

**THE HIGH COURT
COMMERCIAL**

**2007 No. 5367 P
[2007 No. 101 COM]**

BETWEEN

DUNNES STORES (ILAC CENTRE) LIMITED

PLAINTIFF

**AND
IRISH LIFE ASSURANCE PLC AND JOSEPH O'REILLY**

DEFENDANTS

Judgment of Mr. Justice Clarke delivered on 23rd April, 2008

1. Introduction

1.1 The Ilac Centre was one of the first of its kind in Ireland. The centre was developed over 25 years ago as one of the first city centre shopping facilities in the country. It would be fair to say that it is common case between the parties that the centre had, by the early years of this century, become somewhat "tired". The ownership of the landlords' interest in the shopping centre passed through many hands over the years but is now in the possession of the defendants. The Ilac Centre is, therefore, owned as to 50% each by the first named defendant ("Irish Life") and the second named defendant ("Mr. O'Reilly") (collectively "the landlords"). Though only relevant in a marginal way, I should also note that the interest of Mr. O'Reilly was, until approximately 2005 owned by British Land Group ("British Land"), the major land holding company, with interests in both the UK and Ireland. The interest of British Land was disposed of, in 2005, to Mr. O'Reilly.

1.2 The plaintiffs ("Dunnes") are, of course, an extremely well known and established retailing company. Dunnes operate many stores throughout the country and have done so with a significant degree of success over a number of decades. Dunnes has, from time to time, had various interests in properties in and near the Ilac Centre. The particular focus of these proceedings is a unit which is known as Dunnes 1, which has been in the possession of Dunnes since the early stages of the development of the Ilac Centre. The way in which Dunnes holds its interest in Dunnes 1 is by means of a long lease at a nominal rent which was purchased for a significant capital sum. It is obvious that the reason why a lease of that type, rather than an outright freehold purchase, was put in place at the relevant time was so that both Dunnes, the developers of the Ilac Centre and their respective successors in title would be bound by the various covenants contained within the lease designed for the benefit of the centre as a whole. Thus Dunnes, while in commercial terms "purchasing" the property, are nonetheless subject to the terms of the lease which are, doubtless, in terms not dissimilar to those on which the other tenants for the time being in the Ilac Centre hold their properties, save that such tenants are likely to hold their properties on more normal leasehold terms as to rent.

1.3 The dispute which has arisen between the parties concerns a desire on the part of Dunnes to change the use of Dunnes 1 (or, at least, a portion of it), to what is described as a "high quality food hall" use. It is common case that such a use is inconsistent with the existing user clause in the lease. It is also common case that Dunnes are entitled, under the terms of the lease, to apply for a change of use and that the landlords for the time being are not entitled to unreasonably withhold any such consent. This case is, therefore, concerned with the issue as to whether the consent of the landlords has been unreasonably withheld in relation to Dunnes request for that change of use.

1.4 There are some facts of significant controversy between the parties to which it will be necessary to turn in due course. However, many of the underlying and background facts are not in dispute and it is to those that I first turn.

2. The Uncontested Facts

2.1 Irish Life developed the Ilac Centre in the late 1970's in conjunction with Dublin Corporation with the shopping centre opening in November, 1981. In February, 1997 Irish Life bought out Dublin Corporation's interest in much of the shopping centre (i.e. the entirety of the shopping centre devoted to retail). In July, 2001 Irish Life sold a 50% share in the centre to British Land, who in turn sold their interest to Mr. O'Reilly in August, 2005.

2.2 It would appear that subsequent to Irish Life buying out the interest of Dublin Corporation in 1997, an application was made for planning permission in 1998 for significant re-development works within the centre. A revised planning permission was obtained in July, 2003. A number of different projects were brought to completion over the next number of years including a significant re-development which was launched in February, 2005, and completed in October, 2006. It is also important to note that a particularly significant additional development involved Dunnes Stores in an independent arrangement with the landlords. A so called "framework agreement" was entered into in November, 2003 between Dunnes and Irish Life/British Land which provided for an exchange by Dunnes of a unit known as Department Store 2 ("Dunnes 2") for certain units on the central plaza of the Ilac Centre. Those units backed onto a site on which Dunnes intended to build a re-developed Henry Street store, which has become known as Dunnes 3. The units within the Ilac Centre which Dunnes acquired back onto this store, so giving the store access onto the central Ilac Centre mall, as well as directly out onto Henry Street. Therefore, the rear portion of Dunnes 3 is within the Ilac Centre properly so called, whereas the front portion is, strictly speaking, an entirely separate Dunnes development fronting onto Henry Street.

2.3 It is common case that Dunnes wrote to Irish Life on 28th November, 2006, seeking consent to the change of use with which I am concerned. The possibility of such an application had been broached informally some weeks earlier. It will be necessary to turn to the internal consideration given to that matter by and between Irish Life and Mr. O'Reilly and his officials in due course, as this is the subject of some controversy. However, in that context it should be noted that it is clear that Mr. O'Reilly and his officials acted as asset managers of the Ilac Centre and, on any view, had a more significant role in practice in any relevant decision making than Irish Life.

