THE HIGH COURT

[2016 No. 11419 P]

BETWEEN

VINCENT BYRNE AND VINCENT BYRNE JUNIOR

PLAINTIFFS/RESPONDENTS

AND

NATIONAL ASSET MANAGEMENT AGENCY

DEFENDANT/APPLICANT

JUDGMENT of Mr. Justice MacGrath delivered on the 23rd day of March, 2018.

1. This is the defendant/applicant's ("*the applicant*") motion seeking an order to dismiss or strike out the plaintiffs/respondents' ("*the respondents*") proceedings (or alternatively such part of the summons and statement of claim). The application is made pursuant to O. 19, r. 28 of the Rules of the Superior Courts, the inherent jurisdiction of the Court, the provisions of the National Asset Management Agency Act 2009 ("*the Act of 2009*"), or the provisions of the Statute of Limitations Act 1957, as amended. It seeks to do so on the grounds that:-

(a) the proceedings are frivolous and vexatious;

(b) the proceedings disclose no cause of action against the applicant;

(c) the proceedings have been instituted without satisfaction by the plaintiff of the requirements contained in s. 182 of the Act of 2009;

(d) the claim has no reasonable prospect of success;

(e) the maintenance of the proceeding is an abuse of process in light of the previous proceedings instituted by the respondents;

(f) the proceedings are statute barred or otherwise out of time, having regard to the Statute of Limitations Act 1957, as amended, s. 193 of the Act of 2009 and/or Order 84 of the Rules of the Superior Courts 1986.

2. The applicant seeks an order that the respondents or either of them be restrained from instituting proceedings against the applicant, any National Asset Management Agency ("*NAMA*") group entity within the meaning of the Act of 2009, Mr. Con Cronin or Mr. Roger Keogh in their capacity as statutory receivers appointed by NAMA, without leave of the court being first obtained.

3. The applicant also seeks an order dismissing the proceedings bearing record number 2015/4645P or, in the alternative, an order that the respondents in the said proceedings not be entitled to take any further step in relation to the said proceedings without leave of the court.

Jurisdiction of the Court on this application

4. Precedent dictates that the inherent jurisdiction of the court on an application such as this should be exercised sparingly, consistent with the constitutional right of access to the courts. The onus on the applicant in an application of this nature is heavy. The consequences for the respondent of a successful application are severe. That the court might not exercise its jurisdiction to strike out a claim on such preliminary basis should not be interpreted as a reflection on the strength, or weakness, of the claim or defence.

5. In *Wilkinson & Ors. v. Ardbrook Homes & Ors.* [2016] IEHC 434, emphasising that the jurisdiction should be exercised sparingly, Baker J. highlighted the different and distinct nature of the jurisdiction under O. 19, r. 28, from that being exercised under its inherent jurisdiction:-

> *"15. Order 19, rule 28 of the Rules of the Superior Courts permits the court to stay or dismiss proceedings which are shown to be frivolous or vexatious. The jurisdiction exercised under that rule is separate and distinct from the inherent jurisdiction of the court to strike out proceedings on the grounds that the action is not sustainable or is bound to fail. In any application under the rule, the court is constrained by being confined to an analysis of the claim as pleaded and will exercise its jurisdiction on the assumption that the facts pleaded will be established at trial. If, as a result of that analysis, the court takes the view that the claim does not give rise to a cause of action, the claim will be dismissed or stayed.*
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> *16. In his recent judgment in Burke & Anor v. Beatty [2016] IEHC 353, Noonan J. exercised the jurisdiction under O. 19, r. 28 to strike out part of the claim by the plaintiffs against a defendant in which damages for an alleged conspiracy were claimed. Noonan J. made the point … that 'pleadings exist to define the issues which the court has to determine' (para.14).*
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> *17. On the other hand, where the court is exercising its inherent jurisdiction to dismiss proceedings, it may take a broader approach and may look outside the pleadings in order to assess whether the claim is bound to fail and if it can be shown to be such, the continued maintenance of those proceedings is an abuse of process. As explained in a series of decisions of Clarke J., including Salthill Properties Limited & Anor. v. Royal Bank of Scotland plc & Ors. [2009] IEHC 207 and Keohane v. Hynes & Anor. [2014] IESC 66, that jurisdiction is one that will be 'sparingly exercised'. In that context, the court will examine the evidence on affidavit presented by a plaintiff, and will determine whether the plaintiff could possibly establish the facts presented. As Clarke J. said in Lopes v. Minister for Justice, Equality and Law Reform [2014] IESC 21:*
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> > *'…cases which go to trial often take unusual turns on the facts which might not have been anticipated in advance.'*
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> *18. The sparing exercise of the jurisdiction involves the court hearing a motion to strike out as being scandalous or vexatious and bound to fail, in not merely taking a plaintiff's pleaded case at its height, but will have to assess whether arguably those matters pleaded or deposed to on affidavit could possibly be established at trial, and if there is a possibility that the case could possibly succeed it ought not be dismissed. Were the test to be more stringent, and were*

a plaintiff obliged to establish that he or she will arguably succeed, or were the court to require a credible basis for establishing facts, the court hearing the motion could fall into the error of assessing the credibility of the evidence, and failing to recognise that at trial, or even in the course of pre-trial procedures such as discovery, the facts may take a particular course and the court hearing a motion would be depriving a plaintiff of an action that could possibly succeed."

Background

6. The applicant was established under the National Asset Management Agency Act 2009 ("*the Act of 2009*"), the preamble of which describes a reason for its establishment being "*to address a serious threat to the economy and to the systemic stability of credit institutions in the State generally*". The acquisition from participating institutions of eligible bank assets, the expeditious dealing with the assets so acquired and the protection or otherwise enhancement of their value are important functions of NAMA under the Act.

7. The respondents are father and son. They bring the underlying proceedings against the applicant in respect of the applicant's dealings with certain bank assets, the subject of various charges and loans, seeking damages for alleged breach of constitutional right to fair procedures, alleged violation of their rights under the provisions of Protocol 1, Article 1 of the European Convention on Human Rights, Article 17 of the Charter of Fundamental Rights of the European Union ("*the Charter*") and alleged infringement of their rights under the Treaties of the European Union ("*the Treaties*"). These bank assets were transferred to the applicant in accordance with Part 6 of the Act of 2009 on 17th December, 2010, and were held by the applicant, or one of its entities (National Asset Loan Management Agency), until February, 2016 when they were sold by receivers appointed by the applicant.

8. The notice of motion is grounded on an affidavit of Ms. Mary Lawlor, an employee of the applicant, sworn on 24th March, 2017. The facts outlined in that affidavit are not substantially disputed.

