**Judgment Title:** Dellway Investment Ltd & Ors -v- National Asset Management Agency & Ors

**High Court Record Number:** 2010 909 JR

**Date of Delivery:** 08/11/2010

**Court:** High Court

**Composition of Court:** Kearns P., Kelly J., Clarke J.

**Judgment by:** Kearns P., Kelly J., Clarke J.

**Status of Judgment:** Approved

Neutral Citation Number: [2010] IEHC 375

**THE HIGH COURT**

**COMMERCIAL**

**JUDICIAL REVIEW**

**KEARNS P.**
**KELLY J.**
**CLARKE J.**

**2010 909 JR**

**BETWEEN**

**DELLWAY INVESTMENT LIMITED, METROSPA LIMITED, BERKLEY PROPERTIES LIMITED, MAGINOTGRANGE LIMITED, MAY PROPERTY HOLDINGS LIMITED, SCI 20 PLACE VENDOME, DIRECTDIVIDE TRADING LIMITED, SUBMITQUEST LIMITED, BELFAST OFFICE PROPERTIES LIMITED, THE FORGE LIMITED PARTNERSHIP, FINBROOK INVESTMENTS**

**LIMITED, CONNIS PROPERTY SERVICES LIMITED, FORMCREST CONSTRUCTION LIMITED, CHESTERFIELD (THE PAVEMENTS) SUBSIDIARY LIMITED, ABEY DEVELOPMENTS LIMITED AND PATRICK MCKILLEN**

**APPLICANTS**

**AND**

**NATIONAL ASSET MANAGEMENT AGENCY, IRELAND AND THE ATTORNEY GENERAL**

**RESPONDENTS**

**JUDGMENT of the Court delivered the 8th day of November, 2010**

## 1. Introduction

1.1 On Monday the 1st November 2010 this Court gave judgment on the substantive issues arising in these proceedings. For the reasons set out in that judgment ("the principal judgment") the Court concluded that the claim brought by Mr. McKillen should fail. In this judgment terms are used with the same meaning as they were used in the principal judgment.

1.2 On Friday the 5th November counsel on behalf of Mr. McKillen sought from the Court a certificate which, at least one on one view, is necessary to allow Mr. McKillen to appeal to the Supreme Court on two of the issues which were the subject of the principal judgment, that is the fair procedures issue and the European State Aid issue. While it will be necessary to refer to the relevant statutory framework concerning such certificates in a little more detail later in this judgment, it is at least arguable that such a certificate is necessary in order that those matters be raised in an appeal. The possible requirement for such a certificate arises by virtue of the provisions of s.194 of the Act.

1.3 Counsel for NAMA and the State respondents opposed the application. This judgment is directed to the issues which arose. Amongst the matters referred to in argument was a question as to the extent to which a certificate is, in fact, necessary. In order to explain how that question arose it is proposed to turn, first, to the question of the necessity for a certificate.

## 2. Is a certificate necessary?

2.1. The starting point for a consideration of this question has to be the terms of Article 34.4 of the Constitution which provides that, in the absence of a law to the contrary, an appeal lies from every decision of the High Court to the Supreme Court. However, Article 34.4.4 provides that:-

> "No law shall be enacted excepting from the appellate jurisdiction of the Supreme Court cases which involve questions as the validity of any law having regard to the provisions of the Constitution".

2.2 Because of that constitutional prohibition, s.194(3) of the Act provides that the general certification requirement of that section "does not apply to a determination of the Court insofar as it involves a question as to the validity of any law having regard to the provisions of the Constitution".

2.3 First, therefore, it must be noted that Mr. McKillen is entitled, without leave of this Court, to appeal to the Supreme Court from that part of the decision of this Court which rejected his claim that the Act was inconsistent with the Constitution. Mr. McKillen is entitled to appeal that aspect of the principal judgment as of right.

2.4 However, there is a difference between the parties as to the extent to which it is necessary, having regard both to Article 34.4.4 of the Constitution and s.194(3) of the Act, to obtain a certificate for leave to appeal in relation to other issues which arise in a case involving a challenge to the constitutionality of an act of the Oireachtas where those other issues are closely connected with the constitutional challenge itself.

