Neutral Citation: [2014] IEHC 591

THE HIGH COURT

[2014 No. 5449 P]

BETWEEN

VIEIRA LIMITED

PLAINTIFF

AND

ULSTER BANK IRELAND LIMITED

DEFENDANT

-AND-

[2014 No. 5450P]

BETWEEN

EUROPEAN PROPERTY FUND plc and LAURELMORE LIMITED

PLAINTIFFS

AND

ULSTER BANK IRELAND LIMITED

DEFENDANT

Judgment of Mr Justice David Keane delivered on the 9th December 2014

Introduction
1. The plaintiffs in these two related sets of proceedings seek interlocutory injunctive relief against the same defendant in each, comprising, in essence, orders restraining the assignment to a third party of loans made by the defendant to the plaintiffs.

Background
2. From the affidavit evidence submitted on behalf of the plaintiff companies, it appears that each of them is, or has been, a vehicle for the business and investment activities of Mr Eugene Larkin and his sons, Messrs Richard and Michael Larkin.

3. Each of the plaintiffs is, or has been, in receipt of one or more loan facilities from the defendant Ulster Bank Ireland Limited ("the bank"). In particular, it is deposed on behalf of the bank that Vieira Limited ("Vieira") obtained a loan governed by a facility letter dated the 23rd April 2008 upon which €7,414,882 was outstanding as of the 13th October 2014, including interest arrears of €417,732.29. It is further deposed that the bank advanced various different loan facilities to European Property Fund plc ("EPF") in February and March 2008, in respect of which the sum of €19.5 million relates to residential and commercial units in Tyrellstown Town Centre; €5.5 million relates to the acquisition of listed equities; and stg£18.45 million relates to the acquisition of certain properties in the U.K. (described in greater detail below), Each of those loans was outstanding on the 13th October 2014.

4. It is further deposed that, earlier this year, as part of a process of deleveraging its loan portfolio, the bank pooled the plaintiffs' loans (together with other loans associated with the Larkins' business activities) into one tranche - Tranche E - of several loan tranches offered for sale at the same time under the designation "Project Achill". It is deposed on behalf of the bank that the total indebtedness of the Larkin interests is circa €89 million.

5. Prior to the commencement of "Project Achill", the Larkin interests made a bid of €44 million for the purchase of the Tranche E loans by letter dated the 14th July 2014. The bank declined that bid by letter dated the 16th July 2014; Project Achill was launched on the same day. A company named Eastdil Secured managed the loan sale process on behalf of the bank. The Larkin interests made two further offers, in Phase 1 and Phase 2 of that process respectively. The bank did not choose the Larkin interests as the preferred bidder and it is deposed on the bank's behalf that its decision was made on an assessment of price only and that the Larkin interests' Phase 2 bid of €57 million was lower than all of the other bids received. It is further deposed that all of the bids received were materially below the par value of the outstanding debt in Tranche E and that, as of the 13th October 2014, the bank was in negotiations with its preferred bidder.

The Loan Facilities
6. The plaintiffs have exhibited the loan agreements that they say currently evidence their indebtedness to the bank. Those agreements comprise: a facility letter dated the 21st January 2008 in respect of Laurelmore Limited ("Laurelmore") in the amount of stg£48 million; a facility letter dated the 27th February 2008 in respect of EPF (then Davy European Property Fund plc) in the total amount of stg£79 million; two facility letters of the same date in respect of the same entity for sums of €19.5 million and €5 million respectively; and a facility letter of the 23rd April 2008 in respect of Vieira in the sum of €17 million.

7. Each of the relevant loan facility letters states on its face that the loan agreement is subject to the bank's "Standard Terms & Conditions Governing Business Lending to Companies – Corporate Banking (Ref 01/2007)." Paragraph 11.6 of those terms and conditions states (in relevant part):

> "All sums payable by the Borrower under this Agreement (whether of principal, interest or otherwise) will be paid in the currency in which they are outstanding in full without any deduction, set-off counterclaim or witholding whatsoever."

8. As might be expected in light of the proposed sale of the relevant loans, paragraph 11.32 of those terms and conditions states:

> "The bank shall have the right to assign, transfer or sub-participate the benefits and/or obligations of all or any part of any Facility to another entity without the prior consent of the Borrower and the Bank may disclose to a prospective assignee or to any other person who may propose entering into contractual relations with the Bank in relation to this agreement such information about the Borrower as the Bank shall consider appropriate."

The proceedings

9. On the 24th June 2014, the plaintiffs' solicitors sent a letter before action to the bank's solicitors (though, as is noted below, after the issue of a plenary summons), solely on behalf of a company named Vieira. That letter referred to a financial instrument identified as a "positive carry swap" that Vieira had entered into with the bank on or about the 18th July 2008. The letter asserts that the financial instrument concerned was unsuitable and inappropriate for Vieira and contrary to its financial objectives. The letter continues that Vieira has a claim against the bank in respect of the sale of that instrument for negligence, misrepresenation, and breach of the Markets in Financial Instruments Directive 2004/39/EC ("MiFID"). The letter goes on to allege that the bank concealed from Vieira both the duties and responsibilities that the bank owed to Viera and Vieira's rights and entitlements as against the bank, presumably, in relation to that transaction.

10. The bank's solicitors replied by letter of the 1st July 2014, asserting on the bank's behalf that Vieira's claims concerning the positive carry swap are ill-conceived and unmeritorious. The letter went on to assert that both Vieira and the wider Larkin interests have been engaged in property development and investment on a substantial scale for many years, such that Vieira was properly classified by the bank, in accordance with MiFID, as "a professional investor" prior to the transaction at issue. The letter further asserts that Vieira agreed to the bank's written Terms of Business for a Professional Client, which, in common with the written confirmation of the transaction, explicitly provide that the bank was operating on an execution-only basis in relation to it. The letter continues that Mr Richard Larkin confirmed in writing on behalf of Vieira that Vieira was not relying on the bank for investment or other advice and that it was making its own independent decision to enter into the transaction, and as to whether the transaction was appropriate or proper for it.

11. It would appear that no letter before action was written on behalf of either Laurelmore or EPF.

12. In each case, the plenary summons issued on the 19th June 2014, although it would appear that service of each was only effected on the 23rd July 2014 under cover of a letter to the bank's solicitors dated the 22nd July 2014. The *inter partes* correspondence before the Court suggests that a memorandum of appearance was filed in each case on the 29th July 2014. A statement of claim dated the 7th August 2014 has since been delivered in each case. No Defence had yet been delivered in either case when the present application was heard over three days between the 22nd and the 24th October 2014.

