which the court has to decide, it is appropriate to note that that definition is, on any view, wide.

(e) Any institution may object to the designation of any asset as an "eligible bank asset". The procedure for review by an expert reviewer of any designation is set out at Part 7 of the Act. However, there is no provision for an objection by an institution to an acquisition on any other basis. There is no express provision for an objection by a borrower whose loan is deemed to be an eligible bank asset.

(f) NAMA, under s. 84, may then proceed to acquire those eligible bank assets from participating institutions which "it considers necessary or desirable […] having regard to the purposes of the Act and the resources available to the Minister". To formally effect an acquisition, NAMA must serve an "acquisition schedule" on the institution concerned under s. 87.

(g) In order to include an eligible bank asset in such a schedule NAMA must determine the acquisition value of that asset in accordance with the valuation methodology set out in Part 5 of the Act. An institution may object to an acquisition value specified in an acquisition schedule. Where NAMA continues with the acquisition, the participating institution may only object to the total portfolio acquisition value and then only once certain criteria, as set out in the Act, are satisfied.

(h) The Minister will thereafter issue payment for the asset(s) in the form of government bonds.

(i) Finally NAMA will serve a "completion notice" under Section 97 on each institution which has the effect of completing the entire acquisition process after which no further acquisition schedules may be served.

(j) Once the transfer of each eligible bank asset has been completed, NAMA will only then engage with the relevant borrowers by, among other things, inviting the borrower to submit a business plan setting out how the facility is intended to be managed and ultimately repaid. It was noted by the Respondents on affidavit that NAMA, while not obliged to do so, nevertheless has a policy of meeting with borrowers, where requested, prior to a transfer taking place in order to answer certain questions or queries that they may have.

The Powers of NAMA

4.5 The general powers of NAMA are manifold and are set out at Section 12 of the Act. In short, that section provides that NAMA "has all powers necessary or expedient for, or incidental to, the achievement of its purposes and performance of its functions".

Subs (2) sets out a whole range of specific powers which are stated to be without prejudice to the generality of subs (1). Many of those powers are not material to the issues in this case. However, insofar as is relevant the subsection provides:-

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

….

(d) initiate or participate in any enforcement, restructuring, reorganisation, scheme of arrangement or other compromise,

….

(h) distribute assets in specie to the Minister,

….

(ee) do all such other things as the Board considers incidental to, or conducive to the achievement of, any of NAMA's purposes under this Act.

4.6 The specific powers of NAMA in relation to assets are set out under Part 9 of the Act. Chapter 2 sets out how NAMA may dispose of bank assets to any person including by way of transfer, assignment, conveyance, sale or otherwise, notwithstanding any restrictions at law or equity on such a disposal and irregardless of any enactment or contractual requirement, including any requirement for the consent of, notice to, or a document from, a third party or any other statutory restriction on disposal. NAMA may discharge any prior charges on an acquired asset. Furthermore, this portion of the Act also affords NAMA the right to make applications to the District Court for an order authorising NAMA to enter onto land that is the security for an acquired bank asset.

4.7 Chapter 3 grants NAMA the power to appoint statutory receivers, a right additional to the right to appoint a receiver in the normal course.

4.8 Chapter 4 sets out NAMA's right to apply to the High Court for a vesting order over land where the chargee's power of sale has become exercisable and NAMA forms the view that it is unlikely that the sum secured can be recovered by a sale within three months after the application. Among its effects a vesting order will extinguish the chargor's equity of redemption in the land concerned.

4.9 Chapter 5 sets out NAMA's right to compulsorily acquire land. This right is subject to a number of conditions, including the making of an application to the High Court on notice to interested parties and that those persons so affected by the acquisition will be

entitled to compensation.

4.10 Chapters 6 and 7 deal with NAMA's general powers in relation to land and its powers in relation to the development of land respectively. The former places limitations on certain dealings in land which may have an adverse effect on land held directly or as security for an asset held by NAMA. The latter entitles NAMA to engage in the development of land in certain circumstances.

4.11 Before leaving the provisions of the Act it is also appropriate to note that s. 84(2) provides that, for the avoidance of doubt, "NAMA may acquire, from a participating institution, performing or non-performing eligible bank assets".

In that context, a bank asset is non-performing (by virtue s. 4(3)) if:-

> "(a) it is in the course of being foreclosed or otherwise enforced,
>
> (b) principal or interest or both are in arrears,
>
> (c) interest is being or has been capitalised or otherwise deferred otherwise than in accordance with its terms,
>
> (d) payments are not being, or have not been, met,
>
> (e) its covenants are not being, or have not been, complied with, or
>
> (f) other obligations are not being or have not been complied with."

It does not appear that the definition of non-performing asset is of any other consequence in the context of the Act other than for the purposes of s. 84(2). It is clear that the definition of non-performing bank asset is wide and includes any case where covenants relevant to the bank loan in question are not being or have not been met.

4.12 In understanding the context in which the Act and its ancillary legislation operates it is also necessary to have regard to the Credit Institutions (Financial Support) Act 2008 (the "CIFS Act") and its secondary regulations. The CIFS Act was enacted in the face of constrained circumstances in a bid to maintain the stability of the financial system in the State. The CIFS Act paved the way for the scheme which is commonly called the state-backed deposit guarantee. This guarantee, although originally granted a two year lifespan, has since been extended until 2011 by the Minister. Since its inception, NAMA has been tasked with the responsibility of administering the terms of the CIFS legislation.

4.13 It will be necessary to return to the relevant provisions of the Act, and an analysis of same, in addressing the various issues which arise in these proceedings. However, before going on to deal with those issues it is appropriate to set out some of the factual background to the issues which arise.

5. **Factual Background**

5.1 The factual background to these proceedings arises under two broad headings. The first is the financial crisis which has afflicted the State for the last number of years and the consequences of that crisis, in particular, for all of the leading financial institutions in the State. The second aspect of the factual background to these proceedings concerns the business of Mr. McKillen and his companies. It is appropriate to deal with the national situation first.

5.2 The scale of the financial problems which have beset the State since the summer of 2008 hardly needs to be stated. The consequences of those problems have affected almost all areas of commercial, business and personal life. The problems first emerged into public view in relation to difficulties being encountered by financial institutions in September, 2008. The first major Government intervention was the announcement of an intention to provide what became known as the bank guarantee and the early passage by the Oireachtas of the CIFS Act designed to enable such a guarantee to be put in place.

5.3 The materials before the Court suggest that there were three major aspects to the policy response to those difficulties. In addition to the initial enactment of the CIFS Act and the giving of guarantees under its terms, NAMA and the Act, together with measures taken to recapitalise most of the financial institutions in the State (and in the case of Anglo to nationalise same), form the other legs of what is said to be a three pronged macro level approach to the problem. At the risk of repetition, it is important to re-emphasise that it is no part of the function of the Court to decide on the merits or otherwise of that overall macro approach or any element of it. Rather, it is the function of the Court to determine whether one element of that approach, that is the Act, is, properly construed, within constitutionally permissible boundaries and to interpret the Act and apply its terms to the facts of Mr. McKillen's case.

5.4 However, some elements of the problems of Irish financial institutions generally and, in particular those who had significant lending to Mr. McKillen, are of at least background relevance to these proceedings. It must be recalled that the context in which the bank guarantee was given was the view that, at a minimum, most of the Irish banks were, in September, 2008, arriving at a position where they would be unable to obtain adequate funding to carry on their business. If there had been no major policy intervention, then it seems almost certain that the consequences for some, if not all, of the institutions which became participating institutions in the NAMA scheme, would have been severe. In the case of Anglo, it is now apparent that that bank had become insolvent and having regard to the scale of the losses which have now been shown to have been incurred, it seems certain that, in the absence of major intervention, Anglo would have ceased to trade in any way and would, as a matter of high probability, have gone into liquidation. Mr. McKillen had, of course, significant dealings with Anglo. The other bank with whom Mr. McKillen had major dealings was BOI. There can be little doubt but that the scale of BOI's problems were less than those in the other participating institutions but, nonetheless, were significant. The Government has been required to place an additional sum of €3.5bn into BOI as a recapitalisation.

5.5 Again, it needs to be emphasised that the question of whether there might have been better ways of addressing the problem is not one for the courts. The Government and the Oireachtas chose the three major planks of the policy response to the banking crisis. However, it does need to be noted that, in the absence of some significant executive and legislative response to those problems, it is almost certain that the existing banks operating in Ireland (including those with whom Mr. McKillen had long standing banking relationships) would have ceased to function or, at least, function in any way remotely resembling the traditional model of a bank.

5.6 While the true scale of losses in at least many of the participating institutions was not apparent at the time when the Act was passed, it does appear on the evidence to have been clear from an early stage that there were very significant losses in the banks which needed to be dealt with in some fashion. In that context, the Government announced in the Spring of 2009 (during the budget

speech of the 7th April) that what has now become NAMA would be established. The relevant legislation was published in a preliminary form in July of that year, with the Act being passed by the Oireachtas in November and coming into force on the 21st December, 2009. It will be necessary to go into the facts relevant to the sequence of events which led to senior officials of the National Treasury Management Agency ("NTMA") carrying out certain functions in anticipation of the coming into force of the Act in the course of dealing with the issue which arises concerning the alleged prematurity of the decision to acquire the McKillen loans. In general terms, at this stage, it is sufficient to note that the Minister conferred certain functions on the NTMA to enable preparatory work for the coming into effect of NAMA to be carried out. Certain officials of the NTMA were delegated to carry out those functions. In that context, there was, to use a neutral term, a lot of preparatory or preliminary work done in respect of the functions which NAMA was intended to have under the legislation prior to the Act coming into force.

5.7 It was also clear that it was likely that the NAMA scheme would require clearance at EU level. Again, the specific facts relevant to this issue will be addressed in the context of the Commission decision issue. However, in general terms, as soon as the Act in draft form had been made public, the process, initially on an informal basis, of seeking to secure any necessary EU approval, was commenced.

5.8 Turning to the background facts specific to Mr. McKillen's case, it is appropriate to start by noting that Mr. McKillen and his companies have an interest in a portfolio of properties with a current value which seems to lie somewhere between €1.7bn and €2.28bn, depending on what valuations are relied on. Neither party suggested that it is part of the Court's function in these proceedings to resolve any of the valuation differences between the parties. The Court agrees. Loans secured on those properties in favour of Irish banks who are participating institutions in NAMA, amount to approximately €2.1bn. As pointed out earlier Mr. McKillen's challenge is confined, strictly speaking, to the acquisition process in respect of his loans with BOI. However, it does not appear to the Court that anything turns on that detail. As is clear from the Act, all loans connected with a specific borrower (or indeed other persons or entities connected with that borrower) are subject to acquisition. Any point made in respect of the acquisition of those parts of the McKillen loans which relate to BOI would, therefore, also apply equally to all other parts of the McKillen loans. Likewise the Act itself addresses all of the McKillen loans collectively. While touching on that point it is also appropriate to note that the expert reviewer provided for in Chapter 1 of Part VII of the Act, was actually invoked by BOI in respect of those parts of the McKillen loans in relation to which BOI was the lender. As has been pointed out, the purpose of the expert reviewer is to consider whether any particular assets are relevant bank assets for the purposes of the Act. Indeed in that context, counsel for the State respondent drew attention to the fact that s. 80(3) provides that a bank "shall" object if it is of opinion that a bank asset is not an eligible bank asset. It should also be noted that Mr. McKillen does suggest that some of the information given by BOI to the expert reviewer was inaccurate. It does not, however, appear that any such inaccuracy was material to the determination by the expert reviewer. In any event no challenge has been brought to the decision of the expert reviewer.

5.9 The status of those loans was the subject matter of some controversy in the course of the hearing before the Court. Certain facts can be stated with some degree of confidence. First, it is true to say that it would appear that all interest payments due under the loans concerned have been paid to date and, at least in current conditions and at current interest rates, there appears to be sufficient income being generated by the properties concerned to service those loans in the sense of meeting all interest payments due on them. Second, it would appear to be accepted that there are a number of loans in which there have been breaches of so-called loan to value covenants. Under such covenants it is a term of the banking facility concerned that the amount owing remain below a certain specified percentage of the value of the properties used as security for those loans. In general terms, and at least in the case of most of the loans with which these proceedings are concerned, a breach in the loan to value covenant occurs if the bank obtains an independent valuation which shows that, by reference to that valuation, the amount of the relevant loan exceeds the loan to value ratio specified in the facility letter concerned. It would appear that the legal consequences of a breach of such covenant is that it triggers an entitlement on the part of the relevant bank to call in the loan in its entirety. It does not appear that any of Mr. McKillen's loans have, in fact, been formally called in in that way, although it is equally clear that, at least in the case of some of the loans in question, an entitlement on the part of the relevant bank to serve such a notice has arisen. There was some expert testimony, to which it will be necessary to refer to some extent in due course, as to what was likely in practice, as opposed to as a matter of law, to follow from a breach of a loan to value covenant. For completeness, it should also be noted that, in some cases, there would appear also to have been a breach of a similar interest cover covenants which required the maintenance of a specified ratio between the income being generated by a relevant property and the interest payments due under the loan in question.

5.10 In addition, it is clear that, in the case of some of the loans in question, same have expired so that, at least as a matter of law, the full sum due under the relevant loans was immediately payable. There was again expert testimony as to what was likely, in practice, to occur in such circumstances.

5.11 It does not seem to the Court that it is either necessary or appropriate for the Court to reach any concluded view as to the status of Mr. McKillen's loans. It will be necessary to deal with certain aspects of the status of those loans in the context of the case made by Mr. McKillen in respect of what is said to be an entitlement to fair procedures. However, whether the loans can properly be described as impaired or non-impaired is not a matter on which the Court expresses any view. If it were to be the case that, whether for reasons of EU law or otherwise, the Court were to determine that NAMA could only acquire loans which were impaired, then it would follow that, in circumstances where NAMA had not given any consideration to the question of whether Mr. McKillen's loans were impaired, it would be necessary to refer the matter back to NAMA to reach a conclusion on the question of impairment. Likewise, in the event that the Court is not satisfied that NAMA needed to consider whether loans were impaired before proposing to acquire same, then it follows that the question of impairment or otherwise is irrelevant. In either eventuality, it does not seem to the Court that it is any part of its function in these proceedings to reach a concluded determination as to whether Mr. McKillen's loans were impaired or not.

5.12 Turning to Mr. McKillen's portfolio, same would appear to consist of approximately 62 properties comprising shopping centres, hotels and offices. The total income generated by those assets is of the order of €150m per annum. The properties would appear to be 96% let and it is said, without contradiction, that at least in most cases the lettings are to what have been described as "blue chip tenants on long leases predominantly with a 25 year duration". At an aggregate level, it would appear that there is interest cover of somewhere between 1.7 and 1.8, meaning that the income from the relevant properties is 1.7 to 1.8 times the interest payable at current interest rates. Obviously the interest cover varies in individual cases so that, on a loan by loan basis, the cover can be above or below that average figure.

5.13 One particular feature of Mr. McKillen's business model needs to be noted. Many of the loans in question are for a short term duration. It would appear that there has, in general terms, been a practice for Mr. McKillen to successfully negotiate renewals of such loans from time to time. However, the legal position does also need to be recorded. That legal position is to the effect that adopting a policy of financing long term property investments by short term loans undoubtedly leaves the borrower, to an extent, at the mercy of his banks who are in a position, on a regular basis, to revisit the question of whether they are to lend and, if so, on what terms. A party who, on the other hand, has long term loans, has the added security that, provided the terms of the loan are met, the relevant

bank is given no opportunity to re-negotiate the terms of the loan until its expiry. It should also be noted that Mr. McKillen's property portfolio is geographically spread between Ireland, the United Kingdom, France and the USA with, it would appear, approximately 26% by value representing properties in Ireland.

5.14 It will be recalled that s. 2 of the Regulations sets out the meaning of eligible bank assets. That section starts with a definition of what might be described as land and development loans and proceeds through a series of forms of connection to include most other loans of the same borrower and, indeed, some loans of other borrowers who may become connected to the process by reason of the definition of eligible bank asset or associated debtor in the legislation. Given that it is accepted, at least for the purposes of this litigation, that the McKillen loans represent eligible bank assets, it follows that at least some of those loans are accepted as being primarily land and development loans such as to trigger the requirement that the other loans come within the definition of eligible bank asset by reason of the connection through Mr. McKillen of those loans one to another.

5.15 On any view, it should, however, be noted that a significant portion of the McKillen loans are not directly loans in respect of land and development, but rather, are loans which come within the definition of eligible bank assets by virtue of the fact that those loans are to Mr. McKillen or entities associated with him, and thus, are caught by the broad definition of eligible loans contained within the Act.

5.16 Finally, it is necessary to touch on the dealings, or perhaps, more accurately, the lack of them, between NAMA and Mr. McKillen concerning the potential acquisition of the McKillen loans. It will be necessary to deal more fully with those dealings in the course of addressing the specific issues which arise in these proceedings. Some correspondence passed between solicitors acting on behalf of Mr. McKillen and NAMA in the course of 2010. It does have to be noted that it was quite some time before NAMA, in the context of replying to that correspondence, informed Mr. McKillen that a decision had already been taken to acquire his loans. In that, and in certain other respects, it seems to the Court that NAMA is open to legitimate criticism for not having properly or adequately responded to Mr. McKillen's correspondence. It is, of course, the case that the Court will have to turn to the question of whether Mr. McKillen was, as a matter of law, entitled to be heard in respect of the proposal to acquire the McKillen loans. Whether there are any legal consequences arising from the position which NAMA adopted, is, of course, dependent on whether Mr. McKillen had any legal entitlement to be so heard.

5.17 However, independent of Mr. McKillen's legal entitlements, the Court does wish to record that NAMA's response to Mr. McKillen's correspondence was less than open and transparent. NAMA has been given significant powers by the Act. The Court is required to consider whether those powers are constitutionally permissible and if so, whether Mr. McKillen is entitled to be heard in the context of the exercise of those powers. However, independent of those considerations, it is the Court's view that institutions vested with significant power can reasonably be expected to respond to legitimate enquiries from those who may be directly or indirectly subject to the exercise of that power, in a more open and forthright fashion than was engaged in by NAMA in this case.

5.18 Finally, it is important to touch on the fact that there was a significant body of expert evidence placed before the Court in the form of affidavits filed by both sides. Much of that evidence seemed to the Court to be directed more to the question of whether the policies implicit in the Act, or adopted by NAMA in purported reliance on the Act, were proper policies. Those issues were not before the court, and insofar as the evidence related to those issues, it seems to the Court that that evidence was irrelevant.

5.19 Likewise, both sides declined to exercise the opportunity to cross-examine any of the expert witnesses on their affidavits. There would, in those circumstances, in any event, have been very limited circumstances in which the Court could have resolved any conflict between such experts. The expert evidence was, however, in the Court's view, of some relevance in addressing questions such as whether there was a sustainable basis for either the overall policy position adopted by the State and by NAMA, on the one hand, or the factual arguments which Mr. McKillen might have wished to address in the event that he were afforded a right to be heard, on the other. To the extent that the expert evidence was relevant in that sense, it will be addressed under the respective headings of the separate issues which arose in the course of the hearing.

5.20 Having dealt with the general factual background, it is next appropriate to turn to the issues which arise and, as already noted, it is proposed to deal first with the contention on the part of Mr. McKillen that NAMA failed to take into account relevant considerations in exercising its discretion to acquire the McKillen loans. The court now turns to that question.

6. **The Relevant Considerations Issue**

6.1 In assessing this issue, it is important to recall the role of the Court in judicial review. The Court is not concerned with whether a particular decision was correct. Rather the Court is concerned with whether the decision was taken in a legally permissible way.

6.2 There is no doubt but that one aspect of the appropriate review by a court in judicial review proceedings is to assess whether the relevant decision maker took into account all relevant matters and excluded from the decision maker's consideration, any irrelevant matters. In the context of this case it is said that NAMA did not take into account relevant considerations. It, of course, needs to be noted that relevance, or the lack of it in this context, is determined by the factors which the law requires the decision maker to take into account. It is not for the Court to decide what, as a matter of practicality, might have influenced the Court's view of the decision concerned had the Court been the decision maker. Rather, it is for the Court to determine, as a matter of law, the range of factors that were required to be considered by the decision maker and to assess on the evidence whether the decision maker erred by straying outside the parameters of what the law requires either by taking into account matters that should not have been included in the consideration or, equally and particularly in this case, by excluding matters that should have been considered.

6.3 That general proposition, which is well settled law both in this jurisdiction and in other common law jurisdictions, was not, as the Court understands it, the subject of dispute between the parties.

6.4 The case made in these proceedings on behalf of Mr. McKillen was that NAMA had failed to take into account a relevant consideration or set of considerations. In simple terms, the case made started with an analysis of the reasons given in evidence by NAMA witnesses as to why Mr. McKillen's loans were intended to be acquired. On the basis of that analysis, it was suggested that, as a matter of fact, the decision to acquire Mr. McKillen's loans was taken because those loans were, in the view of NAMA, of systemic risk. The question of when that decision was taken is, of course, the subject of a separate complaint in these proceedings to which it will be necessary to return in due course. However, for present purposes it is necessary to look at the evidence and the decision making process in NAMA, in particular in the context of the statutory scheme.

6.5 In any event, and based on the evidence of his own experts, Mr. McKillen argues that, in order to reach a conclusion that Mr. McKillen's loans were of systemic risk, NAMA should have considered six matters which are set out in para. E(xv)(c) of the Statement of Grounds in the following terms:-

1. The solvency of debtors;

2. Whether there has been or is likely to be impairment and/or default including in particular non-payment in respect of any given loans;

3. Whether there has been or is likely to be widespread impairment and/or default including in particular non-payment across the portfolio of loans;

4. The quality (including tenant quality), diversity and geographical spread of the underlying assets;

5. The historical performance of the debtors; and

6. The existing level of cover for outgoings.

6.6 It is said on behalf of Mr. McKillen that, in order to reach a sustainable decision to the effect that his loans were of systemic risk, it would have been necessary for NAMA to have considered those factors. It is not suggested on behalf of NAMA that a detailed appraisal of Mr. McKillen's loans in the manner contended for on behalf of Mr. McKillen was, in fact, engaged in. Rather, NAMA suggests that it was not required to engage in such an appraisal.

6.7 The issue between the parties is not, therefore, one which turns on establishing what factors the decision maker actually took into account. Rather, the issue in this case is as to what factors the decision maker was required to take into account. Mr. McKillen says that the factors which the Court has set out were required to be taken into account. NAMA says they were not. The issue, therefore, turns on what factors the Act required NAMA to take into account.

What Factors are to be taken into Account?
6.8 It is important to start any analysis of that question by looking at what the Act itself says. The principal provision of the Act which deals with the acquisition of bank assets by NAMA is s. 84. Section 84(1) permits, but does not require, NAMA to acquire an "eligible bank asset" of a "participating institution" where NAMA "considers it necessary or desirable to do so having regard to the purposes of this Act and, in particular, the resources available to the Minister."