9. On 18th July, 2006, AIB agreed to advance sums of €5.55 million and €715,000 to the second named respondent, Mr. Vincent Byrne Junior and a named third party for the purpose, *inter alia*, of funding the purchase, for development, of property at Parnell Road, Dublin 12. The respondents take issue with this property being described as a "*site*" and emphasise that the purpose of the loan as described in the facility letter was "*towards the purpose of a development site*". The security provided for the loan included a legal charge over the property at Parnell Road (vested in the named third party and Vincent Byrne Junior), a legal charge over apartments 7 and 8 Doreen House, in the name of Vincent Byrne Junior and Vincent Byrne Senior, a legal charge over a penthouse apartment at No. 9 Doreen House, Blackhorse Avenue, vested in Vincent Byrne Junior, and a letter of guarantee in the amount of €700,000 executed by Vincent Byrne Senior, the first named respondent. These are the "*bank assets*". The development never took place. The loan fell into arrears. The applicant terms it an "*impaired loan*".

10. On 17th December, 2010, an entity of the applicant, the National Asset Loan Management Agency (hereinafter referred to as "*NALM*"), exercising its powers under the Act of 2009, acquired the above bank assets, comprising the letter of sanction, the apartment mortgages, the Parnell Road mortgage and the guarantee.

11. The first named respondent is a guarantor and debtor of, and the second named respondent a debtor in respect of, the bank assets. It is contended by the applicant and not challenged by the respondents that the Act of 2009 applies to these proceedings.

12. Letters of demand were served on the respondents on 20th December, 2013, and 2nd January, 2014. No payments were made.

13. On 13th January, 2014, Mr. Cronin and Mr. Keogh were appointed as statutory receivers pursuant to s. 147 of the Act of 2009 over the apartments; and by further deed of appointment of 3rd February, 2014, they were appointed as statutory receivers over the Parnell Road premises.

14. The respondents attempted to prevent the sales of the properties, in circumstances outlined later in this judgment. They brought court proceedings but were not successful. The premises were subsequently sold by the receivers in 2016.

15. A defence has yet to be delivered.

16. While there is no contemporaneous written record of the making of the decision to acquire the bank assets, the applicant has produced to the Court a certificate dated 14th March, 2017 in respect of the said transfer, which is certified thereby to have taken place on 17th December, 2010. Pursuant to the provisions of s. 108 of the Act of 2009, the certificate is deemed to be conclusive of matters set out therein. The acquired bank assets are specified in schedule 1 of the certificate. They include facility letters, mortgages and a guarantee executed in favour of Allied Irish Banks of 21st July, 2006. The mortgage premises are described in the certificate as including "*apartments 7, 8 and 9, Doreen House, 317/319 Blackhorse Avenue Dublin 7*" and a "*site at Parnell Road, Dublin 12*". The former mortgage was entered into by both respondents with AIB Mortgage Bank and Allied Irish Banks plc, the latter was entered into with Allied Irish Banks plc by the second named respondent only.

17. What is described in the schedule as a "site" at Parnell Road was in fact a well-known fuel filling station. It had been envisaged that this property would be redeveloped for residential use, but such redevelopment never took place due to the onset of the recession.

18. The gravamen of the respondents' complaint is that during the decision-making and acquisition process, the applicant (and its group entities) failed to comply with necessary preconditions and procedures which it is alleged are mandated by law. They contend that such right arises under the Constitution, and pursuant to the Charter and Treaties. They claim that the applicant should have communicated with them before the assets were acquired and, in particular, during the decision-making process. They allege that they should have been afforded the opportunity to provide the applicant with information and documents relating to the nature of the bank assets being transferred, which would have informed the decision making process. It is contended that the procedures and protocols adopted by the applicant effectively prohibited them from making representations. This was in breach of what is claimed to be a right to submit observations pertaining to their personal circumstances, contrary to Article 41(2)(a) and Article 47 of the Charter, Articles 6 and 13 of the European Convention of Human Rights and was also in breach of the constitutional right to fair procedures. It is alleged that the applicant also failed to comply with an obligation to provide a clear and unequivocal statement of reasons for the decision, that it failed to ensure judicial protection, impartiality and legal certainty and that the procedures adopted precluded them from exercising their right, inter alia, to make representations pertaining to their circumstances and those surrounding the assets.

19. At para. 8 of the statement of claim (described in the proceedings as a draft statement of claim but accepted by the parties as the statement of claim delivered on 15th February, 2017), it is pleaded that the applicant based its decision to acquire the bank assets on manifest errors of fact and law. In consequence, the respondents maintain that they have suffered significant financial

losses. That is not the only complaint of the respondents, however, because they go further and maintain that the sale of the premises by the receivers was invalid because the act of sale flowed from the original unlawful action of the applicant in acquiring the assets. The receivers were appointed by the applicant, but in law by virtue of s. 149 of the Act of 2009, are agents of the chargors. The respondents maintain that there was a continuation of the wrong and their loss and cause of action crystallised when the properties were sold. Up until that point they allege that they could not have interfered with the actions of the applicant under the Act of 2009. Significant losses and damages are claimed.

Preliminary application
20. On the hearing of the motion before the Court, the respondents made two preliminary applications:-

> 1. that the applicant failed to comply with its obligations under High Court Practice Direction 54 and that this constitutes a procedural irregularity; and
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> 2. that the application, being made in advance of the delivery of a defence, is premature.

Practice Direction HC54 – Proceedings involving a litigant in person
21. This practice direction came into effect on 26th July, 2010 and is stated to have, as its purpose, the facilitation of "*the hearing of applications to the court in, and the preparation for trial of, such proceedings, and the conduct of the hearing or trial concerned*". The direction applies to proceedings in which one or more of the parties is participating without professional legal representation.

22. The respondents contend that they did not receive the requisite "*Form 1*" information sheet as prescribed by the practice direction. The applicant conceded that the practice direction was not complied with until the morning of the hearing of the motion. The second named respondent, in addressing the Court, initially accepted that there was no prejudice caused by the failure on the part of the applicant to comply with the requirements of the said practice direction. However, on subsequent reflection he believed that they had suffered some prejudice in relation to certain arguments and submissions made by the respondent relating to rights under the Charter.

