THE HIGH COURT

COMMERCIAL

[2014/9409P]

BETWEEN

KOMADY LIMITED AND MICHAEL O'REILLY

PLAINTIFFS

AND

ULSTER BANK IRELAND LIMITED, KIERAN WALLACE AND SHANE MCCARTHY

DEFENDANTS

JUDGMENT of Mr. Justice Fullam delivered on the 29th day of January 2016

Factual Background

1. The Plaintiffs are legal owners of Belgard Retail Park Tallaght, County Dublin. The first Plaintiff is a private company beneficially owned by the Flynn family. Its directors are Elaine Flynn, John Flynn and James Flynn. The second Plaintiff is a businessman. The beneficial owners of Belgard Retail Park are John and James Flynn. The first Defendant is a bank and a successor in title to First Active Plc. The second and third Defendants are joint receivers of Belgard Retail Park appointed by the first Defendant on foot of mortgages securing loans provided by the first Defendant to the Plaintiffs in 2005 and 2006.

2. The Plaintiffs' proceedings arise out of demands for repayment of the said loans in or around 22nd to 24th October, 2014.

3. The Defendants' motion to dismiss the Plaintiffs' claim is the second application arising out of these proceedings which were commenced by plenary summons issued on the 5th November, 2014. On the 6th November, 2014 Gilligan J. granted an interim injunction restraining the second and third named Defendants from acting in their capacity as joint receivers. The Plaintiffs issued a statement of claim on the 25th November, 2014. McGovern J. heard the interlocutory motion on the 26th and 27th of November, 2014 and reserved judgment. On the 8th December, 2014 the first Defendant delivered its defence. In his judgment delivered on the 23rd January, 2015, McGovern J refused the Plaintiffs' application for an interlocutory injunction.

4. In this motion issued on the 16th of February, 2015, the first Defendant seeks the dismissal of the Plaintiffs' action in its entirety pursuant to the inherent jurisdiction of the court on the grounds that the Plaintiffs' claim is vexatious, factually unsustainable and factually bound to fail. The Defendant further alleges that the action is scandalous and an abuse of process. Finally, the Defendant alleges that the Plaintiffs' pleadings are defective in that they have failed to furnish adequate particulars pursuant to Order 19, Rule 5(2) of the ulterior motive they allege underlay the Defendant's demand for repayment of the loans advanced to the Plaintiffs.

Background to the loans

A. The 2005 loans

By loan offers dated the 28th of June, 2005 the first Defendant lent the sum of €24,250,000.00 to each of the Plaintiffs (i.e. a total of €48.5 million) to refinance existing loan facilities from Anglo Irish Bank, in respect of Belgard Retail Park. By supplemental facility letters dated 14th September, 2005, the first Defendant lent a further €190,000.00 to each Plaintiff for the purpose of acquiring a garden site. As security for the said loans, both Plaintiffs executed deeds of mortgage and charge dated the 24th September, 2005.

The principal features of these arrangements were:

1. The loans were repayable on demand. In the absence of demand the loans were repayable over 20 years. The loan offer provided that repayment for the first five years would be interest only, with a repayment schedule to be put in place thereafter.

2. Security for the said loans was to be provided by, inter alia,

(i) a mortgage debenture over the assets of the Plaintiffs, incorporating a First Fixed Mortgage over the secured property.

(ii) The assignment of attributable rental income for the secured property for years 6 to 20.

3. The loan covenants included a requirement that loan- to- value ratios for both loans were not to exceed 80% throughout the terms of the loans.

4. The bank's standard loan conditions were stated to be an integral part of the loan offer.

The Plaintiffs' obligations under the mortgage provisions

5. The Plaintiffs were obliged to open a rental account or such other account with the first Defendant which the first Defendant might specify from time to time for the purpose of receiving the rent **(Clause 1.1).**

The Plaintiffs acknowledge that the Secured Liabilities would, in the absence of express written agreement to the contrary, be due and payable to the bank on demand **(Clause 2.1).**

The Plaintiffs irrevocably waived any right to appropriate any payment to or other sum received, recovered or held by the bank in or towards the discharge of any particular part of the Secured Liabilities and agreed that the bank would have the exclusive and unfettered right to appropriate any such payment or other sum in or towards the discharge of such part(s) of the Secured Liabilities as the bank saw fit **(Clause 2.2)**.

The Plaintiffs:

- assigned the benefit of the occupational leases to the bank **(Clause 4.18)** .