6.9 It is clear that there are three matters that go into the equation. First, the asset must be an "eligible bank asset" as defined in the Act. Second, the financial institution from whom the bank asset is to be acquired must be a "participating institution". Third, NAMA must consider it at least desirable to acquire the asset for the purposes of the Act. The first two elements do not give rise to any difficulty on the facts of this case. It was accepted, at least for the purposes of this litigation, by Mr. McKillen, that each of the bank loans which NAMA says it wishes to acquire are eligible bank assets for the purposes of the Act. Second, it is also clear that each relevant loan is held from a bank which has become a participating institution for the purposes of the legislation. The remaining statutory requirement is that NAMA at least consider it desirable for the purposes of the Act to acquire the loans in question. It is to NAMA's decision in that regard that Mr. McKillen's challenge under this heading is directed.

6.10 That NAMA is given a clear statutory discretion cannot be doubted. What is, in reality, in dispute between the parties is as to the factors that NAMA is, as a matter of law, required to take into account in the exercise of that discretion. It is to that issue that the Court now turns.

6.11 Before analysing the factors that NAMA might legitimately or must consider, it is important to have regard to one relevant principle of law. Counsel for NAMA drew attention to a decision of the High Court of Australia in *Peko-Wallsend v. Minister for Aboriginal Affairs* [1986] 162 CLR 24. The judgments in that case (and in particular the judgment of Mason J.) provide what is, in the Court's view, a persuasive and useful analysis of the limitations on the Court's role in assessing the considerations given by a decision maker when such a decision is challenged in judicial review proceedings. In relation to an alleged failure by a decision maker to take into account a relevant consideration, Mason J. noted that what was required to be established was that the decision maker concerned failed to take into account "a consideration which he is bound to take into account in making that decision".

6.12 Mason J. went on to consider what those factors might be in the following terms:-

> "What factors a decision-maker is bound to consider in making the decision is determined by construction of the statute conferring the discretion. If the statue expressly states the considerations to be taken into account, it will often be necessary for the court to decide whether those enumerated factors are exhaustive or merely inclusive. If the relevant factors – and in this context I use this expression to refer to the factors which the decision-maker is bound to consider – are not expressly stated, they must be determined by implication from the subject matter, scope and purpose of the Act. In the context of judicial review on the ground of taking into account irrelevant considerations, this court has held that, where a statute confers a discretion which in its terms is unconfined, the factors may be taken into account in the exercise of the discretion are similarly unconfined, except in so far as there may be found in the subject matter, scope and purpose of the statute some implied limitation on the factors to which the decision-maker may legitimately have regard (see *Reg v. Australian Broadcasting Tribunal; Ex parte 2 HD Pty Ltd* (1979) 27 ALR 321; 144 CLR 45 at pp. 49-50, adopting the earlier formulations of Dixon J. in *Swan Hill Corporation v. Bradbury* (1937) 56 CLR 746 at 757-8 and *Water Conservation and Irrigation Commission (N.S.W) v. Browning* (1947) 74 CLR 492 at 505). By analogy, where the ground of review is that a relevant consideration has not been taken into account and the discretion is unconfined by the terms of the statute, the court will not find that the decision-maker is bound to take a particular matter into account unless an implication that he is bound to do so is to be found in the subject matter, scope and purpose of the Act."

6.13 The Court accepts that that analysis represents the law in this jurisdiction. It follows that, in a case where, as here, it is alleged that a decision maker has failed to take into account a relevant factor, then the Court must first ask itself whether the factor concerned is a matter which the decision maker is bound to take into account as a matter of law. In determining whether that be so, the Court must look at what the Act in terms requires to be taken into account or what may be said to be required by implication by virtue of the subject matter, scope and purpose of the legislation concerned.

The Legislation
6.14 It follows that the starting point should be consideration of the statute itself. The discretion given to NAMA under s. 84(1) is broad in that NAMA is simply required to consider whether it be necessary or desirable to acquire the asset concerned having regard to the purposes of the Act. Subsection (4) provides more detail but is, in its terms, stated to be without prejudice to the generality of subs. (1). Indeed, subs. (4) itself in subss. (n) permits NAMA to take into account "any other matter that NAMA considers relevant". A reading of the other specific matters referred to in subs. (4) suggests that the type of matters referred to are matters

which might create difficulty for NAMA in the event that it were to acquire the relevant asset. The list includes the adequacy, value and legal status of any security and the status of any facility documentation. Other factors relate to possible inadequacies on the part of the lending institution and also to title to and other similar matters relating to an asset which is given as security. Mr. McKillen placed some reliance on the fact that in subss. (k) the performance of the bank asset was a factor that could be taken into account.

6.15 It should be noted that the factors set out in s. 84(4) are not factors in themselves. Rather, they are matters which can be taken into account by NAMA in deciding whether the acquisition of the bank asset concerned is necessary or desirable having regard to the purposes of the Act.

6.16 Certain other features of the Act seem to the Court to be important in determining the factors which must be taken into account by NAMA in making a decision as to whether any eligible asset is to be, in fact, acquired. First, there is the reference to the resources available to the Minister. In that context, attention should also be drawn to s. 50(4) which limits the total available funds of NAMA to €58bn. On the materials before the Court, it would appear that that sum was the best estimate at the time of the enactment of NAMA as to the total value (calculated in accordance with the Act) of eligible assets, with certain exceptions to which reference will shortly be made, held by credit institutions which were then anticipated to be the likely participating institutions.

6.17 In that context, it is important to recollect that it was clear that the NAMA legislation would require approval by the European Commission. While the detailed issues which arise from the decision of the European Commission to approve the NAMA scheme (as embodied in the legislation) as being an acceptable form of state aid within the meaning of the TFEU will be dealt with in a subsequent section of this judgment, for present purposes it is important to note that a number of the features of the legislation as a whole appear to have been designed to have regard to the need to obtain that Commission approval.

6.18 It is, of course, the case that no such measure could be discriminatory as and between comparable banks operating in Ireland based solely on where the headquarters of the ultimate parent of the bank concerned was located. Thus, the legislation was required to be crafted in a way which allowed any bank doing relevant business in Ireland to apply to be a participating institution. Indeed, the relevant Commission decision makes reference to the set of relevant banks and the scale of their operations in Ireland. It does not appear to have been thought particularly likely that other institutions, although qualifying, might apply to participate but nonetheless the statutory scheme was required to make allowances for that possibility for in the absence of same the scheme would undoubtedly have been found to be discriminatory and would not, therefore, have obtained the necessary Commission clearance. In addition, it would appear that it was not anticipated as being likely that one Irish institution would apply to participate by reason of the low exposure of that institution to property and development loans. That anticipation also turned out to be the case.

6.19 The upper limit on the resources available to NAMA was fixed, therefore, by reference to what were believed to be likely to be the identity of the participating institutions, although there could never have been any guarantee that other institutions might not have chosen to make application in accordance with the provisions of the Act. Likewise, the upper limit was capable of being increased by Ministerial Order under s. 50(4) although in order to be effective such an order would require to be approved by the Dáil Éireann (Section 50(5)). The overall scheme needs to be seen, therefore, against the background of the fact that funding was being made available for the acquisition of almost all loans likely to be eligible from those institutions thought likely to wish to participate.

6.20 If, however, either more institutions than had been anticipated chose to apply and/or if the acquisition value of eligible assets within those institutions turned out be higher than anticipated, it would clearly have been the case that the total monies required to allow NAMA to acquire all eligible assets would be likely to have been higher. In such circumstances, the Minister and the Houses of the Oireachtas would have had to decide whether to make further funds available or, if that was not considered appropriate, to require NAMA not to acquire all eligible assets. In those circumstances, again in order for the scheme to be acceptable as EU level, it was clear that objective criteria needed to be included in the Act by reference to which a decision as to which assets not to acquire could be made in a transparent fashion which was demonstrably non-discriminatory. In that context, it must be recalled that the purpose of the state aid restrictions contained in the TFEU is to prevent a distortion of competition. It follows that, in order to obtain Commission approval, a scheme such as that contained in the Act would require, amongst other things, to have transparent measures for determining which assets were to be acquired. However, it does appear that such measures were unlikely to be required in the event that the scale of bank assets within participating institutions turned out to be as expected, for the funding provided to NAMA was sufficient to acquire all anticipated eligible assets from what were anticipated to be the participating institutions at what was anticipated to be the long term economic value of those assets.

6.21 A second matter needs to be noted. The Act was, in a preliminary form, published before it was introduced into the Dáil. As the Court understands it, the purpose behind that action was to facilitate the process of the scheme inherent in the Act being considered by relevant bodies such as the European Commission. It follows that it was necessary for the Act to anticipate possible complications which, while not regarded as necessarily likely, needed to be covered so as to avoid the need to introduce significant amendments to the Act which might, in turn, require further approval.

6.22 Finally, NAMA's discretion is, in terms, one which is principally directed towards the fulfilment of the purposes of the Act. Those purposes have already been set out. The purposes specified in both the long title and s. 2 of the Act, concentrate on the need to address the critical financial state of financial institutions in Ireland by, amongst other things, dealing with the acquisition of bank assets in both an expeditious manner and in a way which would remove uncertainty about the valuation of assets of credit institutions of systemic importance to the economy. It should also be noted that a specific purpose of the Act under s. 2(b)(iii) is to protect the State's interest in respect of guarantees given under the CIFS Act.

6.23 The logic of the combined effect of those provisions seems to the Court to be compelling. First, as has already been pointed out, one of the earliest measures adopted by the State on the emergence of the financial crisis was the passage of the CIFS Act and the giving of the guarantees permitted by that Act. It should again be emphasised that it is no purpose of this Court to assess whether that policy, either as a general proposition or in the particular form in which it was adopted, was the best or even a good response to the crisis. However, the fact remains that the bank guarantee concerned was in place at the time when the NAMA legislation was adopted. At least in general terms, a principal purpose of the bank guarantee was to seek to ensure that adequate funds remained in Irish banks to allow the economy to function in an appropriate way. There can be little doubt but that uncertainty as to assets held by banks can only lead to a significant reluctance on the part of investors to place funds in the financial institutions concerned, whether as an ordinary deposit or in the form of bonds or other instruments by which financial institutions are funded. It is clear that a perceived purpose of the Act was to enable an early removal of uncertainty as to the value of assets held by relevant financial institutions so as to enable those financial institutions to attract funding on an ordinary basis. Likewise, such an eventuality would have the effect of allowing an earlier relaxation or removal of the guarantee. There can be little doubt from the text of the Act, therefore, that a principal purpose of the Act was to allow early clarity to be brought to the scale of losses which many Irish financial institutions had suffered by reason of the burst of the property bubble. The crystallisation of those losses by the NAMA process and giving a credible assurance to outside investors that those problems had been addressed, were clearly part of what was intended to

be achieved by the Act.

6.24 The Court has engaged in a detailed analysis of the provisions to which reference has just been made precisely because the considerations or factors which NAMA is required to take into account in exercising any statutory function are those which can, in the words of *Peko-Wallsend*, be found by implication "from the subject matter, scope and purpose of the Act".

6.25 That NAMA has a discretion which it can exercise so as not to acquire an eligible bank asset is not doubted. It is necessary to analyse the Act to determine the factors that can or must properly be taken into account by NAMA in the exercise of that discretion. The Court has concluded that the purpose of the discretion, as a matter of statutory construction, is not one which is designed as a means of protecting customers of a participating credit institution. Rather, the discretion is designed to give to NAMA the possibility, at its own discretion, not to acquire assets where there is some good reason (consistent with the overall objectives and purpose of the Act) for not so doing. That reason might, for example, be that the total price which would have to be paid for all eligible assets within all qualifying institutions might have turned out to have been larger than anticipated either because more institutions than had been anticipated applied, the nominal value of eligible loans turned out to be more than was believed at the time of the enactment of the Act, or the so called haircut or the difference between the price which NAMA had to pay for each eligible bank asset and the nominal value of that asset turned out to be less than expected. As it transpires, none of those eventualities appear to have occurred and, indeed, it may well be that the total amount which NAMA is required to pay for all of the eligible bank assets to be acquired may be less than the sum provided by the Minister. However, the Act must be construed on the basis of what was in the mind of the Oireachtas at the time when it was enacted. It was necessary for the Oireachtas to put in place a scheme which would be sufficient to persuade the European Commission to make a decision in favour of approval under the State Aid Rules, but which would also be capable of dealing with eventualities concerning the availability of funds to meet all demands.

6.26 In addition, it must be noted that there is only one matter which NAMA must, under the express terms of the Act, be satisfied of, in order to acquire an eligible bank asset. NAMA must consider "it necessary or desirable […] having regard to the purposes of the Act and in particular the resources available to the Minister", to acquire the asset concerned. Having regard to the Court's analysis of other relevant provisions of the Act, the Court is not satisfied that the subject matter, scope and purpose of the Act requires NAMA to have regard to any other factors. The matters set out in s. 84(4) are permissive rather than mandatory. They are factors which NAMA may take into account in reaching its decision as to whether it is desirable for the purposes of the Act to acquire a particular asset. NAMA is not required to have regard to such factors. It seems to the Court that, if it were considered that a decision to acquire a particular eligible bank asset had to be made on the basis of factors which might derive from the interests of the relevant borrower, then the Act would have said so and would have been, in many respects, drafted in a significantly different way. The whole focus of the discretionary factors set out in s. 84(4) of the Act are consistent with giving NAMA a discretion to enable it to decline to acquire assets which are eligible assets where there is, in NAMA's view, a good reason consistent with the purposes of the Act for not so doing. The Court is, therefore, satisfied that the discretion conferred on NAMA is for NAMA's purposes rather than for any purpose connected with the interests of a borrower whose loans may constitute an eligible bank asset.

6.27 NAMA is not, therefore, under the Act, required to have regard to the status of any eligible bank asset in deciding whether to acquire it. In particular, NAMA is not required to assess the strength or otherwise of the underlying loans or any security backing up those loans. The Court's conclusion under this heading derives from an analysis of the legislation itself. At the risk of repetition, it needs to be re-emphasised that the Court is not, in so finding, reaching any conclusion as to whether there might be a better version of NAMA in which NAMA was required to carry out such an assessment. Much of the expert evidence tendered on this topic seemed to the Court not to be relevant to the issue which the Court had to decide. There is, doubtless, a debate to be had as to whether a scheme such as that included in the Act would be better if it required the acquiring authority to carry out the kind of assessment suggested by a number of experts whose evidence was tendered on behalf of Mr. McKillen. It is no function of this court to resolve such questions. For the reasons which the Court has sought to analyse, the Court is satisfied that, on a proper construction of the Act, the discretion as to whether to acquire or not acquire an eligible bank asset is one which is given to NAMA for the purposes of NAMA deciding, in its discretion, whether the overall objectives of the Act are better met by acquiring the asset concerned. The discretion is not there to protect borrowers who might not wish their loans to be acquired.

What NAMA took into Account

6.28 Against that analysis of the Act, it is necessary to turn to the basis on which NAMA actually decided to acquire the McKillen loans. First, it should be said that it is clear on the evidence that NAMA did not consider that the question of whether a particular loan or set of loans was in default, was impaired or was in some other way non-performing, was a relevant factor to be taken into account. It is also clear that NAMA did not, in fact, take any such factor into account.

6.29 In the context of what was, in fact, taken into account, it is necessary to recall that officials from the NTMA had been carrying out preparatory work for NAMA for some time. It is clear that those officials had available to them fairly detailed information from those institutions, which were anticipated as being likely to apply to become participating institutions, as to loans or other bank assets that might be considered eligible. On the evidence it would appear that a number of large spreadsheets were prepared setting out such loans. At a series of meetings in the earlier part of December (but, certainly in the case of the McKillen loans, prior to NAMA coming into formal legal existence), consideration was given as to whether any relevant loan would be acquired. The process so far as the McKillen loans is concerned was described thus at para. 43 of the first affidavit of Aideen O'Reilly, Head of Legal and Tax at NAMA:-

> "The decision to exercise the discretion of NAMA to acquire the loans connected with Mr. McKillen was taken by a group consisting of myself, Brendan McDonagh, John Mulcahy and Sean O'Faolain on the 11th and 14th December, 2009. At these meetings, we went through the asset lists and the objections raised with the five institutions which were likely to participate in NAMA. We decided to exercise our discretion to acquire Mr. McKillen's loans because of our belief that the extent of aggregate exposure of the relevant participating institutions to Mr. McKillen and his companies (including the Applicants) under credit facilities granted by those institutions, being the sum of approximately €2b was such as to create a systemic risk. The scale of the borrowings from the five institutions of the 100 largest borrowers is in the order of €50b, of which Mr. McKillen's borrowings represent €2b. Systemic risk is the risk that defaults or devaluation of a debt or debts with one institution will by reason of their size endanger not only that institution but any other financial institution from which the first institution has borrowed or any other financial institution from which the borrower has borrowed. The risk to the banking system of any potential impairment in an exposure of €2b and the potential losses that would be suffered by the participating institutions, which were already in receipt of substantial state support due to their individual systemic importance, was such that NAMA considered that the acquisition of Mr. McKillen's credit facilities was necessary to further the purposes of the Act. No formal minutes of this decision were kept since the fact of a decision on each loan was simply recorded by way of a notation on the relevant spreadsheet. For example, the decisions in respect of Mr. McKillen's loans with Anglo are noted on the December list which is exhibited at AO'R14 above."

6.30 In a further affidavit Ms. O'Reilly deposed as follows:-

> "The First Named Respondent has adopted the position that the first issue it must address in respect of any loan is whether that loan is eligible. Once a loan is eligible - whether it is performing or not - the First Named Respondent is empowered to acquire it. The First Named Respondent operates on the basis that, *prima facie*, if a loan is eligible, it should be acquired by NAMA, although clearly the First Named Respondent has a discretion to acquire or not to acquire any given eligible loan. In the view of the First Named Respondent the acquisition of all eligible loans is, on its face, necessary and desirable having regard to the purposes of the Act, although clearly it has a discretion not to acquire an individual loan and exercises that discretion in the light of the facts of any particular case."

6.31 It should be emphasised that the statutory entitlement of a participating financial institution to object to the inclusion of an asset was confined to arguing that the relevant asset was not an eligible asset for the purposes of the Act. However, the entitlement of NAMA to obtain information from the financial institution concerned extended not only to obtaining information relevant to the question of whether the asset might be an eligible asset but also information relevant to the question of whether NAMA might wish to acquire the asset.

6.32 In addition, Ms. O'Reilly also noted at para. 22 of her second affidavit that:-

> "Insofar as Mr. McKillen suggests at paragraph 9 of his affidavit that had he known the figure over which the First Named Respondent considered his credit facilities to represent a systemic risk he would have reduced the level of credit facilities, the fact of the matter is that there is no figure below which an exposure would not be considered to be large enough to warrant removal from the balance sheets of' the participating institutions. The larger participating institutions have been told that total exposures below €5m will not generally be acquired."

6.33 It should also be noted that the main officials who were carrying out the preparatory work for the coming into operation of NAMA had prepared criteria by which an assessment would be made as to what loans were to be acquired. It is worth setting out those criteria in full. In a paper for the Board of NAMA that process and the relevant criteria were described in the following way.

> "During December 2009, the five financial institutions likely to be designated as participating institutions by the Minister for Finance, submitted lists of loan assets which they considered, in the light of the NAMA legislation, to be eligible for acquisition by NAMA. As part of that process, the institutions were asked to identify loans which, though eligible, should not, in their view, be acquired by NAMA and to outline the reasons why these loans should not be acquired. The interim NAMA team reviewed the objections raised by the institutions and accepted or rejected them in line with a number of criteria.

Review criteria

> • The primary consideration was the eligibility of the assets by reference to the provisions of the Act and the Regulations (which were then in draft form).
>
> • In terms of then assessing whether some assets, though eligible, should not be acquired by NAMA, a major guiding principle was the extent to which the borrower's overall exposure across the system was sufficiently material as to contribute to the systemic risk which NAMA is intended to address. Some borrowers, apparently, were keen to exclude some of their loans on the basis that the loans were performing. It was emphasised to institutions, however, that it was always intended that NAMA would acquire full exposures rather than only the non-performing elements of those exposures; indeed, any suggestion that performing assets could be cherry-picked by participating institutions would be unacceptable from a public policy perspective. Furthermore, the argument - made by some institutions - that certain borrowers - typically UK-based - would consider themselves tainted by being associated with NAIVIA was not accepted, given the Government's policy objectives in establishing NAMA.
>
> • As part of the review, NAMA also looked at the scale of a borrower's L&D exposure relative to his/her total exposure across all the institutions and, in particular, the extent to which an L&D exposure was incidental to the main business carried out by the borrower. In the case of some borrowers, the L&D exposure; may have been acquired with the intention of developing a business premises e.g. the purchase of sites for warehouses/offices/retail outlets/etc.
>
> • Another consideration was the borrower's geographical base and the extent of his/her connection 'with Ireland. This was particularly relevant in the case of some of the US-based exposures of AIB and BOI: most of the borrowers did not have had any connection otherwise with Ireland and typically had relatively small exposures. Accordingly, they were not considered to be part of the systemic problem which NAMA was established to address."

6.34 On the evidence it is clear that those criteria were adopted and applied by the senior officials concerned. It is also clear that the relevant participating institutions (or, perhaps, more accurately those who were anticipated to be likely to become such) were informed of the relevant criteria at the time. The Board of NAMA approved the criteria at a meeting on the 7th January, 2010.

6.35 The Court is satisfied that it was those criteria which were applied in the making of decisions on acquisition. In that context it is important to note that, in the overall assessment as to whether a particular loan or connected loans should be acquired, the presumption was that all eligible assets would be acquired subject to what is described as the major guiding principle to the effect that it be the case that "the extent to which the borrowers overall exposure across the system was sufficiently material as to contribute to the systemic risk which NAMA is intended to address". The exceptions to that general principle appear to have been relatively narrow and confined to cases where land and development loans were simply incidental to a non land/development business (such as warehouses, offices for use in the business etc) or where the relevant borrower had little or no connection with Ireland. With those limited exceptions it appears that, provided the asset was an eligible asset, the overall view was that it should be acquired provided, again, that the scale of the relevant borrowing was sufficiently large that it might, in the words of the criteria, "contribute to the systemic risk which NAMA is intended to address".

6.36 It seems to the Court that this latter point is one of considerable importance. The basis on which NAMA approached the matter of the exercise of its discretion was not to determine whether the loans of a particular borrower were a systemic risk in themselves, but rather whether those loans, having regard to their size, can be said to have contributed to the systemic risk, being the risk to Irish financial institutions by reason of their exposure to property and development loans in the first place. It seems to the Court that

the use of the term "systemic risk" in the affidavits of Ms. O'Reilly must be seen in the context of the way in which that term is used in the criteria which were being applied by the relevant team (including her) at that time and which were subsequently approved by the Board of NAMA. Against that background, systemic risk was assessed on the basis of the risk that a land and development qualifying set of loans of a certain scale were of themselves a contributory factor to the systemic risk to Irish financial institutions and should, therefore, be acquired.

6.37 The expert evidence tendered on the part of Mr. McKillen was, it seems to the Court, addressed to the criteria by reference to which the individual loans of a particular borrower might be regarded as creating a systemic risk. However, that was not the criteria applied by NAMA. The criteria applied by NAMA was whether the loans contributed to a systemic risk in the relevant financial institutions in conjunction with other loans of a similar type.

