Neutral Citation: [2014] IEHC 192

THE HIGH COURT

[2013 No. 11779 P]

BETWEEN:

DAGENHAM YANK LIMITED, NO ONE IN PARTICULAR LIMITED AND BRENDAN MCCABE

PLAINTIFFS

AND

IRISH BANK RESOLUTION CORPORATION LIMITED (IN SPECIAL LIQUIDATION)

DEFENDANT

JUDGMENT of Mr. Justice Gilligan delivered on the 13th day of March, 2014

1. This is an application by the plaintiff for an interlocutory injunction order that the defendant not divest, sell or transfer to any third party any right, interest or obligation under any of the loans between the two parties. Mr. Brendan McCabe is a director of the first and second named plaintiffs; connected persons which directly or indirectly own and control several licensed properties in Co. Cork which have a turnover of around €12m per year and which employ approximately two hundred and fifty-five people in the region. The first named plaintiff (hereafter "Dagenham") and second named plaintiff (hereafter "No One") entered into derivative loan agreements with the defendant bank, formerly known as Anglo Irish Bank plc, hereafter ('Anglo'). The first named plaintiff entered into a derivative agreement or Swap with the defendant effective from 30th June, 2006, and with a termination date of 20th June, 2011, in respect of a notional liability of €3.5m. Other hedging arrangements were entered into attendant upon this agreement. The second named plaintiff also entered into a derivative agreement with the defendant effective from 31st March, 2008, and with a termination date of 28th March, 2013, in relation to a notional liability of €4.6m which also imposed an obligation on the second named plaintiff to undertake hedging arrangements to cover some of its liability to the defendant. Mr. McCabe has also entered into personal guarantees with the defendant securing a number of the financing arrangements between the first and second named plaintiffs and the defendant. The aggregate amount of the indebtedness of the plaintiffs under these various agreements is around €18.2m. The plaintiffs' loans are all performing but are short term loans which have over the years been consistently rolled over by Anglo.

2. The plaintiffs are of the view that as a result of the financing arrangements between the parties there has been significant overcharging on the loan accounts which were held by the plaintiffs with Anglo and that certain financial instruments were mis sold to the plaintiffs. The plaintiffs are of the view that they have an equitable right of set off so that any award of damages which they may receive in relation to this matter may be used to reduce the indebtedness which the defendant asserts is owed by the plaintiffs to it on foot of the instruments in question. The plaintiffs are naturally concerned that by reason of the fact that their loans are short term and were consistently rolled over by Anglo, whoever buys the bundles of loans may not continue the practice. The plaintiffs are also concerned as regards the fate of the two hundred and fifty employees throughout their business. The plaintiffs emphasise that their loans are all performing. The principal thrust of their claim is that the special liquidators will not enter into negotiations with them and have bundled their loans into a €1.3 billion package identified by the title "Stone Portfolio" now only available for purchase to selected qualified bidders.

3. The plaintiffs issued a plenary summons on 25th October, 2013, having obtained leave of the court to do so under s. 6 of the Irish Bank Resolution Corporation Act 2013 (hereafter "the 2013 Act") on 21st October, 2013, by order of Birmingham J. They seek a number of reliefs including a declaration that the derivative agreements entered into by the first and second named plaintiffs with the defendant were mis-sold and that they be rescinded and an order for restitution of the total amounts charged in respect of those arrangements and an order for an equitable account of profits in respect of those arrangements. The plaintiffs also seek an order that the defendant make good any loss, liability or damage caused by the defendant to the plaintiffs and also seek damages for breach of contract and a declaration that the defendant, having overcharged interest on the loan accounts in existence between the parties, repay all payments made by the plaintiffs which should not have been charged.

4. The loan agreements between the parties which are the subject of these proceedings are currently in the process of being sold by the liquidators of the Irish Bank Resolution Corporation (hereafter "IBRC"), Mr. Kieran Wallace and Mr. Eamonn Richardson, who were appointed Special Liquidators of IBRC on 7th February, 2013, pursuant to the Irish Bank Resolution Corporation Act 2013 (Special Liquidation) Order 2013 (S.I. 36 of 2013).

5. The Special Liquidators wrote letters to each of the plaintiffs dated 4th September, 2013, inviting the plaintiffs to make representations on the manner in which their loans would be sold and the criteria which should be applied by the Special Liquidators in determining who should be classified as qualified to bid for the purposes of the sale of the plaintiffs' loans. The Special Liquidators informed each of the plaintiffs that it would appoint valuers to provide a market valuation for each of their loans. The letter sets out that if no bid is received for the loans from a potential purchaser who meets all the criteria set out by the Special Liquidators or if any bids received fall below the price set through the independent valuation process, then the Special Liquidators would be obliged to sell the loans in question to the National Asset Management Agency (hereafter "NAMA") at the price set by the valuation. This letter stated that no decision had yet been taken by the Special Liquidators regarding how the loans were to be offered for sale and noted that the Special Liquidators were taking advice in relation to the appropriate method of sale and the correct criteria for determining who should be deemed qualified to bid. The letter also stated that it was currently anticipated that the "substantial majority" of the loans would be offered for sale by way of large loan portfolios, and that only a "relatively small number of loans" would be offered for sale individually or offered for sale with the loans of other borrowers with whom there is an economic or legal connection. The letter stated that "the likelihood is that most of the loans (which may include [the plaintiffs'] loans) will be offered for sale in large portfolios". The plaintiffs were also invited to make any submissions which they wished in relation to the sale process and particularly in relation to how their loans would be offered for sale and the criteria for determining who may be regarded as qualified to bid in the sales process. The closing date for receipt of written submissions was 18th September, 2013.

6. Appended to the letter of 41h September, 2013, were a number of Schedules setting out Ministerial Instructions for the conduct of the liquidation issued by the Minister for Finance to the Special Liquidators. These instructions were issued by the Minister for Finance pursuant to s. 9 of the IBRC Act 2013, and according to s. 9(3) of the 2013 Act any Special Liquidator appointed under this legislation

is required to comply with such instructions or directions issued under this scheme. Schedule 1 of the letter sets out the process of sale which the Special Liquidators were instructed by the Minister to follow including the procurement of independent valuations for the loan book and assets of IBRC, the fact that any loan or asset which does not achieve the same price as its independent valuation on the market will be sold to NAMA and the fact that the Special Liquidator will not divulge to any person other than to NAMA and the Minister for Finance the valuation of the assets of IBRC. The Ministerial Instruction also sets out a number of criteria to be applied by independent valuers in their assessment of the loan book and assets of IBRC and provides a closing date of 31st December, 2014, for the conclusion of the sale process.