-assigned the rents and all right and title to the rents to the bank **(Clause 4.1.9)** .

-charged and assigned by way of First Fixed Charge all right interest and title in and to the rental account to the bank **(Clause 4.1.10)**.

The Plaintiffs covenanted and undertook to:

– collect the rent immediately it became due and payable and forthwith to pay all proceeds of such collection to the rental account and pending such payment to hold the same in trust for the bank **(Clause 7.9)**.

Until the Secured Liabilities were finally paid and discharged in full, the Plaintiffs were not entitled, except to the extent (if any) the bank might from time to time permit in writing, to withdraw any monies from the Rental Account **(Clause 7.11)**.

The bank was entitled as often as it thought fit, without prior notice to the Plaintiffs, to apply the whole or any part of the monies standing to the credit of the Rental Account in or towards the payment and discharge of the Secured Liabilities **(Clause 7.12)**.

Under Clause 11, an Enforcement Event would arise if any of the Secured Liabilities were not paid or discharged when due, or where there was a breach by the borrower of any terms and conditions of the Deed of Mortgage, the Facility Letter or any other security documents executed by the borrower in favour of the bank.

B. The 2006 loans
6. By loan offers dated the 19th June, 2006, the first Defendant lent €2.5 million to each of the Plaintiffs. These loans were repayable on demand and in absence of demand were repayable by the 1st June, 2010. The security included a First Legal Charge over the secured property and also guarantees.

7. The loan- to- value covenant required that the ratio would not exceed 80% throughout the term of the loans or 72% or 76% of specified values at the end of the term.

8. The bank's Standard Conditions were stated to be an integral part of these loan offers.

Standard conditions
9. Clause 6 defines Events of Default which entitled the bank by giving notice to the borrower, to cancel any outstanding commitments and treat the loans as being repayable on demand and to exercise its rights under any security which it held. In respect of Events of Default, it was provided that any delay by the bank on giving notice or in exercising its right was not to be construed as a waiver by the bank of it's rights. The principal Events of Default were:

> 1) Any breach of any term or condition of the loan(s)
>
> 2) Any default in payment on the due date of any sums due and owning under the loan(s) or if the borrowers failed to pay any other monies which might from time to time due and owing to the bank by the borrowers.

Continuing security
10. Clause 13 provided that all items of security provided in the 2000 or 2006 loan offers would be required as continuing security for the discharge of all indebtedness and other liabilities of the Plaintiffs then or in the future.

Judgment on Plaintiffs' application for interlocutory injunction
11. At paragraph 17 of his judgment delivered on the 23rd January, 2015, McGovern J. stated:

> *"…it seems to me there is no issue, let alone a substantial issue, to be tried on the contractual basis upon which these loans were made by the first Defendant to the Plaintiffs' or the terms of the loan agreements and security documents."*

12. McGovern J then went on to consider the two matters raised by the Plaintiffs:

> a An estoppel issue said to arise by virtue of a course of dealing between the parties, and, specifically the failure on the part of the bank to rely on its strict entitlements under the loan agreements; and
>
> b An alleged ulterior motive, namely, the enhancing of the value of an adjoining site (the Uniphar Site) in which the bank had an interest, by disposing of Belgard Retail Park.

13. In relation to the estoppel issue, McGovern J concluded that the evidence fell far short of establishing that the Plaintiffs had raised a serious issue to be tried. In this regard he pointed to the absence of any document or reference to a meeting wherein it was alleged that the bank had waived its legal entitlements under the documents, whereas the evidence before him established that the bank "was continuing to reserve its position, and, if necessary, rely on its legal entitlements to act on foot of the loan and security documents." He pointed to the provision at Clause 6 of the banks standard conditions which stated *"any delay by the bank in giving notice or in exercising its rights hereunder, shall not be construed as a waiver by the bank of its rights"*.

14. Further, in relation to the estoppel issue, the learned judge stated that he considered that in an interlocutory injunction

application he was entitled to consider uncontested facts or facts on which the evidence was clear, and in particular where an averment was clearly untrue. In relation to the latter, he pointed to paragraph 18 of the statement of claim which states:

> *"At no stage did the bank ever seek to correspond with the Plaintiffs on terms that their failure to mandate the rental income to an account in their names held with the first Defendant was treated as an Event of Default or other breach of either the loan or security agreements."*

He said that this was "*simply untrue*" given the contents of the bank's letter of the 12th August, 2014. He pointed to paragraph 9 of Mr. James Flynn's affidavit of the 5th November, 2014, wherein he admitted that the Plaintiff had refused to pay over the rentals into the account sought by the bank. Mc Govern J. said this was a deliberate decision on the part of the Plaintiffs and consequently there was no issue to be tried on this fact.

