[2020] IEHC 297

THE HIGH COURT

[Record No. 2016/9712 P.]

BETWEEN

BRENDAN O'DONOGHUE

PLAINTIFF

AND

PATRICK MARTIN AND NOEL MARTIN

DEFENDANTS

AS CONSOLIDATED BY ORDER OF THE HIGH COURT DATED 3RD APRIL, 2017 WITH THE HIGH COURT

[Record No. 2016/11154 P]

BETWEEN

BRENDAN O'DONOGHUE

PLAINTIFF

AND

PATRICK MARTIN, NOEL MARTIN AND BEN GILROY

DEFENDANTS

JUDGMENT of Ms. Justice Pilkington delivered on the 26th day of May, 2020

1. This is an application by the first and second named defendants, Patrick and Noel Martin ('the applicants'), seeking an order pursuant to s. 194 of the NAMA Act 2009 granting them leave to appeal my judgment delivered on the 24th day of July, 2019 [2019] IEHC 598 ('my judgment') and also my *ex tempore* judgment on 11th October, 2019 (solely in respect of costs), to the Court of Appeal ('the s. 194 application').

2. It does not appear that the judgment in respect of costs has any relevance to this application, save that an order is also sought staying both judgments pending the determination of this appeal.

3. Section 194 of the NAMA Act, 2009 ('the 2009 Act') headed "Limitation of Certain Rights of Appeal to the Court of Appeal" states, in its operative portions, as follows:-

"194. – (1) The determination of the Court of an application for leave to apply for judicial review, of an application for judicial review, of an application for leave to apply for an order, or an application for an order, under *section 182*, is final and no appeal lies from the decision of the Court to the Court of Appeal in either case, except with the leave of the Court.

(2) The Court shall grant leave under *subsection (1)* only if that Court certifies 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 Court of Appeal.

(2A) On an appeal from a determination of the Court in respect of an application referred to in *subsection (1),* the Court of Appeal:-

(a) has jurisdiction to determine only the point of law certified by the Court under *subsection (2),* and to make only such order in the proceedings as follows from that determination, and

(b) shall, in determining the appeal, act as expeditiously as possible consistent with the administration of justice.

(3) This section does not apply to a determination of the Court in so far as it involves a question as to the validity of any law having regard to the provisions of the Constitution."

4. Within the original application the applicants sought the following reliefs:-

"(a) A declaration that the first and second named defendants do not require the leave of this Honourable Court to deliver and serve the amended defence and counterclaim in the within proceedings on National Asset Loan Management DAC ('NALM');

(b) In the alternative, insofar as this Honourable Court may deem necessary, an order granting the first and second named defendants leave to bring an application pursuant to s. 182(2) of the National Asset Management Agency Act, 2009 in respect of the non-damages reliefs sought against NALM in the amended defence and counterclaim herein;

(c) Further, an order pursuant to s. 182(2) of the National Asset Management Agency Act, 2009, permitting the first and second named defendants to seek reliefs in the amended defence and counterclaim herein other than for damages against NALM and to deliver and serve the amended defence and counterclaim on NALM."

5. Accordingly, and it is common case that, insofar as the applicants seek reliefs pursuant to the NAMA Act, they do so pursuant to the relevant provisions of s. 182, and accordingly, s. 194 (1) is triggered arising from my judgment.

6. Within its submissions, the applicants to the motion identify the precise points of law on which it seeks the certification of this Court for leave to appeal to the Court of Appeal in the following terms:-

(a) Does a counterclaim fall within the definition of "legal proceedings commenced" as prescribed by the Act?

(b) Are damages ever an adequate remedy where a party would likely be adjudicated bankrupt? If so, how is a court to assess such adequacy?

(c) In considering any alleged delay in the commencement of proceedings, must a court assess the distinct period and reasons for delay from each alleged cause of action? If so, must a court assess the reasonableness of each delay and consider the context of each period of delay?

(d) Whether a court, on an application for leave to bring proceedings, is permitted (i) determine the reasonableness of a belief on affidavit evidence only; and (ii) substitute its own assessment of the understanding attributed to the alleged statements by witnesses on affidavit?