7. Schedule Two sets out the criteria identified by the Special Liquidators for the marketing of loans in portfolios or individually and notes that factors to be taken into account in this assessment include whether a loan is performing or not, the time remaining on the loan, the sectors to which the underlying asset security on the loan relates, whether packaging the loan would result in funding efficiencies and whether it would make sale easier. This Schedule also sets out that individual loans may be considered for sale individually or with related loans depending on the size of the loan, the likelihood of credible interest from purchasers for such loans, the performance of any underlying business to which the loan relates etc. At the hearing of this action it was stated by Counsel for the defendant that the majority of the loan book is being sold in portfolio form but that some loans are being offered individually for sale.

8. Schedule Three appended to the letter of 4th September, 2013, sets out the criteria for defining any prospective bidder as qualified to bid including whether that bidder has committed funding or a reasonable prospect of committed funding, the ability of the bidder to work within the Special Liquidators' timetable, the track record of the bidder and the existence of transaction risk, the price offered and other criteria as the Special Liquidators may deem appropriate to take into account having regard to the Ministerial Instructions and professional advice.

9. The plaintiffs to these proceedings made representations to the Special Liquidators via their advisors, Deloitte, on 16th September, 2013. The plaintiffs made further legal representations to the defendant by letter dated 17th September, 2013, from their former solicitors. These submissions were rejected.

10. By letter dated 8th October, 2013, the plaintiffs informed the defendant of the claim which forms the basis of these proceedings including the overcharging of interest by the defendant in relation to loan accounts of the plaintiffs held by the defendant and the mis-selling of derivative instruments. The plaintiffs also set out a number of other complaints such as negligence, breach of duty of care, fraudulent misrepresentation and breach of fiduciary duties which they now make a claim for against the defendant in these proceedings. This letter sought undertakings to the effect that IBRC would not offer the disputed loans for sale or would not transfer these loans to NAMA or any other party until such time as the dispute had been resolved or litigated. The letter also notified the defendant that unless these undertakings were given proceedings would be initiated and leave under s. 6 of the 2013 Act would be sought by the plaintiffs to do so.

11. On 1st November, 2013, the plaintiffs were informed by way of letter from the Special Liquidators that it had been decided, having taken consideration of the written submissions of the plaintiffs and relevant professional advice and having regard to the criteria which had been appended to the letter of 4th September, 2013, and as set out above, that their loans would not be sold individually or with other connected loans but as part of a large portfolio given the name "Stone" which would be put on the market on 11th November, 2013. The defendant stated in this letter that this decision had been taken with particular regard to the size of the plaintiffs' loans and the extent to which they would have a meaningful impact on the overall value of the portfolio, the likely credible interest from qualified bidders and in order to maximise sales realisations in the public interest. The plaintiffs were informed that in order to be admitted to the sale process as a qualified bidder in respect of this portfolio any purchaser would be required to provide committed funding or a reasonable prospect of such funding of at least €1,330,000,000.00. Bids entered by persons or entities must relate to the entire portfolio and cannot relate only to individual loans or parts of the portfolio.

12. Mr.Wallace avers that he did take consideration of the letter of 8th October, 2013, from the plaintiffs to the defendants, setting out the nature of their grievances and the order of Birmingham J made on 21st October, 2013, pursuant to s. 6 of the 2013 Act, which granted leave to the plaintiffs to initiate these proceedings against the defendant, in coming to a decision in relation to the sale of the loans in question. The plaintiffs amended their statement of claim under O. 20, r. 6 of the Rules of the Superior Courts in order to take account of this fact.

13. The Stone portfolio has been marketed for sale and the deadline for receipt of Phase 1 offers was 12th December, 2013. The Special Liquidators are currently in the process of considering the offers made and deciding which of these offers will proceed to Phase 2 of the sale process. If at the end of that phase a bid is received which exceeds the valuation received by the Special Liquidator the loan will be sold to that bidder. If no bid exceeds the valuation price then the loans will be sold to NAMA. It is then a question for NAMA to decide whether the loans are to be individually or collectively sold. The plaintiffs to these proceedings have received their own independent valuation of the loans at €8,125,000.00 and on 22nd January, 2014, wrote to the defendant stating that they would offer in excess of this figure, without specifying exactly how much in excess, in order to secure purchase of their own loans. This offer was rejected by the defendants on 24th January, 2014.

14. Part of the complaint raised by the plaintiffs is that under s. 100 of the National Asset Management Agency Act 2009, NAMA may ignore any equitable set-off which may arise in favour of any borrower. This was a considerable element of the claim against the defendant since the plaintiffs hoped, if successful in their claim relating to alleged mis-selling of derivative arrangements and alleged overcharging of interest on related loan accounts, to set off any damages awarded on foot of such a determination against their indebtedness to the defendant. However, at the outset of the hearing in the within application the Court was informed that NAMA had by letter indicated that this provision would not be relied upon by it in relation to the plaintiffs' financing arrangements.

15. Notice of a potential constitutional issue arising in these proceedings was delivered to the Attorney General under O. 60, r. 1 on 3rd January, 2014, but at the start of the hearing of the within application Counsel for the Attorney General and the other parties agreed that no constitutional issue would arise on this part of the proceedings.

16. Counsel agreed during the hearing of this application that the standard principles as set out by the court in *Campus Oil v Minister for Industry and Energy (No 2)* [1983] I.R. 88 and recited below at para. 58 were to be applied by the Court in the exercise of its discretion.

Submissions on behalf of the Plaintiff

17. The primary complaint made by Counsel for the plaintiff is that the defendants, in reaching their decision to offer the plaintiffs' loans as part of a portfolio sale rather than making them available for bidding on an individual basis, have not provided adequate reasons for arriving at this conclusion. Counsel submits that there is a fair issue to be tried in relation to this aspect of the claim.