15. McGovern J. stated that it was not disputed that the 2006 loan had not been repaid. This was an Enforcement Event under Clause 11 of the mortgage giving the bank the power to appoint receivers.

16. As regards the second issue, the ulterior motive, McGovern J stated there was no evidence before him that the first Defendant had acted against the Plaintiffs in order to enhance the value of adjoining lands. He said the decision to sell might have the effect of enhancing the value but the evidence fell far short of establishing an improper motive. He rejected the Plaintiffs' case on this issue referring to a statement in Paget's Law of Banking *vis*:

> *"A mortgagee is entitled to look to his own interests in deciding to exercise or not exercise, his powers, and only risks liability if he acts in bad faith. It is extremely unlikely that there can be implied into a debenture term that the bank shall be under a duty to consider all relevant matters before exercising that power, and in the absence of such a term, it has been held that no wider duty exists in tort."*

He cited the adoption of this statement of the law by Baker J. in *Ryan v Danske Bank* [2014] IEHC 236 where she said at page 17:-

> *"I adopt this analysis and I am not persuaded that the Plaintiff can show that a duty of care arises in the choice by the Bank to appoint a receiver."*

17. McGovern J. concluded that there was no evidence of bad faith on the part of the first Defendant before him.

Submissions
18. Both parties agree that the following represents a broad summary of the Plaintiffs' case:

> a) The Plaintiffs have not defaulted upon their repayment obligations to the Bank;
>
> b) That the Bank is estopped from relying upon its strict contractual entitlement as against the Plaintiffs by reason of a "*course of dealing*" between the parties;
>
> c) That the Bank has effected the appointment of the second and third Defendants as joint receivers and managers of Belgard Retail Park in furtherance of an ulterior motive;
>
> d) That the Bank has unlawfully exercised a right of appropriation in relation to the income of Belgard Retail Park.

19. The parties also agree that an application to the court to dismiss a claim on the ground that it is bound to fail involves a different test and higher threshold than in an application for interlocutory injunctive relief. Both parties accept the relevant principles were identified in the case of *Barry v Buckley* [1981] IR306. In that case, Costello J. stated that the jurisdiction to strike out proceedings was one to be "*exercised sparingly and only in clear cases were the court was satisfied that a Plaintiffs' claim must necessarily fail*". In those circumstances Costello J. stated "*it would be a proper exercise of (the courts) discretion to strike out proceedings whose continued existence cannot be justified and is manifestly causing irrevocable damage to the Defendant.*"

20. The jurisdiction is an adjunct to the court's power under the Rules to strike out a claim which on its face discloses no reasonable cause of action. However, in the exercise of its inherent jurisdiction, the court is entitled to analyse the facts as set out in affidavits and is not merely confined to pleadings.

21. A Plaintiff's case must be taken at its highest. It would be unjust to dismiss a claim with some reasonable prospect of success. However, it would be equally unjust to permit the prosecution of a case to continue with no prospect of success.

Submissions on behalf of the Bank
22. The Bank submits that the Plaintiffs' claim is wholly determinable by reference to the contractual documentation. There is no real dispute in relation to the material facts. The Bank submits that the affidavit evidence on behalf of the Plaintiffs in contesting this motion is neither "*qualitatively different nor in anyway more cogent or compelling than that which was presented to the court in support of the application for interlocutory injunctive relief.*"

23. While the Bank accepts that the judgment of McGovern J. does not represent a final determination of this court, it submits that the terms of the judgment are highly relevant to the present application. That judgment was concerned primarily with the application of legal principles and contractual terms which were not in dispute to factual circumstances which were similarly uncontroversial. That judgment was not the subject of an appeal to the Court of Appeal.

