THE HIGH COURT

JUDICIAL REVIEW

[2023] IEHC 86

[Record No.: 2020/3419P]

BETWEEN:

AISLING FEELY AND MICHAEL MOLONEY

PLAINTIFFS

AND

BANK OF IRELAND GROUP PLC, EXPERT SECURITY LIMITED AND DAVID O'TOOLE

DEFENDANTS

JUDGMENT of Ms. Justice Siobhán Phelan, delivered on the 23rd day of February 2023.

INTRODUCTION

1. In these proceedings the Plaintiffs claim against the Defendants for damages for personal injuries, loss, negligence, breach of duty, breach of privacy and breach of confidence arises from the alleged improper and/or unlawful disclosure of the First Plaintiff's bank details. This matter comes before me on the motion of the First Defendant ("the Bank") for an order granting leave to make a tender pursuant to Order 22 rules 1((7) and 14(2) respectively of the Rules of the Superior Courts 1986, in circumstances where leave of the Court is required if a tender offer is to be permitted at this stage of the proceedings.

BACKGROUND

2. The general background to the issues arising in the within proceedings with the Bank, as apparent from the pleadings, includes a very troubled familial situation, the detail of which it is unnecessary to recite for the purposes of the within application. The Third Defendant is

identified in the Statement of Claim as the First Plaintiff's father. The First Plaintiff's father is also further identified as the managing director of the Second Defendant, a company which it is claimed was, for a time, the First Plaintiff's employer. It is pleaded that the Second Defendant provides investigation and security services. The First Plaintiff claims that the Second Defendant was furnished by her with her bank details for payroll purposes only.

3. Consequent upon the difficult circumstances identified in the Statement of Claim, the First Plaintiff claims that she was led to sever all contact with both of her parents, including the Third Defendant.

4. The central issue in these proceedings as between the Plaintiffs and the Bank relates to the circumstances in which the Second and Third Defendants came into possession of confidential banking documentation emanating from the Bank relating to the First Plaintiff. The confidential banking documentation in question disclosed private details of the First Plaintiff's bank transactions. The case made is that the private details disclosed enabled the Plaintiffs to be tracked, stalked and harassed by the First Plaintiff's parents, despite deliberately keeping their movements and location secret from them.

5. Accordingly, in consequence of the sharing of confidential documentation, which information it is accepted by the Bank could only have been generated from the Bank's internal system, the Plaintiffs' case is that the Third Defendant was facilitated in tracking down the Plaintiffs to Spain and later England and engaging in a campaign of harassment which it is pleaded gave rise to safety concerns, caused very significant distress and necessitated the involvement of police. For reasons associated with her personal history, the First Plaintiff is described in the Statement of Claim as a "*bad candidate*" for the injuries claimed to have been incurred as a result of the wrongdoing of the Defendants, including the Bank.

6. The Bank claims to be a stranger to much of what is pleaded but it is accepted that the Plaintiffs raised issues with the Bank and the Data Protection Commissioner in relation to the treatment of the First Plaintiff's personal data. While the Bank accepts that the documents identified by the Plaintiffs are internal bank records, no admission is made as to how these documents came to be in the possession of the Second and/or Third Defendants as alleged. It is not, however, denied that the documents ought not to have been accessible to any person other than the Bank and the First Plaintiff. The Bank admits that it has certain duties to the

First Plaintiff as account holder (but not the Second Plaintiff), while denying the extent of those duties or that there has been a breach of duty in this case. The Plaintiffs are put on strict proof of their injuries and the responsibility of the Bank for any part of same.

7. Having seemingly been initially adamant that information had not been disclosed to anyone, following the involvement of the Data Protection Commissioner the Bank moved to acknowledge that it had "*fallen short of the standards that you should have been able to rely upon*", recognised that "*anguish and pain*" had been caused and sought to develop "*a process for an amicable solution between the bank and yourself*". Despite correspondence in this vein and the expressed willingness of the Plaintiffs to participate in a process designed to secure an amicable solution, it seems that no process was in fact proposed until after the involvement of solicitors for the Plaintiffs who formally called on the Bank to make proposals concerning a process for amicable resolution, failing which proceedings would ensue.