18. Mr. Hayden S.C., counsel for the plaintiffs, began his submissions by opening s. 3 of the 2013 Act to the Court and submitting that this section sets out the competing interests which the Special Liquidators must have regard to and must balance in making decisions under this legislation. Section 3 provides that the purposes of the Act are:

> "(a) to help to address the continuing serious disturbance in the economy of the State;
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> (b) to provide for the winding up of IBRC in an orderly and efficient manner in the public interest;
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> (c) to end the exposure of the State and the Bank to IBRC;
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> (d) to help to restore the financial position of the State;
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> (e) to help to enable the State to re-establish normalised access to the international debt markets;
>
> (f) to assist, to the extent achievable, in recovering the financial assistance provided by the State to IBRC as fully and efficiently as possible;
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> (g) to resolve the debt of IBRC to the Bank;
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> (h) to protect the interests of taxpayers;
>
> (i) to restore confidence in the banking sector by furthering the reorganisation of the Irish banking system in the public interest;
>
> (j) to underpin Government support measures in relation to the banking sector."

19. Counsel for the plaintiffs submits that the decision taken by the defendant on 1st November, 2013, is a decision within the realm of public law and is therefore subject to judicial review. It is also claimed that the plaintiffs in this instance have a right to a fair hearing in relation to any decision taken which is adverse to their interests and that this right implies a corollary right to have sufficient reasons given for the decision taken.

20. Counsel for the plaintiff opened a number of authorities to the Court. In *Treasury Holdings and Ors v. National Asset Management Agency and Ors* [2012] IEHC 66 it was submitted by the plaintiff that the decisions to appoint receivers and enforce security on a loan taken by NAMA were decisions of a public law nature and therefore were amenable to judicial review. This submission was made in reliance on the statutory basis for the establishment of NAMA and the statutory scheme governing its operation as well as the powers vested in that body under the establishment legislation. Finlay-Geoghegan J. noted the conclusion which had been reached by Peart J. in *Daly & Ors v. NAMA & Ors* (Unreported, High Court, Peart J., 12th September, 2011) at pp. 96-97 in relation to this issue, wherein the court stated:

> "... for the purposes of the present case, I am satisfied that at least the decisions to make a demand for repayment of these facilities, and the decision to appoint receivers following default of repayment, are decisions in the area of public law, despite the provisions of section 99, and the plaintiffs are not excluded from an entitlement to seek leave to pursue remedies in the nature of judicial review, whether under section 182 or 193 of the Act."

Finlay Geoghegan J then held at para. 91 that:

> "91. In my judgment, Treasury has raised a substantial issue for determination by the court that the decisions to enforce...and to proceed to appoint receivers...are decisions taken in the area of public law. I have reached this conclusion having regard, in particular, to: the scheme of the 2009 Act; the establishment of NAMA by statute; the submission that NAMA, in taking the decisions, is performing functions imposed on it by s. 11 of the Act, and exercising powers given it by s. 12 and s. 99 of the Act. The fact that NAMA has, as part of the decisions taken, made decisions, in relation to enforcement of the syndicated loan or to proceed with the appointment of receivers, pursuant to the securities held by the syndicate as successor to AIB and IBRC, does not, in my judgment, deprive the issue of meeting the "substantial issue" threshold. The contentions which support that are firstly, that s.99 of the Act is the source of NAMA's entitlement as a statutory body, which was not a party to the original loan agreements and security documents, to exercise the contractual rights previously held by the participating institutions in relation to bank assets whose acquisition by NAMA has been effected by s.90 of the Act. Secondly, that NAMA, in taking these decisions, is exercising a statutory power and the subject matter of the decision does not bring it within any of the recognised exceptions where a statutory body exercising statutory powers will not be considered to be taking decisions in the realm of public law. Treasury is required to establish that the challenged decisions are decisions taken in the realm of public law as a necessary prerequisite to reliance on each of the remaining grounds. Those grounds are now considered upon an assumption, but not a determination, that they are decisions in the realm of public law."

21. Counsel for the plaintiffs submits that the approach taken by the court in *Treasury Holdings and Ors v National Asset Management Agency and Ors* [2012] IEHC 66 should also be applied by analogy by this Court in relation to the scheme of the IBRC Act 2013. The decisions taken by Mr. Wallace and Mr. Richardson in relation to the sale of the plaintiffs' loans should also be considered public law decisions which are amenable to judicial review given the scheme and purpose of this Act. For the purposes of her decision in relation to an application for leave to issue judicial review proceedings in *Treasury Holdings* Finlay Geoghegan J. assumed but did not conclusively determine that decisions taken under the NAMA Act 2009 were in the nature of public law decisions and amenable to judicial review.

22. Counsel for the plaintiffs further submitted that the right to be heard is the pre- cursor of the right to reasons for any decisions reached by a public body. In relation to the right to be heard, Finlay-Geoghegan J. stated at paras. 93-97 that:

> "93. The principles are not in dispute. The parties agree that the principles are those set out by the Supreme Court in *Dellway Investments & Ors v. NAMA & Ors* [2011] IESC 13. The judgment concerned the right of Mr. McKillen and other applicants to be heard on a decision of NAMA to acquire eligible bank assets pursuant to s. 84 of the Act...
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> 94. In *Dellway*, central to several of the judgments (Denham, Hardiman and Fennelly JJ.) were the following well-known statements of principle by Walsh J. in *East Donegal Cooperative v. Attorney General* [1970] I.R. 317, at pp. 341 & 343-344.

> '... the presumption of constitutionality carries with it not only the presumption that the constitutional interpretation or construction is the one intended by the Oireachtas but also that the Oireachtas intended that proceedings, procedures, discretions and adjudications which are permitted, provided for, or prescribed by an Act of the Oireachtas are to be conducted in accordance with the principles of constitutional justice...'

96. Hardiman J. in particular also considered the matter from a common law perspective and cited with approval from the 6th Ed. of De Smith on *'Judicial Review of Administrative Action'* and adopted the following extract as a statement of the position in Ireland:

> 'The term 'natural justice' has largely been replaced by a general duty to act fairly which is a key element of procedural propriety. On occasion, the term 'due process' has been invoked. Whichever term is used, the entitlement to fair procedures no longer depends upon the adjudicative analogy, nor on whether the authority is required or empowered to decide matters analogous to a legal action between two parties. The law has moved on; not to the state where the entitlement to procedural protection can be extracted with certainty from a computer, but to where the courts are able to insist upon some degree of participation in reaching most official decisions by those whom the decisions will affect in widely different situations, subject only to well established exceptions.' (Emphasis added by Hardiman J.)