2.4 It should be noted in passing that the user clause relevant to Dunnes 3 was different to that which had been in place in respect of Dunnes 2 for which, of course, Dunnes 3, was, in a sense, a partial "swop". Unlike Dunnes 2, the user clause for Dunnes 3 permitted food use. It should, however, be noted that there was no obligation on Dunnes to provide food use in Dunnes 3. Rather such use was permitted. It was stated by witnesses on behalf of both Irish Life and Mr. O'Reilly that it had been their assumption or understanding that Dunnes intended opening a food facility in the Dunnes 3 store. In that context it was said that the landlords were surprised when the November letter was received which intimated a desire to change the use of part of Dunnes 1 to a high quality food hall. It became clear at that time that Dunnes no longer intended to operate a food use in Dunnes 3.

2.5 It should also be noted by way of background that permission had been given for Dunnes to operate a food business out of

Dunnes 2 on a temporary basis during the period when the revamped Dunnes 3 was under construction. The framework agreement provided, of course, that Dunnes 2 was to be handed back to the landlords as soon as Dunnes 3 was operational.

2.6 In any event, having engaged in various meetings and consultations including some consideration of additional information supplied by Dunnes (on request by the landlords), a letter issued on behalf of the landlords on 2nd March, 2007 which informed Dunnes that the landlords refused consent for the change of use sought. It is in respect of that decision that these proceedings are maintained.

2.7 It should, in addition, however, be noted that certain further information was provided subsequent to the refusal in an attempt by Dunnes to persuade the landlords to change their position. That attempt was unsuccessful.

2.8 On 14th March, solicitors acting on behalf of Dunnes wrote to Frank Martin, head of Asset Management within J.F.M. Property Services Limited (which I understand to be a vehicle of Mr. O'Reilly's and which was involved in asset management on behalf of the landlords in respect of the Ilac Centre) referring to the refusal. The original letter of refusal of 2nd March, 2007 had stated that the reason was "on the grounds of good estate management". The letter of 14th March indicated that that reason was not understood and sought an explanation as to what was meant by "good estate management" in the circumstances of the case. This letter does not appear to have been replied to. Proceedings having issued in July of 2007, the landlords maintained the same position in their defence, which was filed on 4th September, 2007, in that it was asserted at para. 3 of the defence that consent had been refused "for good and sufficient reasons related to the management and control of the Ilac Shopping Centre". In addition at para. 5, and having asserted that Dunnes application for consent to change of use was considered, it was stated that such consent was refused "on the grounds that it was not consistent with good estate management".

2.9 The only more detailed account of what were asserted to be the reasons for the landlords refusal is to be found in replies to a notice seeking better particulars of the defence. In that context, and in a notice for particulars dated 18th September, 2007, Dunnes asked the landlords to "set forth the exact basis upon which it is claimed that the use proposed by the plaintiff would not be consistent with the alleged plan for the refurbishment of the Ilac Centre (including the reconstruction of the Mary Street frontage)". The reply, which is dated 4th October, 2007, stated that:-

"The exact basis of the defendants plea is the defendants opinion that the plaintiff's proposed use would not be consistent with the defendants' vision and image for that part of the Ilac Shopping Centre, namely as a primary retail fashion area".

2.10 Therefore, the asserted basis on the part of the landlords for refusal was that use as a "high quality food hall" would, in substance, be inconsistent with what was said to be the landlords "vision and image" for the relevant part of the Ilac Shopping Centre as "a primary retail fashion area". It should be noted that the first time when any such description was given as the basis for refusal was in the reply to the notice for particulars to which I have just referred. Up to that point the only reason given was the extremely general "good estate management" grounds. In that context Dunnes invite me, in conjunction with other facts, to infer that the reason given was not the true reason for the refusal because, amongst other things, of the fact that that reason was not tendered at a much earlier stage. In substance it is said that, if the vision and image of a retail fashion centre was, in truth, the reason for refusal, then some reference to that basis of refusal would have been forthcoming a long time prior to September 2007, which was, of course, long after the proceedings had commenced. I will turn to that issue when considering the controversial facts in this case.

2.11 A further issue arose at the hearing on the basis of which Dunnes urge that I should infer that the reason given was not the true reason. It is important that I should touch on that issue, which concerned discovery, and indicate the role which that issue should properly play in my considerations. I now turn to that question.

3. The Discovery Issue

3.1 There had been a significant exchange of correspondence in advance of the commencement of the hearing before me in which, it is fair to say, Dunnes made complaint that the discovery furnished on behalf of the landlords was inadequate. It was, of course, clear that Dunnes had sought, in the proceedings, to question the true motive for the refusal of consent. In the course of the hearing and in particular during the cross examination of witnesses called on behalf of the landlords, it became clear that there seemed to be a significant volume of additional documentation which was relevant to the issues which had arisen between the parties (i.e. the landlords "vision and image") and which had not been discovered. In those circumstances the case was adjourned, with the landlords being given a further opportunity to make proper discovery. A significant volume of additional documentation was revealed by that further discovery process.

3.2 There can be little doubt that at least some of the documentation concerned is of significance for the issues which I have to try. It does have to be recorded that it is very regrettable indeed that a major public company of the standing of Irish Life, and a significant businessman such as Mr. O'Reilly should have been guilty of a very significant failure to deal properly with their obligations to the court in respect of discovery.

