Judgment Title: Dellway Investments & ors v NAMA & ors

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Composition of Court: Murray C.J., Denham J., Hardiman J., Fennelly J., Macken J., Finnegan J., McKechnie J.

Judgment by: Murray C.J.

Status of Judgment: Unapproved

UNAPPROVED

THE SUPREME COURT

396/10

Murray C.J.
Denham J.
Hardiman J.
Fennelly J.
Macken J.
Finnegan J.
McKechnie J.

BETWEEN

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

APPLICANT / APPELLANTS

-v-

NATIONAL ASSET MANAGEMENT AGENCY, IRELAND

AND THE ATTORNEY GENERAL

RESPONDENTS

Judgment of the Court delivered by Murray C.J. on the 3rd day of February, 2011.

This is an appeal of the above named appellants against an order of the High Court refusing their application for certain reliefs by way of judicial review against the above named respondents. The application for relief by way of judicial review, as amended, centred upon a purported decision of the first named respondent, NAMA, to acquire from particular banks' certain 'eligible bank assets', (hereafter eligible assets) within the meaning of s. 69 of the National Asset Management Agency Act 2009. These assets consist of substantial loans made by the banks concerned to the appellants. It is relevant to note at this point that it is common case that NAMA has not actually acquired those eligible assets since it has not taken the necessary legal step pursuant to s. 87 of the Act of 2009. The exercise of its powers under that section is a necessary legal step before any decision to acquire eligible assets has practical or legal effect in that respect.

It would appear that in or about late May 2010 the appellants first became aware that NAMA proposed to exercise its powers pursuant to the Act of 2009 to acquire their eligible assets, that is to say their credit facilities, from both Bank of Ireland and Anglo Irish Bank. The appellants had initiated their application for leave to seek judicial review on July 1st 2010 by way of a motion returnable for July 5th 2010.

Thus no issue arose concerning any delay in applying for leave to bring judicial review proceedings.

The Parties

The Appellants

The first fifteen appellants are companies, bodies corporate and/or partnerships incorporated in the State, in the United Kingdom and in France in respect of which the sixteenth appellant, Mr. Patrick McKillen, has a 50% or 100% beneficial interest. Mr. McKillen is a businessman and property developer. These appellants have extensive loan credit facilities with Anglo Irish Bank and the Bank of Ireland (although the appellants have focused in these proceedings on their loans from the latter which constitute the vast bulk of such loans) which, for the purpose of these proceedings are not disputed as constituting "eligible assets" within the meaning of s. 69 of the National Asset Management Agency Act, 2009 (hereafter referred to as "the Act of 2009") and Regulation 2 of the National Asset Management Agency (Designation of Eligible Bank Assets) Regulations 2009.

The Respondents

The National Asset Management Agency, commonly and hereafter referred to as NAMA, was established by the Act of 2009 under which, as explained later in this judgment, it has powers to acquire the interest of certain banks in "eligible assets", including those relating to the appellants. As also explained later in this judgment, relevant to the powers and actions of NAMA is the work of an interim team, from the National Treasury Management Agency, and in particular a purported decision of that interim team to acquire those assets on 11th and 14th December 2009, carried out in anticipation of the establishment of NAMA. The Act of 2009 came into force by virtue of a Ministerial Order under the Act, on 21st December 2009. The Board itself was appointed on 22nd December 2009. The third named respondent is sued in his capacity as representative of the State, the second named defendant.

The Issues

The proceedings in the High Court were heard and determined by a divisional court consisting of the President, Kelly and Clarke J.J. The High Court refused to grant any of the reliefs sought by the appellants.

The approach adopted by the High Court was what it called a "telescoped hearing", whereby it heard the application for leave and the merits of the application together. It refused leave to apply for judicial review in respect of four grounds and dismissed the appellants' claim on the merits in respect of the other or fifth ground. That ground concerned the contention of the appellants that there was a breach of their constitutional right to fair procedures by reason of a failure and refusal by NAMA to receive and consider submissions on behalf of the appellants prior to taking a decision to acquire their bank loans as eligible assets.

Section 194 of the Act of 2009 permits an appeal from the High Court to this Court only where the High Court has certified that its decision involves a point of law of exceptional public importance and that it is desirable in the public interest that an appeal should be taken to the Supreme Court.

In this case the High Court granted such a certificate to the appellants and certified a point of law with respect to the fair procedures argument, in the following terms:-

> "…whether the Court was correct in concluding that the applicants did not have a right to be heard prior to a decision of NAMA to acquire loans in respect of which the applicants are borrowers …".

Having appealed on foot of the said certificate the appellants raised four additional issues in the appeal which are essentially the same four issues in respect of which the High Court refused to grant leave to apply for judicial review. Accordingly all five issues were raised by the appellants in their appeal before this Court.

Four of these issues may be said effectively to arise from the particular decision which NAMA said it took to acquire the loans of the appellants.

A distinct and separate ground was raised concerning the scheme of the Act generally where the appellants claimed that the scope of the power of NAMA to acquire assets was unlawful on the grounds that it was in breach of a European Commission decision approving the NAMA scheme as a State aid measure.

The issues before the Court in this appeal accordingly, were as follows:

> I. (a) Whether the failure or refusal of NAMA to receive and consider submissions from the appellants prior to taking the decision to acquire the relevant eligible assets constituted a breach of their constitutional right to fair procedures.
>
> (b) Whether any decision taken by NAMA to acquire the loans of the appellants was invalid or unlawful by reason of the failure of NAMA to consider and take into account six matters referred to at paragraph (e) (xvC) of the Statement of Grounds contained in the appellants' application for judicial review.
>
> (c) Whether the decision of NAMA to acquire the loans of the appellants with the Bank of Ireland was a nullity because the actual decision was made prior to the establishment of NAMA and was one which could not have been, or alternatively was not, ratified or adopted by NAMA after it was established pursuant to Statute. This issue has been referred to by the parties and in the High Court as the 'timing issue' but the Court considers it to be more appropriately characterised as an issue as to whether any decision having a legal effect was made by NAMA. In this particular context a parallel question also arose as to whether s. 17 of the Interpretation Act 2005 could be relied upon by NAMA as permitting it to rely on a decision to acquire taken by the interim team prior to the coming into force of the Act of 2009.
>
> (d) As an alternative, and as the High Court pointed out as a "fallback" position on the part of the appellants to the above contentions, it was argued that if a proper construction of the Act meant that NAMA was not under an obligation to give a hearing to the appellants prior to a decision to acquire its loans, or that the Act conferred on NAMA a power to acquire both impaired and unimpaired loans, this raised a question as to whether the Act is inconsistent with the Constitution in either or both regards.
>
> II. Whether the decision of the European Commission dated 26th February 2010 on the NAMA Scheme as a state aid requires that the Agency be precluded from acquiring loans from borrowers that are not impaired?