97. Hardiman J. then concluded at p. 73:

> 'It appears to me, therefore, that there is ample authority both in Ireland and elsewhere for the existence of a right to fair procedures in the making of a discretionary decision by a public official or officials is based on the status of the person claiming such fair procedures as a person who is or may be 'affected' or 'adversely affected' by such decision.'"

23. Counsel submits that the Special Liquidators in this instance must justify their decision and cannot decide to simply sell the plaintiffs' loans in a portfolio on an arbitrary basis but only as the result of reasoned analysis. The right to be heard, which it was submitted is clearly established, also incorporates a corollary right to reasons, as without knowing the reasons for a decision that decision cannot be challenged and the right to be heard would be rendered nugatory. Counsel submits that the plaintiffs seek some element of participation in the decision reached by the Special Liquidators in relation to their loans.

24. Counsel for the plaintiffs then opened the subsequent decision of Finlay Geoghegan J. in relation to the substantive issue for which leave to seek judicial review had been granted in her earlier decision of 22nd March, 2012, as set out above. In this later decision, *Treasury Holdings and Ors v The National Asset Management Agency and Ors* [2012] IEHC 297, delivered on 31st July, 2012, the court held at para. 104 that "Treasury...did have rights and interests, the practical exercise and enjoyment of which are affected by the decision to enforce." Counsel submits that a similar conclusion should be reached in the substantive hearing in this case in relation to the plaintiffs as the decision to sell the plaintiffs' loans in a portfolio rather than individually does adversely affect the plaintiffs' position. Counsel notes that the court in that instance rejected what has been termed the "floodgates argument." It had been submitted that NAMA would be subjected to a large number of claims of a similar nature if the application was not refused. The court rejected this submission. A similar submission has been made by the defendant in these proceedings and Counsel for the plaintiffs submits that this should be similarly rejected by the Court on the within application.

25. Counsel for the plaintiffs relies on para. 112 of the decision of Finlay Geoghegan J. in *Treasury Holdings and Ors v. The National Asset Management Agency and Ors* [2012] IEHC 297 in support of his submission that the plaintiffs in the within proceedings have a right to be heard and therefore an attendant right to reasons for the decision taken by the Special Liquidators. It was stated by the court in *Treasury* that:

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

26. Counsel submits that the information which the plaintiffs have been given about the decision to sell their loans as part of the Stone portfolio has not been adequately reasoned and that they have not been given adequate information about the manner in which this conclusion was reached in the letter of 1st November, 2013. Counsel for the defendant conceded during the hearing of this application and implicitly in the letter of 4th September, 2013, that certain borrowers had had or would have their loans individually dealt with by the defendant. Counsel for the plaintiffs submits that the reason for the different approach taken by the defendant to the plaintiffs' loans has not been made clear to the plaintiffs. The terms of the letters of 4th September, 2013, and 1st November, 2013, are characterised as generic and pro-forma by Counsel for the plaintiffs.

27. It was also submitted that the defendant to these proceedings has a duty to act in a fair and reasonable manner. In relation to this aspect of the case Counsel for the plaintiffs relied on paras. 115-119 of the decision of Finlay Geoghegan J. in *Treasury Holdings and Ors v. The National Asset Management Agency and Ors* [2012] IEHC 297 in which the court took the opportunity to analyse the law in relation to this issue as it applied to NAMA. The court concluded in that instance, and it is urged upon the Court that a similar approach should be taken here in relation to the defendant, that NAMA was under an obligation to act fairly and reasonably in the procedures which it followed in relation to decisions made which effect the rights and interests of the plaintiff. In this decision the court also conclusively determined that the decision taken by NAMA in that instance was one taken within the public law realm and therefore was amenable to judicial review and Counsel for the plaintiffs urges the Court to adopt a similar approach in relation to the decision taken by the Special Liquidators in this instance.

28. Counsel for the plaintiffs then opened the decision of the Supreme Court in *Dellway Investments Limited and Ors v. National Asset Management Agency and Ors* [2011] 4 I.R. 1 in support of his submission that the plaintiffs in this instance benefit from a right to

reasons for the decision taken by the Special Liquidators. Counsel relied on the decision of Hardiman J. in support of this submission. At pp. 279-281 the court stated:

> "[**298**] Both in Ireland and in other common law jurisdictions the scope of the requirement for fair procedures has expanded considerably beyond its previous bounds. Previous limitations, such as those based on whether the decision is of a *quasi* -judicial or of an administrative nature, or whether the decision making body has "the trappings of a court" have long been abandoned....
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> [**302**] A recent judicial summary of the Irish position is to be found in *Khan v. Health Service Executive* [2008] IEHC 234, [2009] 20 E.L.R. 178 in which, albeit in a tone in which one detects an element of resignation, McMahon J. says at pp 188 and 189:-
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> > '... [the H.S.E.] must comply with rules which adhere to fair procedure/standards. The [H.S.E.] might like it to be otherwise. To those involved in administration, adherence to fair procedure standards may appear cumbersome, irritating and even irksome on some occasions. Undoubtedly, the necessary adherence may slow down the administrators and may not be conducive to efficiency. But that is the way it is. The battle between fair procedures and efficiency has long since been fought and fair procedures have won out. The insistence on fair procedures governs all decision makers in public administration' (emphasis added)...
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> [**304**] More than a decade earlier, in *Carna Foods Ltd. v. Eagle Star Insurance Co. (Ireland) Ltd.* [1995] 1 I.R. 526, a case challenging the withdrawal of insurance cover without fair procedures in the form (in that case) of a statement of reasons, McCracken J. distinguished between the public and private realms as follows at pp. 529 and 530:-
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> > '... where a decision is taken to exercise a function *in the public realm, the person affected is entitled to know the reasons for the decision* . This is because statutory powers must be determined and exercised reasonably. The plaintiffs here seek to extend this principle into the realm of private contractual relationships" (emphasis added).'"

