Neutral Citation: [2015] IEHC 692

THE HIGH COURT

COMMERICIAL

[2014 No. 9766 P]

BETWEEN

PERFECT PIES LTD. (IN RECEIVERSHIP)

AND

PEARSE FARRELL

PLAINTIFFS

AND

CHUPN LTD.

DEFENDANT

JUDGMENT of Mr. Justice Haughton delivered on the 6th day of November, 2015

Introduction

1. The first plaintiff is a limited company registered in the State and it is and was at all material times the lessee of the premises known as Café en Seine, 39/40 Dawson Street and 39 Anne's Lane in the city of Dublin ("the Premises"). The second named plaintiff ("the Receiver") is an accountant and is the lawfully appointed Receiver and Manager of the first plaintiff pursuant to Deed of Appointment executed by the first plaintiff's mortgagee Allied Irish Banks Plc. ("AIB") on 11th December, 2009. The defendant is a limited company registered in the State and is one of a group of companies ("the Fitzgerald Group") owned or controlled by businessman Mr. Louis Fitzgerald ("Mr. Fitzgerald"). The defendant acquired the freehold interest in the Premises in October, 2010, and is the landlord of the first plaintiff under three leases, one dated 21st April, 1993 for a term of thirty-five years from 20th April, 1993, and two dated 29th April, 1997 for terms of twenty-five years from 1st April, 1997 ("the Leases").

2. Following a tender process, by Tender Agreement entered into on 12th September, 2014 between the plaintiffs and Ardan Advisory Ltd. ("Ardan") the plaintiffs agreed that the leasehold interests in the Premises under the Leases would be assigned to Sequana Management Ltd. ("Sequana"), a subsidiary of Ardan being a company incorporated by it for the purpose of acquiring the Premises. The completion date agreed was 14th October, 2014. The Tender Agreement was expressly subject to and conditional on the landlord's, i.e. the defendant's, consent to the assignment to Sequana. By letter dated 15th September, 2014 A.C. Forde & Co. solicitors for the plaintiffs, wrote to Arthur Cox, solicitors for the defendant, formally requesting the defendant's consent to the assignment based on the information and extensive documentation furnished with that letter. There followed correspondence. Consent to assignment was not forthcoming, and by Plenary Summons dated 18th November, 2014 the plaintiffs commenced these proceedings in which they seek:-

> "(i) A Declaration that the Defendant, in delaying or failing to consent to the plaintiff's request to assign dated the 15th September, 2014 is acting unreasonably within the meaning of the Leases and/or Section 66 of the Landlord and Tenant (Amendment) Act 1980;
>
> (ii) An Order dispensing with the defendants consent to the said assignment"

3. In its Defence the defendant asserts that it "has acted reasonably in declining to provide its consent, and has good and substantial reason for so declining", and denies that "in delaying or failing to consent to the plaintiffs request" that it is acting unreasonably within the meaning of the Leases or s. 66 of the 1980 Act.

The Leases

4. The Leases cover separate parts of the Premises, but nothing turns on this. All three Leases contain at clause 3.21 similar provisions prohibiting the tenant from assigning, transferring, underletting or parting with or sharing the possession or occupation of the demised premises or any part thereof subject to the proviso that "the Landlord shall not unreasonably withhold or delay its consent to an assignment". In all three Leases in clause 3.21 there is a covenant by the tenant not to assign "BUT SO THAT NOTWITHSTANDING the foregoing the Landlord shall not unreasonably withhold or delay its consent to an assignment…". Under clause 3.21.1 it is provided that:-

> "the Tenant shall prior to any such assignment or under-letting apply to the Landlord and give all reasonable information concerning the proposed transaction and concerning the proposed assignee or under-lessee as the Landlord may require".

5. There are some differences between the 1993 Lease and the 1997 Leases in the wording used in clauses 3.21, and certain relevant sub-clauses, that should be identified:-

> a. The 1993 Lease in clause 3.21 having stated that "the Landlord should not unreasonably withhold or delay its consent to an assignment" has the added words "to an assignee of …. good financial standing", whereas the 1997 Leases refer "to an assignee of satisfactory financial standing".
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> b. In the 1993 Lease clause 3.21.3 provides – "in the case of an assignment to a Limited Liability Company it may be deemed reasonable for the Landlord to require that two Directors of a standing satisfactory to the Landlord shall join in such consent as aforesaid as sureties for the company for a period of not more than five years …. and shall further provide for the sureties to accept a new lease of the demised premises upon the disclaimer of these presents by the company or on its behalf if so required by the Landlord within three months of such disclaimer such lease to be for the residue then unexpired of the said term of five years". It will be noted that this provision says "it may be deemed reasonable …", and limits the guarantees from such directors to a period of not more than five years.
>
> c. By comparison the 1997 Leases at clause 3.21.3 provide – "in the case of an assignment to a limited liability company it

> shall be deemed reasonable for the Landlord to require that two Directors and/or shareholders of a standing satisfactory to the Landlord shall join in such consent as aforesaid as sureties … and shall further provide for the sureties to accept a new lease of the demised premises upon the disclaimer of these presents by the company or on its behalf if so required by the Landlord within three months of such disclaimer such lease to be for the residue then unexpired of the term hereby granted …".

6. Thus, under the 1997 Leases the wording is "shall be deemed reasonable", and the sureties may be directors or shareholders, and there is no five year limitation on the guarantee or the period during which the sureties may be required to take a lease in the event of a disclaimer.

7. The 1993 Lease was guaranteed by the then directors of Perfect Pies Ltd., Liam O'Dwyer and Desmond O'Dwyer for the first three years of the term. There was no evidence that that guarantee was ever extended, or that, once it lapsed, it was replaced by any other guarantee.

8. The 1997 Leases were supported by guarantees executed by "Break for the Border Group Plc." for the duration of the respective leases. It was common case that those guarantees ceased to be effective some years ago. Thus, there were no guarantors in place at the time of the Tender Agreement or the request for consent to assignment.

Section 66, Landlord and Tenant (Amendment) Act 1980
9. This provides, so far as relevant:-

> "66(1) A covenant in a lease (whether made before or after the commencement of this Act) of a tenement absolutely prohibiting or restricting the alienation of the tenement, either generally or in any particular manner, shall have effect as if it were a covenant prohibiting or restricting such alienation without the license or consent of the lessor.
>
> (2) In every lease (whether made before or after the commencement of this Act) in which there is contained … a covenant prohibiting or restricting the alienation, either generally or in any particular manner, of the tenement without the license or consent of the lessor, the covenant shall, notwithstanding any express provision to the contrary, be subject –
>
> (a) to a proviso that the license or consent shall not be unreasonably withheld, but this proviso shall not preclude the lessor from requiring payment of a reasonable sum in respect of legal or other expenses incurred by him in connection with the license or consent, …"

10. As to the interaction between the expressed covenant in the Leases and s. 66(2) counsel for the plaintiffs and defendant effectively agreed that the statutory proviso that "consent shall not be unreasonably withheld" supersedes the express provision in the Leases, notwithstanding that the original parties to the Leases expressly agreed that certain requirements of the landlord may be "deemed reasonable". However, it was submitted by counsel for the defendant, and I accept, that the matters expressly agreed between the original parties to be reasonable are matters that the parties, and the Court, should consider and take into account when assessing whether or not consent has been "unreasonably withheld". It follows that subtle differences between the 1993 Lease and the 1997 Leases, and the greater obligations from the tenant's perspective, of the 1997 assignment provision, are matters that the parties and the Court can take into account, but these provisions are not determinative because the ultimate test is that of reasonableness. The difference in the sureties that may be required by the landlord under the different Leases has some relevance and will be commented on later in this judgment.