13. In the first case, Vieira is described as a private limited company with its registered office within the State, the financial objectives of which were the conservative and prudent management of its resources and funds for the ultimate benefit of Richard and Michael Larkin, the continued growth and expansion of its property development business, and the protection of the business from the costs associated with unexpected rises in interest rates.

14. On behalf of Vieira it is pleaded that the positive carry swap that it entered into with the bank on or about the 13th August 2008 was entirely inappropriate and unsuitable for Viera's financial objectives. It is further pleaded that the bank misrepresented the nature of the positive interest swap to Vieira, while concealing its true nature, specifically that it would have to be paid down, and that, in doing so, the bank concealed its own duties and responsibilities pursuant to MiFID. It is pleaded that, in consequence, Vieira's liabilities under the positive carry swap were wrongly secured against Vieira's property assets. It is further alleged that the bank owed a fiduciary duty to Vieira and that it breached that duty. Vieira also alleges that the bank is liable for misrepresentation, negligence, breach of duty and negligent mistatement arising out of broadly the same facts. Finally, Vieira claims damages in respect, not only of the various kinds of tortious conduct just described, but also for deceit, coercion, duress and intimidation, although no particulars whatsoever are provided in respect of those claims.

15. In the statement of claim in the second case, EPF is described as a "Qualifying Investment (*sic*) Fund" and Laurelmore as a company incorporated, and with a registered office, in the Isle of Man.

16. On behalf of Laurelmore it is pleaded that, on an unspecified date (which the evidence adduced by the bank suggests was in or around November 2002), it entered into a 20 year fixed-rate loan agreement in connection with the purchase of a property at Belgrave Road, London in 2001 ("the Belgrave Road transaction"). It is further pleaded that the fixed rate associated with that loan was, in fact, a derivative instrument and that this only became apparent in unspecified circumstances at some unspecified time subsequently in the context of the financial reorganisation of certain unspecified Larkin controlled companies. In an averment made on its behalf for the purpose of the present application, the bank contends that the Belgrave Road transaction was a fixed rate loan; that it was transferred to EPF on foot of a facility letter between the bank and EPF, dated the 27th February 2008; and that, on the 4th April 2008, EPF drew down funds on foot of that loan facility, which were used, *inter alia*, to discharge the Laurelmore fixed-rate loan.

17. It is further pleaded that, in January 2008, Laurelmore purchased another property located at Old Jewry in London and that it was a condition precedent to the further loan agreement that Laurelmore entered into for that purpose that a derivative instrument transaction be entered into as a hedge against the interest rate commitments associated with that loan ("the Old Jewry derivative"), which transaction was duly entered into in or about January 2008 (specifically, as the bank asserts, on the 22nd January 2008). The bank asserts that the Old Jewry derivative was novated by agreement between the bank and EPF on the 14th August 2008, with an effective date of the 4th April 2008, and further asserts that the transaction was the subject of a further agreement between the bank and EPF in May 2009.

18. It is then pleaded, questionably in light both of what follows and of the evidence now before the Court, that the Larkins undertook a reorganisation of their corporate assets in and around the middle of 2008, as part of which EPF was incorporated to provide a more tax efficient structure for the "beneficiaries" of both plaintiff companies, Richard and Michael Larkin.

19. The reference to a reorganisation of the Larkin's corporate assets "in and around the middle of 2008" is questionable because the evidence now before the Court establishes that EPF was incorporated on the 13th July 2006, apparently under the name Davy European Property Fund plc, and began the process of acquiring the Belgrave Road property from Laurelmore no later than February 2008. Specifically, it is expressly pleaded on behalf of EPL that it entered into a loan agreement with the bank on or about the 27th February 2008 to refinance (or, as the bank contends, to discharge) the Laurelmore indebtedness in respect of those transactions,

and to acquire the Belgrave Road and Old Jewry properties.

20. It is next pleaded that, at the time of the acquisition of those assets (and of the loan and loan hedging obligations associated with them), EPF was unaware of the liabilities associated with the Belgrave Road transaction and the Old Jewry derivative. This is also a puzzling plea for a reason that I will address later in this judgment.

21. Thereafter, the claims made on behalf of Laurelmore and EPF closely mirror those advanced on behalf of Vieira in respect of the positive carry swap; that the Belgrave Road transaction and the Old Jewry derivative each involved misrepresentation, negligence, breach of duty (including breach of fiduciary duty) and negligent misstatement on the part of the bank; that the bank concealed its duties and obligations, and the plaintiffs' rights and entitlements under the Code of Conduct for Credit Institutions ("the Code") in the case of Laurelmore and under MiFID in the case of EPF; that the bank deliberately deceived EPF concerning the financing costs of loan facilities made available to it; that the bank coerced EPF into the sale of the Belgrave Road and Old Jewry properties; and that the plaintiffs are entitled to damages under each of the foregoing heads of claim, and in addition, are entitled to damages for breach of contract, deceit, intimidation and coercion.

22. It is pleaded that the break cost associated with the Belgrave Road transaction when the property was sold on the 2nd September 2011 was £4.829 million and that this figure was more than £500,000 more than the figure the defendant had advised. It is further pleaded that the break cost of the Old Jewry derivative when the Old Jewry property was sold on the 16th November 2012 was £10 million.

The interim injunction application
23. On the 8th October 2014, the plaintiffs in each set of proceedings applied for, and were granted, an interim *ex parte* injunction restraining the defendant from the divestment or transfer of the plaintiffs' loans pending further order.

24. That application was grounded on an affidavit sworn by Richard Larkin on the 7th October 2014, in his capacity both as the ultimate beneficiary (together with his brother) of the shares in EPF and as a director of Vieira. In trenchant language, Mr Larkin substantially repeats the allegations made in the statement of claim in each set of proceedings, although he does not include or exhibit any significant averment or document corroborating them, before going on to articulate a number of complaints concerning the loan sale process in respect of the Larkin interests' outstanding loans.

25. The subject of both the interim and the present injunction application at last begins to come into focus, when Mr Larkin avers that "any action on the part of the [bank] to divest itself of the [plaintiffs'] indebtedness would adversely affect the equities which arise in the [plaintiffs'] favour by virtue of the existence of these proceedings and the claims and reliefs contained therein."

26. In the course of argument it became tolerably clear that the "equities in the plaintiffs' favour" to which Mr Larkin is referring are the plaintiffs' claims to a right of set off as between the damages that they claim in respect of the derivative transactions the subject matter of the present proceedings, on the one hand, and any claim that the defendant might make for the immediate repayment of the outstanding balances under the EPF and Vieira loan agreements, on the other. The plaintiffs point out, it seems to me quite correctly, that any such right of set off as may exist in such circumstances would be set at nought by the sale of the relevant loans to a third party, although, equally plainly, any such sale would have no effect on the plaintiffs' damages claim in either of the two actions now at issue.