3.3 It has often been said that discovery relies to a large degree on trust. This is true. Discovery orders are made by the court (or an agreement is reached by the parties which has a similar effect) on the basis of defining the obligations of the parties concerning disclosure of documents. The book then passes to those charged with swearing the affidavit of discovery, upon whom a trust is placed that they will conscientiously and diligently deal with the task in hand. It is, of course, the case that mistakes can and do happen. Such mistakes can range from the entirely innocent and understandable to those which might be characterised as blameworthy to a greater or lesser extent. At the other extreme are cases where there has been a deliberate failure to disclose material information. At a minimum it is manifestly clear, on all of the evidence, that those involved in making discovery on behalf of the landlords in this case did not take and act upon proper legal advice as to their obligations in relation to discovery. It is, of course, the case that individuals themselves may not fully understand either their overall obligations in relation to discovery, may not be able to properly address questions of relevance which may arise as to whether documents should properly be included, and most certainly may not be able to deal with legal issues, such as privilege, which may arise. However, the obligation on such parties, in those circumstances, is to take proper legal advice and to act upon it. It is again particularly regrettable that major organisations such as the landlords, who have ample resources available to them and had also access to the best of legal advice, should have failed to take the elementary step of ensuring that they knew what their obligations were and of taking advice in respect of any questions of difficulty that might arise.

3.4 I must, therefore, conclude that, at a minimum, there was a very serious failure on the part both of Irish Life and of Mr. O'Reilly to comply with their disclosure obligations to the court. Both were in significant breach of the trust that was placed on them to deal with discovery in a fair and proper manner. There is no doubt but that amongst the consequences of that failure was that these proceedings were significantly lengthened. However for the purposes of this judgment it is important that I emphasise what, if any,

consequences for the case itself (as opposed to issues relating to the costs of the proceedings) can properly flow from the failure to make proper discovery.

3.5 I should emphasise that a court has no business in seeking to punish a party who has failed to make proper discovery by interfering with what would otherwise be the proper and fair result of the proceedings. The proper way to deal with a culpable failure of discovery is to direct the consequences to the wrongdoing concerned. If it remains, nonetheless, possible that there be a fair trial, then the court should conduct that fair trial and come to a just conclusion on the evidence and the law. The consequences of any failure to make proper discovery should be in costs or other matters directly flowing from the failure concerned.

3.6 It is only if it is proper and appropriate to conclude or infer from the failure to make proper discovery in the first place that the failure concerned was designed for the purposes of not giving access to the other side to relevant information and where it would be appropriate to infer, in turn, from such a finding, a particular view on the issues to which that information refers, that it would be appropriate to allow a failure to make proper discovery to influence the court's decision on the merits of the case. I should point out that Dunnes invite me to draw such an inference in this case. It is said that I should conclude that there was an attempt to prevent certain information becoming available to Dunnes. It is said that an appropriate inference to draw from that fact (if it be so found) is that the landlords were attempting to disguise their true motivation. On that basis it is suggested that I should reach certain conclusions about the true reasons for refusal of consent to which it will be necessary to refer in due course.

3.7 I do, however, wish to emphasise that I fully accept the submission made by counsel on behalf of the landlords to the effect that it would not be proper for me to allow the discovery issues to influence the decision on the case unless I were satisfied (which he strongly urged I should not be) that it was appropriate to draw inferences of the type suggested on behalf of Dunnes. As counsel put it, his clients "had not helped themselves" by the way in which discovery had been dealt with. However, it was urged that I should conclude that the failure to deal properly with discovery was due to a failure to understand what was required in discovery (admittedly a culpable failure deriving from not having taken and acted upon proper legal advice) which should not give rise to any proper inference in relation to the underlying facts. This is an issue to which I will have to return in the context of the disputed facts. However having identified the discovery issues which arose, it is appropriate to now turn to the legal basis for the challenge mounted by Dunnes to the refusal of consent.

4. Dunnes Case

4.1 In the light of the hearing as it developed, Dunnes made three primary contentions at the end of the case for their submission that consent had been wrongfully withheld. These were as follows:-

A. It was said that, on the facts, I should conclude that the true reason for the withholding of consent was not that given by the landlords (i.e. the fashion retail "vision and image") but rather it was suggested that the refusal was as a means for exerting leverage on Dunnes to give up possession of some or all of Dunnes 1.

B. In the alternative it is said that the reason given was not *bona fide* the true reason. and,

C. even if the "fashion" reason was the true reason, it was said on behalf of Dunnes that such a reason was incompatible, in all the circumstances, with the text of the relevant clause of the lease.

4.2 I propose dealing with each of those questions although it has to be said that grounds A and B amount to sides of the same coin in that, in large measure, it is, in reality, suggested that the reason for giving a non bona fide basis for refusal (i.e. "B") was to disguise "A".

4.3 Those two issues centre on an assessment of the evidence concerning what was going on within and between the landlords during the period while Dunnes' request for consent for a change of use was under consideration. It will be necessary, therefore, in due course, to set out the important features of that evidence and reach conclusions.

4.4 However before doing so there are two legal issues which arise to which I should first turn. The first concerns point "C" which involves a largely legal argument concerning the proper construction of the relevant clause. I will turn shortly to that question.

4.5 Secondly, it will be necessary to set out, briefly, the legal principles by reference to which I should approach questions concerning the true reason for the landlords' refusal. Happily those legal principles were not in significant dispute between the parties, although the facts to which they are to be applied were, of course, hotly disputed.