23. In *Harvey v. Courts Service & Ors* [2015] IEHC 680 O'Connor J. observed at para. 11:-

> *"As for the plaintiff's submission about being a lay litigant, the court cannot differentiate between those who have professional legal representation and those who represent themselves. On occasion the administering of justice may be improved by practice directions which facilitate the hearing of applications."*

In *McConnon v. President of Ireland & Ors* [2012] 1 I.R. 449, Kelly J. stated at para. 63:-

> *"The plaintiff alleged that there was a failure on the part of the Bank to adhere to a practice direction issued by the President of the High Court on the 26th July, 2010, in respect of this application. It is not necessary for me to adjudicate on that issue, since even if there was a failure, no mischief resulted."*

24. Further, even had mischief occurred, the practice direction provides at para. 7 thereof that "*[f]ailure to comply with any of the requirements of this direction may expose the party in default to liability for costs*". Thus, failure to comply with the practice direction is not, in and of itself, fatal to the application. I am satisfied that no prejudice has been occasioned to the respondents, and that no mischief has ensued. In the circumstances the non-compliance with the practice direction in this case should not and does not prevent the application from proceeding.

Is the application premature?
25. The second preliminary application made by the respondents is that the motion is premature in that the applicant had not yet delivered its defence in the action. Mr. Steen S.C., on behalf of the applicant, accepting that while normally required to be pleaded, submitted that it is inevitable that such a plea under the Statute of Limitations Act 1957 (as amended) will be raised, should the applicant be required to deliver a defence. He confirms that if the respondents are permitted to proceed with their claim, any defence delivered by the applicant will contain a plea that the claim is out of time by virtue of the provisions of the Statute of Limitations Act 1957 (as amended) and also by virtue of the provisions of s. 182 of the Act of 2009.

26. Order 19, rule 28 of the Rules of the Superior Courts is silent as to the time within which an application such as this ought to be brought. In so far as applications to dismiss the claim on the grounds of abuse of process are concerned, the authorities establish that such an application should not be taken before the essential facts on which a plaintiff's case is based have been identified and they must be accepted to be undisputed for the purposes of the application.

27. It has also been stated by the Supreme Court in *S.M. v. Ireland (No. 1)* [2007] 3 I.R. 283 that undue delay may lead to an application to strike out being dismissed. The applicant concedes that for the purposes of this application only, it must accept such facts as have been outlined in the plaintiff's statement of claim. I accept the applicant's submission that it is not necessary to file and deliver a defence (in which the statute might be raised) in advance of bringing this motion such as this. It seems to the Court that one of the purposes of the procedure envisaged under the order is to deal expeditiously and as inexpensively as possible with matters which are accepted or are clear on their face. That is not to say that it may not be necessary to deliver a defence in all such cases before such a motion is brought. I am satisfied that there is no absolute procedural bar to bringing this application at this time, in this case.

Applicant's submissions
28. The applicant asserts that there is not now and never has been a dispute regarding the fact of the charge, the amounts advanced or the amounts now outstanding, the assets having been disposed of.

29. Mr. Steen S.C. on behalf of the applicant submits that there are essentially three aspects to the respondents' claim. The first relates to the acquisition of the bank assets, the second to undertakings given to the European Commission and the third to the management and sale of the secured properties. He contends that while the claim, on the face of it, is stated to be one for damages, it is essentially a "*couched collateral attack*" on the process of acquisition. This, it is contended, the respondents are not entitled to do, save with the leave of the court pursuant to s. 182 of the Act of 2009; and the time for seeking such leave has long since expired.

30. In so far as any wrong sounding in damages is concerned, the applicant contends that, in any event, a claim seeking damages for

such alleged wrong is clearly statute barred pursuant to the provisions of the Statute of Limitations Act 1957, the wrong having occurred on a date prior to, and not later than, 17th December, 2010. The six year limitation period prescribed by s. 11(2)(a) of the Statute of Limitations Act 1957 expired before the institution of these proceedings.

31. In response, the respondents informed the Court that they attempted to seek leave *ex parte* on 19th December, 2016 but were told that leave was not required as the claim was one for damages. No court documentation has been produced. It would seem that any proceedings which were prepared at that time were neither stamped nor issued. Mr. Byrne Junior accepted during the course of his submissions to the Court that the proceedings did not issue. In any event, this Court can only deal with the proceedings before it, which were instituted on 22nd December, 2016.

32. Mr. Byrne Junior, in response, also submitted that he was not informed of the acquisition until the first week of May, 2011 and, indeed, to this day has not been informed of the date upon which the decision was in fact taken. He contends that the six-year period should run from the date of notification.

No cause of action regarding the 'fact' of the acquisition – s. 103
33. The applicant refers to s. 103 of the Act of 2009, which provides that no cause of action is maintainable against NAMA or any NAMA group entity by reason solely of the acquisition of the bank asset. It seems clear therefore, that if the only basis upon which a claim is brought is the fact of the acquisition itself, such proceedings cannot be maintained by reason of the provisions of that section. In this case, however, it appears to the Court that the claim for damages relates significantly to the alleged failure on the part of the applicant to comply with procedures prior to the acquisition and in those circumstances it is potentially arguable that the provisions of s. 103, of themselves, do not constitute a bar to the maintenance of these proceedings.

Time limit for notification of acquisition – s. 96
34. The applicant relies on s. 96 of the Act of 2009 which provides, inter alia:-

> *"(1) Within 60 days after the acquisition of a bank asset from a participating institution, the participating institution shall make reasonable efforts to notify each debtor, associated debtor, guarantor or surety in relation to the credit facility concerned of the acquisition of the bank asset by NAMA or the relevant NAMA group entity.*
>
> *(2) Where there has been failure or delay in notifying a person in accordance with subsection (1)—*
>
> *(a) neither NAMA nor the relevant NAMA group entity is liable for any such failure or delay,*
>
> *(b) the acquisition is valid notwithstanding any such failure or delay..."*

35. Thus, the applicant submits that if there was a delay in the notification of the acquisition of the bank assets that this was a failure for which NAMA cannot have responsibility and such action, if any, lies against the lending bank, in this case AIB. Given that the respondents' claim relates to matters which occurred before the acquisition, the relevance of s. 96 of the Act of 2009 to the respondents' case is therefore unclear and does not point to a conclusion, at this stage, that a claim for damages in respect of matters that arose before, or during the decision making process, is bound to fail.

Statute of Limitations Act 1957
36. In respect of the argument that any cause of action for damages as may exist is statute barred, s. 11(2)(a) of the Statute of Limitations Act 1957, which is relied on, provides:-

> *"(2) (a) Subject to paragraphs (b) and (c) of this subsection, an action founded on tort shall not be brought after the expiration of six years from the date on which the cause of action accrued."*

It is further submitted that although it is argued by the respondents that they were unaware of the acquisition of the assets until either late April, or early May, 2011, the discoverability principle provided for by s. 3 of the Statute of Limitations (Amendment) Act 1991, does not apply, this not being a claim which involves personal injuries. I accept the applicant's argument that the provisions of s. 3 of the Act of 1991 have no application to these proceedings. However, what is not so clear is the date of accrual of any cause of action in the circumstances that exist in this case.