27. In purported compliance with the obligation on any party seeking interim *ex parte* injunctive relief to make full and frank disclosure, Mr Ronan McGoldrick, the plaintiffs' solicitor, swore an affidavit on the 8th October 2014, exhibiting the bank's "*General Terms and Conditions for Business Lending to Companies, Ref. 01/2007".* Of course, while it might reasonably be expected that those terms and conditions would govern the loan agreements the sale of which the plaintiffs were seeking to injunct, there is no suggestion that they have any application to the derivatives transactions that are the subject of the plaintiffs claim in the underlying proceedings.

The application to set aside the interim injunction
28. The bank asserts that in seeking, and obtaining, an interim *ex parte* injunction the plaintiffs failed to comply with the solemn obligation upon them to make full and frank disclosure. While the bank raised a number of issues of alleged material non-disclosure at the interim injunction stage in the submissions made on its behalf at the hearing of the present application, it seems to me that the majority of those are more appropriately considered in the context of whether the plaintiffs have made out a *bona fide*/fair/serious question to be tried. However, I have come to the conclusion that it is necessary to address one of those matters as a preliminary issue.

29. The bank complains that, in making the case that they have raised a *bona fide*, fair or serious question to be tried concerning whether they were mis-sold the derivative instruments at issue, the plaintiffs entirely failed to disclose to the Court both the bank's terms of business and the contractual relationship between the parties governing those transactions.

30. In an affidavit sworn on behalf of the bank on the 13th October 2014 for the purpose of the present application, Declan Murray, a director in Structured Solutions, RBS Capital Resolution Group within the bank, refers to, and exhibits, a booklet of transaction documentation, including the relevant terms of business and confirmations in respect of the derivatives transactions at issue in the proceedings, with the exception of the Belgrave Road transaction for which the original loan documents have not yet been located. Of course, it must be remembered that, according to the evidence before the Court, the Belgrave Road transaction occurred in November 2002, almost twelve years before the service of the relevant proceedings – without prior notice - upon the bank.

31. Referring to that documentation, Mr Murray cites, as an example, the applicable terms of business between Laurelmore and the bank. Mr Murray exhibits a letter dated the 24th January 2008 from the Head of Settlements in the Capital Markets division of the bank to Laurelmore in the Isle of Man, under cover of which were enclosed the bank's "*Terms of Business for a Professional Client*." The text of the letter states, *inter alia*, that all interest rate derivative (IRD) trades provided to Laurelmore are covered by those terms; that Laurelmore has been categorised as a "professional" client for the purpose of MiFID; and that the service was being provided to Laurelmore on an execution only basis, and not in the capacity of financial or other advisor. The relevant terms of business appear to have been separately signed by two directors of Laurelmore on the 24th January 2008 on Laurelmore's behalf, beneath a confirmation that "[w]e have read and understood the above *Terms of Business* and confirm that they are acceptable."

32. Turning to contents of the *Terms of Business*, Mr Murray points to paragraph 3.3 whereby Laurelmore is categorised as a professional client, and paragraph 3.5 in which Laurelmore is informed of its entitlement to request that it be treated as a retail client.

33. Paragraph 4.2 states:

> "We will not provide you with advice on any transaction or account or provide you with personal recommendations. Accordingly, you should make your own assessment of any transaction that you are considering and should not rely on any opinion, research or analysis expressed or published by us or our affiliates as being a recommendation or advice in relation to that transaction or account."

34. Schedule 1 to the *Terms of Business* comprises a "*Products and Risk Warning*." One such specific warning, set out at paragraph 4 under the heading "*Break Costs*" is the following:

> "If you approach us to close out a transaction which has been entered into between us, we are under no obligation to do this. Where we agree to do this, we will calculate the close out value of the trade based on prevailing market conditions and may include associated costs arising from the close out in this figure. The close out value may be due from you to us or from us to you depending on the trade and may be substantial.
>
> When you enter into a derivative transaction with us for the purpose of hedging a loan or other debt instrument and you subsequently wish to repay the debt (whether through a refinancing or otherwise) you should be aware that it may be necessary for us to terminate the hedging transaction prior to its scheduled termination date and to satisfy any liabilities that you have with us with respect to such transaction (including break costs) before we will release any security you have provided to us with respect to such liabilities)."

35. The various specific risk warnings are prefaced by a general warning in the following terms:

> "This Risk Warning cannot disclose all the risks and other significant aspects of derivative products. You should not deal in these products unless you understand their nature and the extent of your exposure to risk. You should also be satisfied that the product is suitable for you in light of your circumstances and financial position."

36. Finally, as part of this example, Mr Murray refers to the letter of confirmation issued by the bank to Laurelmore on the 31st March 2008 in respect of the Old Jewry derivative, which included the following statements:

> "Each party represents to the other party on the Trade Date of this Swap Transaction that (in the absence of a written agreement between the parties that expressly imposes affirmative obligations to the contrary for this Swap Transaction):-
>
> (a) *Non-Reliance*. It is acting for its own account, and it has made its own independent decisions to enter into this Swap Transaction and as to whether this Swap Transaction is appropriate or proper for it based upon its own judgment and upon advice from such advisers as it has deemed necessary. It is not relying, and has not relied, on any communication (written or oral) of the other party as investment advice or as a recommendation to enter into this Swap Transaction; it being understood that information and explanations related to the terms and conditions of this Swap Transaction shall not be considered investment advice or a recommendation to enter into this Swap Transaction, no communications (written or oral) received from the other party shall be deemed to be an assurance or guarantee as to the expected results of this Swap Transaction.
>
> (b) *Assessment and Understanding*. It is capable of assessing the merits of and understanding (on its own behalf or through independent professional advice), and understands and accepts, the terms, conditions and risks of this Swap Transaction. It is also capable of assuming, and assumes, the risks of this Swap Transaction.
>
> (c) *Status of Parties*. The other party is not acting as a fiduciary for or as an adviser to it in respect of this Swap Transaction."

37. Mr Murray goes on to aver that the relevant exhibit to his affidavit contains documents to like effect in respect of each of the impugned transactions with the exception of the Belgrave Road transaction, for which, as already noted, the relevant documentation has not yet been located.

38. Significantly in this context, the bank submits, and the *inter partes* correspondence confirms, that in response to the pre-action letter written on behalf of Vieira on the 24th June 2014, the bank's solicitors replied by letter dated the 1st July 2014, asserting that Vieira's claim was ill-conceived and unmeritorious in express reliance on the terms of the relevant documentation. The plaintiffs' solicitors then sought copies of the relevant documentation by letter dated the 3rd July 2014 and it was furnished to them by letter dated the 4th July 2014.