29. Counsel submits that it is exactly this approach which the court should apply to the issue which arises in these proceedings. Hardiman J. stated at p. 293:

> "[**351**] In considering whether this case could be considered to be within the scope of any "situation in which the principles of constitutional justice do not apply", I would identify as relevant certain features of the present case.
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> (i) The "decision" of the 11th and 14th December, 2009, and the later decision mentioned by NAMA were in no sense a temporary or interlocutory decision as many of the decisions in the cases cited were, *e.g*. the decision to prevent the midwife from practising pending the outcome of the hearing in *O Ceallaigh v. An Bord Altranais* [2000] 4 I.R. 54. Nor would any fresh decision to the same effect be of a temporary nature.
>
> (ii) The scheme of the Act appears to offer no prospect of revisiting the decision with an input from the borrower affected.
>
> (iii) There is in the evidence of the case, no proof nor even any convincing suggestion of urgency, much less of impossibility of performing the functions of the Act if fair procedures were granted.
>
> (iv) Though the borrowers were granted no hearing at all the banks, according to Ms. O'Reilly, were heard in relation to the acquisition decision and were assisted in making their case by apparently being given the criteria on which the decision was to be made.
>
> (v) There are in the Act various immunities and protections conferred on NAMA in respect of any form of subsequent challenge to the acquisition decision, or any claim for compensation..."

30. Counsel for the plaintiffs submits that in the proceedings currently before the Court a number of these same considerations also apply, particularly the factors considered by Hardiman J. at (ii), (iii), (iv) and (v) above as in this instance if the sale goes ahead the matter will come to an end, the evidence presented by the defendants does not meet the threshold for the purpose of satisfying the requirement of fair procedures and there are no criteria provided to the plaintiffs as the basis upon which the Court has reached its decision. Hardiman J. also held at p. 294 that "there are in practice only two classes of people - the banks and the borrowers, whose interest might be directly affected and it seems extraordinary to permit one to be heard to exclude the other, and the smaller class of solvent and performing borrowers." Hardiman J. concluded at pp. 296-297 by stating that:

> "[**361**] It is trite law to say that a right to a hearing carries with it a right to notification of the proposed decision and to sufficient detailed information, including criteria, as may be necessary to allow the person to be affected to make the best case he can against the decision which he fears... I do not see in the circumstances of the present case a positive need for an oral hearing, though NAMA's obligations may of course be met in that way. I would not otherwise prescribe the nature of the hearing, which will ultimately depend on the circumstances of the individual case."

31. Counsel for the plaintiffs submits that there is a real obligation on the defendant to give reasons for any decision taken which affects the rights and interests of the plaintiffs and that this, on the facts of the case currently before the Court, has not been met, since mere lip service has been paid to this requirement by the defendant in the letter of 1st November, 2013, which sets out the decision of the defendant to offer the plaintiffs' loans for sale as a portfolio rather than individually. Counsel cites a number of authorities in support of his submission that such an obligation to give reasons exists.

32. Counsel relies on a passage from Blayney J. in one of the earlier cases dealing with this issue in support of his submission. Blayney J. stated at pp. 155-156 of his decision in *International Fishing Vessels Ltd v. Minister for the Marine* [1989] 1 I.R. 149:

> "I consider that unless the Minister gave his reasons [for the refsual to award a licence] it could not be said that the procedure he adopted in giving his decision was fair. It seems to me that there are two facts in particular which lead to this conclusion:-
>
> (1) It is common case that the Minister's decision is reviewable by the court. Accordingly, the applicant has the right to have it reviewed. But in refusing to give his reasons for his decision the Minister places a serious obstacle in the way of

> the exercise of that right. He deprives the applicant of the material it needs in order to be able to form a view as to whether grounds exist on which the Minister's decision might be quashed...
>
> (2) The giving of reasons by the Minister could in one case be of particular importance as it would enable an applicant to meet the grounds on which the licence had been refused and, having done so, re-apply....

For the reasons I have given, it seems to me in principle that the failure of the Minister to give reasons for his decision rendered the procedure unfair and not in accordance with the principles of constitutional justice. And in my opinion this conclusion is supported by the authorities cited on behalf of the applicant."

33. Counsel also opened *McCormack v The Garda Siochana Complaints Board and Anor* [1997] 2 I.R. 489 in which Costello P. held at pp.500-502:

> "Constitutional justice imposes a constitutional duty on a decision making authority to apply fair procedures in the exercise of its statutory powers and functions. If it can be shown that that duty includes in a particular case a duty to give reasons for its decision then a failure to fulfil this duty may justify the court in quashing the decision as being *ultra vires*.
>
> It is not the law of this country that procedural fairness requires that in every case an administrative decision-making authority must give reasons for its decisions. Where a claim is made that a breach of a constitutional duty to apply fair procedures has occurred by a failure to state reasons for an administrative decision the court will be required to consider (a) the nature of the statutory function which the decision maker is carrying out, (b) the statutory framework in which it is to be found and (c) the possible detriment the complainant may suffer arising from the failure to state reasons. To give an example of a possible detriment; if a statute permitted an appeal to the court from the decision of an administrative authority on a point of law, the failure to give reasons for a decision may well amount to a breach of a duty to apply fair procedures, if it could be shown that their absence rendered ineffectual a statutory right of appeal.
>
> There may also be circumstances in which (a) no unfairness arose by a failure to give reasons when the decision was made but (b) the concept of fair procedures might require that reasons should subsequently be given in response to a *bona fide* request for them. Therefore in such cases the court would not grant an order of *certiorar*i (because the decision itself was not an *ultra vires* one) but it would have jurisdiction to grant an order of mandamus directing the decision-making authority to carry out its constitutional duty (which the court had found existed) to provide reasons when asked.
>
> Finally, there may be circumstances in which the duty to apply fair procedures may not oblige a decision-making authority to state reasons for its decision at the time or after it has made it but which might oblige the authority to explain to an affected person the material on which the decision was based..."

34. Counsel submits that in *McCormack v. The Garda Siochcma Complaints Board and Anor* [1997] 2 I.R. 489 the information necessary for the plaintiffs to challenge the decision taken by the defendant which was adverse to his interests was given to him. However, in the case of the plaintiff currently before the Court the same cannot be said as no detailed information has been provided to him in relation to the rationale for the decision made by the Special Liquidators to sell the plaintiffs' loans as part of a portfolio rather than individually.