> European Convention on Human Rights Act 2003

37. In so far as any complaint that the respondents may have regarding alleged breach of the provisions of the European Convention of Human Rights, Mr. Steen S.C. argues that s. 3 of the European Convention of Human Rights Act 2003 provides for an even more restrictive time period within which to bring proceedings. The relevant subsections of s. 3 provide as follows:-

> *"(1) Subject to any statutory provision (other than this Act) or rule of law, every organ of the State shall perform its functions in a manner compatible with the State's obligations under the Convention provisions.*
>
> *(2) A person who has suffered injury, loss or damage as a result of a contravention of subsection (1), may, if no other remedy in damages is available, institute proceedings to recover damages in respect of the contravention in the High Court (or, subject to subsection (3), in the Circuit Court) and the Court may award to the person such damages (if any) as it considers appropriate."*

Therefore, it is submitted by the applicant that, to the extent that there may have been a breach of the Convention which, if shown to be binding, such would constitute a breach of statutory duty and a tort. Section 3(5)(a) provides:-

> *"Proceedings under this section shall not be brought in respect of any contravention of subsection (1) which arose more than 1 year before the commencement of the proceedings."*

38. The applicant concedes for the purposes of this application only that "*organ of the State*" may include NAMA but reserves its position on the point should the case proceed to full hearing. Thus, it is the contention of the applicant that even if there is such an infringement of Convention rights and that the respondents are entitled to rely on the Convention in the context of a domestic claim for damages, a claim on this basis is well out of time. This argument may very well succeed on further consideration of the facts of the case. Given the provisions of s. 3(5)(b), however, that "*[t]he period referred to in paragraph (a) may be extended by order made by the Court if it considers it appropriate to do so in the interests of justice*", it is premature to conclude, on the basis of the

material before the Court and in the absence of an application for the extension of time together with a consideration of the response of the applicant to any such application, that such a defence will succeed.

Section 182 of the Act of 2009
39. More fundamentally, the applicant submits that this claim should fail because the respondents did not seek leave of the court to proceed within the time limit laid down in s. 182 of the Act of 2009. This section is contained in Part 10, Chapter 2 of the Act of 2009 which makes certain provisions in respect of legal proceedings. It provides as follows:-

> *"(1) Subject to subsection (2), a claim to which this Chapter applies gives rise only to a remedy in damages or other relief that does not in any way affect the bank asset, its acquisition, or the interest of NAMA or the NAMA group entity or (for the avoidance of doubt) any property the subject of any security that is part of such a bank asset.*
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> *(2) A person may apply for an order that the person may apply for a remedy other than or in addition to that permitted by subsection (1) in relation to a claim to which this Chapter applies.*
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> *(3) An application for an order mentioned in subsection (2) shall be made only by leave of the Court. An application for such leave may be made ex parte.*
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> *(4) Leave shall not be granted to apply for an order under subsection (2) unless the Court is satisfied that the application raises a substantial issue for the Court's determination and—*
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> *(a) the application for leave is made to the Court within 30 days after the later of—*
> (i) the notification by the participating institution to the relevant debtor, associated debtor, guarantor or surety under section 96, and
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> (ii) the accrual of the cause of action in respect of which the legal proceedings arose,
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> *or*
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> *(b) the Court is satisfied that—*
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> *(i) there are substantial reasons why the application was not made within that period, and*
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> *(ii) it is just and equitable in all the circumstances to grant leave having regard to the interests of any affected person."*

Subsection 6 is also relevant. It provides:-

> *"The Court shall make an order under subsection (2) if and only if the Court is satisfied that if the applicant's claim were established, damages would not be an adequate remedy."*

The nature of the remedy
40. Section 182(1) of the Act of 2009 envisages that in an appropriate case, a claim for damages may be brought without leave where the relief claimed does not also seek a remedy that may affect the bank asset, its acquisition or the interests of NAMA or the NAMA group entity or any property which is the subject of the security. Thus, s. 182 appears to focus on the nature of the remedy, rather than the right, and it seems beyond question that any relief which may "*affect*" the assets, its acquisition or the interests of NAMA, such as for example by way of injunctive relief, cannot proceed without the plaintiff first making application for the necessary leave. Read in context therefore it is arguable that the time limits and requirements for leave of the court under s. 182 appear to be more directed at the nature of the remedy sought rather than a curtailment of the right to relief in an action for damages.

41. Support for such possible interpretation is seen in Dodd & Carroll, *NAMA: The Law Relating to the National Asset Management Agency*, 1st Ed., (Round Hall, 2012) at para. 15-08:-

> *"Section 182(1) provides that in certain legal proceedings in relation to bank assets specified in an acquisition schedule, the only relief generally available is damages or other relief that does not affect the bank asset, its acquisition, or the interests of NAMA or the property that is security for such bank asset. In order to claim relief other than damages in such proceedings, an order must be obtained allowing the claimant to apply for such other relief. The procedure for obtaining that order involves two stages: first there must be an ex parte application for leave to seek the order and, secondly, assuming leave is granted, an inter-party hearing of the application for an order to apply for such relief. While the provision does not present an absolute bar to seeking reliefs other than damages or a relief which satisfies the specified conditions, it represents a potential curtailment of the availability of remedies. It is therefore a manifestation of a general policy to protect eligible and acquired bank assets from the consequences of legal proceedings which could unduly hinder the operation of NAMA. This appears to reflect the fact that a remedy of damages may not have the impact of other remedies such as, say, an injunction restricting NAMA from dealing with a bank asset. The provision nonetheless simply restricts remedies and does not relate to any underlying substantive cause of action."*
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> Thus, while it appears that s. 182 envisages a restriction on access to the courts without leave in respect of certain reliefs, it does appear to bring within such restriction, a claim solely based on damages.

The nature of the right alleged to have been infringed – 'constitutionalisation' of the right to fair procedures
42. The next issue to be addressed is whether the claim by the respondents that they were not afforded fair procedures in the circumstances of this case might give rise to a right, the breach of which sounds in damages. The right contended for is the right to fair procedures. Implicit in the applicant's submission is that the respondents have no such right in this case because the loan is non-performing or impaired.