(e) Whether, on an application for leave, a court ought to make final determinations on claims advanced in the application?

7. The submissions of counsel for the applicants, linked (d) and (e) above and also, sought to slightly reformulate those grounds to include the issue of estoppel. I will deal with this aspect of the matter below.

8. In the decision of the Divisional Court in *Dellway Investment Limited & ors v. NAMA & ors* [2010] IEHC 375 ('*Dellway*'), the court set out to define the criteria that would constitute, as the Act describes it, "a point of exceptional public importance and that it is desirable in the public interest that an appeal should be taken…". In *Dellway*, the court stated the criteria as follows:-

"4.4 Likewise, the judgment in *Arklow Holidays v. An Bord Pleanála* [2007] 4 IR 112, suggests that a number of tests must be met before a case is certified. The matters required to be established were noted as being:-

"(i) There must be an uncertainty as to the law in respect of a point which has to be of exceptional importance; see for example *Lancefort v. An Bord Pleanála* [1998] 2 I.R. 511;

(ii) The importance of the point must be public in nature and must, therefore, transcend well beyond the individual facts and parties of a given case; see *Kenny v. An Bord Pleanála (No.2)* [2001] 1 I.R. 704. It is the case that every point of law arising in every case is a point of law of importance; see *Fallon v. An Bord Pleanála* [1992] 2 I.R. 380. That, of itself, is insufficient for the point of law concerned to be properly described as of "exceptional public importance";

(iii) The requirement that the court be satisfied "that it is desirable in the public interest that an appeal should be taken to the Supreme Court" is a separate and independent requirement from the requirement that the point of law be one of exceptional public importance; see *Kenny v. An Bord Pleanála (No.2)* [2001] 1 I.R. 704. On that basis, even if it can be argued that the law in a particular area is uncertain, the court may not, on the basis, inter alia, of time or costs, consider that it is appropriate to certify the case for the Supreme Court; see *Arklow Holidays Ltd v. Wicklow County Council* [2004] IEHC 75…"

9. The principles were distilled by MacMenamin J. in the case of *Glancré Teoranta v. An Bord Pleanála and Mayo County Council* [2006] IEHC 250 ('*Glancré*') into ten principles as follows:-

"1. The requirement goes substantially further than that a point of law emerges in or from the case. It must be one of *exceptional importance* being a clear and significant additional requirement.

2. The jurisdiction to certify such a case must be exercised sparingly.

3. The law in question stands in a state of uncertainty. It is for the common good that such law be clarified so as to enable the courts to administer that law not only in the instant, but in future such cases.

4. Where leave is refused in an application for judicial review i.e. in circumstances where substantial grounds have not been established a question may arise as to whether, logically, the same material can constitute a point of law of exceptional public importance such as to justify certification for an appeal to the Supreme Court (*Kenny*).

5. The point of law must arise out of the decision of the High Court and not from discussion or consideration of a point of law during the hearing.

6. The requirements regarding "exceptional public importance" and "desirable in the public interest" are cumulative requirements which although they may overlap, to some extent require separate consideration by the court (Raiu).

7. The appropriate test is not simply whether the point of law transcends the individual facts of the case since such an interpretation would not take into account the use of the word "exceptional".

8. Normal statutory rules of construction apply which mean *inter alia* that "exceptional" must be given its normal meaning.

9. "Uncertainty" cannot be "imputed" to the law by an applicant simply by raising a question as to the point of law. Rather the authorities appear to indicate that the uncertainty must arise over and above this, for example in the daily operation of the law in question.

10. Some affirmative public benefit from an appeal must be identified. This would suggest a requirement that a point to be certified be such that it is likely to resolve other cases."

10. Clarke J. in the case of *Arklow Holidays v. An Bord Pleanála* [2007] 4 I.R. 112 *('Arklow Holidays'),* referred to in *Dellway*, had summarised the criteria as follows:-

" (i) there must be uncertainly as to the law in respect of a point which has to be of exceptional importance…….