2.5 It is, of course, the case that questions concerning the jurisdiction of the Supreme Court to entertain an appeal are principally, if not exclusively, matters for the Supreme Court. However, counsel for NAMA noted that there was a possible basis on which it might be appropriate for this Court to consider the matter. In order to understand the point it is necessary to say just a little about the competing positions of the parties on the general question of whether a party has a right, without leave, to raise what might loosely be called connected questions as part of an appeal against a finding relating to the constitutionality or otherwise of the Act.

2.6 At its simplest the position argued for on behalf of Mr. McKillen starts by noting the so called constitutional or double construction rule first identified in *East Donegal Co-operative v. Attorney General* [1970] I.R. 348. On the basis of a long line of *jurisprudence* following on from *East Donegal* it is clear that, in the ordinary way, a court will endeavour to place a constitutional construction on any statute under challenge and will only find the statute concerned to be inconsistent with the Constitution if is not possible to construe the relevant legislation in a manner consistent with the Constitution.

2.7 On that basis, counsel for Mr. McKillen argues that it would be a surprising result if the Supreme Court were faced with an appeal confined to the constitutionality of a statute in circumstances were it was not open to the Supreme Court to consider any aspect of the construction of the statute concerned which might have a bearing on whether that statute should be found to be consistent with the Constitution or not. On that basis it is argued that a right to appeal (without certificate) in relation to a finding by this Court that a statute is not inconsistent with the Constitution necessarily carries with it a right to explore, on that appeal, any questions of interpretation which are directly connected with the question of whether the statute concerned is consistent with the Constitution.

2.8 On the other hand counsel for NAMA argues that the Supreme Court, in the absence of a certificate from this Court allowing other points to be raised, will be confined to the narrow question of whether the Act is consistent with the Constitution in circumstances where the interpretation of the Act will, at least for the purposes of the case, be definitively taken as being the interpretation placed on it by this Court. On the basis of that argument, if it be correct, the Supreme Court would not be entitled to revisit any questions of interpretation determined

by this Court even if, it would seem, such questions of interpretation would ordinarily arise on an appeal to the Supreme Court in relation to the often connected questions of the proper interpretation of a statute and whether that statute is consistent with the Constitution.

2.9 It is clearly the case that a final decision on which of those two competing propositions represent the law is a matter for the Supreme Court in that the issue itself concerns the jurisdiction of the Supreme Court.

2.10 However, counsel for NAMA noted two matters. First attention was drawn to the decision of Geoghegan J. in *Jackson Way Properties Limited v. Minister for the Environment and Local Government* [1999] 4 I.R. 608 (a case which involved a provision concerning appeal on certificate only similar to that set out in the Act, (s. 55A of the Roads Act 1993 as inserted by s. 6 of the Roads (Amendment) Act, 1988)). In *Jackson Way* Geoghegan J. expressed the opinion, at p.610, that a certificate of the this Court was necessary for the purposes of raising additional grounds of appeal where the party concerned exercised a right to appeal without certificate in relation to a direct constitutional challenge. Geoghegan J. reached this conclusion on the basis that he did not imagine that the Oireachtas would have intended that, by the simple device of adding a direct constitutional challenge into a relevant claim, the strict limits of appeal could be circumvented. In that context it is also worthy of note that the authors of Kelly, (the Irish Constitution 4th Ed. 2003 at p. 965) take a different view.

2.11 It should also be noted that counsel for Mr. McKillen does not necessarily suggest that just any point raised in a case which happens to include a direct constitutional challenge can be raised on appeal without leave of this Court. Rather it is suggested that points which are inextricably linked with the constitutional question must be capable of being raised on appeal without leave. The reason why Geoghegan J. felt it necessary to reach a conclusion at all on those issues stemmed from the fact that, if the argument put forward on behalf of Mr. McKillen in this case be correct, then there is no need for a certificate where the right to appeal without certificate in relation to a direct constitutional challenge is exercised and in those circumstances there is at least an argument that this Court should not grant a certificate of leave to appeal in a case where it is unnecessary. There may well, in the Court's view, be circumstances where it would be inappropriate for this Court to grant a certificate where it is clear that such a certificate is unnecessary. However, until such time has the Supreme Court has had an opportunity to give a definitive ruling on the extent, if any, to which it may be the case that an appellant can raise, without certificate, closely connected points together with a direct appeal against a decision as to the constitutionality of a statute, it does not seem to this Court to be appropriate to decline to consider the question of a certification on its merits.