43. In *Dellway Investments Limited v. National Asset Management Agency* [2011] 4 I.R. 1, the defendant argued that to establish the right to fair procedures, it had to be shown that a constitutional right of the applicants was implicated. It was submitted that there

was no right to resist the transfer to NAMA of non-contractual "*benefits*" associated with the banking relationships. The plaintiffs in *Dellway* contended that their constitutional rights, such as their property rights, right to a livelihood and right to their good name, were all adversely affected; but they also submitted that they did not have "*to go that far in order to trigger the basic right to a hearing*" (see p. 241). NAMA's argument, as described by Hardiman J., was that the plaintiffs had no right to fair procedures, which included a right to be heard in relation to the decision proposed to be considered. Hardiman J. also noted that NAMA did not have a statutory *obligation* to acquire assets, it had *discretion* to do so [emphasis added]. He approved the following passage in De Smith's Judicial Review of Administrative Action, 6th Ed., (Sweet & Maxwell, 2007) at p. 356:-

> *"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 also been invoked. Whichever term is used, the entitlement to fair procedures no longer depends upon the adjudicative analogy, nor 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)."*

44. On such view the right to fair procedures and to be heard is in itself capable of being a standalone right. It is to be noted that Fennelly J. took a slightly more nuanced view, a matter that has been discussed elsewhere (see David Kenny, "Fair Procedures in Irish Administrative Law: Toward a Constitutional Duty to Act Fairly in Dellway Investments v NAMA", (2011) 2 D.U.L.J., 34). Fennelly J. observed at para. 455:-

> *"The central, and the most difficult, question in the appeal concerns whether the right to be afforded fair procedures in accordance with natural and constitutional justice depends on the contemplated decision amounting to an interference with rights, in the sense of legal rights only, guaranteed by the Constitution."*

He continued at para. 460:-

> *"It does not appear to me that it has been established that the right to be heard before a contemplated decision is made depends on establishing interference with a specific and identifiable legal right. It is difficult to discern a principled basis for restricting the right in that way. The courts have never laid down rigid rules for determining when the need to observe fair procedures applies. Everything depends on the circumstances and the subject matter. The fundamental underlying principle is fairness. If a decision made concerning me or my property is liable to affect my interests in a material way, it is fair and reasonable that I should be allowed to put forward reasons why it should not be made or that it should take a particular form. It would be unjust to exclude me from being heard. For the purposes of the right to be heard, I would not draw a sharp line, what is sometimes called a 'bright line', of distinction between an effect which modifies the legal content of rights and a substantial effect on the exercise or enjoyment of rights. I would fully endorse the first part of the statement of the High Court, quoted above as follows:-*
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> > '[116] 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.'
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> *The problem is with the interpretation of the following statement that '[t]he adverse decision must be such as would directly interfere with those rights, or at least any interference must be so closely connected with any adverse decision so as to warrant that the party concerned be entitled to invoke a right to fair procedures'. If the requirement is that there be direct interference with the legal substance of the rights, the statement is too narrow. It should be capable of including material practical effects on the exercise and enjoyment of the rights. Subject to this qualification, which was crucial to the outcome of the case in the High Court, I would approve the passage at para. [116] (quoted at para. [445] above) as a correct statement of principle."*

45. Applying such proposition to this case, the issue arises as to whether the respondents are persons affected by the decision to acquire the assets. If they are, it appears to the Court that the constitutional and natural justice right to fair procedures has the potential to be triggered.

Persons affected by the decision

46. Agreeing with De Smith's formulation, Hardiman J. in Dellway emphasised that the courts will insist, in the main, on some degree of participation in reaching most official decisions by those whom the decisions will affect. The trigger for fair procedures is that the person claiming them is a person affected by the decision. At para. 203, Hardiman J. noted:-

> *"…the foregoing observations, as well as the matters previously cited, seem to leave little doubt of the proposition that a person whose loans are acquired by NAMA is indeed 'affected' and his rights diminished, by legislation which is of an entirely exceptional character. But the legislation itself will not affect Mr. McKillen or his interests unless and until a decision under s. 84 of the Act is made. That is the point on which he wishes to be heard."*

47. Later, quoting from Hogan and White, *J.M. Kelly: The Irish Constitution*, 4th Ed., (Tottel, 2003) at para. 6.1.52, Hardiman J. observed at para. 313:-

> *"…a person affected by, or with an interest in the outcome of, an administrative decision has the right to have adequate notice of this decision and to be given an adequate opportunity to make his case before that administrative body…"*

Hardiman J. observed as "*especially striking*" the adoption by both legal texts, Kelly and De Smith, of the "*low threshold of being a 'person affected*' or '*with an interest in the outcome*'" as the trigger for the availability of fair procedures. The lowering of the threshold that triggered the right over the previous 40 years was a result, "*not so much of a positive decision to lower the threshold at which a right to fair procedure becomes available in the taking of a decision, but of a constitutionalisation of the right to fair procedures itself*". He concluded at para. 320:-

> *"I would, if necessary, follow O'Higgins C.J. in considering a right to fair procedures, in the public law realm, as being, in itself, a constitutional right, at least where matters of serious significance to a citizen are in question."*

48. Applying the aforesaid *dicta*, it cannot be said at this stage of the proceedings, that the respondents are not persons affected by the decision to acquire the assets in question. The next issue to be addressed is whether any such right may have been negated by

reason of the loan being impaired.

Negation of the right – non-performing loans
49. The applicant sought to distinguish *Dellway* on the basis that the loans in the instant case were non-performing. In contrast, in *Dellway*, the businesses were solvent, and any breaches of the relevant loan terms were of a technical nature. The applicant also contends that the respondents never sought to make representations to NAMA, unlike in *Dellway.* It seems to the Court that implicit in this argument is that the existence of the right or rights envisaged by the Supreme Court in *Dellway*, and/or perhaps the right to have such rights vindicated, is conditional on the loans performing and the debtor actively seeking to make representations.

50. The Court has concerns about the breadth of the argument made by the applicant in this regard, particularly on a preliminary application such as this. In *Dellway*, Hardiman J. described as the main issue in the case the defence maintained by NAMA that even a solvent customer whose loans are being serviced is not entitled to any notice or hearing before his or her loans are compulsorily taken. The plaintiffs in *Dellway* had contended that they had a right to be heard before NAMA considered the exercise of the power to make such decision and, significantly, notice before that decision was made; such right arising because they would be affected by NAMA's decision to acquire the bank assets and that their constitutional rights, including property rights, right to livelihood and the right to their good name "*are all adversely affected*".

51. A proposition to be addressed therefore is whether in circumstances where there has been a default in the repayment and the loan is non-performing, the constitutional right to fair procedures is negatived or curtailed such that the right to a "*hearing*" or to be informed or to make representations does not arise, or its vindication restricted. It is true that in *Dellway* the loans were performing and to that extent that case may be said to be distinguishable from that of the respondents in this case. But if such distinction is to be accepted as an absolute proposition a question arises as to whether and at what point of non-performance does the right becomes extinguished? Must it be a major default, or does a minor temporary default have the effect of extinguishing the right? If the loan goes into arrears but subsequently performs, does the right return? It may be that on a more detailed analysis of the facts the extent of the adverse effect on the respondents by the asset acquisition is limited, or perhaps non-existent, but it seems to the Court that this is not a proposition which is capable of being expressed in absolute terms without reference to the individual circumstances of each case. In my view, it follows that whether, and the extent to which, there has been an adverse effect can only be addressed in the context of each individual case and it seems difficult to envisage how that exercise can be conducted in a realistic manner without reference to the borrower's views or observations. Therefore, I am of opinion, at least on a *prima facie* basis, that the right to fair procedures claimed by the respondents is capable of being triggered. It may be that on a more complete analysis of the facts, the right may be restricted or negated (see analysis conducted in *Treasury Holdings v. National Asset Management Agency* [2012] IEHC 66 in the context of a leave application).