(ii) the importance of the point sought must be public in nature and must, therefore, transcend well beyond the individual facts and parties of a given case ….. It is the case that every point of law is of importance …..That, of itself, is insufficient for the point of law concerned to be properly described as of 'exceptional public importance'

(iii) The requirement that the court be satisfied 'that it is desirable in the public interest ….. is a separate and independent requirement form the requirement that

> the point of law be one of exceptional public importance. …..On that basis, even if it can be argued that the law in a particular is uncertain, the court may not, on the basis, inter alia, of time or costs, consider it is appropriate to certify a case for the Supreme Court….."

11. O'Donnell J. in *Quinn Insurance Ltd v. Price Waterhouse Cooper* [2017] IESC 73 in assessing the question of 'general public importance' stated:-

> "The Court has determined on a number of occasions that to satisfy the test it is necessary first that the point be stateable and second that it should normally have the capacity to be applicable to cases other than that under consideration."

12. In *Raiu v. The Refugee Appeal Tribunal & ors* (Unreported, High Court, Finlay Geoghegan J., 26th February, 2003) ('*Raiu'*) stated in respect of the requirement that the point of law is one of "exceptional public importance" and that "it is desirable in the public interest that an appeal should be taken to the Supreme Court" held that these were cumulative requirements and, whilst they may overlap to some extent, that they require separate consideration by the High Court. The court continued:-

> "The Oireachtas has clearly indicated in s. (5)(3)(a) of the Act of 2000, by use of the word "exceptional" that not all points of law of public importance may be certified. Many if not most points of law which arise in a judicial review to which section… of the Act of 2000 applies will be of "public importance" in the sense that that term has been construed by the Courts, particularly in the jurisprudents relating to applications for security for costs on appeals to the Supreme Court. Counsel for the applicant sought to reply on the decisions of the Supreme Court in *Fallon v. An Bord Pleanála* [1992] 2 I.R. 380 and *Irish Press Plc v. Ingersoll Irish Publications Limited* [1995] 1 I.L.R.M. 117 and the definition therein of a point of law of public importance as being one which "transcends well beyond the individual facts of the case" as being the appropriate test for the granting of a certificate under s. (5)(3)(a). I reject this submission, as it does not fully take into account the use of the word "exceptional" by the Oireachtas.
>
> I do not consider it appropriate for the High Court to take into account the strength of the grounds of appeal when considering an application for a certificate under section … as submitted by counsel for the respondents. The strength of the grounds of appeal is relevant to the probability or otherwise that the decision of the High Court is correct. It might also be relevant to the importance of the decision of the High Court. However, it is not the decision of the High Court which section… requires to be of exceptional public importance. Rather it is the point of law involved in the decision. Hence, it appears to me that this court must consider the point of law involved in its decision rather than its determination of that point of law. The point of law, irrespective of how it is decided, must be of exceptional public importance. Accordingly, the strength of the grounds of appeal against the decision of the High Court, which involves the point of law, does not appear relevant."

13. Counsel for the applicants and respondent were at pains to reiterate the point, highlighted in *Raiu*, that it is not whether the decisions arrived at within my judgment are correct or otherwise, but rather, whether the issues upon which the court was required to adjudicate, raises an issue(s) to satisfy the criteria for leave to the Court of Appeal, pursuant to s. 194 of the 2009 Act.

14. Counsel for the applicants has asserted that the criteria upon which they seek certification for leave to appeal is set out in a descending order of importance and I therefore deal with it on that basis. The first ground (a) relates to s. 181 of the NAMA Act, the remainder at (b) to (e) to s. 182. It was contended on behalf of the respondent that if leave was not granted in respect of ground (a) that this would leave the applicants in difficulty in advancing the remaining grounds. That contention is not accepted by the applicants and I have, at their request, simply adjudicated each ground in turn.

Ground (a) - The counterclaim

15. The issue, as set out above, is whether the counterclaim falls within the definition of "legal proceedings commenced" as prescribed by the s. 181 (1) of the 2009 Act, which provides:-

> "(1) The provisions of this Chapter apply in relation to legal proceedings commenced on or after 30 July 2009 by a person who is a debtor, associated debtor, guarantor or surety in relation to a bank asset, or a participating institution in connection with a bank asset if the bank asset is specified (whether at the commencement of the proceedings or afterwards) in an acquisition schedule."