35. Counsel opened the decision of Clarke J. in *Sr. Mary Christian and Anor v. Dublin City Council* [2012] 2 I.R. 506 in relation to the existence of a general duty of decision makers in the public realm to give reasons. The court did not conclusively determine that such a general duty existed, stating at para. 71 that "there is no clear jurisprudence which provides for a general duty to give reasons in all circumstances". Counsel also pointed to a statement of Fennelly J at p. 66 of his decision in *Mallak v. The Minister for Justice* [2012] IESC 59 to the effect that:

> "66. In the present state of evolution of our law, it is not easy to conceive of a decision-maker being dispensed from giving an explanation either of the decision or of the decision-making process at some stage. The most obvious means of achieving fairness is for reasons to accompany the decision. However, it is not a matter of complying with a formal rule: the underlying objective is the attainment of fairness in the process. If the process is fair, open and transparent and the affected person has been enabled to respond to the concerns of the decision-maker, there may be situations where the reasons for the decision are obvious and that effective judicial review is not precluded.
>
> 67. Several converging legal sources strongly suggest an emerging commonly held view that persons affected by administrative decisions have a right to know the reasons on which they are based, in short to understand them."

36. Counsel for the plaintiff therefore submitted that he had raised a fair issue to be tried in relation to each of these grounds: the public law nature of the decision taken on 1st November, 2013, by the defendant; the amenability of this decision to judicial review, the plaintiffs' right to be heard and the obligation on the defendant to provide adequate reasons for any decision adverse to the interests of the plaintiff which was taken.

37. Section 8 of the IBRC Act 2013 provides that:

> "(1) Where injunctive relief is sought on an interim or interlocutory basis in proceedings:
>
> (a) to compel a special liquidator to take or refrain from taking any action; or
>
> (b) to compel any other person to take or refrain from taking any action where the relief, if granted, would adversely affect a special liquidator in the discharge of his or her functions; the Court shall have regard, in determining whether to grant such relief, to the public interest.
>
> (2) In considering the public interest the Court shall have regard to the purposes of this Act.
>
> (3) Unless the Court is satisfied that the not granting injunctive relief would give rise to an injustice, the Court shall not grant such relief where a remedy in damages would be available to the person who seeks that relief."

Counsel submits that the plaintiff in this instance comes within the category outlined in this provision. It was submitted that if there was no merit in the plaintiffs' primary application under *Campus Oil v. Minister for Industry and Energy (No 2)* [1983] I.R. 88 principles the issue relating to s. 8 of the IBRC Act 2013 does not arise for the Court to determine.

38. Counsel concluded by submitting that damages would not be an adequate remedy for the plaintiff and that the balance of convenience favoured the award of the injunction since otherwise the sale would continue and the plaintiffs would be left with no possibility of achieving a real remedy since their loans and assets would already have been sold by the time the trial of the substantive action has been heard and determined. Counsel emphasised that the defendant is insolvent and in liquidation and that Counsel for the defendant has accepted that no funds have been ring-fenced by the defendant to deal with any successful claims in damages which may be made against it by borrowers. Counsel for the plaintiff rejected the submission of counsel for the defendant that any award made in the plaintiffs' favour against the defendant could be set-off against the purchaser of the plaintiffs' loans and that the plaintiffs would have a claim for their damages against the purchaser.

39. The plaintiffs have given an undertaking as to damages. No prejudice will be suffered by the Special Liquidators or the defendant since the urgency which is claimed to exist in relation to the sale of the instruments and assets the subject of these proceedings is overstated by the defendant. It was submitted that the decision of the court in *Curust Financial Services Limited v. Loewe Lack Werk* [1994] 1 I.R. 450, in which it was held that the fact that a plaintiff will suffer damage which is difficult to quantify does not preclude the award of an interlocutory injunction provided that quantification is not impossible, should be relied upon by this Court in the exercise of its discretion.

Submissions on behalf of the Defendant

40. Mr. Ferriter S.C., for the defendant, characterised the claims made by the plaintiffs as a claim for a right to bid for their loans, as a right to have the Special Liquidators negotiate with them in terms of their bid and a right to purchase their loans at a value which is below par. The plaintiffs do not have the benefit of any such rights. Counsel referred to the clause in each of the loan instruments which confers upon the defendant bank an unfettered right to transfer, assign, sell or dispose of the loans without notice to the borrower or any other person on terms the Bank deems fit. There is no provision in the statutory scheme which governs the relationship between the plaintiffs, the Bank and the Special Liquidators which confers the rights claimed by the plaintiffs on them as borrowers. It was also submitted that the plaintiffs have no right to be given the opportunity to bid for or acquire their own loans, their only right is to repay the debt in full and thereby redeem the security. Their only interest in the assets is the equity of redemption which they possess.

41. Counsel referred to s. 9 of the IBRC Act 2013 which relates to the power of the Minister to issue instructions to the Special Liquidators and the requirement of the latter to comply with those instructions. There is no provision in any of the Ministerial Instructions issued under this legislation to date which provides for a right of the borrower to bid for her own credit facilities. Nor is there any obligation on the part of the liquidators to engage in negotiation with the borrower for such a purpose. Counsel refers to the fact that the Ministerial Instructions also provide for the definition by the Special Liquidators of those persons or entities who are qualified to participate in the bidding process and submits that if the plaintiffs do not meet the criteria which are formulated by the Special Liquidators in applying the Ministerial instructions as regards the sale process then they cannot be said to have a legitimate claim to an entitlement to participate in the sales process themselves.

42. Counsel for the defendant also submits that on a number of occasions the plaintiffs have complained that the Special Liquidators will not release information in relation to the valuation which they have received for the plaintiffs' credit and security facilities but that such complaint is misconceived given that the Special Liquidator is required under the terms of the IBRC Act 2013, and the Ministerial Instructions issued thereunder, to keep such information confidential and not to divulge valuations to persons other than the Special Liquidators and the Minister for Finance. This application was characterised as an attempt to force the Special Liquidators to release the valuation information which they have in relation to the plaintiffs' facilities and also to enter into negotiations with the plaintiffs on the possible sale of those facilities to the plaintiffs.

43. On the facts it is clear that the plaintiffs are attempting to purchase their loans substantially below par value. In this instance the offer made by the plaintiffs to the defendant for the purchase of their loans was in the region of €8.75m which is less than 40% of the actual par value of the facility. Counsel submits that there is no entitlement, in the legislation or the Ministerial Instructions, on the part of the borrower to such a right.

44. Counsel submits that the plaintiffs do not raise a fair issue to be tried in relation to the letter of 1st November, 2013, which conveyed the decision of the defendant to sell the plaintiffs' loans by portfolio rather than individually to the plaintiffs.