Is the claim statute barred?
52. The next issue to be considered is whether the aforesaid right is one to which breach thereof gives rise to a claim in damages and therefore constitutes a wrong for the purposes of the application of a defence pursuant to the Statute of Limitations Act 1957. Broadly, the traditional approach of the courts in this regard is that recognised, for example, in *Hanrahan v. Merck Sharp & Dohme (Ireland) Limited* [1988] I.L.R.M. 629 – being to consider whether the affected constitutional right is one which is already protected by a recognised tort, in which case the vindication of that constitutional right is likely fulfilled by that cause of action.

53. It may be that a standalone cause of action for breach of fair procedures may not come within any existing historically recognised tort and is therefore, potentially, a distinct wrong. This therefore may be a wrong to which the provisions of the Statute of Limitations apply. If that is correct, the cause of action pursuant to the provisions of s. 11(2)(a) of the Statute of Limitations Act 1957 became statute barred six years after the date upon which the cause of action accrued. The respondents maintain that they were unaware of the decision that the assets had been acquired until they received a letter dated 28th April, 2011, in early May, 2011. The applicant maintains that the discoverability provisions of the Statute of Limitations (Amendment) Act 1991 only apply to personal injuries actions, of which this is not one, which the Court has already accepted. Nevertheless, the limitation period, including the date from which time begins to run, is not, in this Court's view, certain at this stage of the proceedings. One must bear in mind the following passage of Hardiman J. in *Dellway* at para. 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. He is also, very probably, entitled to reasons for the decision taken, if any. A finding that Mr. McKillen is entitled to be heard in the present case naturally imports these necessary consequences of the existence of that right."*

On such analysis, once again, a right to be informed or notified of the proposed decision also potentially arises in this case. To that extent, it does not appear to the Court to be appropriate at this stage of the proceedings and without further evidence or argument to arrive at any conclusion as to the date of the accrual of the cause of action. There are a number of possibilities. If the Court were now to conclude without further hearing or argument, that time began to run as of the certified date of the transfer, on the face of it, that would involve a potential negation of respect for any potential rights to be informed or to make representations. This is yet another issue which requires to be addressed further, before it could be concluded that the defence pursuant to the Statute of Limitations will succeed, and thus the claim bound to fail.

Claim pursuant to the Treaties of the European Union
54. The respondents submit that there has been a breach of certain rights which they enjoy in a European law context, such as the right of defence and the right to have reasons stated. They rely in particular on the decision of the European Court of Justice in Case T-320/09 *Planet v. Commission*, ECLI:EU:T:2015:223 in which the court annulled a series of decisions of the European Anti-Fraud Office (OLAF) requesting the applicant's registration in the early warning system ("*EWS*") put in place to protect the EU's financial interests. The General Court considered that the contested measures must be annulled because the applicant in that case had not been given the opportunity to exercise any rights of defence before the contested decisions were adopted. The Commission claimed, inter alia, that it was unnecessary to hear the applicant as it was well aware of the reasons for its entry in the EWS and could deduce from all the facts and documents sent to it the reasons for its designation by the Commission as an entity requiring certain circumspection. The court disagreed and held, at para. 76, that:-

> *"…respect for the rights of the defence in all proceedings which are initiated against a person and are liable to culminate in a measure adversely affecting that person is a fundamental principle of Community law which must be guaranteed, even in the absence of any specific rules concerning the proceedings in question (see judgments of 13 February 1979 in Hoffmann-La Roche v Commission, 85/76, ECR, EU:C:1979:36, paragraphs 9 and 11, and of 1 October 2009, Foshan Shunde Yongjian Housewares & Hardware v Council, C 141/08 P, ECR, EU:C:2009:598, paragraph 83 and the case-law cited)."*

The court also considered the obligation of the Commission to state reasons. It held at paras. 77 and 78 as follows:-

> *"77. It must also be recalled that, in accordance with a consistent body of case-law, the purpose of the obligation to state the reasons on which an act adversely affecting an individual is based, which is a corollary of the principle of respect for the rights of the defence, is, first, to provide the person concerned with sufficient information to make it possible to ascertain whether the act is well founded or whether it is vitiated by a defect which may permit its legality to be contested before the European Union judicature and, second, to enable that judicature to review the legality of that act …*
>
> *78. The statement of reasons required by Article 253 TFEU must, however, be appropriate to the act at issue and the context in which it was adopted. The requirements to be satisfied by the statement of reasons depend on the circumstances of each case, in particular the content of the measure in question, the nature of the reasons given and the interest which the addressees of the measure, or other parties to whom it is of direct and individual concern, may have in obtaining explanations."*

55. It is observed that in that case, the court was required to consider the procedures relating to registration in the EWS pursuant to Article 8(2) of the Commission Decision 2008/969/EEC, and it was observed that the obligation to inform was linked to a right to express its views on the exclusion warning, which right followed from Article 14(3) of that decision. The court stated at para. 83:-

> *" … in accordance with the case-law referred to in paragraph 76 above, the rights of the defence must always be guaranteed, even in the absence of any specific rules concerning the proceedings in question. The same applies as regards the duty state reasons."*

56. The respondents rely on this decision of the European Court of Justice. It seems to me that at this stage, it is not necessary to express a definitive view on the application of these principles to the transaction at hand in these proceedings, save to record that there is, on the face of it, an element of consistency between the approach of the European Court of Justice in *Planet* and the Supreme Court in *Dellway*; at least in so far as it concerns the right to be heard in advance of a decision which has the potential to affect an individual in an adverse way. It may be that this case is distinguishable, but that, it appears, is a matter for further argument should the case be permitted to proceed.

The claim pursuant to the Charter of Fundamental Rights

57. The respondents rely on Articles 17, 41, 47 and 48 of the Charter. Significant emphasis has been placed on the provisions of Article 17 by the respondents. Regarding this and the other provisions of the Charter upon which they rely, the applicant submits that no cause can arise by virtue of the provisions of Article 51 which provides:-

> *"1. The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties.*
>
> *2. The Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties."*

58. The applicant argues that what is at the heart of these proceedings does not involve the application of European law, rather the implementation by the applicant of domestic legislation. The fact that the legislation and procedures were notified to the European institutions, given the potential contravention of state aid provisions, does not elevate it into the status of a provision that confers direct rights under the Charter in respect of actions of NAMA. Thus, the applicant argues that reliance upon this instrument in its entirety is ill-founded and the Charter has no application to the present case.