4.6 I, therefore, turn firstly to the lease itself.

5. The Change of Use Clause

5.1 The relevant clause of the lease (i.e. clause 4.26.1) reads as follows:-

"Not without the prior consent in writing of the Landlord or its Agents thereunto lawfully authorised to use or to permit or suffer or allow the Demised Unit or any part of parts thereof to be used for any purpose other than as set forth in Part II of the First Schedule hereto and for no other purpose or purposes whatsoever and at all times to carry on the said authorised business as a business of high quality standards and tone so as to protect the standing appearance and prosperity of the Centre as a whole and of the other tenants of Units therein PROVIDED ALWAYS AND IT IS HEREBY AGREED AND DECLARED that upon any application by the Tenant or any under-tenant of the Tenant for liberty to alter or change the aforesaid permitted user of the Demised Unit that Landlord shall not unreasonably withhold its consent to such proposed change of user, but in considering the matter full account shall be taken of the fact that the Demised Unit forms part of the Centre in which it is necessary and desirable both for the well being and prosperity of the Centre as a whole and of the individual tenants of other Units therein that the nature of the business is carried on in the Centre as a whole should be of an equally high standard quality and tone and be as diverse as possible."

5.2 It will be necessary to return to certain other aspects of that clause in due course. However, it is the final phrase of the clause which is relevant to the argument with which I am now concerned. As will be seen, the clause does not (as some such clauses do) simply provide that the landlord is not to unreasonably withhold consent for a change of use. Rather the clause specifies that "full account shall be taken" of various matters which stem from the fact that the use to which any particular unit within the centre is to be put can have an affect on the centre as a whole and on the businesses and, therefore, the legitimate interests, of the tenants of other units. In that context, in particular, two matters are required to be taken into account. The first is that the business to be conducted "should be of an equally high standard, quality and tone" and the second, is that the businesses generally should be "as diverse as possible".

5.3 For the purposes of this argument I propose accepting that the reasons given on behalf of the landlords for the refusal of consent represent the true reasons. On that basis it would appear that the landlords were desirous of converting a very substantial segment of the shopping centre into an area designed for retail fashion units. Dunnes argue that such an intention (even it were, contrary to their submissions, the true intention) if applied to a consideration of an application for a change of use, is inconsistent with what is said to be the mandated requirement under clause 4.26.1 of the lease that, in the consideration of applications for change of use, regard has to be had to the necessity and desirability of the businesses being "as diverse as possible".

5.4 A number of preliminary observations seem to me to be appropriate. Firstly it seems clear on the evidence that those who are said by the landlords to have been charged with considering the application on behalf of the landlords, did not give any consideration to that particular aspect of the clause. It would seem that some consideration was given to the text of the clause (in particular by expert advisors) for the purposes of determining whether Dunnes needed a change of use consent having regard to the existing user clause. The balance of the consideration given by both those advisors and, insofar as it is possible to tell (an issue to which I will return) the principals, seems to have been directed towards the general question of whether the proposed change of use was desirable without any reference to the requirement that regard should be had to the necessity and desirability of businesses being as diverse as possible.

5.5 Secondly, and again accepting for the purposes of this argument the position as asserted on behalf of the landlords, it would seem that what was envisaged was that, insofar as possible, all units at the relevant end of the centre would be turned into retail fashion units or, at a minimum uses compatible with retail fashion. While there would, doubtless, be some diversity within that overall concept (such as clothing, footwear, accessories and the like) it seems clear on the evidence that the asserted position of the landlords was to minimise or, indeed, exclude from the relevant end of the centre, any units which did not come within the fashion retail definition or were at least compatible with it.

5.6 Against that background it is necessary to turn to the proper construction of the relevant clause. It was argued on behalf of the landlords that the clause simply enabled the landlords to have regard to the specified matters when considering an application for change for use. On that basis it was suggested that the relevant provision would permit the landlords, expressly, to refuse change of use on the basis that the proposed new use would diminish diversity. However, it was suggested that a tenant could not rely upon that aspect of the clause as a basis for suggesting that consent had been wrongfully refused.

5.7 The clear wording of the clause, however, states that "in considering the matter full account *shall* be taken" of the various matters which follow. It seems to me that the clear wording of the clause, therefore, obliges the landlord to have regard to the matters following in considering whether to consent to a change of use. There is nothing in the context of the agreement as a whole that would lead to that clear wording being given any other interpretation. Neither is that wording inconsistent with an appropriate approach to the construction of the lease as a whole, or in any way ambiguous such as would, again, warrant a departure from the literal meaning of the text.

5.8 In those circumstances, I am satisfied that the lease imposes an obligation on the landlords to have regard to diversity as part of the landlords' consideration of a change of use application. It seems to me that the landlords' refusal of Dunnes application for the change of use which is the subject of these proceedings is in breach of that obligation for two reasons.

5.9 Firstly, it is clear on the evidence that the landlords did not give any consideration to diversity as part of their deliberation. This is not a case where the landlords did have regard to diversity, but came to a view (which might or might not be capable of being questioned) as to the appropriateness of refusing consent having taken diversity into account. Rather this is a case where what I have found to be the mandated obligation on the landlords to at least have regard to diversity did not occur at all.