39. It appears to be common case that neither the relevant documentation nor the correspondence just described were disclosed to the Court by, or on behalf of, the plaintiffs in applying for, and obtaining, an interim ex parte injunction on the 8th October 2014.

40. On the 20th October 2014, Richard Larkin swore a second affidavit in which he addresses, *inter alia*, the relevant averments contained in Mr Murray's affidavit just described. Mr Larkin does not provide any explanation for the plaintiffs' failure to disclose to the Court the existence and contents of the relevant contractual documentation (or the correspondence concerning it) in seeking and obtaining interim *ex parte* relief. Instead, Mr Larkin confines himself to the question of whether the existence of that documentation is fatal to the plaintiffs' contention that their proceedings raise a *bona fide*, real or serious issue to be tried.

41. In the course of argument, the Court was unable to obtain any explanation for the plaintiffs' failure to make full and frank disclosure of the existence of that documentation.

The golden rule

42. As Clarke J. had occasion to note in *Bambrick v Cobley* [2005] IEHC 43, the obligation to make full and frank disclosure in applying for relief *ex parte* was described in the following terms by *Browne-Wilkinson V.C. in Tate Access Floors Inc. v. Boswell* [1991] Ch. 512 (at 532):

> "No rule is better established, and few more important, than the rule (the golden rule) that a plaintiff applying for *ex parte* relief must disclose to the Court all matters relevant to the exercise of the court's discretion whether or not to grant relief before giving the defendant an opportunity to be heard. If that duty is not observed by the plaintiff, the court will discharge the *ex parte* order and may, to mark its displeasure, refuse the plaintiff further *inter partes* relief even though the circumstances would otherwise justify the grant of such relief."

43. In this case, I am satisfied that, in applying for, and obtaining, an interim injunction *ex parte*, the plaintiffs failed to disclose to the Court both the existence of the contractual documentation that appears to govern the derivatives transactions that are the subject of their proceedings and the relevant contents of that documentation.

44. The next question I must address is whether the undisclosed facts I have just described were material to the application for interim *ex parte* relief that was made by the plaintiff. In that regard, the plaintiffs were under the obligation described by Lord O'Hagan L.C. in *Atkin v Moran* [1871] I.R. 6 E.Q. 79 in the following terms:

> "The party applying is not to make himself the judge of whether a particular fact is material or not. If it is such as might in any way affect the mind of the court it is its duty to bring it forward."

45. I am satisfied that the existence of that documentation and its contents were at least capable of affecting the mind of the court. Indeed, although it is not strictly necessary to do so, I have come to the conclusion that the mind of court would inevitably have been affected by that evidence.

46. I have reached that conclusion with due regard to the following passage from the judgment of Clarke J. in *Bambrick v. Cobley*, supra:

> "I am also mindful of the fact that the courts have noted (for example in *Brink's-Mat Limited v. Elcombe* [1988] 3 All E.R. 188) that in particular in heavy commercial cases the borderline between material facts and non-material facts can be a somewhat uncertain one and that, without discounting the heavy duty of candour and care which falls upon persons making *ex parte* applications, the application of the principle of disclosure should not be carried to extreme lengths.
>
> Taking those authorities it would seem that the test by reference to which materiality should be judged is one of whether objectively speaking the facts could reasonably be regarded as material with materiality to be construed in a reasonable and not excessive manner."

47. I am satisfied that the relevant contractual documentation and the contents thereof were directly and, therefore, reasonably material to the plaintiffs' various assertions that: the bank owed a fiduciary duty to the plaintiffs concerning the transactions at issue; that the bank had concealed its duties and responsibilities, and the plaintiffs' rights and entitlements, under MiFID from the plaintiffs; that the bank breached a duty of care that it owed to the plaintiffs in respect of the transactions at issue; that the bank deceived the plaintiffs concerning the nature and effect of the transactions at issue; and that, in all the circumstances, the bank mis-sold the derivative instruments at issue to the plaintiffs.

48. For these reasons, I am satisfied that there was in this case a significant and material failure to disclose matters which should have been disclosed in the context of the *ex parte* application for interim relief.

Consequences of material non-disclosure
49. I accept, as Clarke J. found in *Bambrick v Cobley*, *supra*, that the effects of non-disclosure are not automatic; see *Lloyds Bowmaker Limited v Brittania Arrow Holdings Limited* [1988] 1 W.L.R. 1337. I accept further that the court has a discretion, in cases where failure to make material disclosure at the interim stage has been established, both to discharge the interim injunction already granted and to refuse to grant any interlocutory injunction then sought.

50. I adopt the following description of the factors relevant to the exercise of the court's discretion in that regard identified by Clarke J. in that case:

> "1. The materiality of the facts not disclosed.
>
> 2. The extent to which it may be said that the plaintiff is culpable in respect of a failure to disclose. A deliberate misleading of court is likely to weigh more heavily in favour of the discretion being exercised against the continuation of an injunction than an innocent omission. There are obviously intermediate cases where the court may not be satisfied that there was a deliberate attempt to mislead but that the plaintiff was, nonetheless, significantly culpable in failing to disclose.
>
> 3. The overall circumstances of the case which lead to the application in the first place."

51. Considering each of those factors as it applies to the case at hand, I find as follows. First, for the reasons already set out above, the facts that were not disclosed were directly relevant and, therefore, reasonably material, to the specific allegations made by the plaintiffs of the mis-selling by the bank of the derivative instruments at issue. Second, while – with some hesitation - I do not go so far as to find that the non-disclosure at issue was deliberate, I am quite satisfied that it involved a culpable failure on the part of the plaintiffs. Third, I find that no other aspect of the overall circumstances in the case is directly relevant to the exercise of the discretion now at issue. I therefore conclude that I should exercise my discretion by acceding to the application to discharge the interim injunction and against any consideration of the application for interlocutory relief.

Campus Oil guidelines
52. Lest I am mistaken in that conclusion, for the sake of completeness I propose to consider whether, on the facts now before the Court, it would be otherwise appropriate to grant the interlocutory injunction sought in accordance with the applicable *Campus Oil* guidelines.

53. In that context, the first matter that I must consider is whether the plaintiffs have satisfied me that there is a *bona fide* question to be tried concerning their claims that they were mis-sold the derivative instruments at issue by the bank.

54. On that question, the bank has raised a number of issues, one of which, the existence of contractual documentation entirely inconsistent with the plaintiffs' claims, has already been identified, though there are several others.

EPF as a QIF
55. The first such issue concerns the status of EPF as a qualifying investor fund (QIF). A QIF is a regulated, specialist investment fund targeted at sophisticated and institutional investors. EPF was at all material times an investment company within the meaning of Part XIII of the Companies Act 1990 and was authorised as a QIF by the Financial Regulator.