2.12 As was correctly pointed out by both counsel, a refusal on the part of this Court to consider the merits of certification would run the risk that the Supreme Court might take a different view and thus have to refer the matter back this Court thus, in turn, delaying the appeal process. That is something which would never be a desirable feature of litigation but would be particularly unfortunate in the circumstances of this case where there are tight time limits within which the NAMA project has to be finalised so far as bank asset acquisition is concerned, having regard to the Commission decision. It is, in this Court's view, the case

that this Court could properly decline to consider a certificate for leave to appeal on its merits if, having regard to a definitive determination of the law by the Supreme Court, it was clear, as opposed to being merely arguable, that such a certificate is unnecessary. That not being the case the Court proposes to consider the application for leave on its merits. It is proposed to turn first to the issues which were put forward for certification.

**3. The Certificate Sought**

3.1 Counsel for Mr. McKillen suggested that the following issues should be certified:-

> (1) "Do debtors whose loan facilities are contemplated by NAMA as being eligible assets and suitable for acquisition have a right to make representations to NAMA prior to their loan facilities being identified as eligible and prior to their acquisition? If so, must be the same right of representation be afforded to all debtors?
>
> (2) Whether the decision of the European Commission of the 26th February 2010 concerning the National Asset Management Act 2009:
>
> > (a) may be interpreted by reference to the exchange of correspondence passing between Senator Eugene Regan (letter dated 18th August 2010) and Dr. Irnfried Schwimann (letter dated 8th September 2010) and;
> >
> > (b) is to be interpreted as meaning that before there can be acquisition of loan facilities pursuant to National Asset Management Agency Act 2009 the debtor on the loan or loans in question must be regarded as an impaired borrower and;
> >
> > (c) If the answer to subparagraph (b) above is the affirmative what is the correct definition of impairment for the purposes of the National Asset Management Act 2009."

3.2 Thus, at least in general terms, the decision of this Court rejecting both the fair procedures argument and the European State Aid argument are suggested as being appropriate for certification. Against that background it is appropriate to turn briefly to the legal principles by reference to which certification can occur.

**4. The Law**

4.1 Section 194 of the Act provides as follows:-

> "(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 Supreme Court 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 Supreme Court."

4.2 Similar provisions to those found in s.194 of the Act are also to be found in other legislation most particularly legislation dealing with the planning and environmental field and relating to asylum and immigration matters. There is, therefore, a developed body of jurisprudence from those fields on the circumstances in which a court should give a certificate sufficient to permit leave to appeal in circumstances such as those with which the Court is faced in this case.

4.3 There have been a number of attempts in the decided cases to bring together the principles which emerge from the *jurisprudence* of the Courts in relation to certification of the type with which this Court is concerned in this application. In *Glancré Teoranta v. An Bord Pleanála* [2006] IEHC 250, MacMenamin J., having considered the authorities up to that point in time, said the following:-

"I am satisfied that a consideration of these authorities demonstrates that the following principles are applicable in the consideration of the issues herein.

1. The requirement goes substantially further than that the 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.

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."

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, (Unreported, High Court, Murphy

J., 4th February, 2004)."

4.5 There was no dispute as to those principles. The point of law sought to be certified must derive from the decision which is sought to be the subject of an appeal. There must be uncertainty as to the law and the point sought to be certified must be public in nature. The point involved must be of exceptional importance in which context there must be a real sense in which the point goes beyond or transcends the issues arising in the case in question.

4.6 As pointed out no real dispute arose between the parties as to the applicability of the general principles to which I have referred. There was, however, one issue which arose as to a question of principle which is of some relevance to the approach of the Court in this case.

4.7 As is noted in the principal judgment, the hearing which gave rise to that judgment was a so called telescoped hearing at which the Court had to consider both whether it was appropriate to grant leave to seek judicial review and, to the extent that it was so appropriate, to consider the merits of the judicial review application itself. For the reasons set out in the principal judgment, the Court was persuaded that it was appropriate to grant leave to seek judicial review in respect of the fair procedures issue but was not so persuaded in respect of the European State Aid issue.