The Test of Unreasonableness
11. Although the law in the UK has changed since 1988 [1] and must be approached with some caution, the parties did not disagree that the general principles to be applied in determining unreasonableness are laid down in the current edition of Woodfall's *Law of Landlord and Tenant*[2], para. 11.140, which states as follows:-

> • The purpose of a covenant against assignment without the consent of the landlord, such consent not to be unreasonably withheld, is to protect the landlord from having his premises used or occupied in an undesirable way, or by an undesirable tenant or assignee;
>
> • As a corollary to the first proposition, a landlord is not entitled to refuse his consent to an assignment on grounds which have nothing whatever to do with the relationship of landlord and tenant in regard to the subject matter of the lease [3];
>
> • The onus of proving that consent has been unreasonably withheld is on the tenant [4];
>
> • It is not necessary for the landlord to prove that the conclusions which led him to refuse to consent were justified, if they were conclusions which might be reached by a reasonable man in the circumstances;
>
> • It may be reasonable for the landlord to refuse his consent to an assignment on the ground of the purpose to which the proposed assignee intends to use the premises, even though that purpose is not forbidden by the lease;
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> • While a landlord need usually only consider his own interests [5] there may be cases where there is such a disproportion between the benefit to the landlord and the detriment to the tenant if the landlord withholds his consent to an assignment, that it is unreasonable for the landlord to refuse consent;
>
> • Subject to the proposition set out above, it is, in each case, a question of fact, depending on the circumstances, whether the landlord's consent to an assignment is being unreasonably withheld.

12. In addition, the landlord may state the grounds for refusal to the Court even if no reasons had previously been given: *Rice v. Dublin Corporation* [1947] I.R. 425, a further authority for this proposition is *Irish Glass Bottle Co. Ltd. v. Dublin Port Co*. [2005] IEHC 89. Further, if a landlord gives an invalid reason for refusing, he can subsequently amend his hand by giving a valid reason: *Boland v. Dublin Corporation* [1946] I.R. 88, at 103-104. The essence of the test is that the onus is on the tenant to show that no reasonable landlord would have refused consent in the circumstances as the landlord apprehended them to be. A landlord does not need to justify the conclusions that led it to refuse consent. Moreover, the landlord is entitled to rely upon the advice of appropriate qualified professional/experts provided that the advice given is reasonable: *Blockbuster Entertainment Ltd. v. Leakcliff Properties Ltd.* [1997] 1 EGLR 28.

13. There was no disagreement between counsel that the date on which the reasonableness or otherwise of the landlord's withholding consent falls to be considered is the date/time at which these proceedings were initiated, namely 18th November, 2014. It is on the basis of the proposals, information and documentation furnished at that point in time that the Court should make its determination. As will be seen, this is of particular significance in this case as there were subsequent developments and correspondence between the parties' respective solicitors after the commencement of the proceedings, including a letter sent on the evening of the day that proceedings issued.

14. As to breach of covenant on the part of the outgoing tenant, refusing consent on this ground depends upon the seriousness of the breach, and on whether the landlord's position is prejudiced by the assignment. In *Cosh v. Fraser* [1964] 108 SJ 116 it was held unreasonable to refuse consent on the basis of breaches of covenant not to make alterations in the premises where the breaches were easily remediable at the end of the term. In *Meagher v. Luke J. Healy Pharmacy Ltd*. [2005] IEHC 120, Murphy J. held that it was unreasonable for a landlord to refuse consent on the basis of dilapidations, which the proposed assignee was agreeable to remedy. However, the landlord is entitled to be reasonably satisfied that the proposed assignee will remedy any breaches of covenant to repair that are anything more than minimal: *Goldstein v. Sanders* [1915] 1 Ch 549. Furthermore, it may be reasonable for a landlord to demand that the assignee and its guarantor covenant to a strict timetable for repairs and to supply a performance bond or deposit: see *Orlando Investments v. Grosvenor Estate Belgravia* [1989] 2 EGLR 74.

15. Undoubtedly, the financial position of the proposed assignee is something that may be taken into account by a landlord in considering or refusing consent. As stated by Charleton J. in *Cregan and Gray v. Taviri Ltd.* [2008] IEHC 159:-

> "… Consent to assignment of a lease would be unreasonably withheld where the landlord will be receiving from the new assignees the same benefit, in terms financial reward and care of the premises, as from his or her current tenants".

In *Kened Ltd. v. Connie Investments Ltd.* [1997] 1 EGLR 21, a landlord company objected to the proposed assignee of a lease for a hotel on the grounds that they were not being offered the guarantee for the remainder of the lease of a surety with adequate assets in the country visibly being of sufficient financial status and standing. The Court of Appeal (Millet LJ.) held that the test to be applied was an objective one, i.e. whether no reasonable landlord would have withheld consent for the reasons stated by the landlord; the Court was not entitled to substitute its own view for that of the landlord, whose only legitimate concern, in relation to the financial status of the proposed assignee, was their ability to pay the rent due under the lease. Millett LJ. stated that " an acceptable replacement surety" means a replacement surety which is objectively suitable for acceptance by a reasonable landlord.

16. Landlords are not entitled to seek security beyond what a reasonable landlord in their position would require. Thus in Re: *Greater London Properties' Leases* [1959] 1 WLR 503, involving an assignment to a subsidiary, the landlord was held to have unreasonably withheld consent where it was refused unless the parent company guaranteed performance of the subsidiary's obligations. So also in *Storehouse Properties Ltd. v. Ocobase Ltd.* (1996) 160 J.P. 669 it was held unreasonable for the landlord to require the guarantee of the parent company, which was in the FTSE 100, in respect of the obligations of a subsidiary, where the guarantee of another group company had been offered.

17. As to financial standing the defendant also relied on the following passage from *Woodfall*, at para. 11.143:-

> "A reasonable landlord is concerned with the tenant's ability to meet the obligations under the lease as those obligations fall due. Accordingly, where the assignee's references cast doubt on his ability to pay the rent and perform the covenants, the landlord will normally be entitled to withhold consent … Where the proposed assignee offers guarantors to guarantee performance of his obligations, the landlord must have regard to the financial position of the guarantors as well as that of the assignee. If, however, the financial situation of the assignee and guarantor, taken together, is such that the landlord cannot be satisfied that the rent will be paid and the obligations performed, the landlord will be reasonable in refusing consent. In addition, it has been held that if there is grave doubt about the ability of the assignee to pay the rent, the offer of a guarantor will not necessarily cure the problem since the offer of a guarantor may not be a satisfactory substitute for a satisfactory and responsible tenant."

18. The Court may also have regard to the financial position of the outgoing tenant: *Curragh Bloodstock Agency v. Warner* [1959] Ir. Jur Rep 73. In that Circuit Court case Deale J. commented:-

> "[C]an the defendant be called unreasonable for refusing to exchange the certainty of a solvent and substantial company as his lessee for Mr. Davis and his hazardous enterprise? … Where he has a tenant of exceptional financial strength he should not have to relinquish such a tenant and take on one who will involve him in undue risk. His refusal to take this risk cannot, in my opinion, be said to be unreasonable."

19. However, in assessing reasonableness it is clear that the Courts will not permit a landlord to use the opportunity of a request for consent to assignment to secure a collateral advantage or benefit over and above what the existing lease offers.

20. Of particular relevance to this case, because it is at the heart of the plaintiffs' contentions, is that a landlord is not entitled to use the opportunity of an application for consent to assignment to pursue any "ulterior motives". This principle was affirmed by Clarke J. in the context of an application for consent to change of use in *Dunnes Stores (Ilac Centre) Ltd. v. Irish Life Assurance Plc*. [2008] IEHC 114. Dunnes Stores was the lessee under a long lease and desired change of user for part of a unit in the Ilac Centre which they planned to use as a high-quality food hall. All parties agreed that such a change was inconsistent with the pre-existing leasehold clause as to user and that the consent of the landlord to the proposed change of user was required. Dunnes Stores claimed that the landlord had unreasonably withheld consent of the application for change of user contrary to s. 67 of the Landlord and Tenant (Amendment) Act 1980, a sister section to s. 66 quoted above, which provides that a landlord may not unreasonably withhold consent to a change of user. The landlord in the case had refused consent on "good estate management" grounds but had not elaborated on those grounds either in the original refusal of consent or in response to subsequent request for clarification from Dunnes Stores. In the course of exchanging documents relating to the litigation, the respondent landlord expanded on the refusal as follows:-

> "The exact basis of the defendants (sic) plea is the defendants (sic) 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".

Dunnes Stores challenged the refusal on three grounds:-

> 1. That this was not the real reason for the refusal, rather the landlord was attempting to use this situation to place pressure on Dunnes Stores to give up possession of this unit in the Ilac Centre (which was one of three held by the

company);

2. That the reason given was not the bona fide reason for refusal;

and

3. Even if this where the bona fide reason for the refusal it was incompatible with the change of user clause in the lease.