56. Notice NU 24 of the NU Series of Notices published by the Financial Regulator provides for the authorisation of collective

investment schemes which market solely to qualifying investors. NU 24.6 (issued in May 2006) was the Notice in force when EPF was incorporated and authorised as a QIF. That authorisation operated to permit EPF to avail of a derogation from the conditions and restrictions related to investment objectives and policies and leverage set out in various other Notices promulgated by the Financial Regulator.

57. To qualify for that derogation, EPF had to be in a position to satisfy the Financial Regulator that the relevant investors are "qualifying investors." Qualifying investors are defined as "any natural person with a minimum net worth (which excludes main residence and household goods) in excess of €1.25 million, or any institution (being an entity other than a natural person): (a) which owns or invests on a discretionary basis at least €25 million or its equivalent in other currencies; or (b) the beneficial owners of which are qualifying investors in their own right."

58. The Notice goes on to state that qualifying investors must state in writing to the investment company that they meet the minimum criteria just described and "that they are aware of the risk involved in the proposed investment and of the fact that inherent in such investments is the potential to lose all of the sum involved."

59. The Notice continues that the prospectus of a QIF must describe the objectives and investment and borrowing policies of the scheme in terms that are comprehensive and accurate, and readily comprehensible to investors, sufficient to enable investors to make an informed judgment on the investment proposed to them. In particular, the prospectus must contain "a prominent risk warning which will make specific reference to the following: (i) the potential for above average risk involved; and (ii) the suitability of this type of investment only for people who are in a position to take such a risk."

60. On behalf of the bank, Mr Murray has exhibited to the affidavit that he swore on the 13th October 2014, a company report on EPF which includes a copy of its memorandum, and articles, of association. The memorandum of association describes the company as a public limited company being an investment company with variable capital, having as its sole objective the collective investment of funds in property with the aim of spreading investment risk for the benefit of its members.

61. The bank points out that the powers of the company include (at paragraph 3.01) the power to trade in "futures contracts, swap contracts, contracts for difference…variable or floating rate securities, securities in respect of which the return or redemption amount is calculated by reference to any index, price or rate, options contracts, forward rate agreements…money market instruments and financial instruments" and so on.

62. More specifically, at paragraph 3.03, EPF is expressly empowered:

> "To employ derivative instruments and techniques of all kinds for investment purposes and for the efficient management of the Company's assets and, in particular, but without prejudice to the generality of the foregoing, to enter into, accept, issue and otherwise deal with sale and repurchase agreements, futures contracts, options, securities lending agreements, shorts sales agreement, when-issued, delayed delivery and forward commitment agreements, foreign currency spot and forward rate exchange contracts, forward rate agreements, swaps, collars, floors and caps and other foreign exchange or interest rate hedging and investment arrangements."

63. Moving on to EPF's articles of association, paragraph 3.03 provides (in relevant part):

> "[T]he Company shall forthwith after its incorporation and before it obtains authorisation by the Financial Services Regulator, pursuant to section 256 of the Companies Act, 1990 and in accordance with the requirements of the Financial Services Regulator appoint or procure that a person, firm or corporation shall be appointed by the Company to act as Investment Manager and the Directors may delegate and entrust to and confer upon that Manager so appointed any of the powers, duties, discretions and/or functions exercisable by them as Directors…."

64. Paragraph 6.06 of the articles of association states:

> "To be entered on the Register, Shareholders must apply for or acquire shares to the value of not less than the minimum subscription amount as set out in Financial Services Regulator Notice NU24 (currently €250,000), certify that they meet the Qualifying Investor criteria as set out in NU24 and certify that they are aware of the risk involved in the proposed investment and of the fact that inherent in such investment is the potential to lose all of the sum involved."

65. Finally in this context, paragraph 14.01 of the articles of association provides:

> "The Directors may exercise all the powers of the Company to employ techniques and instruments for hedging and investment purposes in relation to the investments or any of them or any other assets or any borrowings of the Company."

66. I understand the bank to make two broad points by reference to the foregoing material. The first is that, beyond the terse reference to EPF being a "Qualifying Investment Fund" in the first paragraph of the otherwise prolix statement of claim, none of the material facts concerning the implications of that status for the case EPF seeks to make in its proceedings were drawn to the attention of the Court when EPF sought, and obtained, interim *ex parte* relief against the bank. The second point is that the obligations assumed by EPF as a QIF, in conjunction with the hitherto undisclosed contractual documentation in respect of the derivatives transactions at issue, preclude the Court from being satisfied that EPF has raised a *bona fide*, fair or serious question to be tried in the proceedings that it was mis-sold the derivative instruments at issue.

The contractual documentation

67. The second issue raised by the bank is the one already identified in the context of the plaintiffs' obligation to make full and frank disclosure in seeking interim relief; that is, the bank's contention that the evidence it has now adduced (and which the plaintiffs did not disclose) concerning the bank's terms of business and the contractual relationship between the parties governing the trades at issue in the proceedings is sufficient to establish that those proceedings are bound to fail.

68. In his supplemental affidavit, sworn on the 20th October 2014, Richard Larkin addresses that submission at some length. First, Mr Larkin avers that, as is usually the case with trading in financial markets, the execution of formal contracts would have occurred after the execution of the relevant trades. Mr Larkin appears to suggest that the full nature and terms of the transactions concerned are therefore to be gleaned not simply from the formal written terms and conditions ultimately agreed to by the plaintiffs in respect of the relevant transaction but also, or instead, by reference to the contents of any correspondence or discussions by way of negotiation that preceded each of those transactions. That submission does not appear to me to be sound as a matter of contract law.

Moreover, it is not clear how it can be reconciled with the clear terms of the relevant contractual documentation.

69. Take, for example, the claim made on behalf of Vieira that the bank misrepresented the nature of the positive carry swap that the parties entered into on the 13th August 2008; that the bank concealed the true nature of that transaction from Vieira; and that the transaction was entirely inappropriate and unsuitable for Viera's financial objectives. On behalf of the bank Mr Murray has exhibited a letter, under cover of which were enclosed the bank's "*Terms of Business for a Professional Client*." Both that letter and those terms of business are in substantially identical terms to those in respect of Laurelmore and the Old Jewry transaction described at paragraphs 31 to 35 *supra*. Those terms and conditions are signed on their face by Eugene Larkin and Michael Larkin as directors of Vieira, for and on behalf of Vieira, on the 5th August 2008 beneath the statement: "We have read and understood the above Terms of Business and confirm they are acceptable."

70. Mr Murray also exhibits a letter of confirmation in respect of the positive carry swap, dated the 22nd August 2014, which recites on its face that it "evidences a complete and binding agreement" between Vieira and the bank as to the terms of the swap transaction to which it relates. That letter is addressed to Viera, for the attention of Rick Larkin.