45. The plaintiffs submit that the decisions taken by the Special Liquidators, by analogy to the findings made by the court in *Dellway Investments & Ors v. NAMA & Ors* [2011] 4 I.R. 1 and *Treasury Holdings and Ors v National Asset Management Agency and Ors* [2012] IEHC 66, are decisions taken within the public realm and are therefore decisions which are amenable to judicial review. Counsel on behalf of the defendant submits that this cannot be the case since the two aforementioned cases are radically distinguishable on their facts from the situation which pertains on this application. In *Dellway* no opportunity was given to the borrower to make representations to NAMA in relation to the compulsory acquisition of his loans from the Bank of Ireland and no notice of this decision was given to him prior to its being taken. This is not the case here since the opportunity to make submissions was given to the plaintiffs by way of the letter from the defendant dated 4th September, 2013, which letter also gave notice of the various upcoming decisions complained of in the within proceedings. The plaintiffs did make representations and those representations were taken into account in coming to the conclusions reached. Similarly, in *Treasury Holdings and Ors v. The National Asset Management Agency and Ors* [2012] IEHC 297 the decision by NAMA to wind up the companies in question and appoint receivers was taken with no notice of this decision and no opportunity to make representations having been given to the plaintiff borrower. This is distinguishable again from the situation which pertains in the case currently before the Court. Counsel however accepts that there is an arguable case that the plaintiffs have a right to be heard for the purposes of this interlocutory application but submits that there is no fair issue raised to the effect that such a right has been breached.

46. Counsel also submits that the terms of the letter of 4th September, 2013, from the Special Liquidators on behalf of the defendant to the plaintiffs adequately meets the requirements of the right to be heard, should it be found to exist, as the criteria for the sales process were clearly outlined to the plaintiffs in this letter and the opportunity to make representations was given to the plaintiffs. If the letter of the 4th September, 2013, had not been sufficiently clear then the plaintiffs would have sought clarification by way of further letter rather than making submissions on 16th September, 2013, from Deloitte and on 17th September, 2013, from their solicitors without seeking further clarification. This indicates that the terms of the letter and the information set out therein were sufficiently clear and discharged any right to be heard which the plaintiffs may contend exists.

47. No general duty to give reasons is available to the plaintiffs and the requirement to give reasons is limited and does not extend to

a detailed review by the Supreme Court of the adequacy of the reasons actually given. The decision of Clarke J. in *Christian v. Dublin City Council* [2012] 2 I.R. 506 in which it was held at para. 71 that "there is no clear jurisprudence which provides for a general duty to give reasons in all circumstances" is relied upon in this regard. Counsel also notes that the decision in *McCormack v. Garda Siochana Complaints Board* [1997] 2 I.R. 489 made clear that the extent of the duty to give reasons, if it is owed at all, depends on the function which the decision maker is performing and the detriment which is said to have been caused by the failure to give reasons. A body which is exercising a quasi-judicial function will be held to a higher standard than a body which is not. The defendant in this instance is not undertaking a quasi-judicial function. The court in *Laurentiu v. Minister for Justice* [1999] 4 I.R. 26 stated at p. 34 that there was no "obligation constitutional or otherwise to set out specific or more elaborate reasons" than those given in that instance. In *FP v Minister for Justice* [2002] 1 I.R. 164 at p. 175 Hardiman J. stated that:

> "Where an administrative decision must address only a single issue, its formulation will often be succinct....An adequate statement of reasons in one case may thus be equally adequate in others. This does not diminish the statements essential validity or convert it into a mere administrative formula."

The reasons outlined in the letter of 1st November, 2013, despite their supposed generality, are sufficient to discharge any obligation to give reasons which resides with the Special Liquidators and the defendant.

48. Counsel also submits that, given that the award of an injunction is a discretionary equitable remedy, the Court is entitled to take factors other than the three main principles outlined in *Campus Oil v. Minister for Industry and Energy (No 2)* [1983] I.R. 88 into account in making its decision. In this case there was a substantial period of delay between 1st November, 2013, which is the date on which the plaintiffs were informed of the decision of the defendant to sell their loans as part of a portfolio rather than individually and 13th January, 2014, when the complaint in relation to the inadequacy of the reasons given for this decision, was first raised. Counsel also notes that the unsolicited offer for the loans was made by the plaintiffs on 22nd January, 2014, more than two months after the decision taken on I st November, 2013, and the defendants were under no obligation to engage with the plaintiffs in relation to this unsolicited offer of purchase. Counsel for the defendant states that this unwarranted delay of two and a half months, which could have been avoided by the plaintiff issuing a letter seeking further clarification from the defendant in relation to the reasons for the decision taken, militates against the award of the relief sought on this application.

49. In relation to the adequacy of damages it was submitted that damages would be an adequate remedy for the plaintiffs should they be successful at the substantive hearing of this action. The damages are not incapable of quantification and a claim for damages is made by the plaintiffs in the main proceedings. The complaint made is essentially for overcharging, it is a pecuniary complaint and therefore damages would be an adequate remedy. The fact that the loans and assets of the plaintiffs are sold by the defendant to a third party does not interfere with the rights of the plaintiffs as defined in the contract originally held with the defendant. In effect the rights and interests of the plaintiffs merely shift to the third party from the defendant and therefore damages would be an adequate remedy in this instance as there is no prejudice caused which would be irremediable by pecuniary relief. Counsel for the defendant submitted that the plaintiffs would, should they be successful in their claim, retain the possibility in principle of making a claim of equitable set-off against the purchaser of the loan, but that this claim would not be made out on the facts.

50. Counsel submitted that the undertaking as to damages given by the plaintiffs is not satisfactory as Mr. McCabe has a very small net excess of income over outgoings and the two plaintiff companies have a net deficiency of assets. Therefore it is unlikely that the plaintiffs would be capable of discharging any undertaking as to damages should that become necessary at the determination of the main proceedings.

51. Counsel for the defendant submitted that the prejudice which would be suffered by the defendant if the interlocutory injunction was to be awarded is not quantifiable in damages as it would be in the nature of harm to the process of the liquidation generally; to the certainty which is necessary for the proper functioning of the process and to the position which qualified bidders would have to take in the event that they are told that part of the portfolio is no longer available for sale due to the existence of a court order in relation to it.