This latter issue regarding state aid is addressed in the separate judgment of Fennelly J.

Background Facts

The judgment of the High Court comprehensively sets out the factual

background to this case; in particular at paragraphs 5.1 – 5.20. These background facts are not an issue and it is not considered necessary to replicate them in this judgment except in part for the purpose of summarising them.

By way of summary, the factual background to the case concerns both the general context of the financial or economic crisis which the State has been experiencing since 2008, and the narrower context of the business carried on by the appellants.

The general or national context of the financial crisis includes the State's three-pronged policy response to that crisis: enactment of the Credit Institutions (Financial Support) Act, 2008 which provided a statutory basis for the State to guarantee deposits held by lending institutions; measures to recapitalise most of the main financial institutions in the State and to nationalise Anglo Irish Bank; and the establishment of NAMA under the National Asset Management Agency Act, 2009 to address significant losses suffered by banks in the State as a result of the collapsing of the property bubble, through the acquisition of eligible assets from participating credit institutions in order to remove uncertainty about those assets and to alleviate the effect of such uncertainty on the credit institutions in the State.

As the High Court noted at paragraphs 5.4-5.6, the context in which these three measures were taken, particularly concerning those institutions with which Mr. McKillen and his companies have significant loans, is at least of background relevance:

> *"It must be recalled that the context in which the bank guarantee was given was the view that, at a minimum, most of the Irish banks were, in September, 2008, arriving at a position where they would be unable to obtain adequate funding to carry on their business. If there had been no major policy intervention, then it seems almost certain that the consequences for some, if not all, of the institutions which became participating institutions in the NAMA scheme, would have been severe. In the case of Anglo, it is now apparent that that bank had become insolvent and having regard to the scale of the losses which have now been shown to have been incurred, it seems certain that, in the absence of major intervention, Anglo would have ceased to trade in any way and would, as a matter of high probability, have gone into liquidation. Mr. McKillen had, of course, significant dealings with Anglo. The other bank with whom Mr. McKillen had major dealings was BOI. There can be little doubt but that the scale of BOI's problems were less than those in the other participating institutions but, nonetheless, were significant. The Government has been required to place an additional sum of €3.5bn into BOI as a recapitalisation.*
>
> *[5.5]…in the absence of some significant executive and legislative response to those problems, it is almost certain that the existing banks operating in Ireland (including those with whom Mr. McKillen had long standing banking relationships) would have ceased to function or, at least, function in any way remotely*

resembling the traditional model of a bank.

5.6 While the true scale of losses in at least many of the participating institutions was not apparent at the time when the Act was passed, it does appear on the evidence to have been clear from an early stage that there were very significant losses in the banks which needed to be dealt with in some fashion. In that context, the Government announced in the Spring of 2009 (during the budget speech of the 7th April) that what has now become NAMA would be established. The relevant legislation was published in a preliminary form in July of that year, with the Act being passed by the Oireachtas in November and coming into force on the 21st December, 2009."

It is also relevant to the appeal to note that prior to, and in anticipation of, the establishment of NAMA under the Act of 2009 a significant level of preparatory work was carried out by senior officials of the National Treasury Management Agency (NTMA). This is germane to the appellants' argument concerning the legal status of NAMA's decision to acquire Mr. McKillen's loans. The facts and evidence relating to this issue are considered in full later in this judgment.

With respect to the narrower context of the appellants' business activities, Mr. McKillen and the companies in which he has an interest own a portfolio of approximately 62 properties, some 26% of which are located in Ireland, with the remainder in France, the United Kingdom and the United States. According to the expert evidence these properties are valued at between €1.7bn and €2.28bn and generate an annual income in the order of €150m.

Loans secured on those properties with banks in the State who are participating institutions under the NAMA scheme amount to approximately €2.1bn. The status of those loans, namely as to whether the loans could be considered as "impaired loans", was disputed by the parties in the High Court. However, the Court, having concluded that the loans were "eligible bank assets" within the meaning of section 2 of the National Asset Management Agency (Designation of Eligible Bank Assets) Regulations 2009 (S.I. No. 568 of 2009) (hereafter "the Regulations"), irrespective of whether they were deemed to be impaired or not impaired, considered it unnecessary to express any view as to whether those loans were impaired or non-impaired. The High Court did note that on the uncontested evidence of the appellants, 96% of those properties are let, the majority of the tenants being described as "blue chip tenants on long leases predominantly with a 25 year duration", and that the income stream thus generated, at an aggregate level, appears to provide interest cover of the loans of between 1.7 and 1.8 times: that is to say, the income is between 1.7 and 1.8 times the interest payable on the loans at current interest rates. As this is an aggregate figure the interest cover on certain individual loans may be lower.

At paragraph 5.13 of its judgment the High Court referred to one particular feature of the appellants' business model. It noted:

"Many of the loans in question are for a short term duration. It would appear that there has, in general terms, been a practice for Mr. McKillen to successfully negotiate renewals of such loans from

time to time. However, the legal position does also need to be recorded. That legal position is to the effect that adopting a policy of financing long term property investments by short term loans undoubtedly leaves the borrower, to an extent, at the mercy of his banks who are in a position, on a regular basis, to revisit the question of whether they are to lend and, if so, on what terms. A party who, on the other hand, has long term loans, has the added security that, provided the terms of the loan are met, the relevant bank is given no opportunity to re-negotiate the terms of the loan until its expiry. It should also be noted that Mr. McKillen's property portfolio is geographically spread between Ireland, the United Kingdom, France and the USA with, it would appear, approximately 26% by value representing properties in Ireland."

It is appropriate at this point to refer to the definition of "eligible bank assets" which may be acquired by NAMA. Section 2 of the Regulations of 2009 provides a broad definition of "eligible bank assets" which may be transferred from participating institutions to NAMA. The principal assets under this definition are what may be termed land and development loans which are held by a borrower, but the definition also covers a wide range of other types of loans held by a borrower who has land and development loans. The definition in regulation 2 of the Regulations is as follows:

"Eligible bank assets.