4.8 In that context both sides drew attention to the decision of McKechnie J. in *Kenny v. An Bord Pleanála (No. 2)* [2001] 1 I.R. 704 and Finlay Geoghegan J. in *Raiu v. Refugee Appeals Tribunal* (Unreported, High Court, Finlay Geoghegan J. 26th February 2003) which touch on the question of whether it is appropriate for a court to give a certificate necessary for appeal in respect of an issue where the court was not satisfied to give leave to seek judicial review. That question was also mentioned at point 4 in the judgment of MacMenamin J. in *Glancré* cited earlier. In each of the relevant legislative schemes (planning, emigration, and the NAMA legislation) the court is constrained by statute only to give leave to seek judicial review where the court is satisfied that substantial grounds or a substantial issue has been made out. Where the court is not satisfied leave is refused. The question which arises is as to whether, in a case where the court was not satisfied that substantial grounds or a substantial issue had been made out, it could ever be appropriate for the court, to nonetheless, certify, in accordance with the relevant statutory scheme, that a point of law of exceptional public importance arose and that it was necessary in the public interest to grant the certificate in question.

4.9 As this point only arises in the context of the certificate in respect of the European State Aid issue it is proposed to consider the point in the section of this judgment dealing with certification on that point.

4.10 It is, therefore, appropriate to turn to the first question which is as to whether, having regard to the general principles outlined above, it is appropriate to certify the issue of law concerning the fair procedures issue.

**5. Fair Procedures**

5.1 In accordance with its *jurisprudence* to which the Court has referred the first

question is as to whether a point of law of exceptional public importance can be said to arise from the Court's decision. It also follows that, in order that a certificate be given, the point in question must arise out of uncertainty as to the law and be public in nature. There can be little doubt that the point sought to be raised under this heading is public in nature. The point involves the entitlement of a statutory body to acquire a significant volume of assets which acquisition has at least a tangential effect on Mr. McKillen in the sense that the acquisition concerned will lead to him owing money to NAMA, rather than the banks from whom he originally borrowed that money. Given that Court's finding that Mr. McKillen had raised a substantial issue under this heading, it also seems to the Court to be appropriate to characterise the question of the entitlement of a borrower, such as Mr. McKillen, to be heard as being a question where there is uncertainty as to the law.

5.2 Counsel for NAMA placed reliance on cases such as *Harding v. Cork County Council & Ors* [2006] IEHC 450, in which this Court placed emphasis on the fact that the point then in question had the potential to arise in a significant number of cases. There can be little doubt that the fact that a point may arise in a large number of cases is a factor, potentially of some weight, in the court's consideration. It is not, however, necessarily a determinative factor. On the other hand it is also true to say that the NAMA legislation is of a very high level of public importance. The Act involves an important part of the strategy devised by Government to deal with the banking crisis. It is, of course, true to say, as was argued by counsel for NAMA, that the mere fact that a piece of legislation is, in itself, important does not necessarily mean that every question connected with that legislation raises a point of law of exceptional public importance. However, where the point raised is central to the operation of an important piece of legislation, it seems to the court that that fact should weight significantly in assessing whether any such issue amounts to a point of law of exceptional public importance.

5.3 The point sought to be certified under this heading is, therefore, a point deriving from the judgment (i.e. the rejection by this Court of the argument that a right to be heard was implied into the Act) and is public in character. The point relates to what, in this Court's view, is a significant feature of a particularly important piece of legislation, that is the mechanism by which bank assets are to be acquired by NAMA and the extent, if any, to which borrowers may be entitled to be heard in that process.

5.4 It may be that the point will not apply in a great number of cases as a matter of practicality. It was pointed out by counsel on behalf of NAMA that a reasonable proportion of the relevant bank assets have now been acquired by NAMA and it might be doubted as to whether any further challenges raising the fair procedures issue might be anticipated from those whose loans have not yet been acquired. While that may well be true, it does not seem to the Court that the possibility of other challenges can be ruled out not least because of the fact that it is entirely possible that many of those who might wish to bring such a challenge have decided to await the outcome of these proceedings.

5.5 This is not a case, therefore, where the Court can rule out the possibility that other challenges might be brought in respect of which the same point would be relevant. While the number of cases to which the point might be potentially

relevant can be a significant factor in assessing whether a point of law may be of exceptional public importance, it is also true that the importance of the legislation concerned and to the extent to which the point sought to be certified is central to that legislation is a significant factor. On balance the court has come to the view that the point sought be raised under this heading is, at least in general terms, a point of law of exceptional public importance for the purposes of s.194(2).