8. The Plaintiffs' solicitor's correspondence and the threat of proceedings (with summons issuing in May, 2020) appears to have been met by a proposal of mediation. The further correspondence generated in respect of this proposal is understood to be "*without prejudice*" and has not been exhibited. Suffice to say that despite agreement to stay the complaint then pending before the Data Protection Commissioner to facilitate amicable resolution, agreement to the identity of a mediator and dates for the proposed mediation and engagement in a mediation process by the Plaintiffs sharing documentation at an earlier stage than would otherwise occur in the litigation context, the mooted mediation did not proceed.

9. Following the breakdown in attempts at mediation, not surprisingly the litigation process then took its course.

CHRONOLOGY OF PROCEEDINGS

10. While a Plenary Summons issued in May, 2020, a Statement of Claim was not delivered until August, 2020, after the mediation dates mooted for July, 2020 were aborted. It should be noted that the Statement of Claim seeks aggravated and/or exemplary and/or punitive damages, the award of which will depend on the attitude a court ultimately takes to the nature of the respective wrongdoing, if any, of each of the Defendants and the extent of the court's disapproval of each Defendant's conduct in the circumstances. Thereafter, a Notice for

Particulars was raised (September, 2020) and replied to (November, 2020), a Defence was delivered (February, 2021), a Notice of Particulars of Defence was raised (February, 2021), Replies to Particulars were delivered (March, 2021), a Reply to the Bank's Defence was delivered (June, 2021) accompanied by a request for voluntary discovery and some six months later the Bank reciprocated with its own request for voluntary discovery (December, 2021). There followed extensive engagement in relation to voluntary discovery on the part of both parties. However, before discovery was finally agreed and made, the Bank filed a motion seeking for leave to make a tender offer. By letter dated the 3rd of May, 2022 in response to the issue of the motion, the Plaintiffs' solicitors wrote as follows:

> *"It is unusual in many respect, but it seems that the Bank's insurers intend to delay the completion of the Discovery process currently being addressed between our two firms. If we are incorrect in this assumption, please advise but on the face of it this is the only possible purpose of the motion.*
> *Given the range of reliefs sought in these proceedings, it is difficult to understand how the insurers consider that a proposed Offer of Tender by them could have the effect of ending the Proceedings, but in any event, they have their entitlement to make said Offer of Tender after the service of the Notice of Trial.*
> *The correspondence between us to date demonstrates that both sides regards the receipt of Discovery as very important and any attempt by the insurers to short circuit this process is completely inappropriate."*

11. In response, the First Defendant's solicitors wrote by letter dated the 29th of June, 2022 stating:

> *"we confirm that your assumption that the Bank's insurer intends to delay completion of the discovery process is incorrect.*
> *As you are aware, the parties are currently actively engaged in the discovery process through correspondence between our respective firms and we trust that your client will continue to engage with a view to agreeing the scope of the discovery to be made by both parties."*

12. This notwithstanding, at the date of hearing of the application for leave to make a tender offer in February, 2023, discovery had not been finally agreed or made by either side. In his Affidavit grounding the application for leave to tender, the Bank's solicitor avers:

> *"I say that the Insurer – as indemnifier of the Bank – wishes to make an offer of tender of payment to the Plaintiffs, without any admission of liability and on such terms as this Honourable Court deems fit, in the interests of reaching a reasonable resolution of the proceedings as between the Bank and the Plaintiffs prior to incurring further legal costs, including the costs associated with the making of discovery by the parties, either on a voluntary basis or on terms order by this Honourable Court."*

13. The open intention of the Bank in making this application at this time therefore is to have made a tender offer before discovery costs are incurred.