16. It must be noted, that the joinder of NAMA occurred pursuant to the terms of the counterclaim brought by these applicants. As a clear factual matter, therefore, there was no proceeding in being against NAMA prior to the counterclaim. It was not a party to the original proceedings commenced on the 1st November, 2016 but joined (does that constitute a commencement of legal proceedings?) pursuant to the applicants' amended defence and counterclaim which issued in March, 2018.

17. Counsel for the applicants in part placed reliance upon a portion of the text within Dodd and Carroll, *The Law Relating to the National Asset Management Agency* (Dublin, 2012) (at paras. 15.29 & 15.30) where the learned authors assert:-

> "15.29 This particular condition (*a reference to the restrictions imposed s. 182 above*) focuses on the person who commences the proceedings. It incorporates two general categories: First, proceedings brought by a debtor… Section 182, therefore, does not generally apply to any proceedings in relation to a bank asset (and this includes that it does not apply to any proceedings commenced by NAMA or a NAMA group entity in relation to a bank asset), notwithstanding that a wider application to proceedings commenced by any person would have afforded greater protection in respect of the acquired bank asset. Furthermore, as will be discussed, where commenced by a debtor, associated debtor, guarantor or surety, that appears the proceedings must relate to a bank asset in

respect of which the person connected is a debtor, associated debtor, guarantor or surety.

15.30 Section 182 applies regardless of the identity of the defendant or respondent to the proceedings, be that person NAMA, a participating institution or some other person. However, somewhat anomalously, where the proceedings are commenced by a person other than a debtor, associated debtor, guarantor, surety or a participating institution, the Chapter two restriction will not apply where the defendant is a debtor… which seeks to raise a counterclaim in respect of a bank asset. This follows from the fact that the raising of a counterclaim seeking relief other than damages in relation to a bank asset could not be described as proceedings commenced by such parties within section 180. However, where the proceedings are commenced by the debtor… the provision also captures counterclaims made by any other party in such proceedings such as a counterclaim or crossclaim by the defendant or claims by a person who is co-plaintiff so long as the other conditions of chapter two are met."

[The portion underlined above is that highlighted by the applicants in their submissions.]

18. In my view, whilst the provisions of the quotation cited above may (on one interpretation) appear to deny any possibility of a counterclaim being 'caught' by s. 181, it also appears to be arguable that the proposition is advanced in the context of a counterclaim by existing parties to an action.

19. In any event, counsel for the applicants essentially relies upon this passage as raising a possible doubt as to whether a counterclaim properly comes within the definition of legal proceedings commenced; in other words, no issue is taken with the fact that a counterclaim constitutes legal proceedings – the question or issue formulated by the applicants is whether such a counterclaim can be included within the concept or definition of legal proceeding commenced and therefore whether this counterclaim is 'captured' within s. 181. Counsel for the applicants points out that my judgment focused very much (I think he would suggest unduly) upon whether a counterclaim can constitute a "legal proceeding".

20. In a careful consideration by Cregan J. as to the proper identification of the various causes of action within the decision of *NAMA v. Moloughney* [2015] IEHC 865 ('*Moloughney'*), which in turn required a very careful analysis of (amongst others) s. 182 of the 2009 Act, I am invited by the applicants to undertake a similarly dispassionate examination. It is noteworthy in *Moloughney* that at no point did the court raise any issue as to the applicability of s. 181 to the counterclaim in that case and simply proceeded on the basis that it was a counterclaim and adjudicated the matter accordingly.

21. The circumstances concerning the joinder of NAMA have been identified above. They were joined by way of a counterclaim. The respondent contends that the issue of when legal proceedings "commenced" is as much a question of fact as it is of law. NAMA were not a

party to the proceedings until a counterclaim was "commenced" against them. Counsel for the applicants obviously differs in his approach. He points out, it appears correctly, that there is very little (it appears no) case law of assistance on this point. The only time at which it is raised is in commentary upon s. 181 within the text quoted above. The applicants also rely upon Biehler, McGrath and McGrath, *Delany and McGrath on Civil Procedure, 4th Ed.)* at para 5-57 of their text where they state as follows:-