6.38 It again needs to be emphasised that it is no part of the function of this court to assess whether that policy was a wise or correct one. It is simply for the Court to determine whether that policy was legally permissible under the legislation.

Conclusions
6.39 The Court is, therefore, satisfied that in applying a criterion of systemic risk, NAMA took that to mean that scale alone (within the property and development sector) was sufficient to contribute to a systemic risk in the Irish financial system, the removal of which was undoubtedly the principal function of the legislation in the first place. Given the wide discretion conferred on NAMA, it is clear to the Court that such an approach was entirely within the broad discretion given to NAMA. In turn, it follows that NAMA was entitled to apply those criteria to individual cases and adopt a policy of, *prima facie*, acquiring all eligible loans of a certain size given its view that all such loans contributed to the systemic risk attaching to Irish financial institutions.

6.40 In those circumstances, it does not seem to the Court that NAMA was obliged to carry out the sort of detailed assessment of each individual loan which was suggested as being an appropriate policy by a number of the experts whose evidence was tendered on behalf of Mr. McKillen. Whether such an assessment would have been a good idea is not for the Court. NAMA was entitled to exercise its discretion based solely on its view (unless it is irrational) that acquiring all eligible large loans was necessary to remove uncertainty as to the exposure of Irish financial institutions to the property and development sector and thus to remove any contribution of those loans to the overall systemic risk.

6.41 One final point bears noting. In a number of affidavits filed on behalf of Mr. McKillen, his experts sought to illustrate the relatively small scale of the loans of Mr. McKillen in the context of the overall exposure of the relevant financial institutions. However, it seemed to the Court that that exercise was to miss the point. NAMA did not carry out an assessment as to whether the loans of any given borrowers, taken by themselves, constituted a systemic risk. Doubtless, if NAMA had decided that it should or had to carry out such an exercise, then it would have done so at least broadly along the lines argued for in the evidence tendered on behalf of Mr. McKillen. As such, the real question is whether NAMA was legally obliged to carry out such an exercise. For the reasons which the Court has sought to analyse, the Court is not satisfied that the legislation imposed any obligation on NAMA to carry out such an exercise. NAMA was entitled to take the view that, in the words of s. 84, it was desirable for the purposes of the Act, to acquire all eligible assets above a certain size subject to very limited exceptions. It is in that context, as set out in the criteria already cited, that the term "systemic risk" needs to be viewed.

6.42 The Court is not, therefore, satisfied that, either in general terms, or because the stated basis for acquiring Mr. McKillen's loans was that they represented a systemic risk, NAMA was required to carry out a detailed appraisal of the McKillen loans. In those circumstances, the Court is not satisfied that NAMA failed to take into account any relevant considerations in coming to its conclusions.

6.43 As indicated earlier in the course of this judgment, the hearing before the court was a so called telescoped hearing involving both an application for leave to seek judicial review and, to the extent that leave might be granted, the substantive hearing of the judicial review application itself. As has also previously been noted, in order to grant leave the Court must be satisfied that the application "raises a substantial issue for the Court's determination" (s. 193(1)(b)).

6.44 Having regard to the analysis of the legislation set out in this section, the Court is not satisfied that Mr. McKillen has, under this heading, satisfied the "substantial issue" test and the Court, accordingly, will refuse to grant leave to seek judicial review on the grounds which arise in this section.

7. **The Fair Procedures Issue**

7.1 As with the relevant considerations issue, the question under this heading comes down to quite a net issue. It is clear on the facts that Mr. McKillen was not afforded any opportunity to be heard. NAMA's case is that Mr. McKillen was not entitled to an opportunity to be heard. The issue is not, therefore, concerned with the type of hearing to which a party in a position such as Mr. McKillen might be entitled or, indeed, with an analysis of whether the hearing which he was given met whatever standard might be required. Rather, the issue turns on the fundamental question as to whether Mr. McKillen had an entitlement to be heard. If he had, then it is clear that he was not afforded such an entitlement. If he had not, then there is no need for any analysis of what actually transpired. It follows that it is necessary to analyse the legal basis on which a party, such as Mr. McKillen, can be said to be entitled to the right to be heard before a decision is made which might be said to affect his interest. It is appropriate, therefore, to start by analysing the legal principles which underlie the right to be heard.

7.2 The right to fair procedures, also referred to as "due process", "natural justice" or "constitutional justice", is enshrined in the Irish Constitution in Article 40.3.2° and Article 43 and has been described and articulated by this court, amongst others, through its case law on numerous occasions.

7.3 Regard must be had for the distinction between the right to fair procedures which is afforded and is consequently protected by the Constitution and those which may be understood as the natural justice or common law rules. The distinction between the two is not clear cut and to a large extent the labels have been used interchangeably in this jurisdiction in recent years. In *McCormack v Garda Síochána Complaints Board* [1997] 2 IR 489, it is suggested that "constitutional justice is a more policy led and flexible concept than natural justice".

7.4 The rationale behind the right to fair procedures is to ensure that any proposed decision taken in the public sphere and which has or may have an effect on a person's rights is taken in accordance with and with due deference to accepted legal principles, the most well-known of which are "let the other side be heard" (*audi alteram partem*) and "no one may be judge in his own cause" (*nemo iudex in causa sua*). The former is of particular relevance in the present case.

7.5 It will be necessary in the next section of this judgment to deal with the question as to when exactly it can be said that a decision on the part of NAMA to acquire the McKillen loans was taken, and whether, having regard to the timing of that decision, same was valid. There might, on one view, be a question as to whether these proceedings might be said to be premature, given that the practical consequences of a decision to acquire any particular eligible bank asset only comes into play when the asset concerned is contained in an Acquisition Schedule served on the relevant participating credit institution. The McKillen loans have not been included in any such Schedule because, it would appear, of the existence of these proceedings. However, there is no doubt but that it is NAMA's intention, to the extent that it is legally permissible, to seek to acquire the McKillen loans. In those circumstances, it did not appear to the Court that there was any real question as to prematurity. Either Mr. McKillen is entitled to be heard in relation to the acquisition of the McKillen loans or he is not. If he is, then it is important to all concerned that that be established now so that Mr. McKillen can be afforded any entitlements which he might have, prior to a final decision being made as to the inclusion of the McKillen loans in a relevant Acquisition Schedule. On the other hand, if Mr. McKillen is not entitled to be heard, then it is equally clear that that should be established now so as to enable NAMA, if otherwise free so to do, to include the McKillen loans in an Acquisition Schedule.

7.6 The principal issue between the parties under this heading concerns whether it can properly be said that a decision to include the McKillen loans in an Acquisition Schedule amounts to the type of decision which actually or potentially interferes with rights of Mr. McKillen in such a way as to trigger an entitlement to be heard. A number of different questions were canvassed within the broad parameters of that issue. However, the starting point has to be a consideration of the rights which Mr. McKillen argues are or might be affected by a decision to acquire the McKillen loans.

7.7 Mr. McKillen argued that he has four classes of property rights which will actually or potentially be affected through the acquisition by NAMA of the McKillen loans. Specifically those are enumerated as follows: rights in the properties themselves; the right to earn a livelihood; contractual (or quasi-contractual) entitlements and reputational damage.

Rights in the properties
7.8 Mr. McKillen asserts that he possesses rights in the properties which underlie the acquired assets. In particular, Mr. McKillen claims the equitable right of redemption.

Right to earn a livelihood
7.9 Relying on *PMPS v Attorney General* [1983] IR 339, Mr. McKillen asserts that any interference by the Oireachtas in the manner in which economic entities carry out their business amounts to a *prima facie* interference with property rights. Mr. McKillen asserts that the acquisition of the McKillen loans by NAMA interferes with the manner in which he can carry out his business in the future. As an illustration, Mr. McKillen suggests that NAMA is essentially a workout vehicle and not by contrast a bank in the normal sense. In particular, it is said that Mr. McKillen has developed a significant and a beneficial long term relationship with those banks with which he does business. It is said that there are expectations deriving from that long term business relationship as to the way in which Mr. McKillen might expect to be able to do business with those banks in the future and thus earn his livelihood. It is said that those expectations will not be met, or at least are most unlikely to be met, should Mr. McKillen have to deal with NAMA instead.

Contractual (or quasi-contractual) entitlements
7.10 Mr. McKillen submits that the interjection of NAMA will impact on a number of economically valuable interests. There is no doubt but that contractual entitlements can constitute constitutionally protected property. In addition, Mr. McKillen asserts that he has other constitutionally protected entitlements which are of a quasi contractual nature. Under this heading, Mr. McKillen asserts that his relationships with his bankers, some of which have been maintained over approximately 35 years, with its associated trappings and implicit understandings, are valuable property, the loss of which is adverse to Mr. McKillen's interests.

Reputational damage
7.11 Mr. McKillen submits that, in line with the decisions of Murphy J. in *Falcon Travel Ltd v. Owners Abroad Group Ltd* [1991] 1 IR 175 and Keane J. in *Phonographic Performance (Ireland) Ltd v. Cody* [1998] 4 IR 504, the reputation and goodwill of a company are property rights and should therefore be constitutionally protected, in particular as, it is argued, Mr. McKillen's reputation is of considerable economic value. Mr. McKillen further asserts that the association with NAMA will have or is likely to have an effect on his reputation. This contention largely stems from what is said to be the perception that NAMA is a "bad bank" which is concerned with the acquisition of "bad loans". The expressed fear of Mr. McKillen is that market participants will conclude that Mr. McKillen's "going into NAMA" is due to known or unknown performance issues. Mr. McKillen suggests that his association with NAMA has already adversely impacted on his refinancing of certain loans (the so called Maybourne loans) as a case in point as to how his right to the vindication of his good name has been affected.

7.12 NAMA and the State defendants contest whether it can properly be said that any rights of Mr. McKillen will be interfered with by the acquisition of the McKillen loans by NAMA. It was not, however, disputed that the right to private property is, in general terms, protected under Article 40.3.2 of the Constitution. That that is so can hardly be doubted having regard to the jurisprudence of the courts in cases such as *Re Article 26 and the Health (Amendment)(No. 2) Bill, 2004* [2005] IESC 7, *Dreher v. Irish Land Commission* [1984] ILRM 94 and *Re Article 26 and Part V of the Planning and Development Bill, 1999* [2000] 1 IR 421. In that context, it is appropriate to turn, first, to the question of the extent to which it must be established that a right can or may be interfered with in order to engage an entitlement to fair procedures.

The Type and Nature of Interference with Rights Required to Invoke Fair Procedures
7.13 In that context, it is important to note that where some of the authorities (for example, *North Wall Property Holding Co v. Dublin Docklands Development Authority* [2008] IEHC 305) speak of rights which may be interfered with, it is clear from the context of the judgment concerned that the Court, in using the term "may", was simply acknowledging the fact that the right to be heard does not necessarily mean that one has the right to succeed. A person who is afforded the right to be heard may successfully persuade the decision maker not to make a decision which would be adverse to that person's interest. On the other hand, he may equally fail to so persuade the decision maker. In that context, the party may be affected by the decision if he fails to persuade the decision maker to find in his favour. However, in many such cases, it will be the case that the relevant party's rights will be interfered with if he loses. A party who is the subject of a statutory disciplinary process has undoubtedly a right to be heard. If, having exercised that right, the party is found innocent of whatever disciplinary matters are alleged, then the party's rights will not, in fact, have been interfered with, for there will be no legitimate reputational damage attributable to the process and no legitimate adverse consequences such as would follow from a finding of breach of whatever code was involved. On the other hand, the party concerned may have its rights interfered with in the event of an adverse finding. It is because of that risk that the party is entitled to be heard before any such finding is made.

7.14 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 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. Obviously, the precise application of that general principle requires an analysis of the right which it is said might be interfered with and the manner in which it is said that an adverse decision would interfere with that right. Another general consideration concerns the extent to which regulatory or other similar changes can, of themselves, be said to effect property rights simply because the changes concerned might effect property values. Costello J., in *Hempenstall v. The Minister of the Environment* [1994] 2 IR 20, observed the following:-

> ". . . a change in law which has the effect of reducing property values cannot in itself amount to an infringement of constitutionally protected property rights. There are many instances in which legal changes may adversely affect property values (for example, new zoning regulations in the planning code and new legislation relating to the issue of intoxicating liquor licences) and such changes cannot be impugned as being constitutionally invalid unless some invalidity can be shown to exist apart form the resulting property value diminution."

7.15 Comments of a like variety are to be found in *Energy Reserves Group, Inc. v. Kansas Power & Light Company* 459 U.S., 400 where the court took into account the fact that the complaining party in that case operated in a heavily regulated environment in assessing whether there had been any impairment of that party's rights. It is clear that in US law the threshold enquiry before constitutional rights may be invoked, is that a relevant measure has operated "as a substantial impairment of a contractual relationship". While the Irish jurisprudence may not go that far it does seem to the court that any impairment must be at least material and that in assessing any impairment the court is entitled to have regard to the fact, as identified by Costello J. in Hempenstall, that a party can have no expectation that a regulatory regime will remain the same even where changes in that regulatory regime may interfere with the value of property.

Discussion on Equity of Redemption
7.16 On that basis, it is necessary to return to the four headings under which Mr. McKillen argued that his rights would or might be interfered with. Turning first to the question of Mr. McKillen's equity of redemption, it is, of course, the case that Mr. McKillen has a property right in the shape of his entitlement to redeem mortgages on any of the underlying properties which are put forward as security for relevant loans. It is not, however, apparent to the Court how it can really be said that Mr. McKillen's equity of redemption would be interfered with. It will be necessary, in due course, to turn to the extent to which the Act confers additional powers on NAMA which are said to place NAMA in a much stranger position in respect of loans transferred to it, to the detriment of the borrower, than would have been the case had the loans concerned remained with the relevant credit institution. However, leaving those points aside, there does not seem to be any suggestion that, in general terms, Mr. McKillen's entitlements in respect of his equity of redemption in the various relevant properties, will be impaired. As a result of an analysis carried out in debate with counsel for NAMA in the course of the hearing, the Court is satisfied that, subject to the points to which reference has just been made, the position of NAMA is the same as the position of the banks from whom relevant loans are acquired.

7.17 Mr. McKillen is entitled to pay off any loan which he owes to NAMA and thus, have the property given as security for that loan released from any mortgage in favour of NAMA. In that regard, he is in exactly the same position vis-à-vis NAMA as he would have been vis-à-vis the lending bank, had NAMA not acquired the loan in question. NAMA will only be entitled to decline to release a mortgage or charge over property on the basis of the continuing existence of other loans (i.e. those not then being paid off) if there is some legal nexus between the two loans. For example, if the banks concerned had provided for cross security between one loan and another such that the bank was entitled to rely on a property as security for a loan which was not directly connected to that property, then that entitlement would subsist in NAMA. However, the reason why that entitlement would subsist in NAMA is because it was an entitlement of the bank concerned in the first place. The entitlement to redeem any particular loan is not affected by the loan being acquired by NAMA. Subject to the points to which it will be necessary to return, arising out of NAMA's additional statutory powers, it does not appear to the Court that there is any difference between Mr. McKillen's right to redeem any loan or set of loans from the relevant bank in the event that the loans are not acquired by NAMA or from NAMA in the event that they are acquired.

7.18 If Mr. McKillen has, or obtains, the resources sufficient to redeem any loan, whether from other assets or by putting in place a borrowing capability with a non-NAMA bank, he will be able to redeem any loans from NAMA on exactly the same basis as he would be able to redeem those loans from the banks from whom the loans are held currently.

Discussion on Right to Earn a Livelihood
7.19 It is next necessary to turn to the argument based on Mr. McKillen's right to earn a livelihood. It must first be noted that the right to earn one's living is not an absolute right. The State is, in principle, and subject to the limits of what may be constitutionally permissible, entitled to regulate, in the public interest, all areas of economic activity. The right to earn a livelihood is not a right to earn that livelihood free from appropriate regulatory interference. For example, in *Attorney General v. Paperlink Ltd* [1984] ILRM 373, Costello J. said the following about the right to earn a livelihood:-

> "It seems to me to be inaccurate and potentially confusing to state without qualification that each citizen has the constitutional right to carry on the occupation in which he is actually earning his living. The defendants like all citizens have a constitutional right to earn a living; they may choose to exercise that right by doing manual work or non-manual work, by entering a profession or by entering employment, by engaging in commerce (either alone or with others), by manufacturing goods, providing a service, or engaging in agriculture. Their freedom to exercise this constitutional right is not an absolute one, however, and it may be subject to legitimate legal restraints."

7.20 In that context, it is appropriate to ask the question as to how it can property be said that Mr. McKillen will have his right to earn a livelihood interfered with by his loans "going into NAMA". To the extent that Mr. McKillen's livelihood derives from managing a property portfolio and hoping to make a profit from same, then, at least initially, Mr. McKillen's position will be no different if his loans are acquired by NAMA than if they are not. He will still own the property portfolio. He will still owe the same amount of money, albeit to NAMA instead of to his banks, and will have the same obligation in respect of repayment of those loans and the payment of interest on them as currently exists in favour of his banks.

7.21 It is also important to note that NAMA has no additional legal entitlement to require an accelerated payment of a relevant loan over and above that which the bank concerned currently has. It is true that it is anticipated that NAMA will complete its work in the medium term and, thus, ultimately cease to exist. However, that does not mean that NAMA is entitled to call in loans which would not otherwise be due simply because it wants to close its books. To the extent that any party has a long term loan with its existing bank and to the extent that the party concerned does not breach any terms of that loan in a manner which would entitle its bank to call in the loan concerned, then NAMA is likewise prevented from calling in the loan. In those circumstances, if NAMA wishes to close its

books, it will be required to find a purchaser for the loan concerned. Subject, again, to the additional statutory powers of NAMA to which it will be necessary to return, the Court does not see that there is any legal interference with Mr. McKillen's right to earn a livelihood.

7.22 It is also said that there is a practical interference with Mr. McKillen's right to earn a livelihood which derives from the fact that his ability to conduct his business in accordance with the business model which he has established and which may be impaired by reason of his having to do business with NAMA rather than a commercial bank. As that topic also arises under the next heading it is proposed to deal with it there.

Discussion on Contractual or Similar Rights
7.23 That leads to the question of whether there has been any interference with Mr. McKillen's contractual or quasi contractual entitlements. There is no doubt but that contractual rights can amount to property rights which have constitutional protection. See *Southern Industrial Trust Ltd v. AG* 94 ILTR 161 and *Chestvale Properties Ltd v. Glacken* [1992] ILRM 221. Subject again to the question of the additional statutory powers conferred on NAMA, the Court is not satisfied that there is any material alteration in Mr. McKillen's contractual position as a result of his loans being acquired by NAMA. NAMA has the same right vis-à-vis any individual loan or set of loans as the bank from whom the loan was acquired previously had. In that regard the Court agrees with the views expressed by McMahon J. in *J&J Haire & Company Ltd & Ors v. Minister for Health and Children* [2009 IEHC 562, where, at pp. 39-40 the following was said:-

> "The plaintiffs' property rights in this instance are no more and no less than those rights which are accorded to him in the Contract. Either the Minister is entitled to make the changes under the Contract or she is not. If she is entitled to do so, then she is not in breach of the Contract; if she is not entitled to do so, she is first and foremost in breach of the Contract and the plaintiff's primary remedies are in contract. Bearing in mind the terms of the Contract in this case, and particularly clause 12(1) which allows the Minister to change unilaterally the rate of remuneration, admittedly after consultation, there is little doubt that had the Minister chosen to effect the rate changes by following the procedure provided for in clause 12(1) of the Contract, the plaintiffs could not complain. There would have been no breach of the Contract and there would have been no infringement of a constitutional right which, by definition, is no greater than the plaintiffs' contractual right. A close look at the Contract between the pharmacists and the HSE, does not disclose that the pharmacists have any right or entitlement for the rates of remuneration to continue indefinitely into the future.
>
> The so called right claimed by the pharmacists under the Contract is not in fact a right at all. At most it is merely a spes, a hope that the present rates will continue. Whether they do, however, is not a matter which is to be determined by the pharmacists. It is a matter exclusively for the Minister. From this analysis it can be seen that this is the height of the pharmacists' entitlement under the Contract."

7.24 It follows that in determining whether a constitutionally protected property right in the form of a contractual entitlement can be said to have been interfered with, it is necessary to analyse the contract involved to determine whether, in fact, the contractual position of the party asserting an infringement has in truth been materially altered by the legislative or administrative measure under challenge. In the same regard, it is also important to note that the contractual entitlements of borrowers faced with a proposal on the part of a bank from whom they have borrowed money to transfer the bank's side of that credit arrangement to a third party, are, as a matter of law, limited. In *Argo Fund Ltd v. Essar Steel Ltd* [2006] 2 All E.R. (Comm) 104, Auld L.J. stated the following:-

> "In my judgment, the Judge correctly concluded that the term 'other financial institution' in the expression 'bank or other financial institution' need not be a bank or even akin to a bank. Clearly, the disjunctive form of the contractual expression, 'bank or other financial institution', allowed for a financial institution that was not a bank, certainly not in the narrow conventional sense of lending money and/or accepting deposits for investment. However, given the use of that expression in a loan agreement allowing the transfer of the rights and obligations of the contract loan to a financial institution other than a bank, the assignment of its rights to anyone, and the known existence of a secondary market in such loans, I can see no basis for the Judge's starting point that one of the characteristics of such an institution was that it had to be a lender, whether in the primary market or otherwise. It is equally beside the point whether a potential transferee is technically a lender as an established trader in loans in the secondary market or, indeed that it would become a lender, if not otherwise qualifying as such, on becoming a transferee under the Agreement."

7.25 While the terms of the McKillen loans vary to some extent, none are in terms which preclude an assignment by the bank concerned and none are in terms which preclude an assignment only to another bank. If follows that any of Mr. McKillen's banks would have been entitled to assign to another institution (not necessarily itself a bank) the benefit of any of the McKillen loans without requiring Mr. McKillen's agreement and, in most cases, without even consulting him. As against that it was argued on behalf of Mr. McKillen that some recognition should be given to what were said to be rights deriving from his existing long standing banking relationships. A number of points, therefore, need to be made about that contention.

7.26 First, it is difficult to see how any such rights can be described as contractual rights *per se.* Mr. McKillen has entered into a series of contracts for loans with his banks. Those contracts were freely negotiated. The respective rights of Mr. McKillen and his banks are determined from the terms of the facilities letters concerned and any other relevant banking documentation. It would appear that each of the loans in question allow the relevant bank to assign the loan concerned. In most cases that can be done, as a matter of contract, without reference to Mr. McKillen. In a small number of cases consultation is required, but in no case is Mr. McKillen's agreement required. The starting point for a consideration of Mr. McKillen's contractual entitlements must, therefore, be that he has no contractual entitlement to ensure that his loans are not assigned by his existing banks to some third party. Leaving aside for the moment the question of the extent to which it might be said that NAMA is different from an ordinary commercial bank, it is difficult to see how, in the context of the fact that his loans can be assigned, Mr. McKillen can be said to have any real rights in respect of his relationship with his existing banks for those banks could, if they wished, assign his loans to some other bank with whom he would need to forge a new relationship. While it is true that NAMA is not a bank it should be noted that NAMA does have the power to extend credit to those whose loans it may acquire (s. 12). While NAMA is not, therefore, in the position of a commercial bank it does at least have the facility to provide credit in circumstances where it appears prudent to provide that credit within the significant resource available to it in that regard.