21. Clarke J. held that it was well established that landlords are not entitled to use the opportunity of applications for consent to pursue any "ulterior motives"; rather, consent can reasonably be refused only for purposes reasonably contemplated by the lease itself. At para. 6.5 Clarke J. summarised this principle thus:-

> "[W]hat 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 landlord's 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."

22. On the basis of the facts presented to the Court Clarke J. held that he was satisfied that at least part of the motivation for the refusal of consent was an attempt to exert some kind of leverage on Dunnes Stores to give up the unit, this being further reinforced by the fact that the second defendant (co-landlord with the first defendant) had been holding negotiations with Dunnes Stores while the decision on consent was pending about Dunnes Stores giving up possession of the unit. As this was an improper purpose in refusing consent it caused the refusal to be unreasonable. As Clarke J. stated at para. 6.3:-

> "[the landlord] 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."

23. In coming to this conclusion Clarke J. relied inter alia on the decision of Peter Smith J. in Design Progression Ltd. v. Thurloe Properties Ltd. [2005] 1 WLR 1 where the Court 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 purpose 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. He also relied on the decision of Dunne LJ. in *Bromley Park Garden Estates Ltd. v. Moss* [1982] 1 WLR 1019 where it was:-

> "… 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 an eventuality might amount to good estate management. Such reasons were not the sort of reasons contemplated by the lease but amount to ulterior motive." (Clarke J. para. 6.4).

24. I did not take the principles as enunciated in *Dunnes Stores* or the cases relied upon in that decision, or their applicability to s. 66 (as opposed to s. 67), to be disputed by the defendant. Accordingly, one of the Court's tasks in this case is to assess on the evidence what the true motivation of the defendant was in withholding consent to assignment.

The Tender Process and Tender Agreement

25. The Premises was one of four properties of the plaintiff being sold by the Receiver. In the first round, offers were due in by 4th July, 2014. There were 20 expressions of interest received including one from Starpin Ltd., a company connected to the Fitzgerald Group and of which Mr. Fitzgerald's son Edward is the principal shareholder. The initial offer from Starpin Ltd., which was for the Premises alone, was €4.265 million. 15 parties were selected through to the second round of the bidding process – a formal tender – the closing date for which was 7th August, 2014. The tender documents/contracts where uploaded into a Data Room and the selected parties had access to this. On behalf of Starpin Ltd. Mr. John Nash of the Fitzgerald Group had access to the Data Room. On the tender day, 11 formal tenders and one letter had been received. Starpin Ltd. tendered €5.2 million for the Premises, although the evidence of Mr. John Ryan of CBRE, the Receiver's selling agent, was that no proof of funds, as was required in the Tender, accompanied the documentation. Following contact between Mr. Ftizgerald and Mr. Ryan, Starpin Ltd.'s offer was verbally increased to €5.35 million. However that bid was unsuccessful as the Receiver accepted the tender of Ardan for all four properties, including as part of that a tender €5 million for the Premises.

26. It should be noted that on 11th June, 2014 a surveyor Mr. Harry Dowey of Watts Group Plc. was instructed by the defendant to prepare a revised Schedule of Dilapidations on the premises to reflect its current condition. Mr. Dowey inspected on 12th June, 2014, and his "interim schedule of dilapidations" is dated the 23rd June, 2014. I accept the unchallenged evidence of Mr. John Ryan that it was on the defendant's insistence that this interim schedule of dilapidations was placed in the Data Room. It was also not contested by the defendant that it was after the Tender was advertised that Mr. Dowey was instructed to undertake his inspection.

27. Following the tender process a Tender Agreement was entered into between the Receiver and Ardan dated the 12th September, 2014. Special condition 10 governed "consent to assign". Clause 10.1 provides that the Agreement is subject to and conditional on the landlord's consent to the assignment by the first plaintiff to Sequana "in compliance with Clause 3.21 of each of the capital leases". Clause 10.2 provides that:-

> "The Purchaser hereby agrees to provide all information reasonably required and satisfy all reasonable requirements of the Landlord in connection with the proposed assignment expeditiously. The Purchaser further agrees (where applicable) to provide such sureties as may be required by the Landlord having regard to Clause 3.21.3 of the Leases and each of them. Without prejudice to the generality of the foregoing, the Purchaser shall furnish the following on the execution hereof…"

28. There follows in clauses 10.2.1-10.2.15 inclusive a list of documents that Ardan was contractually obliged to furnish and 10.3 relating to the provision of an additional surety, and these may be summarised as follows:-

> 10.2.1 A certificate as to Sequana's shareholders and directors and the same in relation to its associated companies.

> 10.2.2 Projected EBITDA for Sequana for the year 2014 "reviewed by a firm of chartered accountants representing

Sequana…"

10.2.3 Written confirmation from Ardan in the form attached that it would act as surety in accordance with clause 3.21.3 of the Leases.

10.2.4 "Report from a firm of chartered accountants representing …" Ardan confirming it has net assets of a minimum of €10 million and specifying the nature of the assets.

10.2.5 Projected EBITDA "reviewed by a firm of chartered accountants representing Ardan…" for the year 2014.

10.2.6 Legal opinion from Ardan solicitors in the form attached as to Ardan's status as an Irish owned company, its authority to act as a surety and matters related to the validity of the proposed deed of assignment and other documents required to complete the transaction.

10.2.7 "Confirmation that it can procure a Bank Guarantee (from a bank satisfactory to the Landlord) in favour of the landlord for an amount equal to the aggregate annual rent currently payable pursuant to the Leases for a period of five years or until such time as a consolidated EBITDA for Ardan Advisory Ltd. (as certified by a chartered accountant) exceeds three times the aggregate annual rent payable in respect of the Leases, which ever date shall be the earlier".

10.2.8 Written confirmation from DP International Ltd., a company incorporated in Malta, that it will act as surety in accordance with clause 3.21.3 of the Leases and appoint Irish solicitors to accept service of notices and proceedings in Ireland.

10.2.9 A report from a firm of chartered accountants representing DP International Ltd. to confirm that it has net assets of a minimum of €10 million and specifying the nature of the assets "together with copy audited accounts for the said company for the last three financial years".

10.2.10 Legal opinion from lawyers for DP International Ltd. in Malta in the form attached, or such amended form as might reasonably be required by the Landlord.

10.2.11 Written confirmation from J.T. Magen and Co Inc. ("Magen") that it will act as surety and appoint solicitors in Ireland to accept service of notices and proceedings in Ireland.

10.2.12 A report from a firm of chartered accountants representing Magen to confirm that it has net assets in excess of $13.5 million and specifying the nature of the assets, together with copy audited accounts for the last three financial years

10.2.13 Legal opinion from lawyers for Magen in the jurisdiction in which it was incorporated in the form attached or such amended form as may reasonably be required by the Landlord.

10.2.14 Documentary evidence of Ardan's agreement with Splash Hotels Ltd. in relation to the proposed management of the Premises.

10.2.15 A written undertaking from Sequana addressed to the Landlord to complete works required in the Interim Schedule of Dilapidations

10.3 "In the event that the Landlord states that the said sureties are inadequate and/or unacceptable, the Vendor shall (without further notice to the Purchaser) confirm to the Landlord that an additional surety will be provided from J.T. Magen and Co Inc."

29. Under clause 10.4 the Tender Agreement then provided that if the landlord refused to consent or the vendor deemed that consent was "unreasonably withheld or delayed….on the basis of the above bank guarantee and sureties being available" then the vendor was to immediately issue proceedings against the landlord in the High Court seeking declarations in line with those sought in these proceedings, and to seek to have the proceedings heard in the Commercial Court, and to prosecute them without delay. Under clause 10.5 the vendor was required to appeal any adverse decision in the High Court to the Court of Appeal if in receipt of a written opinion from senior counsel confirming that there are grounds of appeal.

30. This revised clause 10 was the subject of negotiation between the plaintiff and Ardan, and was formally communicated by the plaintiffs' solicitors to Ardan by letter dated 4th September, 2014 which also requested copies of the documents set out in the revised special condition 10 and evidence that Ardan was in a funds to complete the purchase of the leasehold interest in the premises for €5 million. The agreement to this revised term was endorsed in that letter on 5th September, 2014 and signed on behalf of Ardan, and the conditional purchase of the leasehold interest based on the Tender Agreement as so revised appears to have been completed on 12th September, 2014. I will comment later in this judgement on the quality of the financial comfort afforded by the documentation that accompanied the revised special condition 10, and the sureties and financial references that were ultimately provided to the defendant.