71. That letter of confirmation also includes the following statements:

> "Each party represents to the other party on the Trade Date of this Swap Transaction that (in the absence of a written agreement between the parties that expressly imposes affirmative obligations to the contrary for this Swap Transaction):-
>
> (a) *Non-Reliance*. It is acting for its own account, and it has made its own independent decisions to enter into this Swap Transaction and as to whether this Swap Transaction is appropriate or proper for it based upon its own judgment and upon advice from such advisers as it has deemed necessary. It is not relying, and has not relied, on any communication (written or oral) of the other party as investment advice or as a recommendation to enter into this Swap Transaction; it being understood that information and explanations related to the terms and conditions of this Swap Transaction shall not be considered investment advice or a recommendation to enter into this Swap Transaction, no communications (written or oral) received from the other party shall be deemed to be an assurance or guarantee as to the expected results of this Swap Transaction.
>
> (b) *Assessment and Understanding*. It is capable of assessing the merits of and understanding (on its own behalf or through independent professional advice), and understands and accepts, the terms, conditions and risks of this Swap Transaction. It is also capable of assuming, and assumes, the risks of this Swap Transaction.
>
> (c) *Status of Parties*. The other party is not acting as a fiduciary for or as an adviser to it in respect of this Swap Transaction."

72. Mr Larkin also avers that both the Old Jewry derivative entered into by Laurelmore and the positive carry swap entered into by Vieira were executed when he was just 24 years of age, having graduated from college without any experience working in or with derivatives. However, it is not clear how this averment can assist either Laurelmore or Vieira in light of the terms and conditions that were agreed by other directors of those companies on behalf of each of them. In response to Mr Murray's averment that "*each of the transactions had the effect of hedging the plaintiffs' exposure to interest rate fluctuation in a manner that the plaintiffs asked for and understood*", Mr Larkin avers that Mr Murray is in no position to determine definitively what he (Mr Larkin) did or did not understand. In this regard, Mr Larkin appears to confuse each of the plaintiffs with Mr Larkin personally. Mr Larkin next asserts, in substance, that since the transactions did not in the event effect a successful hedge but rather led to the incurring of significant losses, then the bank must be liable to the plaintiffs in that regard. However, that assertion merely begs the question by assuming that there was an obligation on the bank, rather than the plaintiffs, to assess the appropriateness of the relevant transactions from the plaintiff's perspective and to bear the risks associated with them.

73. Later in his affidavit, Mr Larkin addresses the nature of the positive carry swap that Vieira entered into with the bank at some length, relying on the advice that he avers has been afforded to him by a derivatives expert engaged by the plaintiffs to assist them in the preparation of their proceedings, for the purpose of asserting that the financial instrument concerned was opaque, unusual and unsuitable for Vieira. The difficulty from the plaintiffs' perspective is that, in order to establish that there is a *bona fide* or fair or serious issue to be tried, it is not sufficient merely to establish that the transaction concerned may have been opaque, or unusual, or inappropriate from Vieira's perspective; it would have to be established that there is a fair issue to be tried that the bank was under a duty or obligation to Vieira to ensure that the transaction was neither unusual nor opaque and, most importantly, that it was appropriate for Vieira. However, that proposition is entirely undermined by the plaintiffs' failure to address the applicable provisions of the underlying contractual documentation whereby the selection of an appropriate or suitable derivative instrument is the responsibility of Vieira and not of the bank.

74. *Parsley Properties Limited & Ors v Bank of Scotland plc & Anor* [2013] IEHC 624 is a relatively recent case involving a claim that an interest rate swap had been mis-sold, against that background of contractual documentation and, in particular, confirmation letters in very similar terms to those now at issue. McGovern J surveyed a number of decisions on the enforceability of broad exclusionary clauses in commercial contracts, such as that of Birmingham J. in *McCaughey v. Anglo Irish Bank Corporation Ltd* [2011] IEHC 546, upheld by the Supreme Court in *McCaughey v. Anglo Irish Bank Corporation Ltd* [2013] IESC 17, and the *ex tempore* decision of Kelly J. in *Anglo Irish Bank Corporation plc v. McGrath* [2006] IEHC 78, before concluding:

> "27. I cannot, on the basis of the evidence before me, envisage any circumstances under which Parsley might avoid the terms of the various instruments entered into by it. Even if it is the case that interest rate swap arrangements were unsuitable for its purposes, it is a corporate entity forming part of a sophisticated structure, being held by a trust and interacting with other corporate vehicles registered in other jurisdictions. Parsley was managed by professional trustees and had available to it the possibility of obtaining any necessary legal or financial advice in relation to the transaction in question. The exclusionary terms were clear and are enforceable, in circumstances where the plaintiffs have not specifically pleaded fraud or fraudulent concealment."

75. I would respectfully agree with the analysis of McGovern J. and I am driven to the same conclusion in the case at hand. As for the various pleas of fraud and fraudulent concealment in these proceedings, those claims are addressed below.

The statute bar and fraud or fraudulent concealment

76. The bank submits that all of the plaintiffs' claims with the exception of Vieira's claim concerning the postive carry swap are self-evidently barred by operation of the provisions of the Statute of Limitations 1957.

77. The plaintiffs' response on that point is confined to the supplementary affidavit of Mr Larkin sworn on the 20th October 2014, in which he deposes in reply that "*in any claim such as this which is based on concealment, duplicity and deceit, then the provisions of the Statute of Limitations will not afford the culpable defendant reliance on the Statute*."

78. In anticipation of that argument, the bank has drawn to the attention of the Court the recent judgment of Peart J. in *Komady Limited & Anor. v. Ulster Bank Ireland Limited* [2014] IEHC 325. That case involved the trial of a preliminary issue on whether a very similar claim to that now at issue in these proceedings was statute barred by reference to the provisions of s. 71, ss. 1 of the Statute of Limitations 1957. That sub-section states:

> "Where, in the case of an action for which a period of limitation is fixed by this Act, either—
>
> (a) the action is based on the fraud of the defendant or his agent or of any person through whom he claims or his agent, or
>
> (b) the right of action is concealed by the fraud of any such person,
>
> the period of limitation shall not begin to run until the plaintiff has discovered the fraud or could with reasonable diligence have discovered it."