5.6 It is also clear from the *jurisprudence* to which the Court has already referred that the Court must then go on to consider, as a separate question, the issue of whether it is in the public interest that an appeal should be taken to the Supreme Court. The Court is of the view that bringing certainty to issues concerning NAMA is a matter which gives rise to a significant level of legitimate public interest. The Court is, therefore, satisfied that it is in the public interest that the fair procedures issue receives a definitive clarification from the Supreme Court. Subject to some comments concerning the precise terms of the relevant certificate, which will addressed at the end of this judgment, the Court proposes to accede to the application made on behalf of Mr. McKillen and certify the fair procedures issue as being a point of law of exceptional public importance where it is in the public interest that an appeal be brought to the Supreme Court. In that context it is necessary next to turn to the European State Aid issue.

**6. European State Aide Issue**

6.1 In this context it is important to note that the objective of the State Aid rules is to ensure fair competition between parties operating in a sector in which it might be said that a member State might inappropriately intervene to favour, by means of State Aid, some competitors. The State Aid rules were not, therefore, designed to protect persons such as Mr. McKillen from "going into NAMA". Rather the State Aid rules were designed to prevent, in the context of the issues with which the Court is currently concerned, Irish banks being given an unfair competitive advantage over other banks by reason of the fact that NAMA might pay above the open market rate for relevant bank assets being acquired under the Act.

6.2 While the Court was, in the principal judgment, prepared to accept, for the purposes of argument, that Mr. McKillen was entitled to argue, in this Court, questions concerning the effect of the Commission Decision on the permitted operation of NAMA, it does remain the case that the primary enforcement of State Aid is a matter between the Commission and the member state concerned. Under the TFEU State Aid decisions are a matter for the Commission although the Courts of member states have a limited enforcement role. It is clear from the Decision that each tranche of loans to be acquired by NAMA must be notified to the Commission who will be entitled, if the Commission is of the view that any loans sought to be included in such a tranche ought not be acquired, to take appropriate and effective action. Mr. McKillen's challenge, in these proceedings, is, at best, tangential therefore to the primary question which is one which arises between the Commission and the Irish Government. Against that background it does not seem to this Court that the points sought to be certified under this heading are points of law of exceptional public importance, and even if it were so, the Court is not of the view that it would be in the public interest that an appeal should be taken to the Supreme Court on these issues.

6.3 The principal judgment set out the reasons why this Court did not feel that there were substantial grounds for arguing that the Commission Decision imposed an obligation on NAMA to confine itself to the acquisition of impaired loans or loans connected with impaired loans. Even if the Court is wrong in that view the primary bodies who are concerned with that question are the Commission and the Irish Government and there remains many avenues open to the Commission under European Union Law to address those questions in an appropriate fashion.

6.4 Having regard to the view which the Court has just expressed, the Court does not find it necessary to consider the issue which arose between the parties as to the possible difference of approach implicit in the judgments of this Court in *Raiu* and *Kenny.* For the reasons already addressed the Court declines to issue a certificate in relation to the European State Aid issue.

**7. Conclusions**

7.1 For the reasons which the Court has analysed the Court is, therefore, prepared to certify the fair procedures issue but not the European State Aid issue.

7.2 The Court is of the view that a proper formulation of the certificate in relation to the fair procedures issue is as follows:-

> "The court certifies that its decision involves a point of law (being the question of 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) which is 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".

7.3 The court also notes that counsel for Mr. McKillen reserves his position to argue in the Supreme Court that, having regard to the *jurisprudence* in cases such as *Clinton v. An Bord Pleanála* (2007) 1 IR 272, it is open to a party, where one point is certified, to raise any other issues on appeal. In that context the Court notes that s.194 of the Act (unlike the current position brought about in respect of the planning code by virtue of s. 50A(11)(a) of the Planning and Development, Act 2000 as substituted by s.13 of the Planning and Development (Strategic Infrastructure) Act, 2006) does not expressly exclude placing reliance on points not certified. However, both parties were agreed, and the court concurs, that a determination on that question is solely a matter for the Supreme Court.