24. The Bank refers to the following summary of the observations and conclusions set out in the judgment which it submits are relevant to the present application:

> a. The parties were in agreement as to the contractual documents and the specific terms thereof, which govern the dealings to which these proceedings relate;
>
> b. The Plaintiffs had failed to disclose the terms of relevant contractual documentation when seeking and obtaining interim injunctive relief on an *ex parte* basis from this court;
>
> c. The terms of the contractual documentation having relevance to the proceedings are clear and unambiguous;

d. The Plaintiffs are very experienced commercial property developers who are fully aware of the obligations imposed by the contractual documentation which they executed;

e. The Plaintiffs had failed to demonstrate any issue to be tried as to whether they were in default of their contractual obligations to the Bank;

f. The Plaintiffs had failed to offer any evidence to support the proposition that the Bank had waived its rights to rely upon the clear terms of the contractual documentation, whether through a "*course of dealing*" or otherwise;

g. The Bank had clearly reserved its right to rely upon the terms of the contractual documentation at all times material to the proceedings;

h. The mere fact that the Bank had entered into negotiations with the Plaintiff was not capable of giving rise to an estoppel;

i. The Plaintiffs had failed to demonstrate any issue to be tried as to whether an estoppel arose in their favour;

j. The Plaintiffs had incorrectly suggested that the Bank had failed to advise them that they were in breach of their obligations regarding the rental income of Belgard Retail Park;

k. The Plaintiffs had failed to demonstrate any issue to be tried as to whether they were entitled to deal with the rental income from Belgard Retail Park in the manner which they did;

l. The Plaintiffs had, in refusing to pay rental income of Belgard Retail Park to the Bank, failed to come before the court with "*clean hands*", and;

m. The Plaintiffs had failed to demonstrate any issue to be tried as to whether the Bank had appointed the second and third Defendants in furtherance of an ulterior purpose.

25. The Bank submits that the Plaintiffs are seeking to imply a term into the contract which was not contemplated by the parties, namely that the Bank was prevented from demanding payment on foot of the 2006 loans notwithstanding the expiry of the term of that loan on the 1st June, 2010. The Bank relies on the statement of Finlay Geoghegan J. in *IBRC v Morrissey* where discussing the "*space between understanding*" and "*agreement*", she said that- "*unless enforceable (as being in accordance with legal or equitable principles) an understanding was not cognisable by the court, the court must determine and enforce rights and obligations of parties in accordance with law*". The learned Judge stated that the obligations of a bank in demanding repayment of loan facilities were not subject to public law principles.

26. The Bank submits that the evidence is all one way in its favour. It engaged with the Plaintiffs over an extended period, giving them every opportunity to formulate a restructuring proposal acceptable to the Bank. When no acceptable proposal was made, the Bank was entitled to enforce its rights. Without prejudice to that position, the Bank was entitled to demand repayment as the 2006 loans, which were to be repaid by the 1st June, 2010. The loans had not been discharged. From at least October, 2010, the loans were in breach of the LTV covenants. The Bank notified the Plaintiffs of the default on the 15th October, 2010, and strictly reserved its entitlements.

27. There is no legal basis for the Plaintiffs' claim that the Bank was not entitled to demand payment of loans when it did or to appoint receivers. The only complaint by the Plaintiffs was that the Bank exercised a right of appropriation. The Banks were entitled to exercise that right under the terms of the mortgage. Furthermore, there was no complaint by Belgard Retail Park Limited, which was the account holder.

28. There was no basis for the injunction application on Mr. Flynn's affidavits. As Mr. Justice McGovern noted, there was no statement oral or written identified by Mr. Flynn constituting a waiver by the Bank of its entitlements. On the contrary the Bank reserved its rights.

29. There was no evidence that the repayment demand was made for an ulterior motive or was a contrivance.

30. The Bank has met the high threshold namely that the Plaintiffs' claim is frivolous, vexatious and factually and unsustainable therefore bound to fail.

31. The Plaintiffs have continued to prosecute this case and make scandalous allegations. In the circumstances this represents an abuse of process as the Plaintiffs have failed to particularise the basis of their contentions in this regard.

32. The Bank should not be required to suffer the expense of a full plenary trial. Notwithstanding the refusal of the injunction, the Bank continues to suffer prejudice by the existence of these proceedings.

The Plaintiffs' submissions
33. The Plaintiffs submit that the judgment of the High Court was legally and fundamentally incorrect.

There is a real and material factual dispute between the parties.

34. The Defendant must satisfy the court:

(a) that there is no possibility of the claims succeeding on the basis of the pleadings and the affidavits, and

(b) on the basis of any issues which might come to light in the course of trial or in pre-trial procedures, i.e. discovery or interrogatories.

35. The Plaintiffs submit that there is a heavy onus on the Bank. It is not sufficient for the Bank to say that the Plaintiffs' case is bound to fail because they have not offered any additional evidence since the judgment of the High Court on the 23rd January, 2015. Much can change in the course of the trial.