ISSUES

14. Order 22 rule 1(7) provides:

> *"(7) A Defendant may once without leave and upon notice to the Plaintiff pay into Court a sum of money in satisfaction of any action to which Section 1(1) of the Courts Act 1988 applies, either at the time of the delivery of a Defence or within a period of four months from the date of the Notice of Trial. A Defendant who has not made such payment within the time permitted or who wishes to increase such sum as has been lodged may only do so by leave of the Court and upon such terms and conditions as to the Court seem fit."*

15. Order 22 rule 14(2) provides:

> *"(2) Where a qualified party is entitled to make or increase a lodgment on his own behalf or on behalf of any other party under the foregoing rules or by order of the Court then such party may, in lieu of lodging any money in Court, make an offer of tender of payment to the other party or parties to the cause or proceedings."*

16. A lodgement or tender may also be made without leave in accordance with Order 22 rule 1(9) (within 21 days of the Plaintiff serving replies to particulars or additional particulars or a medical report after expiry of time permitted for lodgement) or Order 22 rule 1(10) (within 21 days of 18-month lapse of time from service of Notice of Trial), neither of which apply in the current circumstances.

17. The parties agree that if the Bank and/or its indemnifier wishes to make a tender in these proceedings at this juncture, then by virtue of Order 22 rules 1(7) and 14(2) of the Rules of the Superior Courts, leave of the Court is required. Absent such leave, having failed to make a tender when delivering its Defence, the next opportunity for the Bank to make a tender will be the four-month window following the date of the Notice of Trial.

18. Accordingly, the issues I must determine are:

a. Whether leave should be given; and, if so,
b. Upon what, if any, terms and/or conditions should such leave be made contingent.

LEGAL PRINCIPLES

19. There is a large measure of agreement between the parties as to the applicable legal principles. I have been referred to *Ely v Dargan* [1967] 2 I.R. 89; *Brennan v Iarnród Éireann* [1992] 2 IR 167; *Meehan v Keane* (unreported Supreme Court (Appeal Number 33 1992); *Kearney v Barrett* [2004] 1 I.R. 1; *White Young Green Environmental (Ireland) Ltd v Gethings* [2015] IEHC 498; *Emerald Isle Insurance and Investments Ltd. v. Dorgan* [2018] IEHC 214; *O'Mahony v. Hermann & Anor.*[2022] IEHC 9 and *Carpenter v Stoneavon Holdings Ltd* [2016] 1 IR 367. Extracts from *Delaney and McGrath on Civil Procedures* (4th ed., 2018) at paras. 18-16 and 18-19 were opened to me during argument.

20. It is clear from all of the authorities that there is a strong public policy argument in favour of encouraging and facilitating parties to settle proceedings rather than litigating them to conclusion. This public policy is furthered both by promoting the use of alternative dispute resolution such as mediation and through the lodgement or tender mechanism provided for under the Rules of Court which incentivise early resolution. As Peart J commented in *Kearney*

v Barrett, a case in which the Plaintiff sought to strike out a notice of tender offer in circumstances which included the fact that it post-dated unsuccessful settlement negotiations in which certain concessions were said to have been made, in refusing that application (at para. 26):

> *"it is desirable that all efforts to resolve disputes without incurring the high cost of a court hearing should be explored before the trial."*

21. It is not disputed that the authorities indicate that *"... the generally maintained view of the courts'* (*Carpenter v. Stoneavon Holdings Ltd.*) is *"that the public interest is served by allowing a defendant, even at the eleventh hour, to proffer to the plaintiff under the lodgement machinery if the Courts a sum that the defendant considers adequately meets the plaintiff's claim" (Ely v. Dargan).* It is further accepted that *"discretion conferred by subrule 7 is unqualified and granted in the wildest possible terms" (O'Malley v. Hermann)*. Accordingly, *"in general terms, the Court will accede to applications to lodge money in Court or to make an offer of tender of payment after the time ordinarily permitted by the rules, unless by doing so a prejudice is caused to the plaintiff... or unless it is unfair to grant the application" (White Young Green Environmental (Ireland) Ltd. v. Gethings).*