79. Towards the conclusion of his judgment, Peart J. addressed the question on the facts presented in that case in the following terms:

> "55. Much reliance is placed by the plaintiffs on the existence of the fiduciary relationship between the parties at the time these Swaps were entered into. I can agree that such a relationship could impose a greater obligation of disclosure upon the bank. But in my view, even given that relationship for the purpose of this preliminary issue, that fact remains that everything the plaintiffs needed to know in order to get any advice on these swaps was known to them by the 18th July 2006. They had the swap agreements they had entered into. They knew what their conservative financial objective were and that they had explained them to the bank. They knew also that the bank had not explained these Swaps to them. They knew that they thought they were some sort of fixed rate interest agreement. By October 2006, if not sooner, they certainly knew that it was possible that they would have to pay money to the bank in circumstances where they were 'out of the money.' In my view if they had gone to a solicitor at any time after July 2006 and sought advice as to whether these Swaps met their conservative financial objectives, they would have been in a position to provide all the necessary information in order to get such advice, and to decide if the Swaps had been mis-sold. Instead, they did nothing until they ran into financial difficulties in 2012 whereupon a financial review was undertaken and they received advice to the effect that these Swaps had not been suitable for the purposes in July 2006. The fiduciary relationship does not add anything to those facts. The coming into force of the MiFID in November 2007 adds nothing of relevance to those facts. It did not suddenly reveal to the plaintiffs some vital fact that was not available to them from July 2006 and which was essential to their knowledge that they had a cause of action.
>
> 56. The plaintiffs in my view are confusing the emergence of further facts during the course of an action, with facts sufficient for the accrual of a cause of action. They had ample facts at their disposal in order to commence an action for negligence/negligent mis-representation in relation to these Swaps. A process of discovery might in due course have strengthened their hand in terms of their ultimate success at trial – or indeed might have weakened their case. But it is not necessary that every fact be known in order to commence proceedings. Sufficient facts are necessary in order to know that a cause of action has accrued. In the present case more than sufficient was known in the immediate aftermath of July 2006, or at any time before the Swaps came to an end some five and a half years later. The plaintiffs did not have to wait until April – August 2012 before seeking and receiving advice in relation to their suitability. As I have already said, section 71(1)(b) of the Act must not be equated with some sort of discovery test. That is not the intention of the section. No such provision as has been made in relation to discoverability in the context of personal injuries, has been made in respect of other types of tort."

80. I would respectfully agree with the analysis of Peart J. in the passage that I have just quoted. Accordingly, it seems to me that a bare assertion of "concealment, duplicity and deceit" in respect of a cause of action otherwise clearly statute barred under the applicable six-year time limit cannot avail the plaintiffs in seeking to maintain a claim in respect of the Belgrave Road transaction in 2002 or the Old Jewry derivative transaction in January 2008 in proceedings that did not issue until the 19th June 2014.

81. Before leaving this issue, and in anticipation of the next, it seems to me appropriate to note the long established practice of the court to require allegations of fraud to be pleaded with particularity. Order 19, rule 5(2) of the Rules of the Superior Courts expressly provides that in all cases alleging misrepresentation, fraud, breach of trust, wilful default or undue influence and in all cases in which particulars may be necessary, particulars (with dates and items if necessary) shall be set out in the pleadings.

82. In *Keaney v. Sullivan* [2007] IEHC 8, Finlay Geoghegan J approved the following extract from Bullen and Leake and Jacob, *Precedents of Pleading* (12th ed., 1975) as correctly setting out the relevant requirements (at pp. 452-453):

> "The statement of claim must contain precise and full allegations of facts and circumstances leading to the reasonable inference that the fraud was the cause of the loss complained of (see *Lawrance v Lord Norreys* (1890) 15 App Case 201 at 221). It is not allowable to leave fraud to be inferred from the facts pleaded and accordingly, fraudulent conduct must be distinctly alleged and as distinctly proved (*Davy v Garrett* (1878) 7 Ch D 473 at 489). "General allegations, however strong may be the words in which they are stated, are insufficient to amount to an averment of fraud of which any court ought to take notice."
>
> ***Particulars*** Full particulars of any misrepresentation relied on must be given in the pleading (R.S.C. Ord. 18, r. 12(1)(a). The Statement of Claim must show the nature and extent of each alleged misrepresentation (*Newport Dry Dock & Engineering Co. v Paynter* (1886) 23 Ch D 88) in writing and, if in writing, identifying the relevant document (*Seligman v Young* [1884] WN 93). Where the plaintiff alleged that the entries made by the defendant in certain books were false, he was ordered in the first place to give particulars of the entries which he alleged to be false, and subsequently to give further particulars showing in what respects each of these entries was false (*Newport Dry Dock & Engineering Co. v Paynter; ante);* "all accounts rendered to the plaintiff are untrue" did not comply with an order for further particulars of fraud (*Harboard v Monk* (1878) 38 LT 411).
>
> Moreover, the necessary particulars of the fraudulent intention relied on must also be contained in the pleading (R.S.C.

Ord. 18, r. 12(1)(b)), and accordingly, the pleadings must set out the facts, matters and circumstances relied on to show that the party charged had or was activated by a fraudulent intention."

83. It seems to me that the statement of claim in each of the two sets of proceedings now before the Court is very long on general allegations in strong words of fraud, duplicity and concealment, but distinctly short on the requisite level of particularity that would require the Court to take notice of such allegations. The word "fraud" is not a mere incantation to be recited in pleadings in general terms for its talismanic ability to ward off a statute bar or an onerous contractual term.

Set off and fraud

84. The bank submits that, even if the plaintiffs could make out a fair issue to be tried on their entitlement to damages for the alleged mis-selling of the relevant derivative instruments, the fact that the proposed sale of the relevant loan facilities would deprive them of a defence of set off to any claim against them that might be made on foot of those facilities does not provide the plaintiffs with any legal basis for impugning or injuncting that sale.

85. The bank points to the express term in the standard terms and conditions governing each such loan facility that all sums payable thereunder must be paid "*in full without any deduction, set-off counterclaim or witholding whatsoever*." Accordingly the bank submits with some force that, since any right of set off is expressly excluded in respect of each of the relevant loan facilities, the plaintiffs can have no conceivable entitlement to an injunction preventing the sale of those loan facilities in order to protect that right.

86. In *P.J. Hegarty & Sons Limited v. Royal Liver Friendly Society* [1985] 1 IR 524, Murphy J. adopted a number of propositions contained in the decision of the House of Lord in *Modern Engineering v. Gilbert-Ash* [1974] A.C. 689, including the propsition that "whether the parties [to a contract] have in fact curtailed the common law or equitable right of set off depends upon the construction of the agreement between them", which he believed had been accepted by Finlay P. in *John Sisk and Son Ltd v. Lawter Products B.V.* (Unreported, High Court, 13th November, 1976), though restated in the following terms:

> "…I believe the true test to be not whether the common law right of set off has by the terms of the building contract been unequivocally excluded, but rather as to whether all the relevant terms of the building contract are in any particular event inconsistent with the exercise in that event of such a right of set off."