36. The Plaintiffs' case must be taken at its high water mark.

37. In so far as the Bank alleges that the Plaintiffs' case is not adequately pleaded in respect of the invocation of the Banks alleged contractual rights for a collateral, unlawful and ulterior purpose, the Plaintiffs submit:

> (c) That the court should not invoke such a severe jurisdiction without directing the necessary amendment which can only be identified after discovery; and
>
> (d) O. 19, r. 22 provides that it is sufficient to allege fraud as a fact without setting out the circumstances from which the same is to be inferred.

In summary, the nub of the Plaintiffs' defence to the Banks application is that it represents an unwarranted interference of the Plaintiffs' right of access to the courts, where discovery has not yet been sought or granted and where controversial issues of fact requiring oral testimony lie between the parties.

Discussion
38. In exercising its power to strike out or dismiss the Plaintiffs' claim, the court must be confident that the claim will inevitably fail on the basis of

> (a) the pleadings and affidavits, and,
>
> (b) any issues that might arise in the course of a trial or by way of discovery or interrogatories.

39. The jurisdiction to dismiss must be exercised sparingly.

40. The Plaintiffs' claim must be considered under three headings,

> 1) The Plaintiffs' rights and obligations deriving from the construction of the contractual documents.
>
> 2) The claim of estoppel that there was a "*confirmed agreement*" between the parties that the rental account could be used by the Plaintiffs so as to give them a right to appropriate the proceeds of the account as they thought fit. The Plaintiffs bear the onus of proof in establishing such estoppel.
>
> 3) The Bank has acted in bad faith for an ulterior purpose in relying on its contractual entitlements to demand repayment of the loans. That ulterior purpose was to enhance the value of the adjoining site in which the Bank had an interest.

The contractual position
41. This aspect of the case involves the construction of documents, namely the loan offers and the security documents. The position remains no different than it was before McGovern J. There is no dispute as to the contractual basis upon which the loans were made or the terms of the loan agreements and the security documents.

42. I adopt the analysis of McGovern J. which concluded that there was no issue let alone a substantial issue to be tried.

Estoppel
43. McGovern J. observed that the Plaintiffs *had not exhibited any documentation evidencing a waiver by the Bank of its legal entitlements under the contractual documents whereas, on the contrary, there was a series of letters from the Bank reserving its rights.*

Two matters, in respect of which McGovern J. made findings, remain undisputed, although in their submissions at sub paragraph j of paragraph. 28, the Plaintiffs' repeat the allegation at paragraph 18 of the statement of claim.

> i) The learned judge held as untrue the allegation of paragraph 18 that at no stage did the Bank ever seek to correspond with the Plaintiffs on terms that their failure to mandate the rental income do an account in their names held with the Bank was treated as an event of default or other breach of either the loan or security documents; as evidenced by the Bank's letter of the 12th August, 2014.
>
> ii) At paragraph 9 of his affidavit sworn on the 5th November, 2014, in the injunction proceedings, Mr. Flynn admitted that the Plaintiff "had refused" to pay over the sums in the rental account into an account in the names of the Plaintiffs' with the Bank. McGovern J. concluded that there was no issue of fact on that point. .
>
> > In these proceedings, Mr. Flynn has referred to two emails on the 12th August, 2014, and 12th September, 2014, from Mr. Killeen to Mr. Leonard as evidencing the "*confirmed agreement between the parties relating to the circumstances whereby the accumulated rent would be utilised toward the smaller loans*."

44. The first email goes no further than reiterate the fact that the loans had always been repaid from the rental account and queried why the Bank had requested the sudden alteration of the position after nine years, suggesting that it was a crude attempt to manufacture an alleged default.

45. In the second email Mr. Killeen suggests that the deposit funds in the rental account "*are available for the purposes of discharging the smaller two facilities of €2.5 million each*." This is an argument made on behalf of the Plaintiffs in the context of loan restructuring negotiations. The argument was rejected by the bank.

46. As regards the reservation of rights letters, Mr. Flynn avers that the fact that they were not countersigned by the Plaintiffs is evidence of "*a confirmed agreement between the parties in respect of the accumulation of rents and their appropriation by the Plaintiffs'*." Again in the context of negotiations, once the bank had clearly stated that it was reserving its rights, there was no requirement to have the Plaintiffs' written confirmation of the Banks position.