22. The guiding principle identified by Gilligan J. in *Carpenter v. Stevenson Holdings Ltd.* is that the grant or refusal of an application to make a late lodgement or tender is (at para. 20):

> "*subject always to the maintenance of a fair and just procedure which does not allow for one party to gain an unfair litigation advantage by its own action or inaction.*"

23. More recently again, in *O'Mahony v. Hermann,* Coffey J. considered the circumstances in which a Court might refuse to grant leave in an application pursuant of Order 22 rule 1(7) as follows:

> *"...Special circumstances warranting a refusal of leave might well arise where there is evidence that the defendant has mala fide engaged in spurious settlement talks solely for the purposes of making a tight lodgement or where, for example, the application is made during the trial but after the failure of a mediation that has been urged on the parties by the Court itself as was the context for a refusal of leave by Binchy J in the*

case of White Young Green Environmental (Ireland) Limited v Getthings (unreported judgment of Binchy J delivered on 20th July, 2015). Absent evidence of such special circumstances, however, an application to make a late lodgement, even where it is made against a background of unsuccessful endeavours at settlement, ought to be granted but only on such terms and conditions that ensure that the granting of leave does not confer undue litigation advantage on the defendant…..Absent evidence of mala fides, manifest unfairness or some other disentitling circumstance, I am of the view that the discretion of this Court ought to be exercised in favour of the granting of leave but only upon such terms and conditions as ensure that undue litigation advantage does not thereby accrue to the defendants having regard to the timing of this application."

24. Accordingly, against a background of unsuccessful endeavours to settle through mediation or otherwise, further special circumstances are required to warrant a refusal of leave. While Coffey J. gives examples of such special circumstances in his judgment, he does not profess to treat exhaustively of such circumstances. Nonetheless, it is apparent that the threshold for special circumstances which might justify outright refusal of an application for leave to tender is high.

25. Where no special circumstances are identified such as would warrant the refusal of leave but the Court apprehends a risk of unfairness, the Court has a discretion to make the grant of leave conditional on terms directed to safeguarding against the apprehended risk of unfairness. In *Carpenter v. Stevenson Holdings Ltd.*, Gilligan J. expanded on the nature of the discretion in the following terms:

" The risk of unfairness can be overcome by the exercise by this Court of its inherent discretion in providing for, as a condition for the granting of the relief as sought, an order to the effect that if the offer by way of tender by the indemnifiers of Deloitte & Touche is accepted Stoneavon is to be entitled to its costs to be taxed in default of agreement to include all costs incurred in going to the hearing as scheduled for the 1st day of June, 2016, such as but not limited to the solicitor's professional fee, the expenses of witnesses, counsels' brief fees and any other costs and expenses which necessarily will arise having been incurred for the trial of the action."

26. Typically, when the Court grants conditional leave, the conditions imposed relate to costs which might not necessarily be recoverable by the acceptance of the lodgement or tender at the time the order is made (see *Ely v. Dargan* and *Carpenter v. Stoneavon Holdings Limited and Ors.*). However, the power of the Court to impose conditions is not limited to costs. Notwithstanding the wide nature of the Court's discretion, no case was identified by the parties in which the grant of leave was conditional on costs incurred outside the litigation such as would be the case with the mediation costs in this case.

DISCUSSION AND DECISION

27. The purpose of the lodgement or tender procedure is to facilitate an early settlement of an action with the associated advantage of promoting access to justice through limiting litigation costs and preserving court time for cases where a court is required. The authorities recognise the tension between encouraging alternative dispute resolution but also safeguarding the fairness of the litigation process.

28. While great weight was placed in argument before me on the fact that there was an unfairness to the Plaintiffs in permitting a tender to be made now in circumstances where an attempt at mediation had not progressed but resulted in the early disclosure by the Plaintiffs of information to the Bank on foot of their engagement in that process, the caselaw is abundantly clear that the fact that an unsuccessful attempt at resolution precedes the lodgement or tender offer, or application for leave to make a lodgement or tender offer, is not in and of itself a basis upon which a court will refuse leave.