59. I have considered the provisions of Article 51 and in my view, the applicant's arguments in this regard are valid and must be accepted by the Court. The rights therein concerned are those relating to the State in the implementation of European law, which for the reasons submitted by the applicant do not arise in this case. It seems to the Court, therefore, that any argument based on a breach of the provisions of the Charter is "*bound to fail*".

Is the claim for damages effectively a challenge to the validity of the acquisition?

60. In his submission to the Court, Mr. Steen S.C. on behalf of the applicant argues that if, in a damages claim, one is seeking to impugn the acquisition of the bank asset as a necessary precondition to the availability of damages, then leave must be sought. Thus, he characterises the respondents' claim as a collateral attack on the validity of the acquisition. This therefore gives rise to the question of whether, in truth, the respondents' claim is not so much one for damages but one to seek to invalidate the transaction; and, if so, whether they are now barred from maintaining this action by virtue of their failure to do so by way of judicial review. If an application for judicial review is required, then any such claim must be made within one month of the notification of the decision as required by s. 193 of the Act of 2009.

61. In *Sweetman v. An Bord Pleanála* [2018] IESC 1, Clarke C.J. emphasised the requirement of for certainty of administrative action and observed at paras. 7.1 to 7.2:-

> *"7.1 The rationale behind the collateral attack jurisprudence is clear. A party who has the benefit of an administrative decision which is not challenged within any legally mandated timeframe should not be exposed to the risk of having the validity of that decision subsequently challenged in later proceedings which seek to quash the validity of a subsequent decision on the basis that the earlier decision was invalid. Like consideration would apply to a State decision maker who has rejected an application or other similar decisions.*
>
> *7.2 The requirements of legal certainty make clear that a person who has the benefit of a decision which is not challenged within whatever time limit may be appropriate is entitled to act on the assurance that the decision concerned is now immune from challenge subject to very limited exceptions such as fraud and the like."*

62. The applicant contends that the requirement for leave applies once the respondent asserts that the underlying acquisition of the assets is null and void. While it is submitted that the respondents are not in specific terms asserting that the acquisition is invalid, what they are asserting is that it should be declared null and void – something which the applicant says can not now be done as the assets have been sold. Thus, the applicant asserts that this is not a standard damages type claim because it is founded on a proposition that the underlying acquisition is in itself invalid. It is submitted, therefore, that being a collateral attack upon the

underlying acquisition, this claim should have been brought within the time limit prescribed by s. 193. As that was not done, the respondent cannot now dress up the challenge in the guise of the claim for damages.

63. Section 193 of the Act of 2009 provides that an application for leave to seek judicial review must be made to the court within one month after the decision being challenged is notified to the person concerned. There is provision for an extension of time within which to make the application, but the applicant must show that there are substantial reasons why the application was not made within the one month period and that the court is satisfied it is just, in all the circumstances, having regard to the interests of other affected persons and the public interest. The test is a stringent one: see *Daly v. National Asset Loan Management* (Unreported, High Court, Peart J., 12th September, 2011, referred to in *Treasury Holdings v. National Asset Management Agency* [2012] IEHC 297).

64. Here the evidence is that the respondents became aware of the applicant's decision to acquire the bank assets by the end of April or early May, 2011. A challenge was not brought within the requisite period from the date of notification. It seems clear from decisions such as *Daly v. NAMA* and *Treasury Holdings v. NAMA*, that decisions of NAMA, such as the decision in this case, are amenable to judicial review, there being a sufficient public element to the body making the decision; and in the decision made. On this application, it seems to the Court that a relevant question is whether it is mandatory that an application for judicial review is made; or whether a plaintiff is entitled to maintain that the decision is invalid, but seek only damages.

65. In this case, the respondents have expressly claimed that the decision of applicant is null and void. An analysis of the statement of claim confirms this to be so. Particular emphasis is placed on the lack of compliance with procedures but, importantly at para. 11 it is pleaded that a consequence of the adoption of the irregular procedures "*in or about May, 2000*" (which I understand to mean on or about the time that the decision to acquire the assets was made) is "*that the decision is null and void*". At para. 12 it is pleaded that the applicant failed to obtain the correct and or lawful authority to deprive the respondents of their possessions pursuant to the provisions of Article 17 of the Charter. At para. 13, it is pleaded that the respondents' claim is for the loss of potential income and the market value of their assets. The losses are detailed as including potential loss of income, loss of potential in respect of the development of the site, loss of investment in investment funds and loss of livelihood.

66. I am of opinion that on a true and proper interpretation of the claim, it is one which is predicated upon the alleged invalidity of the decision to acquire the assets. It is difficult to separate the claim for the damage alleged by the applicant from the claim of invalidity. In the circumstances it seems that the claim for damages has the potential to be a collateral attack on the validity of the decision taken by the applicant.

67. That a decision to acquire bank assets is one amenable to judicial review is clear. Pursuant to the provisions of s. 84 of the Act 2009, NAMA is empowered to acquire an eligible bank asset where it considers it necessary or desirable having regard to the purposes of the Act and the resources available to the Minister. As noted earlier in this judgment, Hardiman J. in *Dellway* observed that NAMA had a discretion and was not obliged to acquire eligible bank assets.

68. It may very well be that a court ultimately concludes that the respondents should have brought a claim by way of judicial review. The principal question which this Court has to decide is whether it is either an abuse of process, or the plaintiff's claim is bound to fail, because they have not proceeded by way of judicial review. The Act of 2009 was an urgent and necessary piece of legislation which responded to the severe financial crisis which befell the State. Yet, the Act, which enjoys the presumption of constitutionality arguably contains its own framework for the maintenance of proceedings. Given that the Act imposes restrictions as to how, and in what circumstances, proceedings may be brought in respect of the exercise of powers under the Act, it appears to me open to argument that such restrictions should be construed narrowly, consistent with the objects of the Act and the constitutional rights of chargors which were found to exist in *Dellway* as analysed above. No authority has been cited in support of the submission that a claim for damages based on alleged invalidity under the Act must only be brought by way of judicial review under the framework of the Act. If that were so then one queries why s. 182(1) is thus framed. On one potential interpretation, the purpose of the section is to restrict the nature of the remedy being sought, not to restrict the right of action; and to facilitate the realisation of the value of the asset free from a challenge (without the leave of the court) that may prevent or inhibit such transfer or realisation. It seems that this is consistent with the requirement of certainty and to facilitate (per the preamble):-

> *"effecting the expeditious and efficient transfer of those assets to that agency …" and "…the taking by that Agency of all steps necessary or expedient to protect, enhance and better realise the value of the assets transferred to it."*

69. This purpose is also reflected in the provisions of s. 192 of the Act, which limits the court's power to grant injunctive relief. The framework of the Act, with particular reference to s. 182, thus potentially makes provision for such legal certainty as referred to in *Sweetman*, by requiring leave where the relief claimed is one in respect of a relief other than damages.