5.10 Secondly, the stated position of the landlords, which involved turning a very significant portion of the shopping centre into a largely single purpose retail fashion mall, seems to me to be entirely inconsistent with the obligation of diversity. I should emphasise that I am not, in this context, making any comment on whether there may or may not have been understandable commercial reasons why the landlord might have considered it appropriate to attempt to turn the relevant portion of the centre into a mall which catered exclusively (so far as possible) for retail fashion. The problem is that the landlords' freedom of action is circumscribed by its contractual obligations under the lease. The lease does not, in my view, permit the landlord to embark upon such a policy (i.e. to disregard diversity, in considering any application for a change of use which is governed by a clause equivalent to clause 4.26.1) without having secured the agreement of any tenants who may be bound by a clause similar to that in Dunnes' lease to a waiver of the obligation to have such regard to diversity. The precise freedom of action in terms of diversity which a landlord might have in acting reasonably in relation to applications for consent to change of use under a clause such as that contained in this lease at 4.26.1 could be a matter of legitimate debate. However, it seems to me that the clause cannot contemplate a legitimate refusal of consent on the grounds that the proposed new user was inconsistent with a move towards a position of little or no diversity.

5.11 Therefore, even if the landlord had given consideration to the diversity issue, I am not satisfied that the proffered reason for refusing consent (i.e. the fact that the proposed new user was inconsistent with a policy of the landlord in favour of a significant reduction in diversity in the centre), could have been sustained as being a reasonable basis for refusal.

5.12 For those reason alone, I am satisfied that Dunnes are entitled to a declaration that the refusal of consent was unreasonably withheld. However, lest I be wrong in those conclusions, it is necessary to turn to the other issues which centre on the question of the true basis for refusal which, as I have pointed out, is highly contested. However, before so doing I should touch briefly on the legal principles by reference to which I should address those questions.

6. Bona Fide Reasons – The Law

6.1 Dunnes place reliance on *Bromley Park Garden Estates Limited v. Moss* [1982] 1 W.L.R. 1019, and *Design Progression Limited v. Thurloe Properties Limited* [2005] 1 W.L.R. 1, for the proposition that a refusal of consent for an improper purpose, not contemplated by the lease, is not permissible. That contention is accepted at the level of principle on behalf of the landlords.

6.2 *Design Progression* was a case involving an application by a tenant to be permitted to assign a lease rather than to change use, but there is no reason to believe that the general observations made in that case would not be equally applicable to an application for a change of use. In that case, Peter Smith J. was satisfied, on the evidence that a landlord's refusal of consent to an assignment was based not on a *bona fide* reason but was designed for the purposes of getting back possession of the property concerned and, in effect, motivated by a desire to obtain the commercial benefit of the value of the lease for itself. It is important to note that Peter Smith J. acknowledged that a landlord is more than entitled to seek to obtain, by negotiation, a surrender of a lease so as to go into possession and deal with the property as it wishes. There is nothing, in itself, at all wrong with a landlord seeking to secure possession of the property.

6.3 The important point to make is that the terms of a lease bind both landlord and tenant contractually to a series of terms. Among the obligations on the part of the landlord, by covenant, will normally be an obligation not to unreasonably withhold consent to assignment (or, as in this case, to change of use). Such an obligation governs the landlord's freedom of action. He is obliged to act reasonably in respect of an application for a change of use or assignment. He is not entitled to use such an application to obtain leverage in a strategy to regain possession of the property, even though he would be perfectly entitled to pursue any legitimate negotiation strategy to seek to achieve the same end. The reason why he cannot do this is that he is already bound by covenant only to refuse consent where it is reasonable so to do. The reason for his refusal must be reasonable, independent of his strategy to regain the property.

6.4 In like manner, Dunne L.J., in *Bromley Park* noted that it would not be reasonable for a landlord to refuse his consent to an assignment where the purpose of the refusal was to seek to destroy the lease or cause it to be merged with another lease in the same building, even though such eventualities might amount to good estate management. Such reasons were not the sort of reasons contemplated by the lease and would amount to an ulterior motive.

6.5 It is clear, therefore, that what is spoken of in the authorities as an "ulterior motive" does not necessarily (or indeed frequently) refer to a motive which might be inappropriate in itself. There might well be very good and sensible commercial reasons for the landlord seeking to achieve the end concerned. However, the landlord is not free to act without regard to his obligations under the lease which are already in being. However sensible, from the landlords point of view, a particular position may be, it cannot amount to a proper reason for refusing a consent to change of use or assignment unless it is a reason contemplated by the lease. It also follows that the court must, as Peter Smith J. did in *Design Progression*, assess on the evidence what the true motivation of the landlord was.

6.6 I did not understand any of the above principles to be in controversy between the parties although, as I have pointed out, the facts which need to be assessed by reference to those principles are significantly controversial. Against the background of those principles it is, therefore, appropriate that I turn to the facts.

7. The Controversial Facts

7.1 In substance the contention made on the part of Dunnes is that the true reason behind the refusal of consent in this case was an inappropriate attempt on the part of the landlords to seek to obtain possession of Dunnes 1 (or at least a significant portion of it) for the purposes of facilitating what was seen to be a beneficial redevelopment of the Ilac Centre as a whole. I would emphasise that there is nothing, in itself, wrong with the landlords seeking to do this.