The Consent Process

31. By letter dated the 15th September, 2014 the plaintiffs' solicitors formally wrote to Arthur Cox, solicitors for the defendant, notifying them of the sale of the leasehold interest in the Premises to Sequana and requesting the defendant's consent, including the consent of the defendant's lending institution, AIB. In this detailed letter A.C. Forde & Co. solicitors for the plaintiffs set out information on Sequana together with copies of its certificate of incorporation and memorandum and articles of association. This disclosed that the share capital was owned by Ardan as to 998 ordinary shares, with one share being owned by Magen, based in New York, and one share owned by DP International Ltd., a company based in Malta. The letter advised that Splash Hotels Ltd. had agreed to manage Café en Seine – as it had been doing for the past number of years, and a letter from Splash Hospitality was enclosed. A letter was also enclosed from Pricewaterhouse Coopers ("PWC") dated 4th September, 2014 attaching projected EBITDA for Café en Seine for years 2014 and 2015, at €665,000 and €731,000 respectively. In relation to surety, the letter proposed Ardan and DP International Ltd.

32. With regard to Ardan, the letter enclosed the certificate of incorporation and memorandum and articles of association, confirmation that Ardan was prepared to act as surety, the legal opinion of Eugene F. Collins solicitors confirming its capacity to act as surety, and two letters from PWC. The first of these set out the projected consolidated EBITDA for Ardan for 2014 and 2015,

noting that Ardan had also agreed to acquire the other three licensed premises "The George", "Howl at the Moon" and "The Dragon". The EBITDA projections were for €764,000 in 2014 and just over €2 million in 2015, this significant increase being reflected in a reduction in rent payable by Ardan from €1.625 million in 2014 to €752,000 in 2015. The second document from PWC stated that the net assets in the balance sheet of Ardan were €10 million, and indicated that €8.5 million had been placed in Ardan's solicitor's client account on 11th September, 2014 for the purposes of the acquisition of the four properties.

33. With regard to DP International Ltd., the letter enclosed a copy of the certificate of incorporation and the memorandum and articles of association, and confirmation that it was prepared to act as surety. There was also legal opinion from a Maltese firm of advocates confirming its capacity to act as surety. There was a report from PWC dated 11th September, 2014 stating that the net assets in the balance sheet of the company exceeded €10 million. Audited accounts for DP International Ltd. for the previous three financial years were not mentioned.

34. In terms of a guarantee, the letter offered a guarantee from HSBC Bank for a five year period or until such time as the consolidated EBITDA for Ardan exceeded three times the aggregated annual rent payable in respect of the leases, whichever date would be earlier. A copy of the draft guarantee was not enclosed but it was stated that this would be requested and that A.C. Forde & Co. would revert with same. Drafts to affect the consent were enclosed for approval. The closing paragraphs of the letter stated:-

> "The agreed closing date is the 14th October, 2014 and in the circumstances, we should be obliged to receive your client's consent in advance of that date and preferably no later than the 10th October, 2014 to allow time to have all documentation executed by the various parties in advance of completion.
>
> In the meantime, if you have any queries or require any further information or clarification on any matter, we should be obliged if you would revert to us as a matter of urgency in order that we are ready to complete on the 14th October, 2014."

35. As A.C. Forde & Co. had not received any reply by 26th September, 2014 they sent a reminder on that date to Arthur Cox. They also indicated that as they had not received any response they were enclosing a draft letter which they proposed sending to AIB on 30th September, with a Form of Acknowledgment seeking the bank's consent to the proposed assignment.

36. By letter dated 30th September, 2014 Arthur Cox acknowledged receipt of the earlier letters from A.C. Forde & Co. and confirmed that "we are currently taking our clients instructions on this matter and will revert shortly".

37. A.C. Forde & Co. wrote again to Arthur Cox on 3rd October, 2014 noting that they were taking their clients instructions, and referring to a telephone conversation on 2nd October in which Arthur Cox's Mr. Martin Coleman is reported to have indicated that Arthur Cox will be in a position to revert "by the end of the week with confirmation of your client's position". This letter again emphasised the closing date of 14th October, 2014, and also notified that in the circumstances a letter was being written to AIB requesting their consent – and such a letter was indeed sent by courier on 3rd October, 2014.

38. As it happens Arthur Cox had written on the 2nd October, 2014, and this may have crossed in the post with the letter of 3rd October from A.C. Forde & Co. At any rate, Arthur Cox noted the request for their client's consent to assignment and stated:-

> "Our client is not in a position to consider the issue of consent to the assignment of the Leases to Sequana Management Ltd. until such time as your client details its proposals in order to address the significant breaches of the Leases. The breaches identified by our client include, but are not limited to, the following:-
>
> (1) Breach of the repair clause – our client has prepared three interim Schedules of Dilapidations and to date we understand that no works have been carried out to bring your client into compliance with the requirements specified in same.
>
> (2) Breach of the Alienation provisions – There had been significant breaches of the alienation provisions and a number of licences have been granted without our client's permission.
>
> Our client hereby calls on you to arrange for your client to revert immediately with its proposals to rectify these breaches. Thereafter, the issue of consent to the proposed assignment will be considered by our client.
>
> Yours Faithfully"

39. A.C. Forde & Co. replied by letter dated 7th October, 2014 contesting that there was any breach. Their instructions were that the plaintiff had "dealt with the majority of the items identified in your client's Schedule of Dilapidation dated 6th August, 2013" and that any items outstanding were minor or of a decorative nature or would be dealt with as part of phased maintenance repair programme in the usual way. They pointed out that many of the decorative items listed in the Schedule would not require to be dealt with until the final year of the tenancy. They then stated that "in any event, the proposed Assignee will be assuming all obligations of Tenant under the Leases, which includes any outstanding works required to be completed to be pursuant to your client's Schedule of Dilapidations". They then said:-

> "We would point out that the decision of the Supreme Court in *Denis Meagher and Miriam Meagher v. Luke J. Healy Pharmacy Ltd*. upheld that the non-compliance with covenants by a Tenant did not entitle a Landlord to refuse to consider an application for consent to assignment".

40. In relation to a question of a license being granted without the landlord's permission they stated:-

> "Our client engaged with your client in relation to Licenses granted to various occupiers and provided a schedule of occupiers. We refer in particular to a letter from your firm dated the 1st July, 2013 wherein you noted that there were ten separate sub-tenants in place at that time. We enclose herewith a copy of the letter and our client's reply for ease of reference. Your client has never raised any objection to the licenses granted by our client."

The letter then requested that the defendant consider the application for consent "as a matter of urgency" in view of the completion date. They added:-

> "You will be aware the fact that Mr. Fitzgerald of your client company is connected with a different corporate entity which was anxious to purchase the property but which was unsuccessful in so doing can have no bearing on the issue of

consent and the request for same must be considered bona fide and expeditiously by your client."

41. They requested a response by Friday, 10th October. Enclosed with that letter was a copy letter from Arthur Cox to the Receiver dated 1st July, 2013 in relation to 10 separate sub-tenants in place in the property, and seeking confirmation of the term for which they occupied and also "that an appropriate Deed of Renunciation has been executed in respect of this arrangement". This referred to renunciation of Landlord and Tenant rights. Also enclosed was a copy reply from RSM Farrell Grant Sparks to Arthur Cox dated 12th July, 2013 referring to certain changes in licensee and stating that:-

> "Following on from the first license agreement outlined above, a further nine license agreements have been signed by various companies to occupy office spaces at 39 and 40 Dawson St.
>
> I trust that this clarifies the questions raised by your client, however should you have any further queries please contact the undersigned."

42. A.C. Forde & Co. did not hear back from Arthur Cox and wrote again on 14th October, 2014 stating:-

> "Please note that in the event that we do not receive confirmation of your client's consent to the assignment of Leases to the proposed assignee by close of business today we hold instructions to draft proceedings seeking a Declaration from the Court …". The letter was marked "URGENT".