7.27 Second, it seems to the Court that significant regard needs to be paid to the reality of what has happened in Ireland over the last two or so years. The CIFS Act gave to the Minister significant powers to control the lending practises of any bank availing of the guarantee provided under the terms of that Act. It hardly needs to be emphasised that part of the underlying problem which beset Irish financial institutions, and which required significant state intervention, was the overexposure of the banking sector as a whole to property related loans and, it appears from much of the materials before the Court, the overgenerous terms on which such loans were provided. The idea that an existing banking relationship could survive unaffected by that situation is, in the Court's view, fanciful. But

of even greater importance is the fact that the very institutions with whom Mr. McKillen had built up the banking relationship which he so values would themselves have found it very difficult to survive without some form of State support. The position in respect of Anglo cannot be doubted. If it were not for the extraordinary level of state support, Anglo would not now exist. Mr. McKillen would, therefore, have no continuing relationship with Anglo from which he could benefit. In the Court's view, it flies in the face of reason to assert that Mr. McKillen has a right which is constitutionally protected to continue his relationship with Anglo in circumstances where that bank would not exist were it not for substantial state intervention. While the position is not so clear cut in the case of BOI, it remains the case that it seems unlikely that BOI could have continued to trade in the absence of the guarantee given under the CIFS Act or some variation on that measure and in the absence of a significant capital injection by the State to enable BOI to meet the legitimate requirements of the financial regulator as to the capitalisation of all financial institutions. While not as stark a case as Anglo, it remains the case that it is unlikely that Mr. McKillen would be able to have any relationship with BOI were it not for state intervention or, at least, would not be in a position to have any normal banking relationship without such intervention for it can hardly be doubted that, in the absence of state intervention, the ability of BOI to continue business in anything remotely resembling a normal fashion, would have been limited if not non-existent.

7.28 For all of those reasons it does not seem to the Court that it can be said that Mr. McKillen has any constitutionally protected right to whatever expectation he might previously have entertained concerning his banking relationship with both Anglo and BOI. The Court does not doubt the expert evidence tendered on behalf of Mr. McKillen which was to the effect that a banking relationship is an important aspect of any long term business project. Neither does the Court doubt but that a borrower who has maintained a long standing and good relationship with his banks, might reasonably expect to be able to roll over banking facilities as they become due and, in an appropriate case, be able to renegotiate the terms of loans which may be in default of covenants such as loan to value and interest cover covenants. However, the Court very much doubts if any such rights could be elevated to the status of legal rights, even in normal circumstances. That is not to say there might not be some circumstances in which a course of dealing between a bank and its customer might give rise to some form of legal entitlement that went beyond the strict contractual terms of the parties' relationship. However, even to the extent that any such legal entitlement might be asserted, it does not seem to the Court that it could have any relevance in current circumstances where the banks' position would undoubtedly have been significantly altered by recent events.

7.29 In those circumstances, it seems to the Court that all that can be asserted on behalf of Mr. McKillen under this heading is a hope that dealing with a commercial bank (albeit one which is only able to trade in a normal way because of state intervention and in Anglo's case one which does not appear to be likely to be able to trade normally at all) might be better than would be the case in having to deal with NAMA. The Court is not satisfied that any such expectation or hope amounts to a constitutionally protected right such as would give rise to an entitlement to fair procedures.

7.30 As pointed out in *the State (Gleeson) v. Minister for Defence* [1976] IR 280, constitutional entitlements must flow from either an express or implied constitutional right. In the context of the type of rights which must be said to have been interfered with in order that judicial review arise, Kearns J., in *Ryanair v. Flynn* [2000] 3 IR 240 said the following at p. 264:-

> "It follows from the foregoing that there are, quite apart from the public law dimension (which was not an issue in *Murtagh v. Board of Management of St Emer's National School* [1991] 1 IR 482), two other requirements which must be fulfilled before the court can intervene by way of judicial review, namely there must be a decision, act or determination and it must affect some legally enforceable right of the applicant. If the right is not a 'legally enforceable right', it must be a right so close to it as to be a probable if not inevitable next step that some legal right will, in fact, be infringed. While the inquiry were under no obligation, it seems to me, to act judicially, I am nonetheless satisfied that both the respondents and notice party were completely fair in the manner in which they discharged their remit in the sense that they met with all relevant parties, they provided the main protagonists with the opportunity to provide commentary upon material collated by them and invited and received submissions from all such parties. I do not accept they had any further obligation, for the reasons outlined above, to provide an opportunity to the applicant to address any possible adverse findings which the ultimate report might contain."

7.31 To like effect, Egan J. in *TV3 v. Independent Radio and Television Commission* [1994] 2 IR 439, said the following at p. 462:-

> "I am satisfied that the applicants received a benefit of some description from their selection or acceptance in pursuance of a statutory authorisation. However one might describe it, it was some kind of legal right which no other person or body could claim. It might not ultimately lead to the completion of a final contract containing specific and suitable terms but, quite clearly, there was right to negotiate with the Commission with such an end in view."

7.32 It is thus clear that, in order for a contractual right or something resembling such a right, to have constitutional protection it is necessary that it be either a legally enforceable right or something that is very closely analogous to it. It follows that in assessing whether any asserted right has constitutional protection the Court must consider whether the right said to be infringed or potentially infringed is a legal right or something which very closely resembles or is closely connected to a legal right. It also seems to the Court that the interference contended for must be as a direct or closely proximate consequence of the measure complained of. There are all sorts of tangential or remote consequences of virtually every measure and most particularly measures taken in the economic field where the knock-on effects of any one action can spread far and wide. While the entitlement of a party to be heard in a process which might lead to the compulsory acquisition of that party's property is well established, it has never been suggested, nor in the Court's view could it be suggested, that persons who might claim to be likely to suffer an indirect knock on effect from the acquisition concerned are likewise entitled to be heard. For example, a company doing business with a second company, whose premises was under consideration for compulsory acquisition, does not have an entitlement to be heard even though the acquisition might lead to a significant interference with the business relationship between the two relevant companies. In order for a constitutionally protected right to be said to have been interfered with, it is necessary that the measure, whether directly as a result of legislation, or by virtue of a quasi judicial or administrative act resulting from the legislation, has a direct and proximate effect rather than a tangential effect on any rights asserted.

Discussion on Reputational Damage

7.33 Finally, it is necessary to turn to the allegation that the acquisition of the McKillen loans will lead to reputational damage to Mr. McKillen and his companies. That, in certain circumstances, business reputation and goodwill can constitute a property right seems clear from *Falcon Travel Ltd v. Owners Abroad Group Ltd* [1991] 1 IR 175. There may well be a popular perception that only bad loans go into NAMA. However, that perception is misplaced. An analysis of the concept of eligible assets, as defined by the Act, makes it clear that there are many cases where all of the loans of a borrower may be entirely performing, but those loans may nonetheless be required to "go into NAMA". A simple example will suffice. The definition of connected borrower includes a company of which a relevant person is a 25% shareholder. Thus, a (say) 50% shareholder in an ordinary commercial non-property company will cause any loans to that company to be classified as eligible bank assets in the event that that shareholder has land and development loans

which would otherwise qualify as an eligible bank asset. It follows that the other 50% shareholder in the putative company, to which reference has been made, will find the loans of that trading company going into NAMA, not because of anything to do with himself or, indeed, the company itself but rather because it happens that his co-shareholder has property and development loans. In the example given, the ordinary trading company might well be in very good standing with its banks, have met all its commitments and be on any view a good risk for the bank concerned. Yet the loans will "go into NAMA". Other examples could be given. It follows that it is simply incorrect to suggest that all loans which go into NAMA reflect on the financial standing of the borrower concerned. Anyone who takes the trouble to analyse the provisions of the Act can only come to that conclusion.

7.34 The Court is satisfied from the materials before it that there has been an amount of ill informed public comment (some of it from sources which ought to know better), which seeks to associate the acquisition by NAMA of the loans of a particular borrower with the financial standing of the borrower concerned. But in the Court's view it is not possible to legislate for misinformation or the forming of ill informed views. Those cases which determine that a person is entitled to fair procedures because their right to reputation might be impaired by an adverse decision, seem to the Court to be all cases where the adverse finding, if it be made, would logically lead to a reasonable and informed person taking an adverse view. For example, in *McDonald v. Bord na gCon* [1963] IR 217, the relevant finding would have involved the decision maker determining that the person concerned had been guilty of conduct injurious to the greyhound industry. In order that a so called exclusion order be made under the Greyhound Industry Act 1958, it was necessary, in the words of Walsh J., at p. 243 of the judgment, that an incident or event had occurred which could reasonably "be regarded as injurious to or calculated to injure the greyhound industry". It thus follows that a decision to make an exclusion order in that context necessarily carried with it a reasonable imputation that the person excluded had been guilty of such injurious activity. It does not seem to the Court that a party is entitled to rely on the possibility that ill informed persons may draw inappropriate inferences from any decision as a basis for suggesting that the decision concerned affects that persons rights such as to engage an entitlement to fair procedures.

7.35 In coming to that view, the Court had regard to *Holst Ltd v. Secretary of State for Trade* [1978] 3 All ER 280, where the appointment in the United Kingdom of inspectors under the Companies Act was not found to be a matter on which the company into whose affairs the inspectors were intended to appointed was entitled to consultation or a right be heard prior to the appointment of the inspectors concerned. The court so held notwithstanding the fact that it was suggested that there might be a "there is no smoke without fire" adverse affect on the business reputation and goodwill of the company concerned. Likewise, in *Becker v. Duggan* [2009] 4 IR 1, O'Neill J., in dealing with a challenge to a failure to promote a teacher, found that the adverse consequences contended for on the part of the relevant teacher deriving from a failure to obtain the promotion concerned would not normally "be seen as destructive of reputation".

The Powers of NAMA
7.36 In respect of a number of aspects of the analysis which the Court has engaged in, it was indicated that it would be necessary to return to the statutory powers given to NAMA in respect of loans acquired by NAMA. The Court now turns to those powers.

7.37 A number of provisions of the Act were relied upon on behalf of Mr. McKillen as part of a general contention that, taken as a whole, the position of NAMA in terms of the enforcement of loans transferred to it was significantly enhanced to, it is said, the detriment of the relevant borrower, in comparison with the position that would have pertained as and between that borrower and the banks from whom the loans were acquired. Before considering that overall contention it is necessary to address the individual provisions on which reliance is placed.

7.38 Turning first to two provisions which are said to exclude an entitlement on the part of a relevant borrower to pursue an action against NAMA, it is necessary to consider the precise extent of the limitation provided by the relevant sections. Section 17 provides that no action for damages will lie against NAMA "in respect of any decision made in good faith to perform or not to perform any of the functions provided for in Part…9". It is clear that the wording of s. 17 excludes a claim in damages deriving solely from a decision to perform or not to perform the functions conferred by part 9. Part 9 relates to the various powers which NAMA has in respect of assets. However, it is clear that the exclusion of liability does not cover the manner in which any of the relevant powers might be exercised.

7.39 In like fashion, s. 103 of the Act provides that no cause of action can lie against NAMA "by reason solely of the acquisition of bank assets by NAMA…". What is excluded, therefore, is a claim against NAMA for exercising the power of acquisition itself. The exclusion does not extend beyond that. Thus, a bank (or, indeed, a borrower) cannot maintain proceedings based simply on the fact that a relevant bank asset in respect of which the bank is the lender and the customer is a borrower has been acquired. What NAMA does thereafter with that asset is not subject to any statutory exclusion of liability.

7.40 Much of the argument under this general heading addressed on behalf of Mr. McKillen centred on the powers which NAMA has under Part 9 in respect of dealing with assets acquired. Section 146 provides that "the enforcement of a security by NAMA is not subject to the restrictions in the Conveyancing Act 1881, or the Land and Conveyancing Law Reform Act 2009" ("LCLRA"). There was an issue between the parties as to whether, on its proper construction and application, that provision excluded NAMA from the obligations which would otherwise arise to obtain the best price for any asset which might be sold under NAMA's powers. NAMA placed reliance on the judgment of Ó Dálaigh C.J., in *Holohan v. Friends Provident and Century Life Office* [1966] IR 1 at pp. 20-21, which is clear authority for the general proposition that a party selling property in such circumstances must act as a reasonable man would in selling his own property. There does not seem to the Court to be anything in the Act which could be said to exclude that general obligation insofar as it might relate to NAMA exercising any of the powers of sale which might arise as a result of NAMA taking over the position of a bank under a mortgage, charge or debenture. While s. 103 of the LCLRA does impose obligations of a similar nature, the Court is satisfied that it is correct to describe that provision as being "largely declaratory of the general law" (see the Land and Conveyancing Land Reform Act 2009: *Annotations and Commentary* (2009) at pp. 28-285 by Professor Wiley).

7.41 It is true that Part 9 includes provision for the appointment of so called statutory receivers and places an express obligation on such receivers (under s. 148(7)) to exercise "all reasonable care to obtain the best price reasonably obtainable for the property at the time of sale". It does not appear to the Court that the fact that there is an express provision placing such an obligation on a statutory receiver can be taken to imply that the ordinary legal duty on either a mortgagee selling property or a receiver selling property, having been appointed on foot of a debenture, is in any way diminished or reduced. The Court accepts the submission made on a behalf of NAMA that the general position of a receiver can be significantly different to that of a mortgagee selling under a right derived from the mortgage. In *Silven Properties Limited v. Royal Bank of Scotland Plc* [2004] 1 WLR 997, Lightman J. noted the following at pp. 1008 – 1009:-

> "In summary, by accepting office as receivers of the claimant's properties the receivers assumed a fiduciary duty of care to the bank, the claimants and all (if any) others interested in the equity of redemption. This accords with the statement of principle to this effect of Lord Browne-Wilkinson in *Henderson v. Merrett Syndicates Ltd* [1995] 2 A.C. 205E –H relied on by the claimants. The appointment of the receivers as agents of the claimants having regard to the special character

of the agency doe not affect the scope or the content of the fiduciary duty. The scope or content of the duty must depend on and reflect the special nature of the relationship between the bank, the claimants and the receivers arising under the terms of the mortgages and the appointments of the receivers, and in particular the role of the receivers in securing repayment of the secured debt and the primacy of their obligations in this regard to the bank. These circumstances preclude the assumption by, or imposition on, the receivers of the obligation to take the pre-marketing steps for which the claimants contend this action. Further no such obligation could arise in their case (any more than in the case of the bank) from the steps which they took to investigate and (for a period) to proceed with applications for planning permission. The receivers were at all times free (as was the bank) to halt those steps and exercise their right to proceed with an immediate sale of the mortgaged properties as they were."

7.42 In those circumstances, the Court accepts that s. 148(7) of the Act is designed to bring clarity to the obligations of statutory receivers. The presence of that provision cannot be taken as in any way implying that the ordinary obligations which would apply as a matter of law either to a bank selling as mortgagee or a receiver appointed under a debenture, do not apply to NAMA or a non statutory receiver appointed by NAMA.

7.43 Next it is necessary to turn to s. 102 which provides generally that unless the Act otherwise states, the terms and conditions of a bank asset remain unchanged when it goes into NAMA. There is, however, provision for interpreting reference to interest rates in circumstances where the specified interest rate referable to the loan is no longer available (subs. (2)). In addition, where, by reason of the acquisition by NAMA of a bank asset, the operation of a term or condition in a relevant loan ceases to be practicable, subs. (3) permits NAMA to change the term or condition but only so as to make it as near as possible the equivalent of the original term. It should also be noted that the decision of the Commission, to which reference has been made, notes an undertaking by Ireland as to the manner in which that section will be operated.

7.44 It is, however, clear that the scope of s. 102 is limited. While some of the experts whose affidavit evidence was tendered on behalf of Mr. McKillen (including Dr. Stiglitz), suggested that NAMA had a significant power to rewrite its banking contracts post acquisition, an analysis of that section reveals that view to be incorrect. It is a very limited power arising only in very limited circumstances where the existing terms of the relevant contract cannot be applied. Even then, the change must be of the most limited fashion sufficient to solve the problem. In fairness at the hearing counsel for Mr. McKillen did not place particular emphasis on those provisions.

7.45 Next it is necessary to consider s. 101. That section excludes enforcement of representations, undertakings or the like given by a bank prior to acquisition where the existence of the relevant representation, undertaking or the like was not disclosed to NAMA in writing before the service of the acquisition schedule concerned and where the records of the relevant institution do not contain a written note or memorandum of the representation or undertaking. In such circumstances the representation or undertaking is not enforceable as against NAMA by virtue of the provisions of s. 101(1)(i). However, it does need to be noted that neither can the representation be relied on by NAMA and the representation remains enforceable, if otherwise legally valid, as against any party other than NAMA. Thus, if a borrower, such as Mr. McKillen, could establish that a legally enforceable representation or undertaking had been given to him by one of his banks, he remains entitled to enforce that representation against the bank concerned. The only limitation imposed by s. 101 is as to the enforcement of the representation concerned against NAMA.

7.46 In like fashion, it is appropriate to note the provisions of s. 87(3)(b) which allows NAMA to exclude, in the course of specifying eligible assets for acquisition under an Acquisition Schedule, certain obligations which are not, therefore, acquired by NAMA. However, it is clear that the exclusion of any such obligations, if it were to occur, and the Court was informed that it has not yet in fact occurred, does not extinguish the obligation concerned but merely leaves it with the bank from whom the eligible bank asset is acquired. Thus, under both s. 101 and s. 87 potential liabilities or obligations on the part of a bank may not necessarily be transferred to NAMA, but that does not in any way interfere with any rights which the borrower might otherwise have against the bank in question. The only limitation is that those rights cannot be enforced against NAMA.

7.47 Next it is necessary to consider Chapter 4 of Part 9 which deals with vesting orders. Under a vesting order NAMA may apply to the Court for an order vesting in NAMA the interest of a borrower who has created a mortgage or charge over the land in question. It is important to note that the entitlement of NAMA to apply for a vesting order only arises in circumstances where NAMA would, in any event, have a right of sale and where the Court is satisfied that the sum secured by the charge in question would be unlikely to be recovered if the land were to be sold within three months after the application, and that there was no other reasonable basis on which it might be expected that the chargor could redeem the charge concerned.

7.48 In other words, the entitlement of NAMA to seek and obtain a vesting order only arises where NAMA would be entitled to sell the property itself and where there would be no reasonable prospect of that sale covering the debt and where the borrower concerned has no reasonable prospect of being able to otherwise discharge the debt.

7.49 Certainly, at a formal level, there appears to be a very limited effect on the legal entitlement of a borrower in those circumstances. While it is true that a bank would not be entitled to such a vesting order (it will be necessary to turn to the question of foreclosure in early course), in the circumstances in which NAMA can apply for a vesting order, it follows that a bank could sell the property and fix the borrower concerned with any shortfall. Likewise, NAMA can take the property by means of a vesting order and similarly fix the borrower with what would be the same shortfall. The Court is required to objectively value the sum to be credited to the borrower for the purposes of the vesting on the basis of the price which would have been obtained had the property been sold within a three month period.

7.50 There is, therefore, little or no difference between the formal position of the borrower in either case. It is suggested that there might be a practical difference between the way in which the two scenarios might operate. A bank, faced with a situation where it had security insufficient to cover a loan and faced with a borrower who was unlikely to be able to pay the balance, has two choices. The bank can either sell the property and accept whatever shortfall exists as being one which is unlikely to be recovered from the borrower concerned, or the bank may choose, as a matter of practicality, and in its own interest, to wait to see if the value of the asset concerned increases so as to diminish or even extinguish any losses. It is possible that a bank might take such a course of action, particularly if there was an anticipation that the asset was likely to appreciate over a reasonable period of time at a rate faster than the loan would increase by virtue of unmet interest payments. On the other hand NAMA can acquire the asset at a price fixed by the Court by reference to its then value (or more accurately its value within three months), and will acquire the benefit of any uplift in the value of property if the asset is sold at some future date at a significantly increased rate. In practice, the difference is that, in the former scenario with a bank, it is the purchaser who acquires the asset who will get the benefit of any uplift rather than the bank, whereas in the case of NAMA under a vesting order it is NAMA who will get the benefit.

7.51 It is true that that analysis might reflect a realistic commercial scenario. However, it is difficult to characterise any change in a

borrower's position in those circumstances as being a diminution in the borrower's rights. The situation only arises when the borrower is liable to have the asset sold at its current market value and have, thereby, to accept whatever losses may flow from that sale. The losses are no larger in the event of a vesting order. The borrower has no right to prevent the bank from selling in those circumstances. It seems to the Court that any interest which the borrower might have in those circumstances is of the aspirational or "hope" nature which the Court has already indicated, under the heading of banking relationship, is insufficient to give rise to a constitutionally protected right such as would engage an entitlement to fair procedures.

7.52 Finally, it is necessary to turn to the provisions of s. 7 which creates an offence where a person intentionally, recklessly or through negligence provides false or inaccurate information to NAMA, or otherwise breaches the information giving obligations of parties to NAMA. It is said, correctly so far as it goes, that there is no equivalent entitlement on the part of a bank. NAMA does, therefore, have the additional authority that it is entitled to require information from those who may have dealing with it on pain of criminal sanction in the event of a culpable failure to give information. However, any such consequence is a remote consequential knock on effect of a decision by NAMA to acquire a loan. The acquisition of the loan itself does not in any way give rise to a risk of penal sanction. It is only where a party, by an entirely separate act, commits a culpable failure to comply with their obligations under the Act to provide information to NAMA that the criminal sanction is engaged. The Court is not satisfied that remote consequences of that type are such as legitimately requires a right to fair procedures in relation to the acquisition process itself.

Conclusions
7.53 In conclusion, the Court is of the view that many of the provisions on which reliance was placed, either in the written procedure or at the hearing before us, are not such as materially alter the situation at all. Insofar as certain of the provisions do, in the Court's view, alter the position, the Court is not satisfied, for the reasons given, that any such alteration is of a type, nature and extent such as to create an entitlement to fair procedures.

7.54 For all of those reasons, the Court is not satisfied that any of the asserted rights on the part of Mr. McKillen are exposed, by the acquisition of the McKillen loans, to any or any sufficient and proximate risk of an interference with a constitutionally protected right, so as to require fair procedures be adhered to prior to the acquisition of the McKillen loans.

7.55 Lest the Court be wrong in that view, it will be necessary to consider what the position would have been had the Court held that Mr. McKillen had constitutionally protected rights which were potentially interfered with in a significant and proximate way by the acquisition of the McKillen loans. Most of the issues which arise under this heading are more properly considered in the section of this judgment dealing with the constitutionality of the Act. It is well settled, since *East Donegal Co-Operative Ltd v. Attorney General* [1970] IR 348, that in construing an act of the Oireachtas, the Court can, and in an appropriate case should, construe the act, if possible, in a manner which renders the act constitutional. One common way in which the Court applies the *East Donegal* principle is by implying into certain legislation an obligation that appropriate procedures will be complied with (if constitutionally necessary) thus saving the legislation in question from a constitutional infirmity that would arise if those procedural safeguards were not provided for. The question which arises is as to whether, in the event that Mr. McKillen had constitutionally protected rights which were exposed to interference in a significant and proximate way, a right to fair procedures could and should be read into the Act.