2. The following classes of bank assets are prescribed as classes of eligible bank assets for the purposes of the National Asset Management Agency Act 2009 (No. 34 of 2009):

(a) credit facilities issued, created or otherwise provided by a participating institution—

(i) to a debtor for the direct or indirect purpose, whether in whole or in part, of purchasing, exploiting or developing development land,

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

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

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

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

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

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

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

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

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

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

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

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

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

As acknowledged by counsel for the appellants, some 2.5%-5% of the appellants’ loans proposed to be transferred to NAMA are loans in respect of land

and development; the remainder of the appellants' loans are unrelated to land and development and come within the definition of an "eligible bank asset" solely by reason of their being owned by Mr. McKillen or the companies or partnerships in which he has an interest.

The Arguments of the Parties

Counsel for the appellants advanced his case on the basis of five distinct arguments, which may be summarised in turn.

Fair Procedures

Counsel for the appellants focused primarily on this argument. It was contended that Mr. McKillen enjoys certain rights connected to his bank loans and that due to interference, or potential interference, with these rights arising from NAMA's decision to acquire the said loans, Mr. McKillen is entitled to be heard before the decision to acquire is made by NAMA. The appellants contend, in this context, that the Act of 2009 can, and should, be interpreted as affording Mr. McKillen an entitlement to be heard prior to that decision being made.

It was also submitted that the High Court erred in its judgment under this heading, in that the Court misunderstood the constitutional position concerning what constitutes an interference with constitutional rights sufficient to trigger an entitlement to fair procedures; the Court incorrectly applied the test for interference with constitutional rights; and in its assessment of the facts of the case and its interpretation the Act of 2009 the Court failed to address the facts peculiar to Mr. McKillen's case by reference to the evidence.

The Attorney General on behalf of the respondents submitted that the conclusions of the High Court under this heading were correct. It was submitted that there is no interference or potential interference with any constitutional right which triggers an entitlement to fair procedures in favour of Mr. McKillen, that the test for interference with constitutional rights was correctly applied by the High Court and that, if this Court on appeal was to find that acquisition of the said loans does constitute an interference with the Mr. McKillen's constitutional rights sufficient to trigger a right to a fair procedures, the exclusion of an entitlement to fair procedures in the Act of 2009 is proportionate and justifiable. It was submitted that the Act of 2009 cannot be interpreted as requiring or permitting an entitlement to be heard.

The NAMA decision to acquire the appellants' loans

The appellants argued that, in making its decision to acquire Mr. McKillen's loans, NAMA did not take into account relevant considerations. It was submitted that the High Court erred in finding that NAMA had had regard to certain criteria approved by the Board of NAMA on 7th January 2010 in making its decision to acquire Mr. McKillen's loans on the 11th and 14th December 2009. It was claimed that while NAMA made its decision to acquire Mr. McKillen's loans on the basis that the said loans represented a systemic risk or contributed to a systemic risk to the banking system, NAMA had not made any qualitative assessment of the loans in this regard. It was further submitted that the High Court erred in separating its analysis of the Act of 2009 from its analysis of the actual basis

upon which NAMA had made its decision to acquire Mr. McKillen's loans.

On behalf of NAMA and the State it was submitted that the appellants' arguments under this heading are untenable and have no credible legal basis.

The Legal Status of the NAMA decision

Counsel for the appellants contended that the decision to acquire Mr. McKillen's loans had no validity in that the said decision was taken before NAMA came into existence under the Act of 2009. It was submitted that the Act of 2009 provides no mechanism for ratification of decisions made before the establishment of NAMA under that Act, that the decision was accordingly not capable of being ratified by NAMA in a legal manner and that, as a matter of fact, NAMA did not ratify or re-make the decision. Counsel submitted that the High Court erred in finding that, as a matter of fact, NAMA had ratified the decision to acquire the eligible assets relating to the appellants.

Counsel for the State submitted that the decision was legally adopted by NAMA subsequent to its establishment under the Act of 2009 and that the High Court's finding in this regard was correct.

The European State Aid Issue

It is not in dispute that the NAMA scheme and, in particular, the acquisition of Mr. McKillen's loans, constitutes State Aid within the meaning of Article 107 of the Treaty on the Functioning of the European Union ("TFEU"). Nor is it disputed that the European Commission, in a Commission decision (State Aid Reference No. 725/2009 – 14.4.2010 OJC 94/10) did not raise any objection to the scheme established by the NAMA Act of 2009.

The appellants' argument under this heading was that the Commission decision has direct effect and that the decision, correctly interpreted in light of materials extraneous to the decision itself, restricts NAMA to acquiring solely "impaired loans". The respondents contended that this is not a matter within this Court's jurisdiction to consider and further submitted that, even if the Court has such jurisdiction, on a proper construction of the Commission decision the limitation contended by the appellants is not imposed, and in any case Mr. McKillen's loans may properly be described as "impaired".

The Constitutional Issue

As the High Court correctly noted, the appellants posit this argument as a fallback position should the Court find against them on the other substantive arguments. It is submitted under this heading that, if the Court holds that the NAMA Act of 2009 cannot be interpreted as affording Mr. McKillen an entitlement to be heard as regards the acquisition of his loans by NAMA and/or the Act is interpreted as permitting the acquisition of unimpaired loans, the Act is accordingly inconsistent with the Constitution. A second constitutional issue raised is whether the broad definition of "eligible bank assets" in the Act of 2009 and the Regulations, and the lack of guidance provided to NAMA as to the exercise of its discretion in the acquisition of bank loans coming within this

definition constitutes an interference with the constitutional property rights of the appellants.

The Attorney General for the respondents submitted that, if this Court finds no interference with constitutional rights, this was sufficient to dispose of both the fair procedures argument and the constitutional issues. It was also argued that the object and purposes for which an acquisition of assets is made under the Act affects only the interests of the Banks concerned rather than the borrowers. Furthermore, a decision to acquire assets could not be affected or was not dependent on the interests of a borrower having regard to the objects and purposes of the Act. Alternatively, if this Court was to find that Mr. McKillen has an entitlement to fair procedures, the Attorney General contended that the absence of any entitlement to fair procedures for borrowers under the Act of 2009 was justified and proportionate, having regard in particular to the purposes of the NAMA scheme under the Act to address a serious and unprecedented disturbance in the economy of the State and the necessity for expedition in the acquisition of eligible bank loans. As to the broad definition of "eligible bank assets", the Attorney General submitted that this definition is necessarily broad given that the purpose of the Act of 2009 is to acquire all land and development loans which are capable of contributing to the serious risk to the economy and the financial system presented by exposure to such loans.

Relevant statutory provisions

A number of provisions of the Act of 2009 are of particular relevance.