29. In *Kearney v. Barrett*, in rejecting an application to set aside a tender offer, made in circumstances where time limits fixed under the Rules had been adhered to, Peart J. was not satisfied that it was unfair to permit a tender offer to stand if made post unsuccessful settlement negotiations. He refused an application to strike out a tender offer stating that the objection to permitting a lodgement post unsuccessful settlement talks was (at para. 21):

> *"predicated on the idea that if the defendants are kept unaware of the weaknesses of the plaintiffs' case it may be possible to obtain for the plaintiff an amount of damages*

which exceeds the true value of the case, were the plaintiffs' case, warts and all, to be disclosed to the other side."

30. Peart J. went on to add that the days are over when parties could (at para. 22):

"*play a game of poker right up to the steps of the courtroom in the hope that the other party would blink first.*"

31. It was noted by Coffey J. in *O'Malley v. Hermann and Anor.,* that there is no rule contained in the Rules of the Superior Court or elsewhere which states that leave to make a late lodgement may not be granted merely because the claim has been the subject of settlement negotiations or a mediation which have failed to resolve the proceedings. There was no impediment to the Bank making a tender without leave of the Court with its Defence even though this followed from an aborted mediation process. If the Rules permit the making of a tender without leave of the Court with the delivery of a Defence following an aborted mediation or settlement process, as they clearly do, it is difficult to see how the same process would, on its own and without more, justify a refusal of leave if made at a later stage in the proceedings. Clearly something further than the mere occurrence of settlement talks or a mediation in which the Plaintiffs have disclosed their hand is required to warrant the refusal of leave to make a tender offer.

32. In *O'Malley v. Hermann & Anor.,* Coffey J. identified non-exhaustively the types of special circumstance which might warrant a refusal of leave. As noted above, these included a case in which there was evidence that the defendant had *mala fide* engaged in spurious settlement talks solely for the purposes of making a tight lodgement. Another special circumstance identified by Coffey J. is if the application is made during the trial itself as occurred in *White Young Green Environmental (Ireland) Limited v. Getthings*.

33. In considering whether special circumstances are established in this case which might justify the refusal of the application for leave to make a tender offer, it is important to note that there is no agreement as to the circumstances in which the proposed mediation did not proceed. The Bank contends that the Plaintiffs' characterisation of the mediation being cancelled unilaterally by it without adequate explanation is neither accurate nor complete. The Bank

objects also to the disclosure to the Court of information regarding "*without prejudice*" engagement. No application was made to me to lift the "*without prejudice"* veil nor is there any suggestion that circumstances exist which might conceivably justify me in so doing.

34. The evidence before me does not go so far as to allege, still less substantiate, *mala fides* on the part of the Bank in relation to mediation and does not ground a finding of special circumstances. It cannot properly be concluded from timing alone and the limited information available to me (which is in any event described as inaccurate by the Bank) that the Bank proposed mediation improperly for the purpose of securing information they were not entitled to but with no real intention of participating meaningfully in the process.

35. In the absence of evidence of *mala fide* conduct or evidence of some special element of what occurred in the context of the mooted mediation process, I do not see that an unfair litigation advantage flows from the fact that information was disclosed in a mediation process which was then abandoned. The disclosure of such information simply means that the Bank is armed at an earlier stage than it otherwise would have been with information that it was properly entitled to receive in any event in order to understand the Plaintiffs' claim. Accordingly, special circumstances have not been identified by reason only of engagement in a mediation process which did not proceed with the result that information relating to the Plaintiffs' claim was shared at an early stage.

36. As regards the timing of the application, the point is well made that there is nothing unusual in a defendant pursuing a tender application in order to avoid incurring further costs and this is an entirely legitimate course for the Bank to take at any time. I also accept as clearly correct submissions on behalf of the Bank to the effect that consideration of unfairness or undue litigation advantage needs to be informed by the fact that the Rules of the Superior Courts provide for the making of a tender without any leave of court at both an earlier and a later stage of the proceedings. It is suggested that this being the case, there is no conceivable litigation advantage deriving from leave to do so now at a time which precedes an application for a hearing date given that it would be open to the Bank to do so at a later time without leave. While an issue arises in relation to the timing of the application in this case, the application is made well in advance of any hearing date. This is not a case like *White Young Green Environmental (Ireland) Limited v. Getthings* where the application was made after the hearing had commenced.