7.2 The evidence supports the view that the original unit size in the Ilac Centre, while suitable at the time of the construction of the centre, had become outdated. Modern retailing requires a greater number of larger units. With that in mind it seems clear that the landlords have pursued a policy of attempting to increase unit size by securing vacant possession of various units and adjusting the boundaries between vacant units or amalgamating vacant units so as to provide new units of greater size which were considered to be more suitable for the modern market. Significant elements of the redevelopment to which I have referred were designed with this in mind. Furthermore, it appears to be the intention to divide the existing Dunnes 2 (when possession of same is recovered from Dunnes) into a small number of large units. There is no doubt that, from time to time, some consideration was also given to the possibility of providing a small number of larger units within the boundaries of the existing Dunnes 1 unit should same come back into the landlords possession. I am, therefore, satisfied that at all material times the landlords had a general interest in securing possession of Dunnes 1, so that it could be used as part of the overall redevelopment of the Ilac Centre, and in particular, in the facilitation of more larger units.

7.3 Furthermore, there appears to have been some benefit in securing possession of Dunnes 1, in or around the time when the application for consent was made, because the re-organisation of other parts of the centre would have been facilitated by having a small number of large units within Dunnes 1 which could be offered to existing tenants in other portions of the centre as an inducement to those other tenants to move. In general terms I did not understand the landlords to dispute that it was perceived that there would be benefits from their point of view in obtaining possession of Dunnes 1. However, as I have pointed out, that is not really the issue. The landlords were more than entitled to pursue such a strategy provided it was pursued by legitimate means. The issue in controversy in this case is whether, as a matter of fact, the landlords wrongly refused consent to a legitimate application for a change of use, as part of a strategy designed to secure possession of the unit concerned. This is, in truth, a pure question of fact which I must determine on the balance of probabilities on the evidence.

7.4 However, there are some slightly unusual features to this case (not least the fact that the landlord is, in fact, two separate entities) which require that some consideration be given to the question of how one should, in those circumstances, approach the question as to determining the true motivation of the landlord. In truth the first question which must be considered is as to who really made the decision on behalf of the landlords in the first place. It is to that question that I now turn.

8. Who made the Decision?

8.1 Quite an amount of evidence, particularly evidence elicited under cross examination, was directed to the question of where the real decision making on the part of the landlords actually lay. On the basis of that evidence I am satisfied as to a number of facts.

8.2 Firstly the involvement of Irish Life in the decision making process was limited. While it was suggested that the formal decision to refuse consent was made by Fergus Dowd on behalf of Irish Life and Frank Martin on behalf of Mr. O'Reilly, the truth is that Mr. Dowd's involvement was extremely limited. No other person on the Irish Life side was involved at all. It would appear that Mr. Dowd had, not surprisingly, relatively regular meetings, concerning the joint affairs of Irish Life and Mr. O'Reilly, which were conducted in a relatively informal way, frequently over lunch. Mr. Dowd attended one such meeting for the purposes of discussing the response to the request by Dunnes for a change of use. It is clear that Mr. Dowd only had a limited opportunity to peruse the materials which had been supplied by Dunnes for the purposes of supporting their application. In substance I am, therefore, satisfied, that, in reality, the landlords' decision was taken on the O'Reilly side with Irish Life largely confining itself to accepting the advice given by Mr. Martin acting on behalf of Mr. O'Reilly. There is, of course, nothing wrong in itself with such a course of action. It is clear that Irish Life regarded Mr. O'Reilly and his organisation as being, in effect, the asset managers. Irish Life was entirely entitled to take such a position. However, it follows that Irish Life must also accept that the basis for the decision to refuse consent must be taken to be largely the basis adopted by Mr. O'Reilly, rather than Irish Life itself, for it is clear, on the evidence, and I find as a fact, that Irish Life played little independent role in the decision making process.

8.3 So far as the O'Reilly side is concerned, I am also satisfied as a fact that the significant true decision maker was Mr. O'Reilly himself. It is clear that there was an early intimation (in advance of the formal letter seeking consent to change of use) of Dunnes intention to seek the change of use concerned. It seems clear that from an early stage Mr. O'Reilly had expressed a view of opposition to the request. It is true that the task of progressing matters, both by consulting expert advisers and by consulting with

Irish Life in its capacity as co-owner, was left to Mr. Martin. It does not seem to me, on the evidence, to be proper, however, to characterise Mr. Martin as the decision maker. Given Mr. O'Reilly's original indication, it seems clear that Mr. Martin could not have come to a contrary view without going back to Mr. O'Reilly and obtaining Mr. O'Reilly's agreement to an acceptance of the change of use proposed.

8.4 There is nothing, of course, inappropriate in the owner of a significant business empire (such as Mr. O'Reilly) delegating appropriate decisions to persons within his organisation. If such a delegation were to occur, then it would be appropriate to look at the reasons why the delegated decision maker came to the conclusions that he did. However, this does not seem to me to be a case where there was, in reality, a delegation of decision making to Mr. Martin. Rather Mr. O'Reilly indicated his initial reaction to Mr. Martin and left the nuts and bolts up to Mr. Martin for implementation. I am not satisfied that it would have been open to Mr. Martin to come to a decision that favoured giving consent without reverting back to Mr. O'Reilly. On that basis it does not seem to me that Mr. Martin can, in reality, be regarded as the decision maker. Mr. O'Reilly was the true decision maker.