87. The bank points out that in *Coca-Cola Financial Corporation v. Finsat International Limited* [1998] QB 43, the Court of Appeal rejected the argument that a party to legal proceedings is not free to contract out of the right otherwise conferred on him by law to set off one debt or claim against another. The bank relies on another Court of Appeal decision, Caterpillar *(NI) Limited v. John Holt & Company (Liverpool) Limited* [2013] EWCA 1232, in which, presented with the argument that a contractual clause providing that "a buyer shall not apply any set off" applied to legal set-offs but not to equitable set-offs, Longmore L.J. stated:

> "That would be a most surprising result; indeed the average businessman who was told that a clause of this kind applied to legal set-offs but not equitable set-offs would hardly be able to contain his disbelief."

88. Finally in this connection, the bank relies on the decision of the English High Court in *Re Kaupthing Singer and Friedlander Ltd (in Administration)* [2009] EWHC 750 (Ch) in which at issue was a clause that payments via the Crest system were to be made "*without set-off, counterclaim or other deduction, save as required by law."* The Chancellor of the High Court expressly rejected the argument that this clause only excluded the equitable right of set off in the following terms:

> "18. A similar argument was urged on the Court of Appeal in ***Continental Illinois National Bank and Trust Company of Chicago v Papanicolaou*** [1986] 2 LI.L.R. 441. In that case the relevant provision required payment by the guarantor of a secured debt "without set-off or counterclaim". It was submitted that it did not apply to counterclaims for negligence by the payee in the execution of its duties as mortgagee. The argument was rejected by Parker LJ giving the judgment of the Court on two grounds; first, the commercial purpose of the provision was that the bank should be paid quickly; secondly
>
> > "the natural meaning of the words is that all set-offs and counterclaims are excluded…not that all set-offs and counterclaims "other than set-offs and counterclaims for negligence or breach of the bank's duties as mortgagee"…"
>
> 19. Quite apart from the fact that neither Rule 7 para 3.2 nor Clause 3.5(a) of the Deed draws any distinction between one type of set-off and another it would be inconsistent with both their express terms and their commercial context to do so. So far as express terms are concerned both provisions exclude counterclaims as well as set-off. There is no restriction on the nature of the counterclaim or the underlying cause of action. Even if it could be maintained that the differences between an equitable set-off and what is commonly called a legal set-off justified a restricted construction of the word 'set-off' to equitable set-off the same argument could not be used to exclude cases of legal set-off from the exclusion of counterlcaims. But the commercial context demonstrates that all types of set-off or counterlcaim are excluded for it is the essence of the CREST system that bargains are completed immediately and without regard to any other transactions the parties may have entered into. This is made plain beyond doubt by the elaborate system of CREST payments, as defined in the Deed, prescribed by the CREST rules."

89. I cannot avoid the conclusion in this case that, as the bank submits, the language used in the set-off exclusion clause at issue here is clear, unambiguous and entirely unqualified. Accordingly, I cannot see any basis for the argument that the plaintiffs have raised a fair issue to be tried on their entitlement to assert a right of set off in respect of their mis-selling claim against any demand that might be made for the repayment of the relevant loan facilities, whether by the bank or by any third party to whom those loan facilities may be transferred.

90. In attempting to surmount that obstacle, the plaintiffs rely upon certain equivocal authority on whether cross-claims for fraud may be regarded as an exception to, or qualification upon, the principles of construction just described; *Skipskredittforeningen v. Emperor Navigation* [1977] CLC 1151 and the various decisions considered therein. However, for the reasons I have already given in the preceding section of this judgment, I do not accept that the plaintiffs have raised a *bona fide* or real or serious question to be tried in respect of their allegations of deceit or fraud in this case.

No fair issue to be tried

91. In seeking to establish that they have made out a fair issue to be tried, the plaintiffs place particular reliance on the ex tempore decision of Charleton J. in *Supergrace Limited & Anor. v. Irish Bank Resolution Limited & Ors.* (22nd January 2013). However, there are many features of the present case that distinguish it from *Supergrace*, most obvious amongst which are: the clear contractual provisions governing the transactions complained of; the particular status of EPF as a QIF; the obvious relevance of the statute bar;

the unequivocal exclusion of the right of set-off that forms the basis of the claim for injunctive relief; and the very broad scope of the interlocutory injunction that is sought. For the reasons set out above and by reference to the matters just mentioned, I have come to the conclusion that the plaintiffs have failed to make out a *bona fide*, fair or serious quesiton to be tried on the pleadings as they stand and the evidence now before the Court.

92. In reaching that conclusion it is important to emphasise, as Hardiman J. did in *Dunne v. Dun Laoghaire Rathdown Co. Council* [2003] 1 I.R. 567, that in dealing with the present application the Court is not finally deciding any factual or legal aspect of this controversy. On a full hearing the evidence may be different and more ample and, no doubt, the law will be debated at greater length.

Adequacy of damages
93. Assuming, *arguendo*, that the plaintiffs had raised a fair question to be tried, under *Campus Oil* guidelines the Court would next have to consider whether an award of damages would be an adequate remedy for either party. It seems to me that damages would be an adequate remedy for each side in this case in the context of what is, quintessentially, a commercial dispute. I have reached this conclusion notwithstanding the plaintiffs' submission that, if refused the injunction they seek, they may lose control of the properties in Tyrellstown that comprise the security for the loan facilities that are to be sold, which loss, they appear to suggest, would be intangible because of the particular added value that they bring to the management of those properties, which they developed. It seems to me that this submission extends far beyond the claim in these proceedings; *i.e.* that the plaintiffs are entitled to damages arising from the mis-selling of financial derivatives. Similarly, while I do not entirely dismiss the bank's contention that the grant of the injunction sought would undermine the credibility of the entire deleveraging process in which it is engaged, thereby inflicting damage that is impossible to quantify, I do not accept that a bare assertion to that effect is sufficient to displace the conclusion that the bank's potential commercial losses are capable of being compensated in damages.

Balance of convenience
94. The final issue to be considered is the balance of convenience. One further matter is relevant in that regard. Mr Murray swore a second supplemental affidavit on the 20th October 2014, to which is exhibited a train of recent correspondence between the parties, evidencing the imminent redemption of the Vieira loan facility, the sale of which, *inter alia*, the plaintiffs are seeking to injunct. In addition, it was accepted on behalf of the plaintiffs in the course of argument that Laurelmore has no outstanding loan facilities with the plaintiff. I accept both that evidence and the relevant concession as further factors militating strongly against the grant the injunction now sought, by reference to the the well-established principle that the Court should not act in vain. More generally, for all of the reasons set out in the preceding paragraphs, I am satisfied that the balance of convenience is against the grant of an injunction.

Conclusion
95. I refuse the application for an interlocutory injunction and direct that the interim injunction be discharged.