The purposes of the Act

As stated above, the Act of 2009, in its long title, sets out that its purpose is to:

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

Section 2 provides, in more detail, that the purposes of the Act are as follows:

> *"(a) To address the serious threat to the economy and the stability of credit institutions in the State generally and the need for the maintenance and stabilisation of the financial system in the State, and*
>
> *(b) To address the compelling need–*
>
> *(i) to facilitate the availability of credit in the economy of the State,*
>
> *(ii) to resolve the problems created by the financial crisis in an expeditious and efficient manner and achieve a recovery in the economy,*
>
> *(iii) to protect the State's interest in respect of the guarantees issued by the State*

pursuant to the Credit Institutions (Financial Support) Act 2008 and to underpin the steps taken by the Government in that regard,

(iv) to protect the interest of taxpayers,

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

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

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

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

The acquisition of eligible bank assets by NAMA involves a sequence of steps under separate provisions of the Act of 2009.

Designation of a credit institution as a "participating institution"

Under section 62 of the Act of 2009, a credit institution may apply to the Minister for Finance, within 60 days of the establishment of NAMA under the Act, to be designated as a "participating institution" under s. 67 of the Act. Five credit institutions in total applied and were designated "participating institutions" under this section: Bank of Ireland; Allied Irish Bank; Anglo Irish Bank; Irish Nationwide Building Society; and Educational Building Society.

Section 67(2) of the Act sets out the criteria for the designation of an applicant credit institution as a participating institution:

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

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

(i) support that

(I) is available to,

(II) has been received by, or

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

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

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

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

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

Provision of information to NAMA by the participating institution

Under section 80 of the Act of 2009, NAMA may direct an applicant or participating credit institution to provide NAMA with information about each of its bank assets that may be an eligible bank asset within the meaning of section 2 of the Regulations of 2009, in order to allow NAMA to make an informed decision either to acquire the relevant asset or to decide on its acquisition value. Section 80(2) makes clear that this includes information on debtors, associated debtors, guarantors and sureties concerned and the enforceability and marketability of the security associated with each such bank asset.

Section 80(3) provides that a credit institution, if it is of the opinion that the bank asset is not an eligible bank asset, must state that fact when providing information on that asset and must also state that it objects to the acquisition of the bank asset and the reason for its opinion.

Under Section 80(5) NAMA may require that any information provided by a credit institution regarding a bank asset is certified as accurate and complete jointly by the chief executive officer and chief financial officer of the institution. Section 80(6) requires credit institutions to disclose *"in utmost good faith"* all matters and circumstances in relation to each bank asset concerned that might materially affect, or might reasonably be expected to materially affect, NAMA's

decision to acquire the bank asset or the determination of its acquisition value.

It is appropriate to note also that sections 7(2) and 7(3) of the Act of 2009 create two criminal offences that may be committed by a credit institution or an individual, including a borrower whose loans are transferred to NAMA: the first offence concerns the provision of false or inaccurate information to NAMA intentionally, recklessly or through gross negligence; the second offence concerns the withholding of information regarding an asset which has a material impact upon how NAMA deals with or values the asset.

Designation of "eligible bank assets"

Section 69(1) of the Act provides that the Minister for Finance, after consultation with NAMA, the Governor of the Central Bank and the Regulatory Authority (now known as the Financial Regulator), is entitled to designate "eligible bank assets" under that section.

The Minister has, by enactment of the Regulations of 2009 (S.I. 568 of 2009) prescribed the classes of bank assets which constitute "eligible bank assets" for the purposes of the Act of 2009, and has in those Regulations included all classes of bank assets the inclusion of which is permitted under the terms of section 69(2) of the Act of 2009. As already stated, the definition of "eligible bank assets" set out in section 2 of the Regulations and quoted earlier in this judgment is broad. While the principal assets covered by this definition are land and development loans held by a borrower, the definition also extends to a broad range of other types of loans held by a borrower who has land and development loans, simply by virtue of their being owned by that borrower.

Objection to designation of a bank asset as an "eligible bank asset"

Any credit institution participating in NAMA may object to the acquisition by NAMA of a bank asset or assets. However, the sole basis for such an objection under the Act is a review of the decision, the procedure for which is provided for in Part 7 of the Act. There is no express provision permitting a borrower to raise any objections to acquisition of his or her assets.

The Act provides wide scope to NAMA in the acquisition of assets given that section 84 of the Act expressly provides:

> *"NAMA may acquire an eligible bank asset of a participating institution if NAMA considers it necessary or desirable to do so having regard to the purposes of this Act and in particular the resources available to the Minister."*

Sections 84(2) and 84(3) respectively provide that NAMA may acquire both performing and non-performing eligible bank assets from a participating institution and that NAMA may pursue acquisition of a bank asset notwithstanding an objection by a participating institution to the effect that it does not consider the asset to be an eligible bank asset. Section 84(4) of the Act sets out a list of fourteen factors which NAMA may take into account in deciding whether to acquire a particular eligible bank asset.

The formal acquisition process

Section 87 of the Act provides that, in order to formally acquire an asset deemed to be an eligible bank asset, NAMA must serve an "acquisition schedule" on the participating institution which holds that asset. An asset may only be included in such an acquisition schedule where its acquisition value has been determined by NAMA in accordance with the valuation methodology provided in Part 5 of the Act.

Once NAMA has served the acquisition schedule on a participating institution, under section 121 of the Act the institution can formally raise an objection to the acquisition value specified in that schedule in relation to a bank asset and NAMA may, on foot of that objection, remove the bank asset from the acquisition schedule, revoke the acquisition schedule or continue with acquisition in accordance with the schedule. Where NAMA decides to continue with acquisition of the bank asset, the participating institution may then only object to the total portfolio acquisition value in accordance with the criteria set out in section 122.

Under section 92 of the Act, payment for the asset(s) acquired by NAMA is effected by way of government bonds issued by the Minister for Finance. Section 97 requires that NAMA must then serve a "completion notice" on each participating institution. This formally completes the entire acquisition process and no further acquisition schedules may be served after service of the "completion notice".

NAMA does not engage with individual borrowers whose loans are to be acquired until the transfer of each eligible bank asset has been completed. Only then will NAMA engage with the relevant borrowers by, *inter alia*, inviting the borrower to submit a business plan setting out how the credit facility acquired is intended to be managed and ultimately repaid. As the High Court noted in its judgment, the respondents indicated on affidavit that NAMA, while under no obligation to do so under the Act of 2009, has a policy of meeting with borrowers prior to the transfer of a borrower's loans to NAMA, where such meetings are requested, in order to answer certain questions or queries that the borrower may wish to raise.