> "Order 19, rule 2 provides that a defendant in any action may set off, or set up by way of counterclaim against the claims of the plaintiff, any right or claim, whether such set off or counterclaim sounds in damages or not subject to the discretion of the court to refuse the defendant to avail of it, if in the opinion of the court, such set-off or counterclaim cannot be conveniently disposed of in the pending action. Such set-off or counterclaim has the same effect as a cross action, enabling the court to pronounce a final judgment in the same action, both in the original and on the cross claim. In addition, if the set-off or counterclaim is established as a defence against the plaintiff's claim, the court may, if the balance is in favour of the defendant, give judgment for the defendant for such balance, or may otherwise adjudge to the defendant such relief as he may be entitled to upon the merits of the case. It should be noted that by virtue of s. 6 of the Statute of Limitations, although a claim by way of a set-off or counterclaim is regarded as a separate action, it is deemed to have been commenced on the same date as the action in which it is pleaded."

22. From this, the applicants extrapolate, particularly from the last sentence of that quotation, that it mirrors the observations of the authors of the NAMA textbook quoted above, in distinguishing a counterclaim from other pleadings. If a counterclaim is deemed to commence on the same date as the action then, the applicants contend, an issue might be said to arise as to whether any other date for the issuing of a counterclaim can come within the rubric of the commencement of legal proceedings within section 181. I would comment in this regard that the definition of 'legal proceeding' within the NAMA Act is broadly drawn.

23. The applicants contend that this issue is separate and distinct from the one within my judgment. Obviously, whether that is correct or otherwise, is not directly on point. It is whether the point raised satisfies the criteria clearly set out within the caselaw quoted above as it interprets the requirements of section 194 itself.

24. If the applicants are correct in their submission, then any application where NAMA is joined to the proceedings, in the first instance by way of counterclaim, would simply never be caught by the provisions of the s. 182 of NAMA Act, regardless of the claim identified by the applicants against that entity.

25. If it is not merely a question of fact (when did proceedings commence), as suggested by the respondent, then it does appear that the point raised by the applicants is public in nature as it derives from statute. The applicants point to the fact that the resolution or determination of this issue could affect a significant raft of cases and could be an

important derogation from the legislation, affecting anyone bringing a counterclaim against NAMA.

26. Counsel for the respondent also dealt with the factual position in *Dellway*; that it raised a point of significant public importance in respect of recent significant NAMA legislation, arising out of the financial crisis, which was being challenged by a major developer within the Irish economy. Whilst that is undoubtedly factually correct, nevertheless, it does not preclude a point raised by these applicants which may, if their argument is correct, satisfy the statutory criteria and the case law as set out above.

27. In considering this matter I am particularly drawn to point 9 in *Glancré* where MacMenamin J. states very clearly that:-

> ""Uncertainty" cannot be "imputed" to the law by an applicant simply by raising a question as to the point of law. Rather the authorities appear to indicate that the uncertainty must arise over and above this, for example in the daily operation of the law in question."

28. The fact that this point does not appear to have been raised in any litigation previously may suggest that it is a point upon which no party requires adjudication, as much as the applicants' contention that the very absence of authority might indicate why clarification is now required. The text from Dodd and Carroll, quoted at paragraph 17 above, appears to be the only source where this issue is raised. The applicants contend that no particular significance attaches to the joinder of NAMA by counterclaim; either the counterclaim comes within s. 181 of the NAMA Act 2009 or it does not.

29. Adopting the criteria set out by McMenamin J. in *Glancré* above I do not see that this point has arisen in the daily operation of s. 181 of the NAMA Act. In respect of the point raised, in my view it does not pass the *Dellway* criteria of there being uncertainty in the law (as further delineated in *Glancré*). Likewise, if I accept that the point advanced by the applicants is public in nature (it derives from statute) then I do not see how and in what circumstances it transcends the facts of this case. It may be important as contended by the applicants, but I do not see it is a point of 'exceptional public importance' (MacMenamin J. in *Glancré* stated the word 'exceptional' imported a significant additional requirement). The only possible source that, in my view, can be relied upon for the applicants contention, is contained within the text by Dodd and Carroll in respect of NAMA, quoted above. In my view that does not elevate this ground to an issue of exceptional public importance, nor in my view can I see any grounds for it being desirable in the public interest that leave to appeal be given.