7.56 In that context, it is important to return to the clear underlying imperative urgency that is to be found throughout the Act (see, for example, s. 2(b) and s. 10(2)). It would appear that the state aid permission afforded to the State by the Commission requires the scheme to complete its acquisition operation by the end of February 2011. It follows that the process of the acquisition of all loans needs to be conducted in an extremely expeditious manner. The Act makes that fact clear. It is also clear that the Act makes no express provision for any consultation with a borrower. The absence of any such provision needs to be seen in the context of the fact that the legislation makes clear provision for the entitlement of a bank from whom bank assets are being acquired to contest, by means of submissions to NAMA and a subsequent reference of the issue to the expert reviewer, a decision that an asset is an eligible bank asset. Likewise, there are express provisions allowing banks in certain circumstances to contest the value that the bank concerned is to be paid for the portfolio of assets acquired. In those circumstances, it does not seem to the Court that an ordinary construction of the Act could lead to an implied entitlement on the part of a borrower to be heard in the process. It is, of course, necessary to recognise the importance of the statutory scheme, as Charleton J. noted in *Wexele v. An Bord Pleanála* [2010] IEHC 21. The only question which remains is as to whether such an entitlement could or should be "read in" to the Act if it were absolutely necessary so to do to preserve the Act from constitutional infirmity. It seems to the Court that it is more convenient to deal with that question in the context of its assessment of the constitutionality of the Act to which the Court will turn in due course.

7.57 Finally, it is necessary to turn to the question of whether Mr. McKillen raised a substantial issue for the determination of the Court under this heading, such as would justify the grant of leave to seek judicial review. The Court is satisfied that the issues which have been addressed in this section do raise a substantial issue which is sufficient to meet the statutory test for the grant of leave. The Court, therefore, proposes to grant leave to seek judicial review based on the grounds which have been analysed in this section. However, for the reasons which the Court has sought to analyse, the Court has ultimately come to the view that the issues raised under this heading do not entitle Mr. McKillen to succeed in relation to any of the reliefs which he seeks based on those grounds. This latter conclusion is subject to the question as to whether an entitlement to be heard could or should be "read in" to the Act, which, as has been pointed out, will be dealt with in the section dealing with the assessment of the constitutionality of the Act.

8. **The Timing Issue**

8.1 NAMA was established on the 21st December, 2009 pursuant to Sections 8 and 9 of the Act and the National Asset Management Agency Act 2009 (Establishment Day) Order 2009 (S.I. No. 547/2009). This was the same date on which the Act came into operation pursuant to the National Asset Management Agency Act 2009 (Commencement) Order 2009 (S.I. No. 545/2009).

8.2 On behalf of Mr. McKillen it was contended that the purported decision to acquire the McKillen loans was taken on the 11th and 14th December, 2009 by a group of individuals consisting of Aideen O'Reilly, Brendan McDonagh, John Mulcahy and Sean Ó Faoláin. It was contended that this decision could not have been validly made by NAMA which did not exist at that time. It was further contended that there could not have been any valid delegation of any function of NAMA, and in particular by the NTMA, either to Mr McDonagh or to this group of individuals. On this basis Mr. McKillen contended that the decision was invalid and without legal effect.

8.3 In its amended statement of opposition, NAMA made three contentions in response as follows:-

> (a) The individuals who made the decision were authorised to make it pursuant to the National Treasury Management Agency Act, 1990 ("the NTMA Act") and on authority from Brendan McDonagh who had been appointed as Interim Managing Director of NAMA.
>
> (b) The decision was ratified by NAMA on its establishment upon (i) the approval of the Tranche 1-3 borrower lists at a

board meeting on 23rd December, 2009 (ii) the approval of the criteria for not acquiring eligible assets at a board meeting on 7th January, 2010 (iii) the confirmation in a letter dated 9th January, 2010 from Mr. Ó Faoláin, who is now the deputy director of NAMA and (iv) the fact that NAMA's agents have accepted, acknowledged and adopted the decision at all times from December, 2009 in their dealings with the applicants, with relevant institutions and with the Court.

(c) The decision was adopted, confirmed and ratified by Mr. McDonagh as Chief Executive of NAMA, on 17th September, 2010 following a review by him of all of the documentation and information in relation to the credit facilities referred to in these proceedings.

8.4 In the course of legal argument before the Court, the respondents also invoked in defence the provisions of s. 17 of the Interpretation Act, 2005 to argue that the making of the decision in this case was either "necessary" or "expedient" to enable the Act to have full force and effect immediately on its coming into operation and that contention will be examined in some detail.

8.5 Before analysing the contentions advanced by both sides, it is perhaps of importance to stress that, having regard to the Court's findings that the scheme of the Act does not envisage or provide for a right on the part of the borrower, such as Mr. McKillen, to be heard, this portion of the case has, as a result, assumed a somewhat technical and formal quality only. Further, as has been pointed out on behalf of NAMA, an order of *certiorari* to quash the decision made on the 11th and 14th December, 2009 has not been sought. NAMA contends that in such circumstances there could be no knock on or domino effect consequences which might be seen as having infected or contaminated the subsequent process. NAMA further contended if this was the only "flaw" in the decision making process, the Court should not grant any declaration of invalidity, particularly as it had been acknowledged on behalf of the applicants that NAMA could in any event make any such decision forthwith. That being so, a declaration of invalidity could be of no possible benefit to the applicants and should not therefore be made.

The Evidence
8.6 The Court has already referred to the first affidavit of Aideen O'Reilly in which a decision to acquire the McKillen loans is described as having been taken by four named individuals at meetings on the 11th and 14th December, 2009.

8.7 In her second affidavit, Aideen O'Reilly deposed that, prior to the establishment of NAMA, all preparatory work was being carried out by the NTMA in accordance with a direction of the Minister for Finance dated 7th May, 2009. NTMA was established by the NTMA Act, the core function of the NTMA is to borrow on behalf of the Exchequer and to manage the national debt. She deposed that NTMA acts and performs its functions through its Chief Executive and the Chief Executive is directly responsible to the Minister for Finance. The functions of the NTMA are performed subject to the control and general superintendence of the Minister for Finance who may issue directions to the NTMA with which the NTMA must comply. The Minister for Finance announced the establishment of NAMA in his Supplementary Budget 2009 which was announced on 7th April, 2009. On 5th May, 2009 the Minister for Finance appointed Brendan McDonagh as Interim Managing Director of NAMA.

8.8 On 7th May, 2009, the Minister for Finance directed the Chief Executive of the NTMA in accordance with the provisions of s. 4(4) of the 1990 Act to:-

- Advise the Minister in relation to the formation of NAMA
- Undertake necessary preparatory work required to establish NAMA
- Provide necessary staffing and other support to the Interim Managing Director.
- Engage expert advisers and consultants as necessary, commencing with the initial advisory services as set out in the Request for Proposals discussed by the NAMA Steering Group on 1 May, 2009; and,
- Directed that Brendan McDonagh, being a staff member of NTMA, be appointed as Interim Managing Director of NAMA.

8.9 Ms. O'Reilly's affidavit went on to clarify that from 7th May, 2009 until 21st December, 2009 all decisions made and discretions exercised were made and exercised by NTMA in accordance with the Ministerial direction of 7th May, 2009 under the NTMA Act. The prospective participating institutions were immediately notified of NTMA's role and on 7th May, 2009 the Minister wrote to the Chairperson of each of the banks which were considered likely to participate in NAMA to notify them that NTMA would be seeking information including the posing of questions on land and development loans, associated loans, capital and provisions. This communication was followed up by a further letter from the Minister for Finance to these institutions on 30th June, 2009 which confirmed that NTMA would require further information in a timely and ongoing basis from relevant institutions in order to progress the work of preparing for NAMA. The letter stressed that cooperation with NTMA was vital to ensuring the speedy establishment of NAMA. NTMA issued a Memorandum of Understanding dated 1st July, 2009 concerning confidential, commercially sensitive and market sensitive information to be provided by the prospective participating institutions to the NTMA. These institutions continued to provide NTMA with loan information and, during the summer of 2009, NTMA developed due diligence templates which were tested in various draft forms with workshops also being held with the institutions. On 7th October, 2009 NAMA's Interim Managing Director issued a letter to the chief executive of each prospective participating institution concerning the completion of and delivery of the due diligence templates and the delivery of eligible asset lists.

8.10 Ms. O'Reilly thus asserted that it was not correct to suggest that the preparatory work, including the decisions on eligible asset exclusions in December, 2009, were null and void because NTMA had full authority under the NTMA Act to undertake all preparatory work for the establishment of NAMA. She stressed that the reason the preparatory work was carried out by NTMA and not left until NAMA was established by statute was the extreme urgency of the Government measures to put in place an asset relief scheme and the need to commence the state aid clearance process with the EU Commission. The delay that would have been caused by a period of inactivity between April 2009 (when the Minister announced the creation of NAMA) and December 2009 (when NAMA was finally established), was considered unthinkable. The Interim Managing Director attended two meetings of the Oireachtas Finance and Public Services Committee on 26th May, 2009 and 31st August, 2009 along with the Minister for Finance where the operational and policy aspects of NAMA were discussed at length.

8.11 Ms. O'Reilly further deposed that the individuals who made decisions concerning the exclusion of eligible bank assets were employees of the NTMA (Brendan McDonagh, Sean Ó Faoláin and Aideen O'Reilly) or retained on a consultancy contract (John Mulcahy). None of these individuals are now employed by NAMA as NAMA has no employees. Under s. 42 of the Act, NTMA makes available to NAMA such number of its employees as the Board of NAMA determines is necessary. These individuals are employees of NTMA and have been formally assigned to NAMA.

8.12 Ms. O'Reilly further deposed that the Board of NAMA met for the first time on 23rd December, 2009 when a list of Tranche 1, 2 and 3 borrower connections was put before the meeting (including Mr. McKillen). The criteria by which determinations of exclusion of

eligible assets were made were approved by the Board of NAMA at its meeting on 7th January, 2010. At that meeting, the specific criteria that were applied to the McKillen loans were recorded. As previously pointed out the relevant document specifically recorded:-

> "In terms of then assessing whether some assets, though eligible, should not be acquired by NAMA, a major guiding principle was the extent to which the borrowers' overall exposure across the system was sufficiently material as to contribute to the systemic risk which NAMA is intended to address."

8.13 Immediately thereafter, the Deputy Director, Mr. Ó Faoláin, advised Mr. Tuite of Anglo in a letter dated 9th January, 2010, of the loan assets already identified which would not be acquired by NAMA, also identifying those assets, including the assets of Mr. McKillen, which were being acquired. Similar correspondence was also exchanged with BOI during January, 2010.

8.14 Ms. O'Reilly then reiterated her belief that the persons who made the decision were, for these various reasons, fully authorised in law to make it. Further, the criteria by reference to which it was made were adopted by the Board of NAMA shortly after establishment as was the decision to acquire the McKillen loans. Third, the specific decision to acquire those assets was adopted and communicated by Mr. Ó Faoláin in January 2010. Fourth, the duly authorised agents of NAMA have accepted, acknowledged and adopted that decision at all material times since in their dealings with the applicants, with the relevant institutions and with the Court in the presentation of the evidence in these proceedings.

8.15 In the second of his affidavits sworn herein, Brendan McDonagh confirmed the detail furnished by Ms. O'Reilly in her second affidavit before going on to state that he had considered afresh whether, in the light of the submissions and contentions advanced in affidavits delivered on behalf of Mr. McKillen, the decision to acquire the McKillen loans was correct. He deposed that he had in particular reviewed the documentation and information relating to the credit facilities referred to in the various affidavits and had concluded that there was no new information which had come to light since the original decision was taken in December 2009 which made the original decision incorrect or which, in his view, would make it appropriate for NAMA to decide not to acquire the loans. He stated that, as Interim Managing Director of NAMA appointed under a direction by the Minister for Finance, he was the person ultimately responsible for the decision and it was made with his full knowledge and authority.

8.16 In his affidavit, Mr. Frank Daly, Chairman of NAMA, stated that he was appointed to that position by the Minister for Finance on 21st December, 2009. He confirmed that the board of NAMA was appointed on 22nd December, 2009. The first board meeting was held on 23rd December, 2009. Prior to the first board meeting he as chairman had been briefed by Brendan McDonagh, Chief Executive Officer of NAMA, by John Corrigan, Chief Executive Officer of NTMA, and by David Doyle, Secretary General, Department of Finance in relation to the extensive preparatory work undertaken by the interim NAMA team lead by Brendan McDonagh, as Interim Managing Director, since May, 2009. It was made clear to him that Brendan McDonagh had been appointed under a ministerial direction issued to the NTMA under the NTMA Act to undertake preparatory work for the establishment and operation of NAMA on a statutory basis. It was widely acknowledged that the legislation underpinning NAMA would be complex and the appointment of an Interim Managing Director was a sensible approach to ensure that the organisation and implementation process was driven forward in the interim period pending enactment of the legislation and pending appointment of the Board. He stated that it was obvious to the Board at its first meeting that a great deal of preparatory work had been undertaken and the Board was fully briefed in relation to this work. In particular, he had been advised by Brendan McDonagh of decisions of the interim team at meetings held on the 11th and 14th December, 2009 and the Board would have been aware of the outcome of these decisions during its consideration of the item "NAMA Acquisition Timetable and Borrower List" under agenda item seven at its meeting on 23rd December, 2009. The Board meeting on 23rd December, 2009 included Board papers for eleven agenda items. The Board at this meeting and subsequent meetings operated on the basis that all preparatory work carried out by the interim team prior to that date, was in effect considered to be work carried out by NAMA and it was treated as such for the purpose of NAMA exercising its statutory functions and powers. The minutes of the board meeting of 23rd December, 2009 record the Board's appreciation of the extensive work carried out by the Interim Managing Director and his colleagues who were part of the interim team. Under agenda item seven, "NAMA Acquisition Timetable and Borrower List", the list of borrowers based on the eligible assets lists was considered by the Board and this is recorded in the minutes of that meeting. This list included Mr. McKillen.

8.17 Mr. Daly went on to underline the expertise, professionalism and competence of the interim team. However, given that no challenge has been made to the competence and expertise of that interim team to make the decision which they made on 11th and 14th December, 2009, it is not necessary for present purposes to do more than simply acknowledge the fact of that expertise.

Submissions of the Applicants

8.18 On behalf of Mr. McKillen it was argued that it was far from clear on what basis the Minister would be entitled, having regard to the functions conferred on the NTMA under the NTMA Act, to direct the NTMA to make a decision of the type under consideration. Section 4(3) of the NTMA Act requires the NTMA to perform its functions subject to the control and general superintendence of the Minister for Finance. It was only for this purpose, i.e. the control of NTMA, that the Minister could issue directions to the NTMA pursuant to s. 4(4) of the NTMA Act. It, therefore, followed that the Ministerial direction could in no way expand the functions of the NTMA, nor had any function been properly delegated to the NTMA prior to the establishment of NAMA that would authorise the NTMA to acquire loans for NAMA. It was submitted that in any event the Ministerial direction was not nearly as far reaching as the respondents had suggested. The NTMA was directed to advise the Minister in relation to the formation of NAMA and "to undertake all necessary preparatory work required to establish NAMA", including provisions of staffing and engagement of advisers. It was submitted that this direction could not properly be said to have empowered the NTMA to make a decision to acquire the McKillen loans. Aside from the fact that the NTMA is a separate entity, such a far reaching decision could not be said to fall within the scope of "necessary preparatory work required to establish NAMA". Mr. McDonagh's appointment as Interim Managing Director could only have been with a view to the performance of functions provided for under the Ministerial direction. That being so, it was submitted that the group who met on the 11th and 14th December, 2009 had no authority to make the decision purportedly made.

8.19 That the decision was made on that date could not be disputed, notwithstanding the fact that the decision itself was evidenced by nothing more than the insertion of the word "disagree" in a column which provided for the exclusion of the McKillen loans on a spread sheet. There was no documentary evidence to support or suggest that the decision had been taken at any other time, meeting or location.

8.20 Insofar as any suggested ratification was concerned, it was submitted on behalf of Mr. McKillen that it was evident from a consideration of the relevant minutes of the Board meeting on 23rd December, 2009 that no decision was taken by the Board to either approve or ratify the decision to transfer the McKillen loans. The Board had simply considered the list of borrowers. The next Board meeting, which took place on the 7th January, 2010 was one at which the board accepted the criteria used by NAMA in deciding which assets were eligible for transfer. It was clear that this decision by the Board was not a ratification or approval of the decision as such, instead it was an acceptance by it of the criteria which it understood were to be used in respect of decisions generally. By the same token, correspondence emanating from Mr. Ó Faoláin, dated 9th January, 2010, on NTMA headed paper, in which he

confirmed to Anglo that certain credit facilities, including those of Mr. McKillen, were being acquired and similar correspondence with BOI during January 2010, could not be characterised as the ratification of a decision. The correspondence was simply a communication by Mr. Ó Faoláin to the relevant institutions of a decision purportedly taken by NAMA. Further, while NAMA relied on the fact that NAMA's agents had accepted, acknowledged and adopted the decision at all material times, this could not cure an otherwise invalid decision.

8.21 While a statutory body could, by statute, be given the power to adopt the decision of another person, the Act did not confer any such power on NAMA. This was in marked contrast to the situation provided for by s. 37 of the Companies Act, 1963 which permits a company to ratify contracts purportedly entered into on its behalf before incorporation. There was no basis, it was submitted, for taking the view that there was any implied power in the Act to this effect in the absence of any express provision. It was unthinkable that such a power would be either opaque, hidden or unclear in the legislation. It was further submitted that there could be no ratification under common law, because ratification presupposes that the principal is in existence at the time when the agent purports to act on its behalf and no such principal was in existence at the relevant time. (see *Firth v. Staines* (1987) 2 Q.B. 70.)

8.22 Finally, NAMA's contention that on or about 17th September, 2010 Mr. McDonagh, then Chief Executive of NAMA, duly confirmed, adopted and ratified the decision, having reviewed all of the evidence tendered by Mr. McKillen in the proceedings, did not advance NAMA's position. It amounted to nothing more than an indication by Mr. McDonagh of his view that there would be no reason for NAMA to reach a different decision if it were to consider the matter afresh.

Submissions of the respondents
8.23 On behalf of NAMA it was argued that the acquisition of an eligible bank asset necessarily requires and involves a continuing intention on the part of NAMA to acquire those assets up to the actual point of acquisition. Even after an acquisition schedule has been served – and none has been served in the instant case – it may be revoked or amended at any point prior to the earliest acquisition date specified in it. To focus on one discrete point on the decision spectrum in isolation, as Mr. McKillen had done in respect of the events of the 11th and 14th December, 2009, was in effect to contend that a single "once and for all" decision occurred at the outset and that an entire process can be set at nought if such a decision can be pinpointed and then invalidated. The relevant statutory provisions, it was submitted, demonstrated there was no basis for such a contention.

8.24 What the Act requires is that, prior to or at the time of service of an acquisition schedule under s. 87, NAMA may form a view (a) that the assets being acquired are eligible bank assets and (b) that their acquisition is necessary or desirable having regard to the purposes of the Act (s. 84). NAMA formed such an intention and continued in its view that it should acquire the facilities, a fact which was manifest from the evidence before the Court, including in affidavits of Ms. O'Reilly, Mr. McDonagh and Mr. Daly. It was also manifest from the actions taken by NAMA since its establishment, including:

(1) The consideration and implicit approval by the Board of the tranche 1, 2, and 3 lists on the 23rd December, 2009;

(2) The consideration and approval by the Board of the criteria for exclusion of eligible assets on the 7th January, 2010;

(3) The correspondence entered into by NAMA with the relevant financial institutions in January 2010;

(4) The correspondence entered into by NAMA with the solicitors for Mr. McKillen, particularly NAMA's letter of the 14th June, 2010 in which it was confirmed that "your client is included in the current tranche of connections as eligible loans are scheduled for acquisition";

(5) NAMA's defence of its entitlement to acquire the credit facilities before the expert reviewer following the making of objections by BOI; and

(6) NAMA's defence of these proceedings.

8.25 The Statutory Scheme (s. 89(2)(a))also provides that the amendment of an acquisition scheduled by NAMA may include the omission of a bank asset. Section 89 expressly envisages that the acquisition may be aborted after service of the acquisition schedule through a notice of revocation.

8.26 Having regard to these multiple considerations, an acquisition could never be entirely dependent on the initial decision or formation of a view of the kind made on the 11th and 14th December 2009, and the same position would obtain if the initial view had been formed after the establishment date of 21st December, 2009. The decision itself had no legal consequences. The consequences only arose when the formal steps provided for in the acquisition process were taken. It was clear beyond doubt that the relevant acquisition lists were considered by the Board of NAMA on the 23rd December 2009 and that, following consideration, NAMA proceeded to take steps to acquire the loans. That being so, it was perfectly clear that NAMA adopted the decisions that had been made by Mr. McDonagh and the other NTMA employees in the period prior to the formal establishment of NAMA and proceeded on that basis. Any suggestion that the Board merely considered, but did not approve or ratify those decisions was, it was argued, nothing more than an exercise in casuistry.

8.27 In any event it was submitted, without prejudice to any of the foregoing arguments, that NAMA's powers were so widely drawn as to provide a sufficient basis for the adoption and/or ratification of the decision of 11th and 14th December, 2009 to acquire the McKillen loans. Section 12 of the Act expressly provides that NAMA had "all powers" necessary or expedient for, or incidental to, the achievement of its purposes and performance of its functions.

8.28 The circumstances and statutory context in which NTMA carried out preparatory work in advance of the establishment of NAMA was very far removed from the scenario of an agent acting without authority. NTMA, acting through its personnel, had a specific mandate from the Minister for Finance, and NTMA was subject to an express statutory nexus with NAMA under the Act which had been passed prior to the decisions of 11th and 14th December 2009.

8.29 Given that the decisions of 11th and 14th December, 2009 occurred during the interval between the passing of the Act on the 22nd November, 2009 and 21st December, 2009, which is both the date on which the Act came into operation and the "establishment day", s. 17 of the Interpretation Act, 2005 could be relied upon by the respondents in circumstances where s. 10 of the Act expressly imposes a requirement of expedition when specifying NAMA'a purposes. The identification of eligible bank assets that ought to be acquired by NAMA is an "act or thing, the making or doing of which is necessary or expedient to enable the … Act to have full force and effect immediately on its coming into operation" within the meaning of s. 17(b) of the 2005 Act.

8.30 The position in the present case was in marked contrast to the position addressed by s. 37 of the Companies Act 1963, which is concerned with transactions *concluded* prior to any incorporation and which involve existing and definitive legal relationships being altered by the effect of substitution of the company for one of the contracting parties. In this case, prior to the establishment of NAMA, persons serving in an interim capacity subsequently became officers of NAMA and, following NAMA's establishment, clearly had authority to decide to acquire the disputed credit facilities, and had initially formed the view that the disputed credit facilities were eligible bank assets. These facts provided no basis for impugning the future service of an acquisition schedule to restrain NAMA from doing so if that course is otherwise lawful and appropriate.