43. Arthur Cox replied by letter dated 20th October, 2014, dealing at some length with "Breach of repair clause" and "Breach of Alienation Provisions". As to the first, they took issue with the assertion that the plaintiff had dealt with the majority of items, or that the outstanding ones were minor or decorative, and sought details of all works carried out pursuant to the Schedules of Dilapidations. They stated:-

> "following receipt of this information, our client's surveyor will inspect the property to verify the works [have] been carried out."

Noting the contention that the assignee will assume the obligations of the tenant they stated:-

> "However, it is a matter for your client to resolve these subsistent breaches prior to any assignment of Lease".

Having taken issue with A.C. Forde & Co.'s interpretation of the Supreme Court decision in Meagher, they then stated:-

> "Please note that our client is entitled to satisfy itself that all subsistent breaches of Lease have been resolved by your client prior to considering the consent application of your client."

44. With regard to breach of the alienation provisions they observed that providing information on the 10 licenses "did not constitute an application for consent of our client in accordance with clause 3.21 of the Lease", and they sought details of renewals of the licenses which they understood had taken place without the defendant's prior written consent, and they sought copies of the licenses together with deeds of renunciation. They stated:-

> "We confirm that our client is committed to dealing with this matter as soon as your client has dealt with the outstanding queries above."

45. In their penultimate paragraph they rejected any connection between their client's relationship to another corporate entity submitting a bid for the property and their client's handling of the application for consent and stated:-

> "Our client has valid concerns in relation to the subsistent breaches of Lease which it requires your client to resolve prior to it considering the consent application of your client."

46. A.C. Forde & Co. replied by letter dated 22nd October, 2014 stating that the outstanding works in the interim Schedule of Dilapidations were not an issue as the purchaser was fully aware of them and taking responsibility for completion of any outstanding items, and that "your client has always been fully aware of the occupation of the various licensees and has never objected to same." They stated:-

> "In all the circumstances therefore, it is difficult for our client to see what *bona fide* reason your client has for refusing to deal with the request for consent to assign the Leases. Your client's responses to date do not indicate that your client is committed to dealing with the matter, as you state, and can only be interpreted by our client as a method of delaying the process.
>
> Our client has therefore no alternative but to issue proceedings seeking a Declaration from the Court and then Order dispensing with your clients consent and we hold instructions to issue such proceedings without further notice to you."

47. Arthur Cox replied by letter dated 31st October, 2014 again stating that dilapidations and licenses were live issues. They reiterated their client's requirement for "unqualified agreement on your part that the works prescribed by our surveyor will be done" stating that "if it is the case that the purchaser intends to carry out these works in your place then our client welcomes this. However, in that event, we will require an open letter from them confirming this and our Client's position on this issue remains fully reserved until such letter, in terms satisfactory to our client, is received."

48. With regard to the alienation issue, an email dated 24th October, 2014 records that copies of the licenses for the premises were forwarded to Mr. Patrick Walsh of the Fitzgerald Group. Arthur Cox stated in their letter of 31st October, 2014 that since these had been received their client was now "in a position to undertake a review of the content of these licenses". They stated that the plaintiff still had not dealt with the queries raised by their client in connection with breaches of the leases, and that it was "proper and reasonable for our client to clarify how your client is intending to rectify any breaches of the leases …"

49. On 6th November, 2014 A.C. Forde & Co. replied confirming that the proposed assignee would take over all the obligations of the tenant in the leases to include obligations related to dilapidations, and they enclosed a letter from the proposed assignee, and another from the proposed guarantor and parent company Ardan, confirming that they would accept responsibility for any outstanding items.

50. With regard to the licenses they reiterated that the defendant was aware of the occupation of the various licensees since he had been furnished with a schedule of occupants in July, 2013, and also from inspections of the property by the defendant's agent on a number of occasions, following which no objection was taken. They also pointed out:-

> "Furthermore, full details of the Licenses were available during the tender process in the data room. Your client had access to the data room and indeed on the instructions of your client you wrote to us on a number of occasions setting out your client's demand with regard to documentation which your client wanted made available to prospective purchasers in relation to the Schedule of Dilapidations but no reference was made to the occupation by the Licensees in this correspondence."

They reiterated that it was difficult for the plaintiff to see what bona fide reason the defendant had for refusing to deal with the request for the consent to assign, and they renewed the request for consent.

51. On 14th November, 2014 A.C. Forde & Co. wrote again requesting the consent, and imposing a deadline of close of business on Monday 17th November, 2014, indicating that proceedings would issue in default.

52. The next event was that the plaintiffs initiated these proceedings by Plenary Summons issued on 18th November, 2014, and a copy of that Plenary Summons was sent by A.C. Forde & Co. to Arthur Cox by email early that evening. Arthur Cox responded by letter also dated 18th November, 2014 which I was informed (and this was not disputed) was sent to A.C. Forde & Co. at about 9.00pm, presumably by email. It is important to note that this letter/email was sent by Arthur Cox in response to the issue of proceedings. This is of critical relevance because counsel for both parties agreed that the question of the reasonableness or otherwise of the defendant withholding consent falls to be considered as at the time of the issue of proceedings.

Post-Proceedings Exchanges

53. It is nonetheless necessary and instructive to refer to the contents of Arthur Cox's letter, and other exchanges postdating the issue of proceedings for a number of reasons. First, in that letter the defendant through its solicitors addresses the question of sureties, and the quality of the financial information and comfort offered by the plaintiff in the letter of 15th September, 2014 seeking consent, and the enclosures with that letter. The plaintiffs' witnesses asserted that this was the first time such matters were raised, although this was disputed by Mr. Fitzgerald in his evidence. Secondly, as the authorities referred to above establish, a landlord refusing consent may *after the date of refusal* and even in the course of the proceedings rely upon reasons not previously relied upon for such refusal. The defendant does rely on reasons given post the issue of proceedings in support of its contention that withholding consent was not unreasonable. Thirdly, the plaintiffs rely inter alia on events occurring after (as well as before) the 18th November, 2014 as showing or corroborating their assertion that the defendant's stated reasons for not considering the request for consent were not genuine or *bona fide* concerns and that the defendant always intended to withhold consent for an ulterior motive, namely its desire to obtain possession of the Premises for itself or Starpin Ltd.

54. Referring first to the written exchanges, in their letter of 18th November, 2014 Arthur Cox firstly acknowledged receipt of the licenses which their client "continues to review", and the correspondence from the proposed purchases in respect of the outstanding dilapidations. Secondly, they refer A.C. Forde & Co. to clause 3.21.3 of the Leases under which:-

> "our client is entitled to, and requires, two directors and shareholders to join in the consent as sureties. As is normal in these circumstances our client requires three years audited annual accounts in respect of the proposed guarantors so that our client can assess the financial standing of these companies."

They point to limitations in the PWC documentation concerning Ardan and DP International Ltd., stating that it "does not constitute an examination made in accordance with generally accepted auditing standards" and they go on to "urgently require three years audited accounts". Finally, they pointed out that they had yet to receive a copy of the HSBC guarantee that had been offered.

55. A.C. Forde & Co. replied on 24th November, 2014 enclosing a copy letter from Ardan's solicitors Eugene F. Collins of the same date. This letter advised that:-

> • Ardan was a shelf company set up to acquire the tenant's interest in the Premises, and they relied on PWC's information (in the form already provided to the defendant with the letter of 15th September).
>
> • DP International Ltd. was not required to provide audited accounts in Malta, and that the PWC Report should be relied upon.
>
> • J.T. Magen & Co Inc, another shareholder in Ardan, would be "…happy to provide a further guarantee if required."
>
> • That J.T. Magen & Co. Inc.'s audited accounts, furnished to A.C. Forde & Co., would be furnished if the defendant executed a Confidentiality Agreement.
>
> • A 'Letter of Credit' would be obtained from HSBC if required.

A Form of the proposed Letter of Credit and the Confidentiality Agreement were enclosed. The HSBC Form was from HSBC USA, was redacted, and indicated that it would be governed by the laws of New York.

56. Arthur Cox replied on 5th December, 2014, indicating they would resist the matter being admitted to the Commercial List. On dilapidations they stated "…a satisfactory response was finally received from your office on 7 November 2011". They expressed continuing dissatisfaction on the licensee front – lack of evidence of identity of all the licensees, and lack of landlord consent. The request for two directors of Sequana to provide guarantees for five years was repeated. Objection was taken that the financial information provided was inadequate and the U.S. guarantees offered were "not adequate financial covenants". They continued to rely on "several breaches of the Leases".