The Powers of NAMA under the Act

Section 12 of the Act of 2009 sets out the powers of NAMA. Section 12(1) provides that:

> *"NAMA has all powers necessary or expedient for, or incidental to, the achievement of its purposes and performance of its functions."*

Without prejudice to the general powers of NAMA under subsection (1), section 12(2) then sets out an extensive range of specific powers. As the High Court noted, many of these powers have no bearing on the issues in these proceedings. Powers relevant to the issues in these proceedings include the power to:

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

…

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

…

(h) distribute assets in specie to the Minister,

…

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

Part 9 of the Act sets out NAMA's specific powers in relation to bank assets it has acquired. Under Chapter 2 of Part 9 NAMA has a general power to dispose of assets including by way of transfer, assignment, conveyance, sale or otherwise, to any person, notwithstanding any restrictions on such a disposal at law or equity and notwithstanding any enactment or contractual requirement, including any requirement for the consent of, notice to, or a document from, a third party or any other statutory provision which would otherwise prohibit or restrict such disposal. Chapter 2 also grants NAMA the power to discharge any prior charges on an acquired asset and the power to make applications to the District Court for an order authorising NAMA to enter onto land that is the security for an acquired bank asset.

Under Chapter 3 of Part 9 NAMA has the power to appoint statutory receivers, which is additional to the right to appoint a receiver in the normal course.

Chapter 4 of Part 9 grants NAMA the power to apply to the High Court for a vesting order over land where the chargee's power of sale has become exercisable and NAMA forms the view that it is unlikely that the sum secured can be recovered by a sale within three months after the application. NAMA in an application for a vesting order must satisfy the Court as to the necessity for such an order and the Court may direct that evidence be given on affidavit. The Court may also direct that notice must be given to any other person. Among its effects a vesting order extinguishes the chargor's equity of redemption in the land concerned.

Under Chapter 5 of Part 9, NAMA has the power to compulsorily acquire land. NAMA's exercise of this power is subject to a number of conditions, including the making of an application to the High Court on notice to interested parties, the right of parties affected by such acquisition to raise objections, and the entitlement of such affected persons to compensation.

Chapters 6 and 7 deal, respectively, with NAMA's general powers in relation to land and in relation to the development of land. Chapter 6 places limitations on certain dealings in land which may have an adverse effect on land held directly

or as security for an asset held by NAMA. Chapter 7 grants NAMA the power to engage in the development of land in certain circumstances such as where the High Court has granted a vesting order or where a statutory receiver has been appointed under Chapter 3.

Other relevant provisions

Other relevant provisions of the Act of 2009 include the following:

> *"102.— (1) Subject to the provisions of this Act, after a bank asset is acquired by NAMA or a NAMA group entity, the terms and conditions of the bank asset are unchanged.*
>
> *…*
>
> *103.—No cause of action lies or is maintainable against NAMA or any NAMA group entity by reason solely of the acquisition of a bank asset by NAMA or a NAMA group entity.*
>
> *…*
>
> *105.— (1) Nothing in this Act renders NAMA or a NAMA group entity liable for any breach of contract, misrepresentation, breach of duty, breach of trust or other legal or equitable wrong committed by a participating institution.*
>
> *(2) No legal proceedings shall be brought against NAMA or a NAMA group entity in relation to any legal or equitable wrong referred to in subsection (1).*
>
> *(3) Nothing in this Act deprives any person of a remedy in damages against a participating institution in relation to a legal or equitable wrong referred to in subsection (1)."*

Decision

Of the first four issues raised by the appellants in this appeal one of them directly raised the issue as to whether NAMA could be considered to have made any decision to acquire the eligible assets related to their loans or whether any purported decision had any legal status or effect. The other three issues could be said to be contingent on, or based on a presumption that, NAMA had taken such a valid decision for the purposes of the Act.

In the circumstances the Court considers it proper that it should firstly address the question whether NAMA, as a matter of law, had made any decision to acquire those assets. This issue is not a mere question of form but is fundamental in this particular case to the exercise of its statutory powers by NAMA in respect of the eligible assets in question. In the light of the Court's decision on that issue the justiciability of the other three issues just referred to

will have to be considered.

As regards the fifth and final issue concerning state aid, which concerns the NAMA scheme generally, as already indicated, Fennelly J. will deliver a judgment on this matter.

Whether NAMA has made a Decision

Under the title of the "timing issue," the appellants question whether NAMA has made any decision to acquire the loans. The first and fundamental question is whether NAMA has made any decision. Stripped to its essentials the appellants' claim is that the decision to acquire their loans was made on 11th and 14th December 2009, without legal authority, before NAMA was established and that it is, for that reason, a legal nullity.

The National Asset Management Agency Act 2009 was passed on 22nd November 2009. NAMA was established on 21st December, 2009 pursuant to an order of the Minister for Finance (the National Asset Management Agency Act 2009 (Establishment Day) Order 2009 (S.I. No. 547 of 2009) made in exercise of the powers conferred by section 8 of the Act). The Act was brought into force on the same day: the commencement day was fixed by S.I. No. 545 of 2009. The Board of NAMA was appointed on 22nd December 2009.

A number of important steps had been taken before these dates. The intention to establish NAMA had been announced in the budget in April 2009. On 5th May, the Minister for Finance appointed Mr Brendan McDonagh to be Interim Managing Director of NAMA. The Minister on 7th May 2009, pursuant to section 4(4) of The National Treasury Management Agency Act, 1990, gave directions to the Chief Executive of the Agency to provide staffing and to carry out preparatory work required to establish NAMA including the engagement of expert advisers and consultants. Ms Aideen O'Reilly was part of the "interim NAMA team" which carried out extremely extensive preparatory work in anticipation of the establishment of NAMA. The other members of the team were Mr Brendan McDonagh, Mr John Mulcahy and Mr Sean O'Faolain. Each member of the team, except Mr Mulcahy, was, at the time, an employee of the National Treasury Management Agency; Mr Mulcahy was a consultant.

As an administrative strategy, this was entirely legitimate insofar as it involved advance collating and assessment of matters material to the functions of NAMA in anticipation of the Act coming into force. What is in issue here is not the usefulness or benefits of such an administrative exercise but the legal status and effect of any purported decision of the interim team. This is a matter of primary relevance, as is explained later, to the question of whether NAMA made a decision in the exercise of its statutory powers to acquire the loans of the appellants.

The respondents had contended in opposition to the application for judicial review that the acts of the interim team were made by employees of, or persons retained on a consultancy basis by, the National Treasury Management Agency, and who were duly authorised to make such decisions pursuant to and in accordance with a direction of the Minister for Finance made pursuant to the provisions of the National Treasury Management Agency Act, 1990 and on the authority of Brendan McDonagh, who had been duly appointed by that direction

as interim Managing Director of NAMA. The High Court examined the relationship between the Act of 1990 and NAMA and could find no basis upon which a power of the Minister under that Act could be used to authorise the Agency to acquire loans for NAMA. The respondents have made it clear in their submissions to the Court that they no longer contend that the decision to acquire the appellants' loans were authorised by the provisions of that Act or any ministerial directions.