8.31 Finally, it was submitted that it would be an exercise in futility to quash the decision to acquire – a remedy not, in fact, sought by the applicants – or to remit the matter back to NAMA where inevitably the same decision would be made and the acquisition process would thereafter continue.

Decision
8.32 The Court is of the view that its decision on these various points may be best approached by distinguishing and separating from its decision those arguments and contentions which the Court is satisfied should not be seen as determinative.

8.33 To begin with, the Court is satisfied that what might be described as the "belt and braces" averment of Mr. McDonagh in his second affidavit to the effect that he is satisfied, having considered all the documentation and information, as to the correctness of the decision to acquire the credit facilities, the subject matter of the proceedings, should not be seen as having any special value. The Court can well understand that a degree of anxiety, no doubt prompted by the attack on the validity of the steps taken on 11th and 14th December, led to the making of the averments in question. They cannot, however, in the Court's view confer from that far removed point in time a validity on earlier steps in the proceedings if in fact those early steps were not validly taken.

8.34 Second, the Court is of the view that s. 17 of the Interpretation Act, 2005 has no application to the particular circumstances of this case.

Section 17 of the Interpretation Act, provides as follow:-

> "Where an Act or a provision of an Act is expressed to come into operation on a day subsequent to the date of the passing of the Act, the following provisions apply:
>
> (a) . . .
>
> (b) if, for the purposes of the Act or the provision, the Act confers a power to make a statutory instrument or do any act or thing, the making or doing of which is necessary or expedient to enable the Act or provision to have full force and effect immediately on its coming into operation, the power may, subject to any restriction imposed by the Act, be exercised at any time after the passing of the Act."

8.35 In this context, the respondents relied upon the decision of the High Court (Morris J.) in *McInerney v. Minister for Agriculture, Food and Forestry, Ireland and the Attorney General* [1995] 3 IR 449, a case in which the making of regulations prior to the coming into force of the Abattoirs Act, 1998 was held to be "expedient" within the meaning of the equivalent statutory provision contained in the Interpretation Act 1937. The facts in that case may be briefly summarised. The plaintiff was a butcher residing in Co. Clare. When he moved there from Co. Tipperary he attempted to obtain a permit to operate an abattoir near Kilrush but was refused. On a date in late 1989 he agreed to purchase an existing purpose built abattoir from a Mr. William Longworth and the sale was duly completed. During the time that this acquisition was in progress the Abattoir's Act, 1988 was passing through Dáil Éireann. The Act was passed on the 3rd April 1988, but did not come into operation immediately on its passing. The relevant sections of the Act came into force on the 1st September, 1989. Two months prior to that date, the Minister for Agriculture, in exercise of powers conferred on him by ss. 20 and 61 of the Abattoir's Act, 1988, made the Abattoirs Act 1998 (Abattoirs) Regulations, 1989 and they came into force on that date. The plaintiff who had continued his abattoir had been summoned in respect of five alleged infringement of the regulations and he sought an order striking down the regulation on the grounds that the Minister in purporting to make the regulations acted *ultra vires* his powers under the Abattoirs Act, 1988.

8.36 Morris J. identified the issue in the case as whether it was "necessary or expedient" to make the regulations prior to the coming into operation of the Act of 1988 or whether they could have been made to come into force contemporaneously with the coming into operation of the Act. At p 454 Morris J. stated:-

> "I take the definition of expedient to be "conducive to advantage in general or to a definite purpose" and I am left in no doubt whatsoever that the more advance notice and warning that an industry gets of forthcoming changes, which are fundamental to the construction and operation of the plant, the better. It cannot be otherwise than conducive to advantage in general that the industry would be made aware with the minimum possible delay of the standard to which they are expected to conform upon the coming into law of the Abattoirs Act, 1988, so that the Act can have full force and effect immediately upon its coming into operation. I do not accept that the industry could be adequately notified of these standards without ministerial order and I accept the evidence that anything less than a ministerial order might, if the standards were subsequently changed, lead to an unsatisfactory position for a person who altered his plant to conform to what he believed to be the new standards.
>
> Apart from providing the industry with appropriate notice, I am satisfied that the making of the ministerial orders enabled the Act of 1988 to have full force and effect immediately upon its enactment and that the provisions of s. 17 of the Act were not an adequate substitute."

8.37 Section 17 of the Act had provided a machinery for the phasing in time of the work required to be done on existing abattoirs to bring them up to the standard required, and, under this section, when an application was made to the Minister for an abattoir licence, he was able to give a temporary permit for the use of the abattoir providing he was satisfied that the premises, while below standard, could be adapted to conform to the regulations. It was argued on behalf of the plaintiff that by the use of the permits the abattoir owners would have had time and an opportunity to conform to the standards and that since the permit scheme was to last for five years it provided an effective phasing in process. It was therefore argued to be unnecessary to provide abattoir owners with the additional two months for phasing in prior to the coming into operation of the Act of 1988. Morris J. held that the Minister was fully justified in exercising his discretion in favour of making the regulations prospectively on the grounds that it was expedient to do so to enable the Act of 1988 to have full force and effect immediately upon its coming into operation pursuant to the power contained in the Interpretation Act and that, accordingly, the regulations were not *ultra vires* the powers conferred on the Minister by Sections 20 and 61 of the Act of 1988.

8.38 On behalf of NAMA, it was stressed that the same urgency, expediency and necessity underpinned the introduction of the 2009 Act establishing NAMA. NAMA stressed how important it was that NAMA should "hit the ground running" and that the decisions on the 11th and 14 December had to be seen as necessary or expedient to enable the Act to have "full force and effect"

8.39 The Court has difficulty in seeing how such a decision, taken as it was some nine or ten days before the establishment date, could meet either of those requirements given that the decision could just as easily, and without impairment of NAMA's functions, have been taken immediately following its establishment.

8.40 The Court equally is not convinced that the requisite authority to make the decision taken on the 11th and 14th December is to be derived from s. 4 of the NTMA Act.

Section 4 of that Act provides:-

> "(1) The principal functions of the Agency shall be to perform, on behalf of the Minister, the functions delegated to it under section 5.
>
> (2) The Agency shall have all such powers (including the power to employ consultants and financial institutions) as are necessary or expedient for the purpose of its functions
>
> (3) The functions of the Agency shall be performed subject to the control and general superintendence of the Minister."

8.41 The Court in this regard is satisfied to accept the submissions of Mr. McKillen that ministerial directions can in no way expand the functions of the NTMA which is limited to the functions afforded to it by virtue of the provisions of the NTMA Act. The Court is far from clear as to the basis on which the Minister would be entitled, having regard to the functions conferred on the NTMA under the NTMA Act, to direct the NTMA to make a decision of the type under consideration. Specifically, it does not appear that any function was delegated to the NTMA prior to the establishment of NAMA that would authorise the NTMA to acquire loans for NAMA. The Court is satisfied that the ministerial direction, properly understood, was directed to advising the Minister in relation to the formation of NAMA and the undertaking of all necessary preparatory work required to establish NAMA, including provision of staffing and engagement of advisers. The Court is satisfied that this direction cannot properly be seen as empowering the NTMA to make a decision to acquire the McKillen loans.

8.42 Ultimately, however, the Court is satisfied that the decision made on the 11th and 14th December 2009, was adopted, albeit not expressly, by the subsequent actions of NAMA following its establishment and in particular at the Board meeting of the 23rd December, 2009. The Court is also satisfied that the additional matters relied on by NAMA as evidencing adoption provide further support for the Court's conclusion in this regard. The Court accepts the contention of NAMA that the term "decision" requires particularly careful consideration in the context in which the NAMA schema operates. A decision may be a simple 'once and for all' determination of a particular matter or may be but one in a series of steps which together and cumulatively constitute a decision. The acquisition of loans under the NAMA scheme is, in the opinion of the Court, very much in the latter category. When the initial decision or formation of a view was taken on 11th and 14th December, it was no more than a first step in a sequence.

8.43. The distinction may be more readily understood from a judgment in a particular case, to which reference was made during the hearing, being a decision of the New Zealand Court of Appeal in *New Zealand Employers Federation Inc. v. National Union of public Employees* [2001] NZLR 54.

8.44 This was a case in which the plaintiff sought an injunction as to strike notices issued by the defendant trade union on the basis that the defendants' registration as a union under the Employment Relations Act, 2000 was invalid. The Registrar of unions had purported to register the defendant as a union on the 29th August, 2000, and issued a certificate of registration on 3rd October, 2000. The plaintiff argued that the defendant could not be registered before the Act came into force on 2nd October, 2000. The defendant argued that the Registrar was entitled to exercise his power of registration before the Act came into force on the basis that it was necessary or desirable to bring, or in connection with bringing, the Act into operation (s. 11 of the Interpretation Act, 1999 being in similar terms to those contained in the Irish Interpretation Act, 2005). The judge refused the injunction and an appeal was made by the New Zealand Employers Federation Inc. to the Court of Appeal. The defendant argued, in case registration was invalid, that relief should be refused under s. 5 of the Judicature Amendment Act 1972, as it was only a defect in form or technical irregularity.

8.45 The Court of Appeal, by a majority, held that the objective of s. 11 of the Interpretation Act, 1999 was to ensure that the necessary and desirable infrastructure to make an Act work was put in place before the Act came into force, whereas registration of unions under the Employment Relations Act 2000 involved the substantive provisions of that Act. Further, the purposes of the 2000 Act would not be frustrated if unions were registered after the Act came into force as ss. 13 and 15 of the Act required that an applicant who is entitled to be registered at the time of application be registered. It followed that s. 11 of the 1999 Act did not authorise registration of a union before the 2000 Act came into force. The Court further held that the premature registration of unions went well beyond a mere defect in form or technical irregularity within s. 5 of the Judicature Amendment Act, 1972 and a declaration was required to vindicate the law, emphasise the proper scope of administrative anticipation of legislation and prevent differing decisions by courts on the validity of registrations.

8.46 While at first blush this decision might obviously be seen as providing support for Mr. McKillen's various contentions with regard to the non-availability of s. 17 of the Interpretation Act, 2005 to NAMA in this case, a view which the Court has upheld, the case nonetheless clearly emphasises just how different the "once and for all" decision under consideration in that case was when contrasted with the "start of process" decision in the instant case. The act of registration in the New Zealand union case represented and constituted the complete decision. This was and is totally different in character from the decision under attack in the instant case which was nothing more than the formation of an initial opinion which preceded subsequent steps by NAMA, including the proposed service of an acquisition schedule, the opportunity of the relevant institution to have a review by an expert reviewer of the eligibility of the assets in question and the ultimate acquisition of the asset or assets thereafter.

8.47 The Court is satisfied that there is a seamless continuity in the approach and actions of NAMA in relation to the proposed acquisition of the McKillen loans such as to satisfy the Court, on the basis of the material set out in Ms. O'Reilly's affidavits in particular, that the board of NAMA adopted the decision by its actions on the 23rd December 2009 and confirmed that adoption by its decisions, approbation and further actions thereafter.

8.48 The Court cannot be unmindful of the huge pressures under which Mr. McDonagh and his colleagues were working in December, 2009 and while Mr. McDonagh and his colleagues might have made a more formal decision at that first Board meeting of 23rd

December, 2009, the Court is nonetheless satisfied that it should not hold that a valid decision was never made in this case.

8.49 Even if the Court is mistaken in this view, the Court would emphasise that the remedy of Judicial Review is discretionary and all of the circumstances must be taken into account by the Court in approaching its task. In the instant case those considerations include the following:-

> (a) The fact that the scheme provided by NAMA does not provide for fair procedures. It follows that no opportunity has been lost by Mr. McKillen by reason of the fact that the initial or preliminary decision in this case was taken some nine days prior to the formal establishment of NAMA;
>
> (b) No Order of *Certiorari* has been sought in this case to quash the decision in question;
>
> (c) It is accepted on behalf of Mr. McKillen that, even if invalid, a valid decision could still be made by NAMA with regard to the McKillen loans at this point in time;
>
> (d) The point is a purely technical and formal point lacking in merit or substance; and
>
> (f) The fact that some infirmity might affect one stage of a statutory process does not automatically have a domino or knock on invalidating effect on subsequent steps in a statutory process. Nor are the sequence of statutory steps laid down in the NAMA Scheme to be equated with the kind of evidential chain associated with criminal prosecutions where one slip or omission, regardless of how trivial, may result in the failure of a prosecution.

8.50 In relation to the issues raised in this section, the Court is not satisfied that Mr. McKillen has established a substantial issue, sufficient for the grant of leave to seek judicial review under the provisions of s. 193(1)(b) of the Act. The Court will, therefore, refuse leave to seek judicial review for the relief to which the grounds advanced in this section are relevant.

9. **The European State Aid Issue**

9.1 Article 107 of the TFEU contains a general prohibition on state aid. But it then goes on to outline aid which may be compatible with the internal market. Article 107(3)(b) identifies such aid and describes it as "aid to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of a Member State".

9.2 Article 108 of TFEU requires, *inter alia*, that the European Commission be informed, in sufficient time to enable it to submit its comments, of any plans to grant or alter aid. If it considers any such plan not to be compatible with the internal market it is obliged to decide that the state concerned shall abolish or alter such aid within whatever period of time is determined by the Commission.

9.3 In accordance with its obligations under these Treaty provisions the establishment of NAMA was notified to the Commission by the State.

9.4 The Commission concluded that the establishment of the NAMA scheme constituted a state aid within the meaning of Article 107(1) of the TFEU but that as the measure fulfilled the requirements of Article 107(3)(b), the scheme was one which was compatible with the internal market. The Commission's decision of 26th February, 2010 in this regard ("the Decision") was duly notified to the Minister for Foreign Affairs. The Decision is appended to this judgment as annex one. The net effect of the Decision is that the Commission approved the NAMA scheme.

9.5 In Mr. McKillen's original statement grounding the application for judicial review, no specific relief was sought by reference to the Decision although a copy of it was exhibited by Mr. McKillen in his grounding affidavit.

9.6 On 24th September, 2010 Clarke J. granted leave to the applicants to amend the statement grounding the application for judicial review so as to include both reliefs and grounds referable not merely to the Decision of the European Commission but also to a letter dated 8th September, 2010, described as being "from the European Commission" in response to a letter sent by Senator Eugene Regan touching on this topic.

9.7 The thrust of Mr. McKillen's case is that NAMA failed to exercise its powers in accordance with the terms of the Decision. It is said that the Decision when read alone or in conjunction with the response to Senator Regan's letter means that NAMA as part of the exercise of its discretion to acquire eligible bank assets had to take into consideration whether the borrowers were or are impaired. Only if such was the case could the discretion be exercised validly, it is said.

9.8 As part of his written submissions dealing with issues other than this one, Mr. McKillen originally submitted that the correct definition of "eligible bank assets" in s. 69 of the Act and s. 2 of the Regulations (independent of the issue now under consideration) had to take into account the concept of impairment. However, at the trial it was indicated that Mr. McKillen no longer sought such a ruling from the Court. This part of Mr. McKillen's case argues that the Act and the Regulations have to be interpreted in the light of the Decision and indeed the response to Senator Regan's letter. When thus viewed, it is contended that no valid acquisition of eligible bank assets can occur in the absence of impairment on the part of the borrowers.

9.9 In opening this part of the case, counsel described the structure of his argument as falling into four parts. First, he submitted that the Decision has direct effect. Second, the Decision, when properly construed, contains a requirement that when deciding whether assets are eligible to be transferred, the borrower in question must be regarded or classified as impaired. Third, having regard to the nature and the wording of the Decision, it is said that Mr. McKillen is in a position to invoke it directly before this Court. Finally, that being so, the Court has jurisdiction to restrain the transfer of assets on the basis that a requirement of the European Commission has not been met.

Direct Applicability

9.10 For the purposes of this judgment and for that purpose alone, the Court is prepared to assume, though without deciding the issue, that the Decision has direct effect and may be relied upon by Mr. McKillen before this Court. Given this assumption it is not necessary to consider the extensive case law on this topic which was referred to both in the written submissions and in the hearing.

9.11 The Court, therefore, turns to the second leg of Mr. McKillen's argument under this heading, namely, that the Decision contains a requirement that when deciding whether assets are eligible to be transferred, the borrower has to be regarded as impaired.

The Decision (1)

9.12 At the outset it should be noted that Mr. McKillen accepts that, despite his submissions to the contrary, it is possible to read the Decision as accepting the application of a more general definition of eligible bank assets than that which he asserts. It was accepted that the decision might be read as not requiring impairment of the borrower. However, he contends that such an interpretation is not tenable in the light of the letter of 8th September, 2010, to Senator Regan.

9.13 The Court will first examine the Decision without reference to the letter and then turn its attention to the letter and its implications, if any.

The Decision (2)
9.14 In order to examine the Decision, it is necessary to refer briefly to some provisions of the Act. Section 84 of the Act confers on NAMA a power to acquire an eligible bank asset of a participating institution if NAMA considers it necessary or desirable having regard to the purposes of the Act. The term "*eligible bank asset*" has the meaning given to it by Section 69(4). That subsection provides that a bank asset that is in a class prescribed under s. 69(1) is an "*eligible bank asset*". Section 69(1) provides that the Minister may, after consultation with various bodies and having regard to the purposes of NAMA and the resources available to it, prescribe, by regulation, classes of bank assets as classes of eligible bank assets. Subsection 2 of s. 69 then provides that the classes of assets prescribed under subs. 1 may include a number of specified asset classes. The Minister made the Regulations under the Act following its enactment prescribing the classes of bank assets for the purposes of Section 69.

9.15 The Court can find nothing in the Act or the Regulations which restricts the classes of bank assets which may be acquired by NAMA to impaired assets or assets associated with impaired borrowers. As a matter of fact, nowhere in the Act or in the Regulations is there any reference to impairment. Thus impairment is not, under domestic law, a requirement for eligibility for transfer of assets to NAMA. It is contended, however, that having regard to the "principle of conforming interpretation" such a requirement must be read into it or alternatively can be seen as a stand alone requirement by reference to the Decision and its legal status.

9.16 NAMA and the State respondents argue that, given the clear provisions of the Act and the Regulations and the approval which was forthcoming in the Decision, it would be surprising if the Commission either misunderstood the position or sought to impose the concept of impairment despite the absence of that element in both the Act and the Regulations.

The Decision (3)
9.17 Mr. McKillen relies upon certain specific provisions of the Decision which the Court will examine presently. It is, however, important to see those provisions in the context of the Decision as a whole.

9.18 The Decision contains 140 paragraphs (excluding the annexe to it) before it concludes that the introduction of what it describes as the asset relief scheme for certain financial institutions in Ireland constitutes state aid but is compatible with the Internal Market. As a result of this conclusion the Commission raised no objections to the NAMA scheme.

9.19 The Decision begins with an introduction which describes NAMA and says:-

> "The establishment of NAMA intends to address the issue of asset quality in the Irish banking system by allowing participating financial institutions to sell to NAMA assets whose declining and uncertain value prevents the longer term shoring up of bank capital and the return to a normally functioning financial market."

9.20 At para. 8, the Commission notes that the draft legislation to enable the creation of NAMA was published on 10th September, 2009 for consultation purposes. The Bill establishing NAMA was presented to the Dáil on 16th September, 2009 and was passed into law on 22nd November, 2009. It came into operation on 21st December, 2009.

Paragraph 10 of the Decision reads:-

> "It is anticipated that assets will be transferred by 'impaired borrower' exposures across all participating institutions as opposed to transferring portfolio of loans per institution. That transfer process is expected to take place in seven tranches starting from the end of February 2010. The Irish authorities aim to complete the transfer process over 6 – 12 months following the adoption of the Decision."

9.21 The Decision then considers the objectives of the measure set forth in the legislation and identifies the eligible institutions. It goes on to consider the concept of eligible assets. Under this heading at para. 15, the Commission notes that "the assets targeted by the measure are (i) all loans issued for the purchase, exploitation or development of land as well as loans either secured or guaranteed by land, and (ii) some of their associated commercial loans." Associated commercial loans are defined as loans made to a small number of large developers who constitute the largest borrowers in respect of land and development loans. The Commission goes on to say that it is anticipated that, given their interconnected nature with land and development loans, these associated commercial loans are likely to become impaired, if they are not already impaired. In a footnote to this paragraph, the Commission points out that the majority of loans include loan to value covenants which if breached and not waived will trigger a technical event of default on the loan. The existence of cross default clauses between land and development loans and commercial loans to the same borrower would mean that the commercial loan is also in technical default.

9.22 Paragraph 17 of the Decision points out that these interconnections and inter-linkages between land and development loans and associated commercial loans can take many forms and then sets out a nonexclusive list. In a footnote to this paragraph, the Commission says that the actual definition of associated commercial assets in the Act is quite broad to allow NAMA to capture the entire borrower relationship and root out most of all potential impairments to come from a relationship.

9.23 Paragraph 18 of the Decision is one to which the applicants draw particular attention. It reads:-

> "According to the Irish authorities, eligible assets are expected to be concentrated on a small number of very large real estate developers, involved across the whole cycle of property development. Loans to such developers are closely interconnected and interlinked (through cross default and cross guarantee clauses for example as described in footnote 6) which is viewed as significantly contributing to the impairment problems currently threatening credit institutions in Ireland. Therefore, the approach to determining asset eligibility under the scheme is based on the concept of impairment at the borrower relationship level as opposed to impairment at the asset level only (impaired borrower relationship)."

9.24 The Decision goes on to describe the structure and operations of NAMA as provided for in the Act. It deals with the powers and rights of NAMA, the transfer process and valuation methodology.

9.25 Part 3 of the Decision deals with the position of Ireland. At para. 74, the Commission notes a number of commitments given by the State in respect of the operation of certain of the provisions of the Act. It is clear that the approval given by the Commission was on the basis of these undertakings and commitments.

9.26 Part 5 of the Decision contains the Commission's assessment of the scheme. It includes reference to the communication from the Commission on the treatment of Impaired Assets in the Community Banking Sector ("IAC"). The Commission concludes that the eligibility criteria proposed by the Irish authorities for both participating institutions and bank assets are in line with the provisions of the IAC. The Commission also takes the view that although normally it would limit its approval to a six month period, it would not be appropriate to impose this limitation in the context of the NAMA scheme. Rather, in the light of the scale and complexity of the transfer process, it considered it appropriate not to limit the approval of the scheme to that period.

9.27 It is important to note that the Decision begins its consideration of eligible bank assets by noting that the assets targeted by the measure are all loans issued for the purchase, exploitation or development of land as well as loans either secured or guaranteed by land and some of their associated commercial loans. (See paragraph 15.) The Decision also records that the actual definition of associated commercial assets in the Act is quite broad so as to allow NAMA to capture the entire borrower relationship and root out most of all potential impairments to come from a relationship (see para. 17, footnote 7). Paragraph 17 of the Decision also includes as one of the examples of interconnections and inter linkages:-

> "lending whereby the total indebtedness of borrowers and associated obligors (e.g. connected companies, joint venture partners, guarantors) is of an amount that would adversely affect the stability of any of the participating credit institutions or of the financial system in Ireland."

9.28 It is in the context of the Decision when read as a whole that the Court has to have regard to those parts of the Decision which have been isolated by Mr. McKillen as allegedly supporting his case. Particular reliance is placed on para. 18 which has already been reproduced in full. It is contended that, there, the Commission requires the definition of eligible bank assets to include borrower impairment. The Court is unable to agree with this submission.