8.5 Having regard to the fact that Irish Life did, for the reasons which I have set out, largely defer to the O'Reilly side, it follows that the true decision maker on the part of the landlords, on the facts of this case, was Mr. O'Reilly. Mr. O'Reilly indicated an initial view against acceptance of the change of use. It appears clear that a final view in favour could not have been communicated to Dunnes without going back to Mr. O'Reilly. On that basis he was, in reality, the decision maker. Unfortunately Mr. O'Reilly was not tendered in evidence and it is only possible to infer what his motivation was. However, it is against the background of my conclusion that Mr. O'Reilly was the true decision maker, that it is necessary to approach the real reasons why consent was refused in this case. I now turn to that issue.

9. What was the True Reason for Refusal?

9.1 I have already identified two matters put forward on behalf of Dunnes from which, it is said, I should infer that the reason given for refusing consent to change of use was not the true reason. The first such basis was the undoubtedly very lengthy period which elapsed from the refusal itself to the time when any meaningful explanation of the reason proffered for that refusal was given. The second basis was the absence, in the documents as originally discovered on behalf of the landlords, of a significant volume of documentation concerned both with the landlords' fashion "vision and image" and, indeed, with the consideration given by the landlords either individually (which in reality relates to the O'Reilly side) or collectively, to the question of the consent.

9.2 In this latter context a further significant issue arises. During the period when the application for consent to change of use was "pending" certain negotiations took place between professional agents acting on behalf of Mr. O'Reilly on the one hand and on behalf of Dunnes on the other hand concerning the possibility of Dunnes giving up possession of Dunnes 1. It is fair to say that those negotiations involved a much wider range of possible commercial arrangements between companies controlled by Mr. O'Reilly and Dunnes. Mr. O'Reilly's interests extend to a significant number of shopping centres (including, for example, the Dundrum shopping centre) and it is hardly surprising that Dunnes, as a major retailer, would have at least the possibility of having an interest in dealing with Mr. O'Reilly in relation to some of his centres. As I have pointed out there is, of course, nothing wrong with Mr. O'Reilly seeking to secure possession of Dunnes 1, whether as a stand alone arrangement or in conjunction with a series of other commercial arrangements to be entered into with Dunnes in relation to a variety of other shopping centres. The only issue which is relevant to these proceedings, in that context, is as to whether the refusal of consent was in some way inappropriately used as part of a strategy to secure an agreement on the giving up of possession of Dunnes 1.

9.3 It was, of course, the case that Dunnes did not need discovery to be informed of the existence of the relevant negotiations. After all Dunnes, through their professional agents, were involved in the negotiations.

9.4 The fact that parallel negotiations were in train was not something, therefore, that could have come as any news to Dunnes. However, much of the background to those negotiations from the perspective of those representing Mr. O'Reilly's interests was not revealed in the discovery as originally made. The existence of a Master Plan for the Ilac Centre and reference to meetings of an Asset Management Forum within which the interests of Irish Life and Mr. O'Reilly in relation to the Ilac Centre were debated are cases in point. Having considered all of the evidence I have come to the conclusion that the failure to make adequate discovery can not be put down to inadvertence or even negligence. The documents not discovered are too recent and too important to have been accidentally overlooked. While the explanation given by Mr. Martin under cross examination concerning the difficulty of locating all of relevant email strings may go some way towards placing a small number of the omissions into the inadvertent category, that explanation falls far short of providing a full explanation, even in respect of emails, but most particularly in respect of other documentation. It is also clear that much of the documentation which was omitted from the original discovery would, at a minimum, have at least afforded ammunition to the Dunnes side to suggest that at least part of the true reason for the refusal of consent was interlinked with a desire on the part of Mr. O'Reilly's organisation to obtain possession of some or all of Dunnes 1.

9.5 In those circumstances I am driven to the conclusion that the relevant documents were deliberately suppressed with a view to minimising the extent to which Dunnes would be able to provide a factual basis for the suggestion that a desire to obtain possession of Dunnes 1 was at least a significant element of the consideration given to the user question by those involved in Mr. O'Reilly's organisation. In those circumstances it also seems to me that I should infer that the reason why this documentation was suppressed was, at least in part, because the possession issue did actually form part of Mr. O'Reilly's consideration. A number of other factors also point to the same conclusion. There is no doubt but that at least some members of the landlords' team expressed themselves in writing during the relevant period in terms which suggest that those members, at least, saw the consent issue as "leverage" which might be used to advance possession. While attempts were made to distance the actual decision making from those who had expressed themselves in that way, it remains the case that a linkage between the two issues was at least in the minds of some members of the landlords' team at the relevant stage. As I have already noted I am satisfied that the true decision maker was Mr. O'Reilly. Mr. O'Reilly did not give evidence and it follows that it is only possible to infer the true reasons for his refusal of consent from the surrounding facts. It is also relevant, and surprising, that Irish Life did not appear to know about the wider negotiations between Mr. O'Reilly's agent and Dunnes until the facts emerged at the hearing. The belated clarification on behalf of the landlords of the stated reason for refusal is also a matter of some (although not great) weight. That delay is at least consistent with a desire on the part of the landlords to refrain from specifying the reason in any detail. While there might be a number of possible explanations for such conduct, it is at least consistent with the fact that there were a number of factors involved in the decision and the landlords were reluctant to be specific until compelled so to be in the context of these proceedings.