The High Court judgment deals in detail with the work performed by the interim team. It is not necessary for the purpose of this appeal to go into further detail.

The interim team met on the 11th and 14th of December 2009. Ms. Aideen O'Reilly, a solicitor and the Head of Legal and Tax at the National Treasury Management Agency swore an affidavit on 30th July 2010 in response to the original application for judicial review. At that point, she was responding to the appellants' claim that NAMA did not have the power to acquire their loans. No point had yet been made about the timing of the decision. In the course of that affidavit Ms O'Reilly made a statement about what occurred on 11th and 14th December which is central to this issue. She swore:

> *"The decision to exercise the discretion of NAMA to acquire the loans connected with Mr. McKillen was taken by a group consisting of myself, Brendan McDonagh, John Mulcahy and Sean O'Faolain on 11th and 14th December 2009. At these meetings we went through the asset lists and the objections raised by the five institutions which were likely to participate in NAMA. We decided to exercise our discretion to acquire Mr McKillen's loans because of our belief that the extent of the aggregate exposure of the relevant participating institutions to Mr McKillen and his companies……under credit facilities granted by those institutions, being the sum of approximately €2 billion was such as to create a systemic risk." (emphasis added)*

No formal minutes of this decision were kept. The fact of the decision on each loan was simply recorded by way of a notation on the relevant spreadsheet. For brevity, and without any assumption as to their legal effect, the acts described by Ms O'Reilly will be described as the "December decision".

The appellants, not having been previously aware of these facts, submitted an amendment of their Statement of Grounds seeking declarations that the purported decision of NAMA to exercise its discretion to acquire the loans was taken on dates prior to the establishment of NAMA and by individuals having no authority to make such a decision and that it was "null, void and of no effect." They included in their application for judicial review and pursue in their Notice of Appeal an application for an order of prohibition and/or an injunction restraining NAMA from service of any acquisition schedule pursuant to section 87 of the Act in respect of the appellants' loans. Mr McKillen, in his grounding affidavit, stated that the appellants anticipated that the service of such a schedule was imminent. NAMA agreed before the High Court not to proceed with the acquisition of the appellants' loans pending the outcome of these proceedings.

The respondents, in their amended grounds of opposition, claimed that:

> *The December decision was authorised through the National*

Treasury Management Act, 1990; this ground is no longer pursued;

The December decision was "duly ratified" at NAMA Board meetings on 23rd December 2009 and 7th January 2010 and confirmed by a letter of 9th January 2010 and by acceptance, acknowledgement and adoption by agents of NAMA at all material times since, including in court in the course of these proceedings;

The Chief Executive of NAMA duly confirmed, adopted and ratified the December decision on 17th September 2010.

It is of critical importance to consideration of this case that NAMA, as it has made abundantly clear, has never reached the stage of serving on the financial institutions concerned with the appellants' loans an acquisition schedule as provided for in s. 87 of the Act. The service of such a schedule on the relevant financial institution has legal effects under Part 6 of the Act which do not need to be considered in this case. For example, the service of an acquisition schedule operates, according to section 90 of the Act, to effect the acquisition of the relevant assets by NAMA.

If that stage had been reached, any examination of whether NAMA had made a decision to acquire the appellants' loans would have had to be considered from a different perspective.

As counsel of the appellants emphasised, the present case is focussed entirely on the particular circumstances of the appellants and their loans which have been treated as eligible assets under the Act. The question under consideration is, therefore, whether NAMA has made a decision pursuant to section 84 of the Act in respect of the appellants' loans.

The facts relied upon in support of the grounds of opposition set out in paragraph 11 are as follows. Firstly, it is said that the Board of NAMA approved the Tranche 1-3 borrower lists at its first meeting on 23rd December 2009. According to the minutes of that meeting, under agenda item 7, "NAMA Acquisition Timetable and Borrower List," the "board considered the proposed acquisition timetable and a list of borrowers whose loans are scheduled for transfer as part of the first three tranches." The minutes do not, however, record any decision.

In support of the submission that the Board has subsequently adopted and approved the December decision, Mr Frank Daly, Chairman of NAMA, swore an affidavit to which the respondents attached particular importance.

Mr Daly said it had been obvious to the Board at its first meeting that "a great deal of preparatory work had been done…" Mr Daly had himself been advised by Mr McDonagh of "decisions of the interim team at the meetings held on the 11th and 14th of December 2000 and the Board would have been aware of the outcome of these decisions during its consideration of the item *"NAMA acquisition and borrower list" under Agenda Item 7*…" He said: *"The Board at this meeting and at subsequent meetings operated on the basis that all*

preparatory work carried out by the interim team prior to that date, was, in effect, considered to be work carried out by NAMA and it was treated as such for the purpose of NAMA exercising its statutory functions and powers." He added that under Agenda Item 7 *"the list of borrowers based on eligible asset lists was considered by the Board and this is recorded in the Minutes of that meeting."*

Secondly, the Board, at a meeting on 7th January 2010, accepted the "CRITERIA FOR REVIEW OF ELIGIBLE ASSET LISTS SUBMITTED BY INSTITUTIONS." It noted that the financial institutions had submitted lists of loan assets considered to be eligible for acquisition. It mentioned the criteria applied by the interim NAMA team. These included the following:

> *"the primary consideration was the eligibility of the assets by reference to the provisions of the Act and the Regulations……."*
>
> *"In terms of then assessing whether some assets, though eligible, should not be acquired by NAMA, a major guiding principle was the extent to which the borrowers overall exposure across the system was sufficiently material as to contribute to the systemic risk which NAMA is intended to address. Some borrowers, apparently, were keen to exclude some of their loans on the basis that the loans were performing. It was emphasised to institutions, however, that it was always intended that NAMA would acquire full exposures rather than only the non-performing elements of those exposures…"*

Thirdly, in a letter of the 9th January, 2010 Mr Sean O'Faolain, on NTMA headed paper, confirmed to Anglo that certain credit facilities, including those of the Applicants, were being acquired and there was a similar letter to Bank of Ireland during January, 2010.

Fourthly, NAMA maintain in these proceedings that NAMA's agents have accepted, acknowledged and adopted the decision at all material times.