57. A.C. Forde & Co. replied on 8th December, 2014 and stated *inter alia*:-

> "We wrote to you seeking consent to assign by letter dated 15th December 2014 and provided full information on the financial status of the proposed assignee and proposed guarantors. You did not engage with us in any manner concerning the financial status of the proposed assignee until after our client issued proceedings and the first time you reverted to us in relation to the financial status of the proposed assignee was in your letter of the 18th of November, 2014. We passed this letter to the Solicitors for the proposed purchaser/assignee, the outcome of which was to reply to you by letter

> dated the 24th of November 2014 and included an offer by the proposed assignee of an additional guarantee from J.T. Magen & Co. Inc. You have not responded to this letter or provided the confidentiality agreement sought therein.
>
> You have used alleged breaches of the terms of the Leases as a delaying tactic since our letter of 15th September and the requirement to provide a letter from the proposed assignee (which you state is a "satisfactory response") in relation to the schedule of dilapidations was and is superfluous as the proposed assignee will be bound by the terms of the Lease, to include the schedule of dilapidations."

58. Thereafter the case was admitted to the Commercial List by Order of McGovern J. dated 8th December, 2014. Some "engagement" on the issue of consent resumed in September, 2015 after Mr. Mark O'Meara, a director of Sequana, made a witness statement which was dated 17th September, 2015 and filed late on behalf of the plaintiffs. At the hearing I ruled this to be admissible and Mr. O'Meara gave oral evidence and adopted and confirmed the contents of his statement which included the following:-

> "7. I confirm that Sequana has always been and continues to be ready, willing and able to meet such reasonable security requirements that the Landlord may have."

59. Following delivery of this witness statement the parties' solicitors in open correspondence reprised the history of their debate over consent and joined issue with para. 7 of Mr. O'Meara's witness statement. Arthur Cox on the defendant's behalf took the position that this was a new departure – indeed this was a position maintained in court. In their letter of 30th September, 2015 they indicated that:-

> "Any guarantees must obviously be supported by satisfactory certified net asset statements that demonstrate the proposed guarantors to be persons of robust solvency";
>
> and observed:-
>
> "It follows that the provision of guarantees from individuals or substantial trading entities was the established norm as between the parties' respective predecessors in title under the Leases at issue in these proceedings, a matter specifically recognised in each of the Leases."

Arthur Cox indicated that "In the alternative, our client is willing to accept an appropriate Irish bank guarantee" or in the alternative a security deposit paid now into a nominated joint account in an amount equivalent to 18 months' rent and rates." They stated:-

> "Our client's position remains that it is willing to consider a fresh application for consent if the present proceedings are discontinued and our client's costs are discharged."

60. In a further letter of 30th September, 2015 Arthur Cox sought to clarify that their reference to personal guarantees was to "both directors and shareholder". A.C. Forde & Co. responded by letter the same day (headed "without prejudice", but this was waived at the hearing) that this was still unclear and asked for clarity on "precisely what your client is now requesting in your letter in respect of each lease and from whom." Arthur Cox replied on 1st October, 2015 that their first option was a reference "to personal guarantees from two directors of a standing satisfactory to our Client as envisaged [under] the provisions of the 3 Leases in question…Clearly the offer of guarantees from shareholders is inadequate as, first, the financial standing of those proposed guarantors has not been established and, secondly, the Leases, and in particular the Lease of 21st April 1993, provide for guarantees by directors."

Motive – The Evidence in Controversy

61. The plaintiffs submitted that the defendant's real motive in withholding consent was its desire to obtain possession of the Premises. They contended that by raising issues with regard to breach of covenant in respect of repair and licensees whose occupation had not been the subject of any express consent the defendant was not raising *bona fide* issues and was wrongfully refusing to consider the application for consent. They contended that the real reason for the defendant putting these obstacles in the path of the plaintiffs was the defendant's desire to obtain possession for itself or the associated company Starpin Ltd. controlled by Mr. Fitzgerald's son, Edward Fitzgerald. In particular, they relied upon the failure of Starpin Ltd. to acquire the Premises in the Tender Process; certain conversations between Mr. Fitzgerald and the selling agent Mr. John Ryan during that process and prior to the request for consent; and an attempt by Mr. Fitzgerald through Avalondale Ltd., a company in the Fitzgerald Group, to put the first named plaintiff into compulsory liquidation with the intention that the Leases would then be forfeit. In this regard, each of the Leases provides for forfeiture and a right of re-entry *inter alia* where the tenant "being a company shall go into liquidation either compulsory or voluntary" (see clause 5.1.3).

62. The defendant denied this and, principally through the evidence of Mr. Fitzgerald, asserted that the reasons given for withholding consent were given bona fide and underpinned by professional and legal advice, and reflected valid concerns in relation to subsisting breaches of the Leases – while also accepting that the defendant/the Fitzgerald Group did ultimately want to obtain possession of the Premises. In what follows this judgement deals with relevant evidence and my findings in relation to the repair issue, the licensee issue and other relevant evidence concerning the alleged ulterior motive.

Repair - Dilapidations

63. The defendant acquired the lessor's interest in the premises on 13th October 2010, and Schedules of Dilapidations were prepared and issued by the Watts Group Plc. on 31st March, 2011, 18th July, 2013 and 6th August, 2013. As to the first two of these, the Receiver's evidence was that no steps were taken by the defendant to ensure compliance with those Schedules. In his evidence Mr. Fitzgerald indicated that he instructed Mr. Pat Walsh, a manager in the Fitzgerald Group, to deal with the question of dilapidations, and he was unable to say whether any steps had been taken to ensure compliance. In particular he was unable to say whether there were any subsequent inspections to ascertain to what extent the works mentioned in the first two schedules had been addressed.

64. The third Schedule of Dilapidations resulted from instructions from the defendant on 11th June, 2014, and led to an inspection by Mr. Harry Dowey on the following day. The inspection was visual only. When Mr. Fitzgerald was asked why this Schedule was felt necessary in June, 2014 he said that:-

> "Well, I do believe, Your Honour, that potential buyers should understand that there was a dilapidation there and it was quite substantial." (Day 2, p. 86)

65. Mr. Fitzgerald accepted under cross-examination that he had never compared all three Schedules of Dilapidations (Day 3, p. 12). No evidence was presented by the defendant to indicate that there was any failure to carry out works, or at any rate significant

works on the part of the tenant after the first or the second Schedules of Dilapidations. Mr. Fitzgerald had a singular lack of knowledge, and relied on Mr. Pat Walsh (who did not give evidence), and he was unable to point to any documentation or correspondence indicating any failure on the part of the first named plaintiff to address or carry out works pursuant to the Schedules.

66. Of significance is that Mr. Fitzgerald admitted that he had not read the third Schedule of Dilapidations. He was unable to point to any significant item constituting a want of repair. Most of the remedial works referred to in the third Schedule appear to relate to cleaning or other maintenance matters, redecoration or other minor matters. For instance, item 1.1 concerns missing roof tiles and requires "Fit new hip tiles to match existing and replace missing cowl". Item 6.3 relates to the floor in the third floor kitchen and the remedial work required is "wash the floor covering". Some of the items do not demonstrate lack of repair because they are stated to be matters to be addressed before the expiry or surrender of the lease. For example, item 5.3 concerns "windows, doors & joinery", and under the heading "Breach" says "windows, doors and joinery are all in good decorative order", and the remedial work required is stated to be "within 12 months of the expiry/surrender of the lease clean down, prepare and redecorate all windows, doors and joinery in accordance with the lease covenant." Similar wording appears in clauses 7.3, 7.4 and 7.5. It was an extraordinary feature of Mr. Fitzgerald's evidence that not only had he not read the Schedule but he was unable to identify any single substantial breach or element of remedial work required. He simply resorted to repeatedly saying "my understanding of it is that the works hadn't been carried out and there was issues" (Day 3, p. 17), or words to similar effect. He accepted that no letters had been written which belied his assertions that dilapidations were a matter of significant concern.