70. There is a further issue of whether, if established, the standalone constitutional right to be heard in advance of the acquisition of the asset might give rise to a cause of action for damages for that very breach and if so, whether such breach is actionable per se, or only on proof of damage, and the measure of such damages. A claim of that nature may not be one that would affect the bank asset.

71. In all of the circumstances, while it seems likely that the respondents will be faced with many hurdles and may very well fail after further hearing, I find myself unable to conclude, at this point in time that it is a case which is "*bound to fail*" or that the applicant's contention that the proceedings constitute a collateral challenge for improper purpose is clearly established at this stage.

Multiplicity of litigation and abuse of process

72. It has also been submitted that given the litigation history of the parties, that the respondents have been guilty of abuse of process and that the claim should be struck out pursuant to the inherent jurisdiction of the court. This is the fourth set of proceedings brought by one or other of the respondents.

73. In the first set of proceedings, entitled *Vincent Paul Byrne v. Roger Keogh & Con Cronin* (2014/2599P), the second named respondent, Mr. Byrne Junior, sought various reliefs to restrain the sale of the properties which were the subject of the charges by the statutory receiver. He had not sought leave of the court pursuant to s. 182 of the Act and by reason of this fact the proceedings were ultimately struck out by White J. on 27th February, 2015. During the course of those proceedings, White J. afforded the plaintiffs the opportunity to join NAMA and AIB as co-defendants in the proceedings, which invitation was not acted upon by the plaintiff. The proceedings were subsequently struck out on 27th February, 2015. I consider it important to note the nature of the remedy sought by the plaintiff in those proceedings which included, not only damages, but also other reliefs which engaged the requirements of an application for leave under s. 182 of the Act of 2009.

74. Further, the proceedings were brought against the statutory receivers who, pursuant to the Act, are deemed to be agents of the

chargors and for whose actions NAMA are exempt from liability pursuant to s. 149 of the Act of 2009, which provides:-

> *"(1) A statutory receiver shall be taken to be the agent of the chargor for all purposes.*
>
> *(2) … NAMA does not incur any liability (either to the chargor or to any other person) by reason of the appointment of a statutory receiver or for the actions or inactions of a statutory receiver..."*

75. Having considered the pleadings and arguments in those proceedings there can be little doubt that many of the complaints made by the plaintiffs in the current proceedings form the basis of certain of the complaints made against the receivers, yet the claim was not against the applicant in this case and the issue of the cause of action for damages for breach of constitutional right to be heard, or to fair procedures, was not addressed in any significant way. The cause of action clearly "*affected the bank asset*" – an equitable remedy was sought to restrain its sale and leave was required.

76. The second set proceedings (record number 2015/4645P) are a mystery. The Court was not provided with a copy of the pleadings. They are stated to have been issued against the applicant by "*Vincent Byrne*" on 5th June, 2015. They were not served.

77. The third set of proceedings (2015/6365P) were instituted by the first named respondent only against NAMA on 5th August, 2015. A statement of claim, which was delivered on 13th November, 2015 was subsequently amended and included reliefs seeking the return of the apartment properties in respect of which the first named respondent had an interest and also seeking damages for breach of constitutional rights and rights under the Convention.

78. It is not contested that leave of the court was not obtained prior the institution of those proceedings, as is required, pursuant to s. 182 of the Act of 2009. O'Connor J. struck the proceedings out, on a preliminary application by the defendant. At the time those proceedings were instituted, the receivers were actively engaged in marketing the charged premises. On the hearing of the motion in the instant case, the parties informed the Court that the reason why those proceedings were ultimately struck out was because Mr. Byrne had not sought the requisite leave of the court pursuant to s. 182 of the Act of 2009. The respondent emphasises the fact that during the course of those proceedings, the first named respondent filed written submissions in which a claim similar in nature to that made in these proceedings was advanced. It was there contended that:-

> *"…at the core of this issue is my claim that NAMA breached my fundamental rights under the Constitution of Ireland and are in violation of Article 1, Protocol 1 under the European Charter of Human Rights by their unjust actions and confiscation of my private property and thus depriving me of lawful possession of my property and my constitutional right to earn a living…"*

79. On 22nd December, 2016, these proceedings were issued (the fourth set of proceedings 2016/11419P), and were served on the defendant on 30th January, 2017.

80. In his first proceedings (2015/6365P) the plaintiff, Mr. Byrne Junior, sought a declaration that the letter of sanction was void and that he was entitled to lawful possession of his property. He also sought damages for breach of constitutional rights. However, because those proceedings involved a claim which may have "*affected the assets*" and given the limited grounds upon which the proceedings were disposed, in the circumstances this Court does not believe that it is just to strike out these proceedings as being frivolous and vexatious or an abuse of process solely on the basis of the claims made in those proceedings.

81. This Court has some concerns that the first named respondent did not avail of the opportunity afforded to it by White J. to reconstitute the proceedings. There is also the issue that Mr. Byrne should have brought all his claims within the one proceedings – see the rule in *Henderson v. Henderson*. Given that there appears to be an interconnection between all of the debts incurred and securities provided, and further, that there was no real consideration of the claim for damages on a standalone basis, I do not think this is an appropriate case in which to exercise the Court's jurisdiction on a preliminary application such as this to strike out the first named respondent's claim on the grounds of abuse of process, but to allow the second named respondent's claim to proceed. I have reached this conclusion not without hesitation.

82. In the circumstances and bearing in mind the relief sought by the applicant being an order dismissing or striking out the proceedings, or alternatively, such parts of the summons or statement of claim as may appear just, I propose to make an order striking out so much of the respondents' claims seeking the reliefs claimed at paras. 3, 4 and 5 of the plenary summons, noting and accepting that the prayer section of the statement of claim is silent. The claims for damages at paras. 1 and 2 remain standing.

83. As previously stated, the Court wishes to stress that in considering the applicant's motion, it is being requested to exercise a jurisdiction which the law dictates should be exercised sparingly. There is a high threshold cast upon the applicant on such application.

84. The Court will hear the submissions of the parties relating to the further prosecution of the proceedings.