Fifthly, Mr Brendan McDonagh swore an affidavit of 17th September 2010, in which he referred to "the fact that the decision to acquire the credit facilities associated with [Mr McKillen] was taken at meetings held on the 11 and 14 December 2009. He said that, "for the avoidance of any doubt and without prejudice to any points made by Aideen O'Reilly in this regard, I have considered afresh whether, in the light of the submissions and contentions in affidavits delivered on behalf of the Applicants, the decision to acquire the credit facilities…… was correct." This passage is quoted more fully below.

The High Court ruled on what it termed "the timing issue" in the following paragraphs:

> *"Ultimately, however, the Court is satisfied that the decision made on the 11th and 14th December 2009, was adopted, albeit not expressly, by the subsequent actions of NAMA following its establishment and in particular at the Board meeting of the 23rd December, 2009. The Court is also satisfied that the additional*

matters relied on by NAMA as evidencing adopting provide further support for the Court's conclusion in this regard. The Court accepts the contention of NAMA that the term "decision" requires particularly careful consideration in the context in which the NAMA scheme operates. A decision may be a simple "once and for all" determination of a particular matter or may be but one in a series of steps which together and cumulatively constitute a decision. The acquisition of loans under the NAMA scheme is, in the opinion of the Court, very much in the latter category. When the initial decision or formation of view was taken on the 11th and 14th December, it was no more than a first step in a sequence." (paragraph 8.42)

"the decision under attack in the instant case .. was nothing more than the formation of an initial opinion which preceded subsequent steps by NAMA, including the proposed service of an acquisition schedule, the opportunity of the relevant institution to have a review by an expert reviewer of the eligibility of the assets in question and the ultimate acquisition of the asset or assets thereafter." (paragraph 8.46)

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

The High Court rejected a further argument of the respondents, namely that the decision was validated by section 17 of the Interpretation Act, 2005. The Court also rejected the submission that Mr McDonagh, had, in his affidavit of 17th September 2010, confirmed and ratified the December decision. Finally, the Court held that it would not, as matter of discretion have granted the order sought.

The appellants point to section 84 of the Act, being the provision which confers on NAMA the power to decide, in the exercise of its discretion, to acquire eligible bank assets. In keeping with standard administrative law principles, NAMA must actually exercise the power by duly considering all the relevant considerations. It was submitted that NAMA has never at any time since establishment considered these matters or exercised this discretion. The appellants characterise the respondents' argument as being to the effect that it effectively rubber-stamped the decision made on the 11th and 14th December 2009 by *ex post facto* adoption or ratification.

The respondents submit that the decision, under the Act, to acquire eligible bank assets has, of itself, no legal effect. It does not have to take any particular form and there is no point in time at which it must be made. It acquires a legal effect when and only when steps are taken to include the assets in an acquisition schedule. The respondents do not contend that there was any act of ratification, *stricto sensu*, of a pre-establishment decision to acquire the assets. They,

nonetheless, accept that the decision to exercise the discretion to acquire is a necessary preliminary to acquisition. Prior to the service of an acquisition schedule, the Act requires that NAMA be of the view that the assets are eligible bank assets and that their acquisition is *necessary* or *desirable* having regard to the purposes of the Act.

The respondents continued to maintain that NAMA has in fact decided to acquire the assets. NAMA, it is submitted has manifestly evinced the intention to acquire them by the various acts listed above and its general restatement of its entitlement to acquire them including its defence of these proceedings. The respondents accept that the December decisions were not a decision of NAMA. When pressed to identify when that decision had been made by NAMA, counsel for the respondents, at the hearing of the appeal, replied that the decision of 11th and 14th December was "adopted," not ratified, albeit not expressly, by a series of actions of NAMA subsequent to establishment. He then cited the views of the High Court as quoted above, laying some emphasis on Mr Daly's affidavit and Mr McDonagh's subsequent review of the original purported December decision to acquire. In respect of Mr McDonagh's affidavit it was submitted, in the appellants' written submissions (though not in oral argument), that Mr McDonagh has under section 38 of the NAMA Act power to make decisions in relation to the acquisition of eligible bank assets.

Counsel submitted that the only inference to be drawn from the minutes was that a decision had been made. He said that from a series of decisions, events and facts, the Court can arrive at no other conclusion.

The respondents also rely on section 17(b) of the Interpretation Act, 2005. They submit that the initial decision to acquire the Applicants' loans was made "*after the passing of the Act."* In terms of considering whether section 17 has application, they then submit that the essential issue is whether the taking of that decision can properly be regarded as *"necessary or expedient to enable the Act or provision to have full force and effect immediately on its coming into operation" (emphasis added*).

Conclusion on the Issue of Whether There Was a Decision

It is correct that there are several stages to the acquisition process culminating in the service of an acquisition schedule. However, as appears to be accepted by the respondents, an essential pre-condition is that NAMA have formed an intention to acquire. Section 84 provides that NAMA *"may acquire an eligible bank asset of a participating institution if NAMA considers it necessary or desirable to do so having regard to the purposes of this Act……"* Subsection (4) refers to considerations which NAMA may take into account *"in deciding whether to acquire a particular bank asset…"*

Thus, NAMA must exercise its discretion as conferred by the section and make a decision to acquire. It must form an opinion that it is *necessary* or *desirable* to acquire the asset. To state the obvious, NAMA must make the decision and the Board of NAMA is, under section 18 of the Act, the decision-maker. That section deals with the functions of the Board. Principally, they are "*to ensure that the functions of NAMA are performed effectively and efficiently*." Subsection (2) permits the Board to provide *"for the performance of any of its functions by an officer of NAMA"* but it is not suggested that the Board has made any such

provision. Insofar as the respondents' written submissions suggest that section 38 of the Act conferred power on the Chief Executive Officer (Mr McDonagh) to make decisions in relation to the acquisition of eligible bank assets, that section contains no such provision. Nor has Mr McDonagh purported, in any event, to make such a decision, a matter which will be discussed in connection with the respondents' reliance on his affidavit of 17th September 2010.

NAMA is a body established by statute and no act performed in its name has any legal effect except as provided in the Act. The Act contains no provision such as section 37 of the Companies Act, 1963 which permits private companies to ratify contracts and other transactions *"purporting to be entered into by a company prior to its formation or by any person on behalf of the company prior to its formation…"* It is axiomatic that NAMA could not make any decision before it came into existence. It is a matter of fundamental legal principle that a statutory body may only perform its functions as authorised by its founding statute.

It follows that the decision of the interim team made at meetings on 11th and 14th December 2009 was, in law, at the time when it was made, a nullity and had no legal effect.