9.29 The Court is of the view that the Commission fully understood the legislation presented to it, the scheme prescribed by it and the scope of eligible assets as defined in it.

9.30 Insofar as the Decision contains references to impairment, the Court is of the view that the Commission was not, in the relevant passages, attempting to impose any restriction on the operation of the NAMA scheme but rather setting forth its understanding of the rationale for it. Had the Commission been of the view that only assets relating to impaired borrowers could be acquired by NAMA, the Court believes that it would have said so in unequivocal terms. It could, if it was of such opinion, do as it did in other respects and require the State to give a commitment or an undertaking, similar to the undertakings which were extracted at para. 74 of the Decision. No such commitment or undertaking was insisted on. It is, in the view of the Court, inconceivable that the Commission intended to impose a restriction of the type argued for by Mr. McKillen which, if correct, would have major implications for the whole NAMA scheme, without such restriction being clearly set out.

9.31 When one looks at the commitments given by the Irish authorities at para. 74 of the Decision, it is clear that the legislation and the NAMA scheme was looked at in minute detail by the Commission. If it was the intention of the Commission that the definition of eligible bank assets had to be altered so as to include the necessity of borrower impairment, one could reasonably expect a commitment to that effect to be sought and given by the State. No such undertaking was sought in respect of the operation of s. 69 of the Act.

9.32 Turning to a more detailed examination of the Decision, it is clear that many elements of it are supportive of the case made by NAMA and the State respondents. The Court takes the view that having regard to the matters set out in the Decision, most particularly in those paragraphs immediately preceding para. 18, the Commission was referring to the general concept or rationale underlying the establishment of NAMA, i.e. the need to remove entire borrower exposures in a class or classes of exposures which are considered to carry particular risk and which might adversely affect the stability of the financial system in Ireland.

9.33 In the course of its Decision, the Commission considered the designation of eligible bank assets as part of its assessment of compatibility of the state aid measure with the IAC. The Decision referred specifically to the requirements of the IAC that asset relief measures require a clear identification of impaired assets and that certain limitations in relation to eligibility must apply to ensure consistency and prevent undue distortions of competition. But it also referred to the fact that the IAC allows for the possibility to extend eligibility to well defined categories of assets corresponding to a systemic threat, without quantitative restrictions. One such systemic threat identified in the IAC is the burst of a bubble in the domestic real estate market which is precisely what occurred in Ireland.

9.34 At para. 110, the Commission in the context of considering eligibility of assets says:-

> "As mentioned in paragraphs 15 – 19, the measure targets a specific types of assets, namely (i) all loans issued for the purchase, exploitation or development of land as well as loans either secured or guaranteed by land and (ii) some of their associated commercial loans. Commercial loans are loans to the same borrowers which are interconnected to the land and development loans."

9.35 In the following paragraph, the Decision expressly recognises that the Irish financial system and domestic economy had been affected by the burst of a real estate bubble. It agrees that as a consequence, loans to the real estate sector were the source of the principal uncertainties in relation to asset quality in the Irish financial system. At para. 112, it goes on to say:-

> "On the basis of the above Ireland has developed a proportionate approach within the meaning of point 34 of the IAC and the scope of assets to be included in the NAMA scheme is in line with the eligibility requirements of the IAC"

9.36 Insofar as Mr. McKillen contends that, in the absence of a requirement to consider borrower impairment, the definition of eligible bank assets under the Act might in some way be inconsistent with the IAC, it is clear from this paragraph that the Commission concluded that the definition of eligible bank assets under the Act is proportionate and in line with the IAC. Paragraph 138 of the Decision reiterates that in no uncertain terms. In particular it views "the inclusion of the associated commercial loans as necessary to capture the entire exposure to the impaired borrower relationship as well as to help with aligning the measure with public policy objectives" as being in order.

9.37 Lest there by any doubt about it, para. 126 of the Decision, specifies that the Commission "acknowledges that the existence of

NAMA and the scope and scale of its acquired assets are necessary to address the serious disturbances to the Irish economy created by the burst of the real estate bubble".

9.38 It is the view of the Court that the Decision demonstrates a comprehensive understanding on the part of the Commission of the working of NAMA and as to what was intended in respect of eligibility of assets. Impairment either at borrower or asset level is not a condition for eligibility under the Act. Neither is it made so by the Decision. It is the view of the Court that the Commission understood that the category of eligible bank assets comprised all loans in the land and development category.

9.39 Indeed, in fairness to Mr. McKillen, and as the Court has already pointed out, it was conceded that the Commission's conclusions approving NAMA could be viewed as accepting the application of a more general definition of eligible bank assets than the one he urges. It is that wider interpretation which recommends itself to the Court. Consequently, insofar as reliance upon the Decision itself is concerned and assuming that it has direct effect and can be prayed in aid by the applicants, it does not assist them in attempting to make the case that impairment is required in order to make assets eligible for acquisition by NAMA.

9.40 It is now necessary to see whether this view of the Court is or can be displaced by reference to the response to Senator Regan's letter.

Senator Regan's Letter
9.41 On 18th August, 2010, Senator Eugene Regan wrote to Ms. Catherine Day, Secretary General of the European Commission. His letter referred to the Decision and pointed out that prior to it he had made representations to the Commission in respect of the scale and scope of NAMA and highlighted the potential for distortion of competition in the market. He pointed out that he had suggested that the Commission should exclude borrowers from NAMA who had performing loans unconnected to distressed loans that were to be acquired by NAMA. His view was that would significantly reduce the scale of NAMA, and "allow for some continued diversity in the property development and financing markets". The letter, *inter alia*, refers to para. 18 of the Decision and asks for confirmation under three headings. They are:-

> "1. That for the NAMA scheme to apply there must be *impaired loans* and an *impaired borrower.*
>
> 2. That a borrower to be an *impaired borrower* must have *impaired loans*.
>
> 3. That, where a borrower has no impaired loans or associated impaired loans that borrower cannot be considered an *impaired borrower*, and in such circumstances there is no basis for his or her loans/assets with participating Irish banks to be transferred to NAMA."

Footnotes to that passage give definitions to the terms "impaired loans" and "impaired borrower"

9.42 Senator Regan's letter was replied to by Dr. Irmfried Schwimann, Director of the European Commission Competition D.G. on 8th September, 2010. Both Senator Regan's letter and the response are appended as annexe two to this judgment.

Objection
9.43 NAMA and the State respondents raise a fundamental objection to the Court having regard to Dr. Schwimann's response at all. They contend that the letter cannot be used to "clarify" the Decision. If the respondents are wrong in this regard, it is further argued that the letter does not have the effect claimed. The Court is of opinion that the objection to the utilisation of the letter is well founded for the reasons which follow.

9.44 The Decision is the determination of the European Commission acting as a collegiate body pursuant to Article 17 of the Treaty on European Union ("TEU"). In giving the Decision, the Commission was exercising the functions conferred upon it by Articles 107 and 108 of the TFEU.

9.45 Not merely is the Decision the view of the collegiate body but the Decision is required to be published and was in fact published in the Official Journal. The Decision has to be construed by reference to itself and cannot be amended or altered save by a subsequent decision of the Commission. Neither can subsequent correspondence emanating from a Commission official, regardless of status or distinction, be utilised to construe the terms of the Decision itself. That applies *a fortiori* in circumstances where a letter comes not from the decision making body itself i.e. the Commission, but rather from a member of the staff of the Competition D.G. in the course of private correspondence with Senator Regan.

9.46 In fairness, both in the written submissions and in the course of the oral hearing, Mr. McKillen made the argument that the Court was merely required to take the letter into account in its interpretation of the Decision. Counsel argued that the letter could not be ignored but that the weight to be given to it was a separate issue. The Court is satisfied that it ought not to take the contents of the letter into account at all. The Decision must be construed in accordance with its own terms. The Court is satisfied that the authorities which have been relied upon by Mr. McKillen in support of the argument that regard should be had to the letter do not support that proposition.

9.47 For example, in Case 310/90 *Nationale Raad van de Orde van Architecten v. Ulrich Egle* [1992] ECR 1117, the European Court of Justice ("ECJ") found that its interpretation of Article 4(1)(a) of Directive 85/384 on the mutual recognition of diplomas, certificates and other evidence of formal qualifications in architecture, was confirmed by a joint declaration of the Commission and the Council, contained in the minutes of the session at which the Directive was adopted. That is a far cry from a letter written by a member of the staff of the Commission as in the instant case.

9.48 In *Deutsche Shell AG v. Hauptzollamt Hamburg-Harburg* [1993] ECR I-363, the ECJ observed:-

> "Although the recommendations of the Joint Committee cannot confer upon individuals rights which they may enforce before national courts, the latter are nevertheless obliged to take them into consideration in order to resolve disputes submitted to them, especially when, as in this case, they are of relevance in interpreting the provisions of the Convention."

There, the ECJ was dealing with the recommendations of the joint committee which was at issue in the case.

9.49 The instruments which were relied on in these cases, even if they were not binding in law, had a status far above a piece of private correspondence emanating from a Commission official. In addition those documents were publicly accessible which is not the case with private correspondence.

9.50 Reliance, by Mr. McKillen, on the duty of sincere cooperation between Member States and EU institutions is similarly misplaced as can be seen by reference to the quotation relied upon by Mr. McKillen from the ECJ decision in *Winner Wetten GmbH. v. Bürgermeisterin der Stadt Bergheim* (8th September, 2010) where it said:-

> "It is also settled case-law that any national court, hearing a case within its jurisdiction, has, as an organ of a Member State, the obligation pursuant to the principle of cooperation set out in Article 10 EC, fully to apply the directly applicable law of the Union and to protect the rights which the latter confers upon individuals, disapplying any provision of national law which may be to the contrary, whether the latter is prior to or subsequent to the rule of law of the Union (see to that effect, in particular, Simmenthal paragraphs 16 and 21, and Factortame paragraph 19)."

9.51 The Court, of course, accepts the principle which is there stated but nevertheless the principle cannot confer a status on the letter which it does not have. The application of the principle is dependent on the letter having the status of a directly applicable law of the Union which it manifestly does not and cannot have.

9.52 Accordingly, the Court is satisfied that the letter has no greater status than any other piece of private correspondence and cannot be relied upon to inform the Court's interpretation and construction of the Decision.

9.53 Quite apart from the above considerations, if the Court were to have regard to this letter, then NAMA and the State respondents quite reasonably pose the question: why single out one letter from the Commission which Mr. McKillen believes supports his case and ignore other correspondence from the same source? Such correspondence has been exhibited (Exhibit DC2 to the affidavit of David Cantrell of 21st September, 2010). It is contended that some items in that correspondence do not support Mr. McKillen's case yet Mr. McKillen ignores it. The difficulties which would result if the Court were to accept the invitation extended by the applicants are manifest. It is not permissible to have regard to the letter in construing the Decision.

In the light of this finding it is not necessary to express any view on the letter.

9.54 Notwithstanding that, the Court points out that the letter restates various parts of the Decision but in the only part where it makes mention of s. 69 of the Act (which it refers to as Article 69 through 71) the writer had this to say:-

> "It should be noted that the Commission has considered the criteria included in the National Asset Management Act 2009 (hereafter the Act), to assess the compatibility of the state aid measure. In particular, regarding eligibility of assets, the Commission has considered in its assessment Article 69 through 71 together with Articles 2 and 10 of the Act."

9.55 That appears to the Court to be a confirmatory statement that the Commission fully considered the provisions of the Act and in particular s. 69 which is, of course, the section which defines eligible bank assets. Section 2 is the section which sets out the purposes of NAMA and s. 10 provides that NAMA is to contribute to those purposes by, *inter alia*, the acquisition from participating institutions of such eligible bank assets as is appropriate.

9.56 In the light of this, the Court is of the view that even if it were permissible for it to have regard to the letter, it would not assist the applicants in the case which they seek to make on impairment.

Conclusion
9.57 In the light of the above, the Court takes the view that the applicants have not raised a substantial issue for the Court's determination on this topic. The Court, therefore, will refuse to grant leave to seek judicial review in relation to the reliefs and grounds addressed in this section of the judgment.

10. **The Constitutional Issue**

10.1 As pointed out earlier, the constitutional challenge brought on behalf of Mr. McKillen against the Act was very much stated to be a fallback position arising only in the event that other aspects of his claim were to fail. It is, of course, the case that, in any event, in accordance with the jurisprudence of the courts (see for example the dicta of Henchy J. in *the State (P Woods) v. Attorney General* [1969] IR 385 at 399 and also *Condon v. Minister for Labour* [1981] IR 62 per Kenny J. at pp 70, 71) the Court should ordinarily only proceed to deal with a direct constitutional challenge in circumstances where there is no other means by which a relevant plaintiff can obtain the remedy asserted.

10.2 In any event, the other aspects of Mr. McKillen's case having failed, it is necessary for the Court to now turn to that constitutional challenge. It should be noted that the basis of the challenge arises only in circumstances where the Court's view of the legislation is such that it does not confer a right to Mr. McKillen to be heard in relation to the acquisition of the McKillen loans and where those loans are found to be capable, under the Act, of being acquired by NAMA, irrespective of whether the loans or any of them might be regarded as impaired.

10.3 In those circumstances it is said that a measure which allows the acquisition of a broadly defined category of loan or credit asset without affording a right to be heard to the borrower, and in circumstances where such assets can be acquired irrespective of whether they be impaired, is a disproportionate interference with the rights of borrowers whose loans are acquired.

10.4 The starting point must again be an analysis of the extent to which the acquisition by NAMA of the McKillen loans operates as an interference with Mr. McKillen's constitutionally protected rights. For the reasons which the Court has already analysed in the section of this judgment dealing with fair procedures, the Court is not satisfied that there is, in fact, any significant interference with constitutionally protected rights. In summary, save in a number of respects which, on the Court's analysis, are minor, the legal entitlements of Mr. McKillen vis-à-vis NAMA, will be broadly the same as the legal entitlements which Mr. McKillen would have had in respect of the banks who originally extended him credit facilities. No legitimate reputational consequences arise. Any aspiration or hope on the part of Mr. McKillen that he might be able to conduct his business in a fashion which, from his perspective, is more appropriate, if dealing with commercial banks rather than NAMA is not, in the Court's view, a constitutionally protected right not least because, in the absence of the range of government measures adopted, Mr. McKillen would not now have the facility, in any event, of conducting normal banking relationships with those banks. In those circumstances, Mr. McKillen would have been required, in the absence of government intervention, to have procured other banks willing to lend to him on normal commercial terms. That right remains open to him as he has the clear right to redeem any or all of his loans from NAMA if he can persuade another non participating bank to lend him money so as to take out the loans which will "go into NAMA".

10.5 That finding alone would, in the Court's view, be sufficient to lead to the Court concluding that there was no constitutional infirmity to the found in the Act. However, lest the Court be wrong in that conclusion it is proposed to address the other issues which

arose.

Is the Measure Overbroad?

10.6 The starting point of the argument made on Mr. McKillen's part was to assert that the definition of "eligible asset" is extremely broad. There is no doubt that that assertion is correct. It appears, at least in general terms, that the definition of eligible asset is designed to ensure that all loans associated with a borrower who has at least some land and development loans, are caught. As the Court has already determined, on a proper construction of the Act, it is open to NAMA to acquire all such loans without having regard to whether any of the loans are in any way impaired. The Court has already found that NAMA was entitled to take the view that the purposes of the Act required acquiring all such loans which were of a sufficient scale such that they might be regarded as contributing to the systemic risk to Irish financial institutions which stems from the over exposure of those institutions to land and development loans and in the context of the bursting of the property bubble which has led to, at least, a significant amount of those loans being seriously impaired on any view.

10.7 Also, as already pointed out, the loans of third parties may be caught by the definition because of a connection in some way with the loans of those who have exposure in the property and development sector. There can be no doubt, therefore, that the scope of acquisition which the Act permits, and which is being implemented by NAMA, is broad indeed. However, as pointed out by counsel for NAMA, the fact that statutory provisions are broad or wide ranging is not, in itself, a reason for questioning the constitutional validity of the legislation concerned.

10.8 In their written submissions counsel on behalf of Mr. McKillen suggest that the definition is so broad as to make it imprecise in the sense that a person could not reasonably know which assets were to be acquired. In that context, it is important to distinguish between different types of legislative measures. Some, for obvious reasons, apply to everyone. The broad provisions of the criminal law are a case in point. Others apply to all those within a particular category. For example, offences which might be said to amount to breaches of a regulatory regime are frequently confined to those who are governed by the regulatory regime in question. Likewise, the requirement to be subject to a regulatory regime applies only to those who come within the definition which the legislation in question applies. Most of the provisions, for example, of the Solicitors Acts, apply only to solicitors. At the other end of the spectrum there are measures which are very specific, either because the measure relates only to a very narrowly defined set of circumstances or is only intended to be applied after a decision has been made as to persons, bodies, assets or other matters to which the legislation in question is to be referable. It does appear that the proper approach of the Court may depend, at least to some extent, on where along such a spectrum the particular measure under consideration might be said to lie. Cases such as *MacPharthaláin v. The Commissioner for Public Works* [1994] 3 IR 353, and *Dunraven Estates Company v. Commissioners of Public Works in Ireland* [1974] IR 113, relate to general schemes where significant decision making was left to the decider in each case. Cases such as *Eircell Ltd v. Leitrim County Council* [2000] IR 479 and *North Wall Property Holding Company Ltd v. Dublin Docklands Development Authority* [2008] IEHC 305 are more concerned with very individual decisions. On the other hand, a case such as *Hempenstall v. Minister for Environment* [1994] 2 IR 20 is an example of an overall measure which is very much at the end of the spectrum where the legislative provision applies to all concerned.

10.9 Legislation which concerns the compulsory acquisition of assets can itself fall at differing points along the same spectrum. At one end there can be legislation which provides for the compulsory purchase of a specific asset or set of assets defined in the legislation itself. At the other end of the spectrum are broad enabling measures which allow compulsory acquisition for a range of purposes specified in the statute concerned and put in place appropriate procedures for selecting the assets to be acquired. Compulsory purchase for, for example, road improvements or construction come into this latter category where a decision is made as the route followed by a compulsory acquisition process designed to acquire land necessary to build the roadway concerned along the route in question.

10.10 There is nothing wrong, however, with any of those models. In some cases it may be possible at the time of the enactment of the legislation in question to identify with some high level of precision the precise assets to be acquired. There might, perhaps, be some leeway provided for in the legislation but the broad drift of what is to be acquired might be known. At the other end of the scale might well be the type of road schemes, to which reference has been made, where little more than a general understanding of the routes likely to be chosen may exist at the time of the enactment of general legislation dealing with, for example, motorways.

10.11 It, of course, needs to be noted that the Act is not, in reality, a compulsory purchase measure at all. Rather, it is a measure which enables a bank to volunteer to become a participating institution. By so doing, those financial institutions are able to obtain an enhanced value for eligible assets in the form of the long term economic value. The *quid pro quo* from the State's point of view is that those assets are removed from the balance sheets of the relevant financial institutions thus, it is hoped, regularising the position of those financial institutions and enabling them to trade in a more normal way into the future. The financial institution is not, however, given any say in the precise assets which it is to offload to NAMA. It has a choice as to whether it participates. If it does participate, it must, however, allow any eligible asset to pass to NAMA unless NAMA chooses not to acquire it. In that sense, once a particular financial institution has decided to participate and has been accepted as a participating financial institution, the scheme then becomes one analogous to a compulsory purchase scheme for NAMA is entitled to acquire any asset once it is an eligible asset. Viewed in that way, it seems to the Court that the scheme is much closer to the end of the spectrum where the assets to be acquired are specified in the Act itself rather than an enabling measure where a major decision remains to be taken after the legislation has been passed as to which assets are ultimately going to be acquired. It is true to say that some leeway as to the assets to be acquired is given by the terms of the Act. Indeed, it is worthy of some note that the Commission identified the need for some degree of flexibility in circumstances where the identity of the precise assets, which it might turn out needed to be acquired for the purposes of solving the problems of financial institutions, might not emerge until a later stage. However, for the reasons which the Court has already analysed in the section concerning relevant considerations, the Court is satisfied that, on its true construction, the intent of the legislation is that all eligible assets of a significant scale are to be acquired unless there is a good reason, connected with the purposes of the Act, for NAMA not to acquire any particular asset and where the discretion not to acquire is entirely for the benefit of NAMA.

Proportionality
10.12 At least at a general level, it does not appear to the Court that it could be argued that an asset relief measure of the type contained within the Act could be said to be arbitrary, unfair or based on irrational considerations. The need to take some measures to address the problems within the Irish banking system was manifest. It will, of course, be necessary to turn to the question of whether it can be said that the measures contained in the Act are such as impair any rights "as little as possible". In that context, some of the more detailed provisions of the Act will need to be considered. However, at a general level, the Court is more than satisfied that the broad thrust of the Act is both rationally connected to its objectives and is not arbitrary, unfair or based on irrational considerations.

10.13 It is against that background that it is appropriate to turn to the application of the principle of proportionality to the Act. The test, as originally formulated in *Heaney v. Ireland* [1994] 3 IR 593, is now well accepted. The test was referred to in *Iarnród Éireann v. Ireland* [1996] 3 IR 321 by Keane J. in the following terms:-

> "If the State elects to invade the property rights of the individual citizen, it can do so only to the extent that this is required by the exigencies of the common good. If the means used are disproportionate to the end sought, the invasion will constitute an "unjust attack" within the meaning of Article 40.3.2°.
>
> The criteria which the Court should employ in determining whether the means used in the case of any particular enactment are disproportionate to the end sought were defined as follows by Costello J. (as he then was) in *Heaney v. Ireland* [1994] 3 IR 593, at 607:-
>
> > 'The objective of the impugned provision must be of sufficient importance to warrant overriding a constitutionally protected right. It must relate to concerns pressing and substantial in a free and democratic society. The means chosen must pass a proportionality test.
> >
> > They must:-
> >
> > > (a) be rationally connected to the objective and not be arbitrary, unfair or based on irrational considerations,
> > >
> > > (b) impair the right as little as possible, and
> > >
> > > (c) be such that their effects on rights are proportional to the objective.' [1996] 3 IR 321, at 361-362."

10.14 It can hardly be doubted that there is a rational connection between the measures contained within the Act and the problems sought to be addressed. As is clear from both the long title of the Act and the purposes as set out in s. 2, the problems sought to be addressed concern risk to the State and its economy by virtue of the extraordinary situation which emerged in the Irish banking system. At least in general terms, a scheme which sought to remove problematic assets from the banking system is rationally connected to that problem.

10.15 It is next necessary to look at whether it can be said that the measures contained within the Act interfere with the rights of those involved as little as possible and, indeed, in a way which is proportionate to the end sought to be advanced. It is against that background that it is necessary to look at the fact that the Act does not, for the reasons which the Court has already analysed, require that any eligible bank asset be an impaired loan or a loan connected with an impaired loan in order that it be acquired and that the legislation makes no provision for giving a hearing to a borrower whose loans may be about to be acquired. The argument put forward on behalf of Mr. McKillen is that by going that far, that is including all loans whether impaired or not and failing to afford a right to be heard, the Act interferes with Mr. McKillen's rights in a way which is more than that which is necessary to achieve the goal of the legislation and does so in a disproportionate way to the end sought to be achieved.

