

Banking lawyers' fingerprints are all over Nama Bill

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The ambiguity in draft legislation for Nama is food for lengthy and costly litigation at the taxpayer's expense

WHETHER NAMA is an effective solution to Ireland's economic and banking crisis is a matter for economists to debate but for Nama to work it needs superior drafting.

The draft Nama Bill of September 10th, 2009 is poorly constructed and appears to have been drafted by banking lawyers with no contribution from construction colleagues.

This is an error; the underlying concern is rooted in construction.

In essence, Nama is acquiring development loans from participating institutions (the banks). The means of acquisition should be simplified. Such loans could be novated to Nama, and consequently the banks removed from the transaction.

Once this principle is established, there is no need for lengthy definitions or statements that Nama has the same rights as the bank in relation to any breach of contract or obligation of any borrower/developer.

Nama may continue or terminate as it thinks fit any "agreement in relation to the development of the land concerned".

This seems to indicate that Nama is given a statutory right to step in to the building contract and/or appointments of the members of the design team. Why not use the well-understood legal concept of "step in" rights?

The Bill further states that: "nothing in this section deprives a person of fair and reasonable remuneration for work already done".

The Bill does not specify by whom. Is it intended that Nama pays? This ambiguity is food for lengthy and costly litigation.

A key consideration when drafting "step in" provisions is whether the party "stepping in" has to pay for: all monies due to the contractor/consultants (including variation, delay and disruption and other claims) as if that party was the employer ab initio (ie, past and future); or only future commitments.

The Bill does not deal at all with this crucial choice.

From the taxpayer's point of view it would seem that Nama should only have to deal with future commitments, once it decides to step in.

This might seem unfair to contractors/consultants, but there is no reason why they should be given statutory preferential treatment.

The contractor/consultants can still pursue the developer and should be in the same situation as any other creditor facing a potentially insolvent entity.

The Bill needs to bring greater clarity to the Nama concept and give Nama the appropriate power. This will limit unnecessary and expensive litigation, which the taxpayers will have to bear.

At risk of preaching against our parish, such costs will only enrich law firms. This must be avoided.

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