NAMA could have made a valid decision following establishment. It could have done this independently of any prior work of the interim team. It could also have done so by reference to that work. In either event, the essential point is that it would have to be a decision of the NAMA Board. The respondents have accepted very clearly that NAMA made no explicit decision but argue for an implied decision. The High Court held that the December decision *"was adopted, albeit not expressly, by the subsequent actions of NAMA following its establishment."*

NAMA first rely on the board minutes of 23rd December 2009. Those minutes merely record that the *"board considered the proposed acquisition timetable and a list of borrowers whose loans are scheduled for transfer as part of the first three tranches."* This entry appears indeed to refer to the appellants' loans, but to consider is not to decide. The minutes provide no evidence of a decision. By the same token, the board on 7th January 2010 merely approved certain criteria to be applied in considering whether to acquire eligible assets. Unlike the minutes of 23rd December 2009, those minutes do not even refer to the appellants' loans.

Mr Daly, however, swore that the Board, at the meeting of 23rd December, was aware of the December decision and that the Board at that and *"subsequent meetings operated on the basis that all preparatory work carried out by the interim team prior to that date, was, in effect, considered to be work carried out by NAMA and it was treated as such for the purpose of NAMA exercising its statutory functions and powers."* That statement goes no farther than to say that the Board considered the December decision to be the effective decision and to have been made on behalf of NAMA. If so, the Board were under a serious misapprehension as to the legal effect of the December decision. Being of that view, it did not address the need for a new decision and did not purport to make one, even a decision taking the form of adoption of the December decision.

The Board meeting of 23rd December, as already indicated, records no decision. This is not a mere matter of defective recording. The more fundamental point is

that it is clear from the evidence of Mr Daly that no decision was in fact made.

The events surrounding the meeting of 23rd December as explained in Mr Daly's affidavit are the high point of the respondents' case on this issue. Since it is not contended that the Board ever expressly decided to acquire the appellants' loans, the search is for an implied decision. It is clear from a reading of all the material offered that the Board of NAMA and its officers considered the matter to have been decided on 11th and 14th December. There being in their minds no need for a further decision, it is not surprising that they never purported to make one.

The respondents rely on the following paragraph from Mr McDonagh's second affidavit:

> *"I have considered afresh whether, in light of the submissions and contentions advanced in affidavits delivered on behalf of the Applicants, the decision to acquire the credit facilities, the subject matter of the proceedings, was correct. I have also in particular reviewed the documentation and information, relating to these credit facilities referred to in the Affidavits, and I believe that there is no new information which has come to light since the original decision was taken in December 2009 which makes the original decision incorrect or which in my view would make it appropriate for NAMA to decide not to acquire the loans. I, as Interim Managing Director of NAMA appointed under a direction by the Minister for Finance was the person ultimately responsible for the decision, and it was made with my full knowledge and authority."*

The principal difficulty about this paragraph is that it is founded entirely on the decision of 11th and 14th December, which it twice describes as "*the original decision."* It does not refer to any later decision and, even assuming Mr McDonagh to have had the authority to make a new decision, he does not say that he made one and does not purport to make one. Mr McDonagh's affidavit adds nothing to the respondents' case on this point.

The consistent assumption of all concerned was that the decision to acquire had been made by the interim team on 11th and 14th December. Ms Aideen O'Reilly, for example, in her second affidavit again refers to that decision by naming the four individuals. She expressed her belief that all preparatory work was carried out by the National Treasury Management Agency in accordance with a direction of the Minister for Finance and that the Agency had full authority to do this work. To the credit of those swearing the various affidavits, they have not attempted to contend that any decision was made after the establishment of NAMA. At most they argue for an implied decision. But they believed that the decision had already been made and were not conscious of any legal difficulty about this. Therefore, it is not possible to clothe their actions with an implied intention to do something which they did not consider necessary.

NAMA could have taken steps to prevent this problem arising by the simple expedient of making a Board decision, which, in addition should have been properly evidenced following establishment, to exercise the discretion conferred by section 84 of the Act. If it had done so, it would not have been driven to rely,

as evidence of the making of a decision by implication, on a variety of statements, particularly in the affidavits of the Chairman and Managing Director of NAMA. Regrettably, all of these, without in any sense calling into question the credibility of the deponents, on close analysis, served only to demonstrate the belief of those responsible that the decision to acquire had been made prior to establishment and that it was authorised through the National Treasury Management Act, 1990, a point which NAMA has not pursued before this Court.

Finally, it is necessary to refer to the argument based on section 17 of the Interpretation Act, 2005. That section provides, in certain circumstances, for the exercise of statutory powers at a time between the enactment of a statute and its coming into effect. The relevant provision is paragraph (b), which provides:

> *"If, for the purposes of the Act or the provision, the Act confers a power to make a statutory instrument or do any act or thing, the making or doing of which is necessary or expedient to enable the Act or provision to have full force and effect immediately on its coming into operation, the power may, subject to any restriction imposed by the Act, be exercised at any time after the passing of the Act."*

The respondents' main point is that the making of the December decision was *"necessary or expedient to enable the Act or provision to have full force and effect immediately on its coming into operation."* That submission ignores the need for the Act to have conferred a power on the persons who purported to make the decision. Clearly, no such power was conferred on the employees of the National Treasury Management Agency or its employees. Thus, section 17 can have no effect so far as the acts of the "interim team" were concerned. The respondents have pointed to no power conferred by the NAMA Act on those persons. The Interpretation Act does not rescue the December decision from invalidity.

The Court is satisfied, therefore, that the December decision made by the interim team had no legal effect and, that contrary to what was decided by the High Court, it was not given legal effect by any subsequent act or series of acts of NAMA. This is no mere matter of form. It is fundamental to the functioning of a statutory body that it, itself, take such decisions as it is empowered to make by the statute and exercise any discretions conferred on it. Consequently, NAMA has made no decision to acquire the appellants' loans. The appellants are, therefore, entitled to a declaration to that effect.

The Court does not consider that there are any grounds, such as those mentioned by the High Court, upon which the Court should exercise its discretion to refuse relief to the appellants. The Court does not agree that the question of whether NAMA has made a decision is a purely technical and formal one; a decision to acquire eligible assets is an essential step in the statutory process; there was no need to seek *certiorari* of a decision which is a mere nullity; whether the appellants are entitled to fair procedures does not affect this legal point.

Accordingly the appeal is allowed and the appellants are entitled to a declaration that NAMA has not made a decision to acquire the eligible bank assets

represented by their loans.

As indicated Mr. Justice Fennelly will deliver a judgment, with which I agree, on the appellants' ground of appeal concerning state aid.

As regards the other issues in the appeal the Court will invite the views of the parties as to whether they can now be considered to be a justiciable controversy between the parties at this stage.