10.16 In the context of the first part of that argument it is important to emphasise with some precision what the Court's role is. In many areas of legislation there will be a policy decision required as to just how far it is necessary to go in order to achieve whatever public good is considered to be advanced by the legislation in question. In such circumstances there may well be a range of measures in contemplation which would have a greater or lesser effect on the rights of those who might be affected by that legislation. It will always, in those circumstances, be possible to argue that any particular policy position chosen goes too far, in that it may be suggested that a less intrusive policy, one which is somewhat more benign from the perspective of those who might be affected by the relevant legislation, would nonetheless achieve the ends desired. However, ultimately the primary policy decision in such circumstances is one for the Oireachtas. It is only where the policy position adopted by the Oireachtas is one which could not reasonably be said to be required to achieve the end in question, that the legislation will be found to be inconsistent with the Constitution.

10.17 Thus, in *Cox v. Ireland* [1992] 2 IR 503, the Supreme Court held that there was no reasonable basis for the suggestion that imposing the added penalty of loss of employment and loss of accrued pension rights on those who happened to have been convicted before the Special Criminal Court (whereas those convicted of exactly the same offence before the ordinary courts would not be exposed to the same consequences) was necessary to achieve the objectives of the legislation in question. Likewise, in *D.K. v. Crowley* [2002] 2 IR 774, Keane J. expressly noted that no explanation had been given (because none could) as to why the legislation then in question (s. 54(3) of the Domestic Violence Act, 1996) would not have worked every bit as well if the initial *ex parte* order permitted under that Act was expressed to last only for a short period of time, thus requiring the moving party to come back before the court in early course and justify a continuance of the order. In both those cases there was undoubtedly a pressing public policy need to act. The Court in Cox did not doubt that it was legitimate for the State to seek to protect itself by imposing additional adverse consequences on those who might be found guilty of subversive crime and in *D.K.* accepted that there was need for urgent *ex parte* orders to be available in the context of domestic violence. What was not established in either of those cases was that there was any reasonable basis for the contested aspect of the response to those undoubted problems. Where there is no reasonable basis for believing that an aspect of a measure is a required policy response needed to achieve the ends of the legislation, then the courts will intervene. However, the Court does not second guess a reasonable policy balancing judgment on the part of the Oireachtas.

10.18 Indeed, the jurisprudence makes clear that the Court should be particularly reluctant to second guess such policy balancing judgments in cases involving what were described by Kenny J. in *Ryan v. Attorney General* [1965] IR 294 as "controversial social and economic matters". Likewise it was noted in *BUPA v. Ireland and Another* [2005] IEHC 431 that the case in question involved "major issues of national policy and accordingly, the courts must show due deference to the State in this regard". It is, of course, the case that these proceedings involve legislation relating to what might reasonably be described as controversial economic matters. It follows that a significant degree of deference needs to be afforded by the Court to the judgment of the Oireachtas as to just how far it is necessary to go in providing an adequate solution to the undoubted problems which exist. Further authority for that proposition can be found in *Murphy v. IRTC* [1999] 3 IR 321 and in *Colgan v. The Independent Radio and Television Commission* [2002] 2 IR 490 where O'Sullivan J. was satisfied on the facts of that case that a "rational explanation for wider infringement is available to the Court".

10.19 Applying that analysis to the facts of this case, it is important to start by noting the scale of the problem which the range of measures adopted (including the Act) is designed to confront. The scale of the collapse in the Irish banking system is so well rehearsed in public debate that it is unnecessary to set it out in any detail here. That does not, of course, mean that no measure, no

matter how draconian, would be immune from challenge. However, the scale of the problem is a necessary and legitimate starting point for any analysis of the application of the proportionality test. In assessing the scale of the problem which needed to be addressed the Court has had regard to the point made in the expert testimony of Dr. Michael Cragg to the effect that any systemic risk arising out of the Irish property bubble has already been realised. Dr. Cragg's point is that the losses attributable to the bursting of that bubble have already occurred. There are, however, a number of points that need to be made in that regard. First, the Act needs to be considered by reference to the time when it was enacted. While a significant proportion of the losses attributable to the bursting of the Irish property bubble may have occurred by that time (although it is by no means clear whether, in truth, all of the losses had been incurred by that time or, indeed, have been incurred by now), it is far less clear that the effect of those losses on relevant Irish financial institutions had been fully recognised by those institutions themselves at the time the legislation was put in place. It is the systemic risk to those financial institutions which is the legitimate concern of the legislation. Measures designed to ensure that all losses attributable to the bursting of the property bubble are, and are seen to be, crystallised and reflected in the accounts of those financial institutions, is itself a significant part of the solution. Without that clarity, it was at least reasonable for the Oireachtas to conclude that Irish financial institutions would find it very difficult to restore a normal and proper level of banking.

10.20 In *J. & J. Haire* McMahon J. noted that the existing problems which beset the State could reasonably be described as "an extreme financial crisis or fundamental disequilibrium in the public finances" being a term borrowed in re Article 26 and the Health (Amendment) (No. 2) Bill, 2004 [2005] IR 105. In the course of the written submissions filed on behalf of the State respondents, it was suggested that those difficulties (in the submissions described as a serious disturbance) heightened the presumption of constitutionality which, of course, applies to any Act of the Oireachtas. The Court does not feel that it is necessary to decide whether such a heightened presumption of constitutionality is an appropriate way of characterising the undoubted deference to the policy decision of the Oireachtas that exists in such circumstances. However, in assessing a legislative response to a difficult and pressing national problem the Court, in applying the principle of proportionality, must give all due weight to the severity of the problems intended to be solved. Proportionality has sometimes been described as a legal example of the old maxim that one should not take a sledgehammer to crack a nut. On the other hand if what needs cracking is a significant rock, then a sledgehammer may well be needed. To complete the analogy it is, of course, the case that the sledgehammer must be fit for purpose or, more accurately, that there be a rational basis for believing it to be suitable.

10.21 The question that must be asked, therefore, is as to whether it is a reasonable policy response to the undoubted national banking and economic difficulties to put in place legislation which acquires all loans of a sufficient size which are property and development loans, or related loans to such loans, without regard to whether any of the loans in question are impaired and without affording the borrower an opportunity to be heard. In that context it is also appropriate to have regard to the way in which the Commission described the scheme (which was given effect to by the Act) in the Decision. At paragraph 86 of the Decision the following was said:-

> "Further, the Commission considers that the present scheme concerns the entire Irish banking market and does not dispute the analysis of the Irish authorities that concerns remain over the asset quality of financial institutions in Ireland. Indeed, if these problems are not addressed, they will result not only in difficulties for the Irish banking sector but, owing to that sector's pivotal role in providing financing to the rest of the economy, they will also have a systemic effect on the Irish economy as a whole. Hence it finds that the scheme is apt to remedy a serious disturbance in the Irish economy."

10.22 There was, in the Court's view, ample material before the Court to justify the view that it was reasonable for the Oireachtas to consider it necessary, in order that the legislation work both in general terms and within the parameters of the Commission Decision, that almost all loans of the type described should be taken and taken quickly. Having regard to the number of different loans and borrowers likely to be the subject of the acquisition process and the timescale within which that acquisition was required to take place, it seems to the Court that it was within the permissible range of policy options for the Oireachtas to decide that such loans were to be acquired without the complicating factor of determining whether, in the case of each borrower, there was a sufficient impairment to justify acquisition on the basis of impairment.

10.23 The Court has already pointed out the reasons why it was not considered necessary to decide, on the facts of this case, whether any of the McKillen loans were, in fact, impaired by reference to any definition of that term. However, the debate which took place before the Court, and the evidence that was presented in relation to it on that topic, demonstrates the extent of the enquiries and hearing that would or at least could have been necessitated should the legislation have provided for an impairment requirement and an entitlement to be heard by the borrower in question in relation to that or, indeed, any other issue. Against that argument it is said on behalf of Mr. McKillen that it seems likely that such a case could only be made in respect of a small number of relevant borrowers. However, two points need to be made about that submission. The first is that the legislation needs to be looked at as of the time when it was passed. It does not appear that it could have been said with any confidence at that time that there might not be a range of borrowers who, for one reason or another, might wish to hold up the acquisition of their loans by NAMA. Any right to be heard would, of course, at least at the level of principle, have had to have been afforded to every relevant borrower. It was argued on behalf of Mr. McKillen that it might be possible to put in place some form of procedure which would have the effect of narrowing, based on objective criteria, the range of borrowers who would be entitled to be heard. However, it does not appear to the Court that it was unreasonable for the Oireachtas to take the view that the number of loans whose acquisition was reasonably viewed as being required to address the very grave problems which confronted the financial system, could only be effectively acquired within the sort of timescale that was necessary both to contribute to dealing with the economic problems of the State and to meet the requirements of the Commission, without involving a right to be heard on the part of the borrowers.

10.24 The Court has had regard to the evidence placed before it on behalf of Mr. McKillen (particularly from Dr. Stiglitz) which suggested that a process involving each borrower being heard as to whether the loans of that borrower were to be acquired, could be beneficial to the process as a whole, not least by giving more information to NAMA as to the nature of the loans concerned and the businesses, assets or projects which underlay those loans. There is no doubt that the view of Dr. Stiglitz is an arguable proposition. In that context it is also necessary to record the arguable contrary view given in evidence by Steven Seelig which stressed the need for considerable expedition. However, as pointed out, it is not for the Court to determine what the best or proper procedure should be but rather to decide whether the policy option decided by the Oireachtas is permissible. In addition in this, as in other areas where there were conflicts of expert testimony no cross examination was sought so that it would, in any event, have been difficult to make a definitive determination on such issues. The expert evidence was, of course, potentially relevant to determining whether any particular policy option had a rational basis. For the reasons already set out the Court is satisfied that the policy option which favoured expedition was such a reasonable and rational option.

10.25 Finally, before leaving the topic of proportionality, it is appropriate to say something about an issue which was raised in one of the affidavits sworn by Mr. McKillen. In that context, and having noted the grave financial and economic problems facing the State, Mr. McKillen indicated that he could make no complaint about he and his companies suffering along with everyone else in the context of the general economic downturn and, by implication, paying their share of any additional tax that might be raised to enable the

State to meet its obligations arising from any solution to those problems. Those comments were laudable. However, the comments seemed to the Court to somewhat miss the point.

10.26 While the entire Irish economic problem is not just a problem of the banks, there is no doubt that the grave problems which have emerged in the banking system are a significant part of the problem. In those circumstances, it is inevitable that the policy options identified as a solution to those problems focus particularly on the banks. As has been pointed out on a number of occasions, it is no part of the function of the Court to assess whether the policy options chosen are the right ones. However, the ones that have been adopted will undoubtedly cost the Irish taxpayer a great deal of money and will undoubtedly impact on the lives and livelihoods of many citizens for quite some time to come. Some of that impact is a function of the economic problems besetting the country generally and, in particular, the problems which have affected the public finances. However, a significant portion of the problem stems from the difficulties with the banks. In those circumstances, it is hardly surprising that many of the measures adopted to address the problem are directed towards the banks.

10.27 It is argued by Mr. McKillen that his loans are not the type of problem loans that brought the banks into difficulty in the first place. Just as it is no part of the Court's role to determine, in this case, whether Mr. McKillen's loans can be said to be impaired, likewise it is no part of the Court's function to pass a judgment on that contention. However, even if it is the case that Mr. McKillen's loans are not part of the problem that does not seem to the Court to be a central consideration. Very many people will be paying both in money, in jobs and in other ways, for a very considerable period of time, to pay the price of solving the problems of Irish banks. The vast majority of those persons had nothing to do with creating the problem. Yet they will be required to play their part in its solution to their cost. Loans are not "going into NAMA" as a punishment for borrowers whose problems may have contributed to the financial crisis which has hit the Irish banks. Loans are "going into NAMA" because the NAMA scheme has been determined upon as part of a range of policy measures deemed necessary by the Government and the Oireachtas to solve the problems in the Irish banks. Nevertheless other parts of that policy mix will require significant public funding which will place an interest burden on the State of a very significant amount on a more or less indefinite basis. Many will pay the price for the latter. If there is, and the Court concludes that there is, an arguable policy basis for taking the view that NAMA acquiring all eligible assets of a certain scale is desirable for the purposes of solving the problems of the banks, then even compliant borrowers who are involved in loans which are eligible bank assets, will find their loans going into NAMA as part of the overall solution.

10.28 The Court is of the view that the creation of NAMA, as permitted by the Act in the manner interpreted by the Court, is a reasonable and proportionate policy response to the problems which the Act seeks to address. It was, in the Court's view, possible for the Oireachtas to conclude that impairing any rights which borrowers might have to any lesser extent, by either restricting NAMA's acquisition powers to impaired loans or loans connected with impaired loans, or by delaying the NAMA acquisition process by putting in place an entitlement on the part of borrowers to be heard, or both, would not have achieved, to a sufficient extent, the ends of the Act. In those circumstances, the Court is satisfied that the Act meets the proportionality test.

10.29 In passing, the Court does note that some of the authorities relied on by the State respondents do not seem to the Court to be particularly relevant. Those cases (such as *D.K.*, *Clancy v. Ireland* [1998] IR 326 and *Iarnród Éireann v. Ireland*) which deal with an entitlement to avoid fair procedures in the short term do not seem to be really relevant to the facts of this case. There are many circumstances in which it may be possible to put in place temporary measures without giving a relevant party an entitlement to be heard, but where it is necessary, in order for those measures to be continued, that the party concerned is given a right to be heard. It does not seem, however, to the Court that those cases are of any relevance to a measure such as that with which the Court is concerned in these proceedings which involves a situation where a party is not going to be heard at any stage in the process. At a minimum the considerations which will be required to justify a complete exclusion of a party from a process are very different from those which might justify a short term exclusion of a party at the time when some initial order or decision is made in circumstances where that party will have a full opportunity to become involved later.

The European Convention on Human Rights

10.30 As indicated earlier the Court proposes to deal with those issues which arise under the European Convention on Human Rights ("ECHR") at this stage. In the written submissions filed on behalf of Mr. McKillen argument was put forward in favour of the making of a declaration of incompatibility with the ECHR under the provisions of s. 5 of the European Convention on Human Rights Act, 2003. While the matter was not central to the oral argument the Court feels that it should deal with the points raised. In addition, it should be noted that counsel for Mr. McKillen quite correctly pointed out that, in any event, the jurisprudence of the Irish Courts affords decisions of the European Court of Human Rights ("ECtHR") the status of persuasive authority when the Irish courts are considering the interpretation and balancing of rights recognised both in the Irish Constitution and in the ECHR.

10.31 It is, of course, the case that property rights are protected by Article 1 of the First Protocol of the ECHR. Possessions, being the term used in the ECHR, have been held to include moveable and immovable property (*Wiggins v. U.K.* [1978] 13 DR 40), shares (*Bramelid v. Sweden* [1982] 29 DR 64) and Intellectual Property (Anheuser-Busch Inc. v. Portugal [2003] 45 EHRR 830). However, it is also clear from *Kopecky v. Slovakia* [2004] 41 EHRR 944, as explained in *Gravella v. Croatia* (APP. 33244/02) Decision 11th July, 2006, that, in order for an entitlement to be regarded as an asset or possession it is necessary that the entitlement in question is sufficiently established to be enforceable. In *Gravella* the ECtHR said the following:

> "'Possessions' can be 'existing possessions' or assets, including claims, in respect of which an applicant can argue that he has at least a 'legitimate expectation' (which must be of a nature more concrete than a mere hope) that they will be realised, that is, that he or she will obtain effective enjoyment of a property right (see, *inter alia, Gratzinger and Gratzingerova v. the Czech Republic* (dec.) [GC], no. 39794/98, ECHR 2002-VII, ss. 69; and *Kopecky v. Slovakia* [GC], no. 44912/98, ss 35, ECHR 2004-IX). A claim may be regarded as an asset only when it is sufficiently established to be enforceable (see, *inter alia*, *Kopecky v. Slovakia* [GC], cited above, ss 49; and *Stran Greek Refineries and Stratis Andreadis v. Greece*, judgment of 9th December 1994, series A no. 301-B, p. 84, ss. 59). No 'legitimate expectation' can come into play in the absence of a claim sufficiently established to constitute an asset. By way of contrast, a conditional claim cannot be considered an asset (see *Kopecky v. Slovakia* [GC], cited above, ss. 42, 51 and 58). In the Court's view, a claim is conditional where it depends upon a future uncertain event.
>
> The Court takes the view that the applicant's pre-emption rights were 'claims' rather than 'existing possessions'.
>
> The Court notes that a right of pre-emption is a right to buy prior to or ahead of others, but only if the owner decides to sell. It does not grant the power to compel an unwilling owner to sell, and is thus distinguishable from an option to purchase. For that reason, it is often referred to as an option on condition precedent. In this connection, the Court recalls that in the *Mirailles* case (see *Mirailles v. France* (dec.), no. 63156/00, ECHR 2003-XI (extracts)) it has already dealt with a similar issue, finding that the applicant's conditional option to purchase did not constitute a 'possession' within the meaning of Article 1 of Protocol No. 1."

10.32 It follows that the definition of possessions for the purposes of the ECHR is, if anything, narrower than the scope of property rights which may be afforded constitutional protection under the Irish Constitution. Two consequences seem to the Court to flow from that conclusion. First, it follows that the Court is of the view that there has been no interference with the rights of Mr. McKillen as guaranteed by the ECHR for those rights are, at a minimum, no more extensive than the rights guaranteed by the Irish Constitution which the Court has already determined have not been infringed. Second, the approach of the ECtHR lends reinforcement to the view which the Court has already expressed which is to the effect that property rights of a contractual or goodwill nature are required to be legally enforceable (or at least in the Irish context analogous to being legally enforceable) before those rights achieve the status of being constitutionally protected.

Conclusions
10.33 Given the Court's view, as already expressed, that the Act does not interfere with any constitutionally protected rights of Mr. McKillen, it follows that, in any event, the Act is not inconsistent with the Constitution by reference to Mr. McKillen's rights. Even if the Court's analysis of the interference by the Act with Mr. McKillen's rights is incorrect, it does not seem to the Court that any such interference could be placed at a very high level for all of the reasons which were addressed in the section of this judgment in relation to fair procedures. Even if the Court is wrong in its view that no constitutionally protected rights of Mr. McKillen are interfered with, then that analysis must, at a minimum, lead only to a conclusion that any interference with his rights is on the lower end of the scale.

10.34 For the reasons which the Court has already set out, the problem needing to be addressed is at the very highest end of the scale. In addressing the proportionality between those two matters (that is the scale of the problem and the minimal interference (if any) with Mr. McKillen's rights), it does not seem to the Court that any such interference as might be said to derive from the absence of an impairment requirement and the absence of a right to be heard, can be said to infringe the principle of proportionality.

10.35 The Court is not satisfied that Mr. McKillen has established a substantial issue for the determination of the Court under the issues raised in this section. It follows that the Court must refuse leave to seek judicial review in respect of those grounds and issues including those grounds and issues concerning a declaration of consistency with the ECHR. This finding also covers the one aspect of the fair procedures argument which was left over for determination in this section.

11. **Overall Conclusions**

11.1 As has been pointed out on a number of occasions in the course of this judgment, the Court has been anxious to emphasize the proper role of the Court in litigation of this type. It is not the function of the Court to form a judgment on the merits or otherwise of NAMA or individual aspects of the Act. Rather, the Court is engaged in interpreting the Act, applying the Act to the facts of Mr. McKillen's case and determining whether the Act, as so interpreted, is within the bounds of what is constitutionally permissible.

11. 2 The Court has carried out that exercise by reference to the five issues which were identified in the course of the hearing as requiring the Court's determination. It is proposed to summarise the conclusions in respect of each of those issues in turn.

11. 3 Insofar as it was argued on behalf of Mr. McKillen that NAMA failed to take into account relevant considerations in reaching its decision to seek to acquire the McKillen loans, the Court has concluded, for the detailed reasons set out in Section 6 of this judgment, that those contentions do not give rise to a substantial issue which would justify the grant of leave to seek judicial review and the Court, accordingly, refuses to grant judicial review under that heading. In summary, the Court has concluded that, on a true construction of the Act, any discretion given to NAMA to decline to acquire an eligible bank asset is a discretion solely for the benefit of NAMA, and not one which requires, in its exercise, a detailed analysis of the loan or loans in question.

11. 4 So far as the issues raised in relation to fair procedures are concerned, the Court is satisfied that the issues raised under that heading gave rise to a substantial issue sufficient to grant leave to seek judicial review. The Court therefore grants leave to seek judicial review under that heading. However, for the reasons set out in Section 7 of this judgment, the Court is not satisfied that Mr. McKillen is entitled to any relief under this heading. In summary, the Court is of the view that any constitutionally protected rights which Mr. McKillen might have, when properly analysed, are either not interfered with by the Act, or are interfered with in such a minor or tangential way so as not to require that Mr. McKillen be heard prior to the acquisition, from the financial institutions concerned, of his loans.

11. 5 For the reasons set out in Section 8 of the Court's judgment, the Court is not satisfied that Mr. McKillen has made out a substantial issue sufficient for the grant of leave to seek judicial review on those issues concerned with the timing of the original decision by officials of NAMA to seek to acquire the McKillen loans. In summary, the Court is satisfied, for the reasons set out in that section, that the decision made on 11th and 14th December, 2009 was adopted by subsequent action of NAMA following its establishment.

11. 6 Likewise, the Court is not satisfied that Mr. McKillen has made out a significant issue, sufficient to justify the grant of leave to seek judicial review, on the European State Aid question. For the reasons set out in Section 9 of this judgment, the Court was not satisfied that it was appropriate to take into account the correspondence between Senator Regan and Commission officials. The Court is satisfied that, on a proper reading, the Decision of the Commission does not require NAMA to limit the acquisition of bank assets to loans which are either impaired loans or are connected with impaired loans. The Court, therefore, refuses to grant leave to seek judicial review in relation to the grounds raised under that heading.

11. 7 Finally, and for the reasons set out in Section 10 of this judgment, the Court is not satisfied that Mr. McKillen has made out a substantial issue in relation to the constitutionality of the Act. In summary, the Court has concluded that the Act is a proportionate response to the very grave financial situation in which the State finds itself and which has particular relevance to financial institutions within the State. As is pointed out in Section 10 of the judgment, the Court is not concerned with deciding whether the policy options adopted by the Oireachtas as a solution to the banking crisis are the best solutions. Rather, the Court is concerned with the question of whether there is a rational basis for the selection of those policy options. For the reasons analysed in that section, the Court is satisfied that there was such a rational basis.

11. 8 In summary, the Court is, therefore, prepared to grant leave to seek judicial review only in respect of the grounds addressed in Section 7 concerning the right to fair procedures. In respect of all other grounds, the Court refuses to grant leave to seek judicial review on the basis that a substantial issue has not been made out. In relation to the fair procedures grounds, the Court is not, however, satisfied that Mr. McKillen is entitled to ultimately succeed on those grounds, and, therefore, having granted leave, dismisses his claim in relation to those grounds.