67. While the Receiver in his evidence did acknowledge that there were "some" repairs outstanding, he characterised these correctly in the Court's view as minor. There is no evidence that the landlord regarded them as significant at any stage. It is notable that nowhere in the correspondence between 15th September, 2014 and 18th November, 2014 relating to the consent requested by the plaintiff did the defendant's solicitors, Arthur Cox, identify any significant items of disrepair or identify what works they were referring to when they stated "we understand that no works have been carried out" (their letter of 2nd October, 2014 to A.C. Forde & Co.). In this context there was no justification for the defendant's request in Arthur Cox's letter of 20th October, 2014 for "full details of the works that had been undertaken by your client to rectify the matters identified in their Schedule of Dilapidations", or the statement that following receipt of that information the defendant's surveyor would inspect the property to verify the works carried out.

68. It was also not disputed that it was on the insistence of the defendant that the third Schedule of Dilapidations was placed in the Data Room.

69. The Receiver accepted that in the Tender Documentation prospective purchasers were advised "some of the work" had been carried out. However, he denied that there was any breach, stating (Day 1, p. 25) – "again we would have taken advice on that, that in terms of when the Notice of Dilapidation was served upon us, we engaged our own consultant to review the Schedule of Dilapidations and he reported back to us and he told us that in very simple terms the matter of dilapidations were of a decorative nature and of a minor nature. That's the advice we got." See also his evidence to similar effect referring to retaining there own expert Val O'Brien & Associates who reviewed the Schedule of Dilapidations and informed the Receiver that "all matters in relation to the dilapidations had been dealt with apart from minor elements…" (Day 1, p. 21).

70. For these reasons I prefer the evidence of the Receiver in relation to the dilapidations issue. I do not accept that there was any significant or material breach of the repair covenant at the time that consent to assignment was sought – at most there were some minor matters outstanding. I do not accept the contention in Arthur Cox's letter of 31st October, 2014 that dilapidations "are a live issue", particularly having regard to the content of the third Schedule of Dilapidations to which I have referred. I found Mr. Fitzgerald's evidence on this issue entirely unconvincing.

71. It was put to Mr. Fitzgerald in cross-examination that the only reason for the third Schedule of Dilapidations, and the requirement that it be put in the Data Room, was to deter prospective purchasers and thereby enhance the prospects of Starpin Ltd. succeeding in the tender process. His response was that dilapidations were a "real live issue" (Day 2, p. 86), and "that potential buyers should understand that there was a dilapidation there and it was quite substantial" (Day 2, p. 83). He was then asked:-

> " Q. Are we taking that as a yes?"
>
> A. Yes" (Day 2, pp. 86-87)

72. This was a virtual admission by Mr. Fitzgerald that the real purpose behind obtaining the third Schedule of Dilapidations and requiring that it be put in the Data Room was to put off other potential purchasers. I find that this was the defendant's real motive in preparing that Schedule and putting it in the Data Room, and in pursuing that issue in the correspondence sent on the defendant's instructions by Arthur Cox in response to the request for consent. I find that as that correspondence between solicitors developed the defendant, through its solicitors Arthur Cox, realised the weakness of the defendant's position. Whether as a ground for refusing consent or simply refusing to consider the application for consent, this issue dissolved on 6th November, 2014 when A.C. Forde & Co. confirmed that the proposed assignee would deal with any outstanding works referred to in the Schedule of Dilapidations, and enclosed signed undertakings in that regard from Sequana and Ardan. I am not satisfied that the dilapidations issue was or could have been a *bona fide* or a valid reason for failing or refusing to consider the application for consent. I am further satisfied that it was not, taken alone or in combination with any other factors, a reasonable basis for the defendant to withhold consent to assignment as of 18th November, 2014. I am also satisfied, having regard to my further findings, that it was raised for an ulterior motive.

Licensees for which there was no Landlord's Consent

73. The position taken by Arthur Cox solicitors on the defendant's behalf in correspondence prior to the issue of proceedings was last stated in their letter of 31st October, 2014 in the following terms:-

> "The alienation issue similarly remains live as between our Clients. Your letter states that our Client has always been fully aware of the various licensees. This is not the case. Our Client has only recently been made aware of the identity of all of their licensees and their consent has not been sought in each case. It is noteworthy that your Client has only furnished documentation in respect of the Licenses last week and has never requested nor applied for the appropriate consent in each case.
>
> And now that our Client has received a full list of Licensees currently in occupation, it is, for the first time, in a position to undertake a review of the content of these licenses. Also, please confirm that our Client should interpret the provision of this information as a formal request for the consent of our Client to the grant of these licenses, in accordance with Clause 3.2.1 of the leases. We are reviewing each of the licenses with our Client and will provide our comments and queries, very shortly."

74. The Receiver in his witness statement, which forms part of his evidence, said that he was surprised that this issue had been raised during the consent process as "at no stage during the tender process did the Landlord raise any issue whatsoever concerning the licenses. I say it was only when the company connected to the Landlord (Starpin Ltd.) was unsuccessful in the tender process that the Landlord started to raise these issues" (para. 17).

75. The Receiver asserted that there could be no doubt that the Landlord was fully aware of the occupation by the licensees, and in support of this he refers, in para. 23 of his witness statement to a number of documents:-

> 1. A letter dated 21st October, 2010 from Arthur Cox solicitors to him as Receiver confirming the purchase by the defendant of the Premises, and requesting redirection of payments to the defendant. This letter stated that:-
>
> "also, we understand that a short-term letting was permitted to Eco Securities Group Plc and that permitted subletting has expired. Please clarify whether this Tenant is still in occupation and if so the status of this occupation. Clearly no Landlord and Tenant rights should be allowed to accrue and you might confirm the position in this regard."
>
> 2. In the Receiver's letter dated 5th September, 2011 to Mr. Pat Walsh of "the Louis Fitzgerald Group" the Receiver stated that:-
>
> "I would appreciate if you would formally confirm your consent to the proposed sublease with RF Intro Agency Ltd., a copy of which I enclose for further information.
>
> I trust the above is in order, however should you have any queries or require clarification on any point please do not hesitate to contact my colleague…"
>
> 3. In a response by email dated 14th September, 2011 Mr. Walsh responded:-
>
> "Both leases seemed to be in order but obviously our consent is subject to receipt of properly completed and signed leases and deeds of renunciation. Any queries give me a shout."
>
> 4. By letter dated 19th June, 2013 the Receiver wrote to Mr. Pat Walsh of the Fitzgerald Group stating that:-
>
> "… please find enclosed, a schedule of the subtenants at 39 – 40 Dawson Street.
>
> I trust the above is in order, however, should you have any queries or require clarification on any point please do not hesitate to contact my colleague…"
>
> 5. Attached to this letter was a Table listing ten subtenants of the Premises, indicating the term (in months) of their occupation, and the dates upon which they commenced. One of the occupants "Intro" had commenced occupation on 1st March, 2011 and was on a 12 month "rolling" term. Another, Ali Coffey was on a 12 month term with six month break, and commenced occupation on 20th June, 2013. The other eight named occupants were all on 12 month terms and commenced occupation between February and April, 2013.
>
> 6. That letter and Table elicited a response from Arthur Cox solicitors on behalf of the Fitzgerald Group by letter dated 1st July, 2013. They "noted the Schedule of subtenants which were furnished to our Client which would indicate that there are now ten separate subtenants in place at the property". They noted that Eco Securities International Ltd. appeared no longer to be a subtenant, and they requested confirmation. They noted that Intro had been in possession since 1st March, 2011 and they sought confirmation of "the precise term for which they currently occupy and also that an appropriate Deed of Renunciation has been executed in respect of this arrangement". They also sought confirmation that the first occupation by each of the other nine subtenants commenced on the dates stipulated in the Schedule (Table) and that there was no prior occupation by them. This obviously demonstrated the defendant's solicitors' concern that no subtenants or licensees should obtain any Landlord and Tenant rights in respect of those parts of the Premises occupied by them. However, the landlord's solicitors expressed no concern over the absence of prior written consent to the licenses, and they did not seek applications for consent.
>
> 7. On Mr. Powell's behalf, his firm replied to Arthur Cox by letter dated 12th July, 2013. This letter confirmed that Eco Securities were no longer tenants, their lease agreement having been terminated on 8th May, 2012. They then stated:-
>
> "RF Intro Ltd. signed a new lease agreement on 21st September 2011 for one office space at 40 Dawson Street. A Deed of Renunciation was also signed in relation to this letting at the same date.
>
> On 21st January 2013 RF Intro signed a LICENSE AGREEMENT to occupy 3 office spaces at 39 and 40 Dawson Street, through letting agents Bespoke. It is the letting agent's advice that the rights conferred by such a license agreement are very different to that granted by a lease, and that no automatic entitlement to renew applies until at least five years of occupancy. Further it is the letting agent's advice that this license agreement supersedes the earlier lease agreement in place with RF Intro Ltd.
>
> Following on from the first license agreement outlined above, a further 9 license agreements have been signed by various companies to occupy office spaces at 39 and 40 Dawson Street.
>
> I trust that this clarifies the questions raised by your Client, however should you have any further queries please contact the undersigned." This letter did not provoke any further response.