37. Notwithstanding what has been urged on behalf of the Bank, however, I consider that there is a risk of unfairness inhering in giving leave to make a tender offer now in view of the particular timing of the application. The risk of unfairness which I see flowing from the grant of leave relates to the fact that the application for leave was only brought when the discovery process had been engaged and was at an advanced stage. Resulting from the timing of this application, the Plaintiffs have identified the documentation they seek by way of discovery and by so doing have revealed their hand. For their part the Bank have had an opportunity to establish whether there are matters in the documentation identified by the Plaintiffs as discoverable which would assist the Plaintiffs in advancing their claims, most particularly their claims for aggravated, punitive or exemplary damages, or be damaging to the Bank's defence. Where otherwise discoverable information has been identified on behalf of the Plaintiffs, the effect of giving leave now is that they are denied access to it before making a decision on the tender offer, but the information identified by the Plaintiffs as relevant and necessary is available to the tendering side.

38. It seems to me that the tendering side enjoy a potentially unfair litigation advantage by being alerted or "*tipped off*" by the terms of the discovery request and the reasons identified for same. This imbalance as between the parties which results from the timing of the application for leave is not present at other times in the proceedings. Permitting a tender at this time results in a situation whereby the Plaintiffs are required to make a decision as to the adequacy of a tender offer while blind to the contents of documentation which would become available were discovery complete. The decision they are required to take upon the making of a tender offer is one which gives rise to an additional litigation risk whereby they may be penalised in costs if they do not ultimately recover more than the amount tendered. The risk of injustice resulting from unfair pressure arising from a fear of cost exposure from the date of the tender offer where the amount of the tender offered is not "*beaten*" is obvious to me.

39. To my mind the potential unfairness which this situation produces is compounded by the fact that the legal advice available to the Plaintiffs were the tender permitted before discovery is complete, would be provided in the absence of otherwise relevant and necessary information and would, perforce, be heavily caveated and sub-optimal. The Bank on the other hand has the advantage of being in a position to assess the impact on the case of the

documentation which it would likely be required to discover were the discovery process to conclude in the Plaintiffs' favour.

40. As I see it, the fact that relevant and necessary information is "*red circled*" or "*flagged*" by the terms of the Plaintiffs' request for discovery but is available to only one side results in an inequality of arms as between the parties and gives rise to a potential litigation advantage to the Defendants. I consider the fact that information may be available to one party but is withheld from the other party to carry a risk of unfairness because it creates an inequality in the process. While some litigation advantage may accompany the making of a tender offer at other times, it seems to me that such advantage as accrues does not arise in the same way or in a manner which puts the fairness of the process on the hazard where a tender is made, without leave of the Court, in accordance with the time-frames permitted under the Rules absent leave of the Court. Were the tender made with the Defence, the Plaintiffs would not have yet identified the documentation which they would pursue by way of discovery whereas were it made within four months from the date of the Notice of Trial, the discovery process would in the normal course have already concluded. In either situation permitted under the Rules without the leave of the Court, the parties are on a more equal footing than would be the case where a tender offer is made before the discovery process has concluded.

41. Embarking on a discovery process will not have the same significance in every case and much will depend on the nature of the case. The fact that a claim for exemplary and/or aggravated and/or punitive damages is pursued in these proceedings serves to underline the particular significance of the discovery in this case as it is potentially relevant to questions of quantum. Properly assessing quantum in this case is not a straightforward process for which guidance is readily available under the Book of Quantum or Personal Injuries Guidelines. The plea for relief by way of aggravated and/or exemplary and/or punitive damages makes clear that an additional factor in this case is just how egregious the wrongdoing complained of is. I do not propose to hypothesize on the circumstances in which the First Plaintiff's confidential information came to be in the possession of the Second and/or Third Defendants, but it is clear that a spectrum of legal culpability for same potentially exists which in turn may bear on whether this is a case in which it would be considered appropriate that a court mark its disapprobation by an award of aggravated and/or exemplary and/or punitive damages.