52. In relation to s. 8(3) of the IBRC Act 2013, counsel submitted that there would be a remedy in damages available to the plaintiffs and many of the reliefs sought by the plaintiffs are pecuniary reliefs and therefore the Court should be cognisant of this provision which provides that "[u]nless the Court is satisfied that not granting injunctive relief would give rise to an injustice, the Court shall not grant such relief where a remedy in damages would be available..."Section 8(4) provides that: "the possibility that the action in respect of which injunctive relief is sought would or might result in a person being declared bankrupt or ordered to be wound up or otherwise adversely affected is not, of itself, sufficient to establish that not granting such relief would give rise to an injustice". Counsel submits that this is quite a high threshold to meet. None of these consequences come into play here and this loan is a performing loan. Therefore there is no need for the Court to consider this aspect of this provision. Counsel also submits that there is an overwhelming public interest in the liquidators being allowed to close out the sales process with the minimum of interference.

53. In relation to the balance of convenience element it was submitted that the delay between the date of the decision on 1st November, 2013, and the date at which the inadequacy of the reasons for the decision issue was raised on the 13th January, 2014, was significant and should militate against the making of the order sought as the issue could and should have been raised at an earlier stage in the proceedings. The liquidation process in this instance is rather exceptional and therefore it was incumbent upon the plaintiffs to come to Court as soon as reasonably possible in order to raise any issues which they foresaw as problematic. Kirwan, *Injunctions Law and Practice*, (Dublin, 2008) states at para. 4.28 that it is necessary, in order to establish that delay precludes the award of an injunction, to show that two elements exist "first, that the plaintiff in question delayed unreasonably; and secondly, that such delay means that it would be unjust to grant an injunction to the plaintiff."

54. Counsel also submits that the issue in relation to the mis-selling of the loan instruments and the overcharging of interest, on facilities which were granted in July 2006, and March 2008, was not raised until the letter of 8th October, 2013, which was after the Statute of Limitations limitation period had been exhausted in relation to one of those instruments and which was close to the expiration date for the other.

55. Counsel for the defendant also submits that the conduct of the proceedings militates against the award of the relief sought as it was not until the 14th January, 2014, the day on which the interlocutory application was originally to be heard, that the public law issues, which are raised here and in the amended statement of claim on the part of the plaintiffs, were made known to the defendants. Counsel also submits that the original claim was framed in such a way as to make complaint about the fact that NAMA would not offer the plaintiff a right to set off any award of damages which they may receive if successful in their substantive action against their indebtedness to the Bank. However, this right of set off was accepted by NAMA in relation to the plaintiffs' loans by letter of 13th January, 2014, and therefore the nature of the case as pleaded had to be changed. Counsel submits that this militates against the award of the relief sought.

Conclusion
56. As stated by Lord Diplock in *American Cyanamid v. Ethicon Ltd* [1975] A.C. 396 at p. 407:

> "It is no part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial."

57. The test to be made out for the granting of an interlocutory injunction in this instance is the well known test set out in *Campus Oil v. Minister for Industry and Energy (No 2)* [1983] I.R. 88 which was recently restated by Laffoy J. in *McCann v. Morrissey & Ors* [2013] IEHC 288 at para. 23 namely:

> "(a) Whether [the applicant] has established that there is a serious issue to be tried;
>
> (b) Whether damages would be an adequate remedy for [the applicant], if he was successful at trial, and, conversely, whether, if he was not successful at the trial, the entitlement of the defendants to resort to the undertaking as to damages, which was given to the Court by [the applicant] would be an adequate remedy for them; and
>
> (c) Whether the balance of convenience lies in granting or refusing the interlocutory injunction."

58. The Court concludes that Counsel on behalf of the plaintiffs has raised a serious issue to be tried in relation to the plaintiffs' right to be heard and their right to reasons for any decision taken by an entity within the realm of public law which may have adverse consequences for them. The Court is prepared to accept, as Finlay Geoghegan J. did in *Treasury Holdings and Ors v National Asset Management Agency and Ors* [2012] IEHC 66 and purely for the purposes of the within application, that the decision taken by the Special Liquidators on 1st November, 2013, was a decision within the realm of public law and therefore may arguably be subject to a requirement that an adequate rationale be furnished for the decision to those most affected by it. This conclusion is reached having regard to the purposes and the structure of the 2013 Act, the effects of the decision taken on the interests of the plaintiffs and the statutory scheme as a whole, in particulars. 3 of the Act which sets out its purposes, s. 8 which deals with interlocutory injunctive relief and s. 9 which deals with the status of Ministerial Instructions made under the Act. While it is not clear that there is a general duty to give reasons, it is at least clear from the authorities opened by Counsel for the plaintiff, and in particular the recent decision of the Supreme Court in *Dellway Investments & Ors v. NAMA & Ors* [2011] 4 1.R. I, that such a duty may exist in particular circumstances. It is not incumbent upon this Court to conclusively determine on an application for interlocutory relief that the decision taken within the statutory scheme of the IBRC Act 2013, as here, is subject to such a duty.

59. However, in relation to the adequacy of damages. The plaintiffs, in their substantive action, make a number of claims related to damages and such damages would appear to be quantifiable. Should they be successful at the trial of the action the fact that their loan instruments and assets have been transferred from the defendant will not deprive them of a right of remedy. The factual reality is that it is unlikely that any damages which the plaintiffs will be entitled to will exceed their indebtedness to the Special Liquidators. In the circumstances the Court is satisfied that damages will be an adequate remedy.

60. In consideration of the balance of convenience, as was emphasised by counsel for the defendants, the plaintiffs have delayed in bringing the within claim. The plaintiffs' loans continue to be considered as performing loans and the plaintiffs retain the option of buying out their loans by paying off the remaining indebtedness should they so wish. In relation to s. 8(1) of the IBRC Act 2013, the Court is obliged to have regard to the public interest where injunctive relief is sought on an interlocutory basis to compel the Special Liquidators to refrain from taking any action, as is the case in this instance. In doing so this Court has regard to the purposes of the IBRC Act 2013 as set out in s. 3 and in particular, s. 3(b) in relation to the orderly and efficient winding up of the IBRC and s. 3(i) in relation to the need to preserve and restore confidence in the banking sector among the wider public. The Court is satisfied that not granting the relief sought will not give rise to an injustice and has regard to its view that in this instance damages would be an adequate remedy for the plaintiffs should they be successful in the substantive claim as advanced in these proceedings.

61. The Court accordingly, in the exercise of its discretion, refuses the relief sought.