30. In noting the case law's confirmation (*Dellway, Glancré* and *Raiu*) that the requirements constituted by s. 194 (2) of 'exceptional public importance' and 'desirable in the public interest' must both be satisfied; i.e. a cumulative test, in my view, for the reasons set out above, neither criteria has been satisfied and accordingly leave is declined in respect of this ground.

Remainder of the Grounds – (b) to (e)

31. In my view, the remainder of the criteria advanced by the applicants must be seen not only against the background of my judgment but, in my view, of equal or perhaps greater importance, are the terms of the NAMA Act itself. The remainder of the grounds relate to that portion of my judgment which dealt with the various criteria within s. 182 of the NAMA Act.

32. In essence s. 182 provides that, in respect of a non-damages claim, an individual claimant may apply for reliefs with leave of the court. Section 182 (4) states that leave shall not be granted unless the court is satisfied that :-

    (a) A substantial issue has been raised for the court's determination; and

    (b) An application for leave is made to the court within 30 days (and the criteria set out in that regard); or

    (c) If the court is satisfied that there are substantial reasons why the application was not made within that 30 day period and that it is just and equitable in all of the circumstances to grant leave, having regard to the interests of any other affected person.

33. Section 182 (6) states that the court shall not make an order for leave if the court is satisfied that if an applicants' claim were established, damages would not be an adequate remedy. In short, an order for leave is only granted if damages are not an adequate remedy.

34. In my view, mindful of course of the fact that this court is to focus on the issues raised by the applicants rather than the manner in which they were dealt with within my judgment, nevertheless, I believe, given the strictures of the case law, in particular, *Dellway* and *Arklow Holidays*, that the point of law must arise out of the decision itself. In respect of this decision, this must comprise both it and s. 182, to which each ground seeking leave within my judgment is linked. To deal with each in turn.

Ground (b) - The Adequacy of Damages

35. The applicants frame this question/issue linking whether damages are ever an adequate remedy for a person likely to be adjudicated bankrupt and, if so, how is a court to assess such adequacy?

36. No case law has been opened to me to suggest that a bankrupt is precluded from taking such action of which he may be advised and, in particular, I note the judgment of Kelly J. in *Quinn v. IBRC* [2012] IEHC 261 who confirmed that certain personal claims advanced by a bankrupt do not vest in the Assignee in bankruptcy.

37. In my view, within my judgment and the parameters of this case, the adequacy of damages is very much a consideration which any court is required to adjudicate within the strictures of section 182 (6). It is also one that is dealt with sequentially in dealing with the criteria within s. 182 (having initially determined the other matters required

before arriving at assessing the criteria of s. 182 (6)) and I suggest that my judgment made an assessment in that context.

38. The question is raised in the context of s. 182 and not otherwise. I do not see how any question of general application arises in this regard.

39. With regard to the issue of damages, it appears that the court is being invited to grant leave to appeal on this ground in order that some form of potential assessment might be undertaken as to whether, and in what circumstances, the damage to a reputation of an individual, by their adjudication as a bankrupt, would meet the criteria that damages would be an adequate remedy for that party. The applicants relied upon the decision of Hogan J. in *Wallace v. Irish Aviation Authority* [2012] IEHC 178, which was a case where the learned Judge was dealing with the issue of reputational damage in the context of a possible suspension from employment. I do not see how that case assists the applicants; reputation is of course important to them, but it seems to me a very personal matter advanced by these applicants and not one of broader application.

40. I can see no basis upon which the threshold criteria set out within s. 194 and the case law cited above, are met by this ground seeking leave. The question as to whether damages are an adequate remedy on the facts of any particular case are entirely that: case and fact specific. Equally, whether it constitutes an adequate remedy does not appear to me to be capable of some form of adjudication outside the issues within this case. Whilst the point is an important one to the applicants it is not, in my view, one of exceptional public importance.

41. Again, noting the cumulative criteria of 'exceptional public importance' and 'desirable in the public interest' which must be satisfied; in my view, for the reasons set out above neither criteria has been satisfied and accordingly leave is declined in respect of this ground.