42. Given the nature of the policy considerations which inhere in promoting settlement of disputes, however, it seems to me that to qualify as a "*special circumstance*" which would justify the refusal outright of leave to make a tender offer, the circumstance identified would normally be in the nature of a circumstance which causes an injustice or unfairness which cannot be cured through the exercise of the Court's jurisdiction to make the grant of leave conditional. Having considered the respective positions of the parties, it is my view that the evidence presented in the application before me does not reach the threshold of special circumstances such as would warrant the refusal of the application because I can mitigate against the apprehended unfairness by conditioning the grant of leave. Accordingly, I propose to grant leave but to make it contingent on conditions crafted for the purpose of ensuring that the Bank does not thereby secure undue litigation advantage and ensuring fairness of process as between the parties.

43. In their submissions, the Plaintiffs have sought that if leave is granted I make it a condition of permitting a tender that it would not take effect until after the conclusion of the discovery process and that the Plaintiffs be entitled to costs to include costs up to and including the within application and specifically the costs incurred in preparation for the mediation, such as the solicitor's professional fee, senior and junior counsels' brief fees and any other costs and expenses which necessarily arose.

44. The Bank objects to the terms of the proposed conditions on the basis that the discovery process has not concluded and hence discovery costs have not yet been incurred. They seek to avoid incurring further litigation costs, including discovery costs, by making the tender offer now. As for the costs of mediation, they maintain that there is no authority to support the exercise of a jurisdiction to conditional leave to make a tender on the payment of costs incurred outside the litigation process, such as the costs of an abandoned mediation process.

45. A proper balance between competing policy considerations requires me to ensure that the Plaintiffs' right of access to the Court is not jeopardised by my order granting leave to make a tender offer. I am satisfied that the potential unfairness identified as resulting from the grant of leave at this time is addressed through an order which directs that any tender made on foot of the leave of the court will only take effect after the conclusion of the discovery process. While regrettably this means that additional discovery costs will be incurred, I can see no other

way to ensure that the Bank is not given an unfair advantage or the Plaintiffs are not unfairly disadvantaged by the making of tender offer at this time.

46. For the avoidance of all doubt I will also direct that the costs of any expert reports obtained for the purpose of the Plaintiffs' claim as advanced in the within proceedings and exchanged in the aborted mediation process constitute costs in the cause in case there is any ambiguity as to whether they would be recoverable at the stage of the litigation at which the tender offer is made. Otherwise, I do not propose to make the grant of leave conditional on the payment of the costs of mediation not only because no authority has been produced which might support the making of such an order but primarily because I do not consider that any unfairness or undue litigation advantage has resulted from the engagement of the Plaintiffs in that process such as would justify me making orders for costs incurred outside the litigation. As the discretion under the Rules is wide and the manner in which it is exercised directed to safeguarding against unfairness in the litigation, however, there may well be cases where the exigencies of doing justice on the facts and circumstances may justify the making of an order in respect of mediation costs. This is not such a case.

CONCLUSION

47. For the reasons set out above and in line with the general approach of the courts as evident through the case-law, I will grant leave to make a tender offer to the Bank but to preserve litigation fairness and safeguard the Plaintiffs' constitutionally protected rights of access to the Courts, I will direct that any tender offer made will not take effect until after the conclusion of the discovery process as against the Bank, or if the Bank elects, the conclusion of the discovery process as against both parties. For the avoidance of any doubt, I direct that the costs of expert reports obtained for the purpose of the Plaintiffs' claim as advanced in these proceedings and exchanged during the mediation process be costs in the cause. I will hear the parties further in relation to the form of the order and any consequential matter.