9.6 The sequencing of the negotiations concerning possession is also consistent with possession being a consideration taken into account on the part of the landlords. While it is true that the landlords sought additional information from Dunnes, on the balance of the evidence it would seem unlikely that there was any reality to that process given the clear view that had been taken at an early stage. While it might be going somewhat too far to describe, as was urged by counsel on behalf of Dunnes, the process of seeking additional clarification as a "sham", it nonetheless remains the case that it is difficult to see what reality there was to the request. Likewise no real explanation was given for the delay in informing Dunnes of the refusal of consent given that, even on the basis of the

evidence tendered by the landlords, the final decision had been made some weeks before it was communicated. It is difficult to avoid the conclusion that the delay in telling Dunnes that consent was being refused was intimately connected with the negotiations which were then still alive between Mr. O'Reilly and Dunnes concerning, amongst other things, a basis upon which possession of Dunnes 1 might be surrendered. All of those factors lead me to conclude, on the balance of probabilities, that, as a matter of fact, the refusal of consent was, at least in material part, based upon a desire to strengthen Mr. O'Reilly's hand viz a viz his overall negotiations with Dunnes and in particular to increase the likelihood of being able to negotiate a surrender of possession on the part of Dunnes of, at a minimum, a part of Dunnes 1. If Dunnes could not make the use which they wanted of that unit then it would, of course, strengthen that position. That conclusion is supported by the strange, and in reality unexplained, fact that Irish Life were wholly unaware of the relevant negotiations until after the hearing began.

9.7 I am, therefore, satisfied that Dunnes have established that at least part of the purpose behind the refusal to give consent in this case was an improper purpose and for that reason, in addition, it seems to me that Dunnes are entitled to the declarations sought.

9.8 Finally I should also deal with the issue which was the subject of expert evidence at the hearing before me and which concerned whether there was an objective justification for the view that the use proposed by Dunnes was or was not consistent with the "vision and image" of retail fashion. This issue would, of course, only have been decisive in the event that I had found against Dunnes concerning the proper interpretation of the relevant clause of the lease (clause 4.26.1) and against Dunnes on the question of the true purpose for the refusal. Had I found against Dunnes on both of those matters, then it would have followed that the landlords would have been entitled to withhold consent if it were truly the case that it could reasonably be concluded that the use proposed by Dunnes was potentially damaging to the "fashion vision and image". Lest, therefore, I be wrong in both of the conclusions which I have just noted I should deal briefly with that issue.

10. The Justification

10.1 Two sub issues seem to me to arise on the evidence. Firstly there is the question of the nature of what was proposed by Dunnes. Dunnes asserted that what was intended (and what was, indeed, included in the request for change of use) was an upmarket food hall and not, therefore, anything resembling the food element of major stores with which all will be familiar. The landlords seemed to query two aspects of that suggestion. Firstly it was said that the "upmarket" end of the equation was difficult to enforce. On that basis it was suggested that once consent was given, the landlords' might find themselves with something that was, in effect, a supermarket. It seemed to be accepted by all that a traditional supermarket would not be likely to be beneficial in the location concerned.

10.2 However it seems clear that Dunnes request for consent was based on something very different from a supermarket. It is also worthy of note that clause 4.26.1 itself refers to the business to be carried on being a "high quality standard and tone" business. It is, therefore, clear that the parties themselves (or, at least in part on the landlords' side, a predecessor in title) were happy that a phrase such as that was capable of enforcement and of governing, in practice, the situation on the ground. It is difficult to see, therefore, that there was any merit in the position adopted on behalf of the landlords which I have just described. The parties themselves voluntarily entered into an agreement which was governed by a similar term governing quality and there seems no reason why a similar provision could not be included in any permission to change use which would be enforceable and effective. I was not, therefore, in any event, satisfied that the quality concerns expressed on the part of the landlords were of any merit and had the general issue which I have described been decisive it would, therefore, have seemed to me to turn on whether the proposed "high quality food hall" use could be said to be a use which could reasonably be refused.

10.3 There was, undoubtedly, expert evidence tendered on the part of Dunnes which suggested that it might well be the case that a high quality food hall might attract the same sort of customers as a fashion mall and that, rather than being inconsistent with the asserted fashion vision and image, a high quality food hall could, in fact, have been beneficial. However, it does not seem to me that the appropriate test is as to whether there might an argument to that effect or indeed whether the court might, on balance, regard the expert evidence tendered on behalf of Dunnes to be more cogent than the evidence tendered on behalf of the landlords. Rather the question would have been as to whether it had been demonstrated that the landlords were acting unreasonably in taking the view which they did. I do not believe that the evidence tendered went so far as to establish that fact. In those circumstances, I am satisfied that it would have been reasonable for a party, such as the landlord, in principle, to come to the view that a high quality food use was not beneficial to the shopping centre as a whole.

11. Conclusions

11.1 It seems to me, therefore, that Dunnes are entitled to the declarations sought on two bases:-

A. On the ground that the landlords improperly took into account the possibility of using a refusal of consent as leverage for the purposes of pursuing the aim of securing possession of some or all of Dunnes 1; and

B. Even if the landlords did not take that improper factor into account, it was, nonetheless, inconsistent with clause 4.26.1 of the lease for the landlords to have refused consent without having had proper regard to the need to maintain diversity in the types of businesses permitted to operate within the Ilac Centre as a whole.

11.2 It should be noted in relation to point B that I have also come to the view that, even had the landlords taken that factor into account, the landlords could not reasonably have concluded that it was legitimate to refuse consent by virtue of a proposed use by reference to a standard which imposed a virtual lack of diversity, contrary to the terms of the lease.