

81. NAMA and Litigation

Existing Proceedings

Legal proceedings in respect of bank assets, including enforcement proceedings, continue notwithstanding that NAMA acquires the secured asset. NAMA may choose to be substituted in the proceedings and assume some or all of the rights and obligations of the participating institution in relation to it. NAMA is not to be liable for any counterclaim or set off by the other party to the proceedings.

Where NAMA chooses to be substituted in the legal proceedings, the institution continues to be liable for the following:-

- ❖ damages on any counterclaim or cross claim by the other party;
- ❖ its own costs in the proceedings before substitution;
- ❖ potential costs incurred to others as a result of the institution being a party before substitution;
- ❖ any subsequent costs it may incur in a capacity in which it remains in the proceedings.

Where NAMA takes over any legal proceedings, the institution is obliged to assist in full.

Where a ~~is~~ pendens+ (notice of pending litigation which binds third parties) is registered in respect of pending litigation after 30th July 2009 it is to have no affect against NAMA or any person who acquires land from NAMA. Where an institution has obtained a judgment before acquisition of the asset, NAMA may enforce it.

Where the institution is defendant in legal proceedings it remains liable in the same capacity. NAMA may elect to become a party to the proceedings.

Legal Action against NAMA

There are limitations and restrictions on taking legal action against NAMA. No legal action may be taken against NAMA by reason of its acquisition of a bank asset. No legal action is maintainable against NAMA for damages for any injury caused to person or property or other loss alleged to have been caused or contributed by failure to perform any functions by NAMA.

No legal proceedings may be taken against NAMA in relation to breach of contract, misrepresentation or wrong committed by a participating institution. The claimant concerned may be able to enforce such right against the institution itself.

In any proceedings for recovery of money by NAMA the principal interest or otherwise a certificate in writing by NAMA

specifying the sum due is deemed sufficient evidence for a period of one month.

There are restrictions in taking injunctive action i.e. Court order against NAMA ordering it (to do or desist from doing an act). The Court is to have regard to the public interest in particular the purpose of the act, the desirability of certainty and the desirability of moving assets back into the private economy in a timely and efficient manner. The Court may not grant an injunction where damages would be an adequate remedy unless refusal to grant an injunction would give rise to injustice.

Judicial Review

Judicial review is an application to Court to challenge the legality of the act of a public body. The right to take a judicial review against NAMA actions under the act is severely limited. An application for consent to take judicial review is required within one month of the decision unless there are very good reasons for the delay. Consent to take judicial review will not be given unless a substantial issue is raised.

The application may only be made with the initial consent of the Court. The Court may grant consent only if it is satisfied that the public interest is outweighed by the applicant's interest and the applicant has given an undertaking. In applying for consent the applicant must undertake to

pay any damages suffered by NAMA as a result of being prevented from dealing with the asset, and must produce adequate security in respect of that undertaking.

In considering an application, the Court must have regard to the purposes of the act, the desirability of certainty in relation to acquisition by NAMA, the desirability of having bank assets that NAMA managed move back into the private economy in a timely and efficient manner.

Obligations to Enforcement Authorities

NAMA has obligations to pass information to the authorities including Garda Síochána, Revenue Commissioners, Director of Corporate Enforcement or other regulatory bodies, where it believes an institution may have committed a criminal offence or may have contravened the law in relation to taxation, companies or financial services legislation.

Where NAMA is obliged to pay monies to any guarantor, debtor or connected person, payment is not to be made until a tax clearance certificate or a direction from Revenue Commissioners issues to the effect that it is in order to make the payment. Where this is not available, the Revenue Commissioners may issue a notice to NAMA directing NAMA to pay, where the amount of money is greater than the outstanding tax, the amount of

money equal to the outstanding tax or where it is less, than the outstanding tax.

NAMA has obligations to pass information to the authorities including Garda Siochana, Revenue Commissioners, Director of Corporate Enforcement or other regulatory bodies, where it believes an institution may have committed a criminal offence or may have contravened the law in relation to taxation, companies or financial services legislation.

This extract is from our “Legal Guide to the Management and Enforcement of Security in Ireland” (2009). The Guide is intended as an overview and broad outline of the matters covered in it. Its purpose is to inform and raise awareness. We are happy to offer specific legal advice on particular circumstances. It should not be relied on as a substitute for comprehensive legal advice with reference to the particular circumstances. While we have taken due care in the preparation of this publication, we do not accept legal liability as a result of any reliance placed on anything in it. The reader should rely only on specific legal or taxation advice. It is based on the law as of 1st October 2009.

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