Ground (c) - Delay

42. It is the applicants' case that leave for appeal should also be sought for the issue that discreet periods of delay should be properly assessed and a decision reached in respect of each one, as opposed to looking at the matter "in the round". The applicants contend that there were, what they describe as, multiple trigger points generating or potentially generating a claim by the applicants (particularly in respect of certain alleged representations by bank officials) and that it is incumbent upon a court to assess those trigger points individually rather than collectively and, in such circumstances, assess whether or not the delay is reasonable in such circumstances.

43. It is very difficult to imagine how any issue of delay is anything other than entirely fact specific to each individual case. Delay in my view (and again this is against the requirement to assess whether there was an application for leave within 30 days, as required within s. 182 (4)), is arguably broader than assessing individual facts sequentially rather than the passage of pleadings within the litigation as a whole.

44. If the applicants feel that my judgment was unfair to them in respect of my findings with regard to delay and the consequential implications of that, in my assessment of their entitlements for leave pursuant to s. 182, then, in my view, that is very much a decision upon the specific facts advanced. Taking a different view is simply that; and I can see no circumstances in which that ground meets the threshold criteria set out above. No general or 'global' issue of delay arises in this decision, in my view it is fact specific to this case. It is not therefore a matter of exceptional public importance and nor, in my view, is there any identified public interest in having this ground determined.

45. Leave is declined in respect of this ground.

Grounds (d) and (e)

46. Criteria (d) and (e) have been effectively joined by counsel for the applicants (as is his prerogative) in advancing claims with regard to an estoppel type argument. The applicants contend that they are entitled to the benefit of the derogation afforded by s. 182 and that any adjudication, such as my judgment, must be careful not to shut out or refuse any suggestion of their claim (based upon their averments as to representations made) so as to permit the applicants to raise the estoppel which would bind NAMA, on the basis of those alleged representations made by certain bank officials throughout the course of this matter.

47. In my view consideration of the doctrine of estoppel was again linked to specific statutory requirements that my judgment was seeking to determine, namely, as to whether, pursuant to the judgment of Peart J. in *Daly & ors. v. NALM & ors*. (Unreported, High Court, 12th September, 2011), a "substantial issue" had been raised.

48. This is, in my view, virtually entirely fact specific. Estoppel, on the facts of any case, must relate to specific representations made. I have difficulty in determining how that issue (whether representations ground an estoppel) can ever be of public importance let alone of exceptional public importance. Representations are considered against the factual background of this case. The doctrine of estoppel is well established in determining whether it can be invoked arising, again, upon facts and issues specific to that case. In my view there is no matter of exceptional public importance and nor can I determine any public interest in having this ground determined.

49. Leave is declined in respect of this ground.

Observations and Conclusion

50. In my view the criteria for leave has not been satisfied in respect of any of the grounds advanced by the applicants.

51. With regard to ground (a) in my view the dual test set out in s. 194 of 'exceptional public importance' and 'desirable in the public interest' was not satisfied. In my view the applicants' argument did not reach the threshold on either aspect of the requirements within section 194 of the NAMA Act 2009.

52. *Arklow Holidays* and *Dellway* confirm that the issues raised pursuant to s. 194 must transcend the facts of the specific case. I have great difficulty in discerning how the grounds advanced within categories (b) to (e) do so.

53. I note that the applicants may well take issue and fundamentally disagree with my judgment and assessment of those issues but, in my view, the points raised by the applicants are more appropriate to grounds within a conventional appeal process as opposed to the undoubtedly higher threshold criteria within section 194.

54. The application of the criteria in s. 194 o the NAMA Act is very clearly set out within the seminal decision in *Dellway* and its further elucidation in *Glancré*. As has been asserted throughout the caselaw, any applicant must satisfy a high threshold test. In my view the applicants have, in respect of all grounds advanced, failed to satisfy this test.

55. For the reasons set out above, I must therefore decline the reliefs sought by the applicants at paragraph 1 of this Notice of Motion.

56. I will hear the parties as to what if any consequential or other orders are required including any as to costs.