Conclusion
47. In the circumstances, the Plaintiffs could not have understood that the bank had agreed to waive its sole and unfettered right of appropriation per clause 2.2 of the mortgage. The Plaintiffs have not provided any evidence to advance the position on estoppel

beyond that at the injunction proceedings. In the circumstances, I am satisfied that taken at its height, the Plaintiffs' argument relating to the claim of estoppel and the Plaintiffs' right of appropriation could not succeed.

Ulterior motive
48. If the Plaintiffs could establish a *prima facia* case of *mala fides* in respect of the Bank's exercise of its contractual rights to demand repayment of the loans, then they would be entitled to successfully resist the Banks application and have the issue referred for plenary hearing. That would allow the Plaintiffs avail of discovery so as to remedy any pleading disadvantage at this stage in not having access to evidence in the possession of the Bank which might support their case. On the other hand as Clarke J. pointed out in *National Education Board v Ryan* [2008] 2IR 816 at paragraph 4.6:

> *"The other side of the coin, of course, requires that care be taken not to allow a party, by the mere invocation of an allegation of fraud, to engage in a widespread trawl of the alleged fraudster's confidential documentation in the hope of being able to make his case."*

At paragraph 4.9 he said:

> *"It is clear, therefore, that a Defendant is entitled to have the claim sufficiently particularised to enable him to plead in any event."*

49. In this case the Defendant has filed its defence and would be in a position to seek further particulars of the Plaintiffs' allegation of *mala fides*.

50. Mr. Flynn has exhibited additional documentation which he avers supports the Plaintiffs' case that the Bank engineered a default by the Plaintiffs. The documents comprise a report by Dr. Lawrence Tomlinson entitled "*Banks' Lending Practices: Treatment of Businesses in Distress*" and a newspaper report in the Daily Telegraph dated the 24th November, 2014, concerning an apology by members of the Global Restructuring Group of RBS for giving misleading evidence to a Treasury Select Committee. Dr. Tomlinson held the position of "Entrepreneur in Residence Department for Business Innovation and Skills". In his report, he concluded at paragraph 19 - "*it is undeniable that some of the Banks, RBS in particular, are harming their customers through their decisions and causing their financial downfall.*"

51. The Daily Telegraph article referred to allegations, principally by Dr. Tomlinson, that RBS had "*forced customers out of business so it could buy their assets and make a profit.*" Mr. Flynn states that Mr. Leonard and Mr. Gareth Fay formerly worked for the Global Restructuring Group of Ulster Bank.

52. In response, Mr. Leonard states that the Tomlinson Report does not refer to the Bank in any way but considers the enforcement practices of the Global Restructuring Group of RBS, a wholly separate legal entity to the Bank which operates under separate governance in another jurisdiction and in accordance with a different regulatory regime. He points out at paragraph 20 that the Plaintiffs have offered no evidence to suggest the alleged practices occurred in the instant case. Mr. Leonard believed that:-

> *"the evidence is all one way, that the Bank demonstrated considerable forbearance in the face of clear and material default on the part of the Plaintiffs and gave the Plaintiffs more than a reasonable opportunity to address the Banks' concerns which the Plaintiffs chose not to avail of."*

53. At paragraph 22, Mr. Leonard states that the conclusions reached in the Tomlinson Report have been the subject of two independent investigations in the United Kingdom and in this jurisdiction, which concluded that there was no evidence to support the principal allegations made. Mr. Leonard suggests that the Plaintiffs are attempting to imply guilt by association on the part of himself and Mr. Fay.

54. According to Mr. Flynn, the Bank and the Plaintiffs have been in restructuring negotiations for the past four years and for three of those years the bank has being trying unsuccessfully to sell the joining Uniphar site.

55. If the Banks' purpose was to obtain a good price for the Uniphar site and the stumbling block to the sale was access, which could only be remedied by the Plaintiffs granting a right of way, then one would have expected that over such a prolonged period there would be some approach or mention, direct or indirect, by the Bank of this obvious trump card in the Plaintiffs' negotiation hand. The matter only appears to have been raised at the very end, not by the Bank, but by the Plaintiffs as a negotiating tactic and to discredit the bank in the context of failing negotiations and imminent litigation.

Conclusion
56. The Court determines that the Plaintiffs have not established a *prima facia* case of *mala fides* in respect of the Bank's exercise of its contractual rights to demand repayment of the loans. There is no evidence that the Bank engineered a loan default on the part of the Plaintiffs in this case.

57. I am satisfied the court should exercise its discretion against allowing the issue to proceed to plenary hearing.