76. The Receiver asserted that at no stage was any objection raised by or on behalf of the landlord to the licenses during or following this correspondence, and prior to Arthur Cox's letter 2nd October, 2014 which for the first time raised alleged breach of alienation provisions as a matter to be addressed before the issue of consent of the proposed assignment would be considered. The Receiver asserted that the failure by the landlord to object to the licenses granted by him in his capacity as the Receiver could only be deemed to be acquiescence on the part of the landlord.

77. In cross-examination of the Receiver it was put to him that there were other licensed subtenants referred to in the Conditions of Tender Documents Schedule at item 19, referring to License Agreements with Irogon, and Amicus Recruitment. The Receiver explained that these were licenses created in the year 2014 (Day 1, p. 41), and indeed the Documents Schedule lists their dates as being 13th

May, 2014 and 4th February, 2014, respectively. He said that they were negotiated by the operator of the property, Splash Hotels and "our understanding was that provided there was a Deed of Renunciation contained within the licenses that rights did not accrue to particular occupants, that our understanding was the landlord didn't have a difficulty" (Day 1, p. 41). He accepted that the landlord would not have seen these two licenses until copies were provided on 24th October, 2014 to Arthur Cox (during the consent process). The Receiver stated that "what I do know is that the landlord was aware of the nature of these rolling licenses" and "…I restate that there was a practice in operation, and again you know we would operate it as best practice. Certainly, if the landlord had indicated at any stage that he required, you know, a formality as regards these licenses, we would have concurred with that" (Day 1, p. 43). The Receiver was then referred to one of the "office based license agreements" furnished to Arthur Cox, dated 23rd July, 2014, with a license C "Rathula", and due to commence on 1st August, 2014. This arose during the Tender Process. The Receiver acknowledged that he would not "personally" have known the identity of the occupants but their requirements were "that they meet certain standards; that there would be, obviously, financial covenants; that it be in the form of a license, and there would be absolutely no right, any rights in relation to the occupancy of the properties." (Day 1, p. 46)

78. In his evidence the Receiver confirmed his understanding that the licenses were in the Data Room. It was not disputed that Mr. Nash, Financial Controller of the Fitzgerald Group, visited the Data Room on 13th June, 2014. The Receiver confirmed that he did not at any stage after that visit hear any issue being raised in relation to the licenses (Day 2, p. 10).

79. In his witness statement and his oral evidence Mr. Fitzgerald relied on the fact that the Leases at clause 3.21 provided that the tenants might not assign or sublet or part with possession of the property without the landlord's consent, such consent not to be unreasonably withheld. He relied on the correspondence in 2011 and 2013, referred to above, as not constituting a request for or a provision of or form of consent, and maintained that details of the license arrangements "were first provided by Fiona Fitzpatrick of Duff & Phelps on behalf of Mr. Farrell by email to my colleague, Pat Walsh of the Fitzgerald Group, on 24th October 2014." (para. 3.17 of his witness statement). He asserted that the Receiver did not "follow proper procedures", and that it could not be said that the defendant acquiesced in connection with the arrangements.

80. Under cross-examination Mr. Fitzgerald accepted that when the defendant bought the property it was aware that there were people in occupation of the office space, be they subtenants or licensees. He said that "when I bought the premises my legal people would have assured me that everything was in order and they were all checked out and everything was above board at that time." (Day 3, p. 27). He accepted that the defendant continued to accept rent from the first named plaintiff following the exchange of information between the Receiver and Arthur Cox/ Mr. Pat Walsh in 2013.

81. I should refer to one other piece of evidence on this issue which I found to be significant. On Day 3 I addressed the following question to Mr. Fitzgerald: -

> "Q. Mr. Fitzgerald, are you saying that Chupn's real concern was the financial covenant, that really the dilapidations and licenses were secondary matters, that there were concerns but not major concerns?
>
> A. Yes, absolutely, yes, because…
>
> Q. That really the financial covenant was blocking you?
>
> A. Absolutely because as a person that operates in Ireland and I was told by my professional people that I would have to go to Malta and go to the US or somewhere else in the event of a dispute and that would be a major problem for me because I don't have that kind of experience to operate outside of Ireland because I don't have any business outside of Ireland and I needed comfort in that area and that was the main problem."

82. No evidence was given by Mr. Patrick Walsh, or by Mr. Nash who inspected the Data Room on behalf of the Fitzgerald Group. I infer from this that there is no genuine evidence on the part of the defendant or its advisors prior to the correspondence from Arthur Cox in October, 2014, in relation to the occupation of office parts of the Premises by licensees. I also conclude that Mr. Fitzgerald had no real or genuine concerns about this issue at any relevant time.

83. In argument counsel for the defendant relied on the Receiver's acceptance that from a landlord's point of view knowing who is occupying the property is important. It was argued that the Receiver held its information both as to the identity of the occupants and the nature of their occupations, and held the agreements under which they occupied. Reliance was placed on s. 43 of Deasy's Act [6] which provides:-

> "Where any lease made after the commencement of this Act shall contain or imply any condition, covenant, or agreement to be observed or performed on the part of the tenant, no act hereafter done or suffered by the landlord shall be deemed to be a dispensation with such condition, covenant or agreement, or a waiver of on the benefit of the same in respect of any breach thereof, unless such dispensation or waiver shall be signified by the landlord or his authorised agent in writing under his hand."

84. Counsel argued that there was no evidence in writing constituting waiver by the defendant of compliance with clause 3.21 in respect of the licenses. Counsel for the plaintiffs argued that Mr. Fitzgerald accepted that the questions of dilapidations and licenses were "secondary matters" (Day 3, p. 40), and that his various advisers never concerned themselves in practical terms with the licenses. He argued that they knew they were there and everything about them, but as the tenancy progressed they really did not concern themselves with them, until the application for consent was made. Reliance was also placed upon the fact that copies of the licenses were in fact furnished to Arthur Cox on or about 24th October, 2014.

85. On the evidence I find that the raising by the defendant of the issue of breach of covenant in respect of the absence of formal written consent in respect of the licenses was not raised *bona fide* by the defendant – either as a reason for refusing to consider the application for consent to assignment or as a reason for refusing that consent. I find that the defendant was aware of the presence of occupants, be they subtenants or licensees, from the time that it acquired the landlord's interests in the premises in 2010. I find that the defendant was, through its solicitors Arthur Cox, aware insofar as it wished to be of the details concerning subtenants/licensees following the correspondence and exchange of emails in mid-2013. Mr. Fitzgerald in his evidence repeatedly resorted to answering questions by reference to his reliance on his professional advisors. In Arthur Cox solicitors, the defendant had most eminent solicitors, and they were specifically engaged to enquire into sub tenancies/licenses in mid-2013, and having obtained the responses outlined above they did not pursue the matter any further. It was reasonable thereafter for the Receiver to assume that the landlord was content with practical arrangements under which short term licenses would be made occupants, and rolled over from time to time, provided that Deeds of Renunciation in respect of landlord and tenant rights were assigned – and in effect provided that none of the occupants obtained any rights under the 1980 Act. Furthermore Mr. Nash, when inspecting the Data Room in June,

2014 had available to him the current information in relation to licenses, yet no issue was taken by him or Starpin Ltd. or the defendant or anyone in the Fitzgerald Group in relation to the absence of formal written consent in respect of any of the licensees.

86. For these reasons it was disingenuous of the defendant to raise through the correspondence from Arthur Cox the issue of licenses. I am satisfied that in instructing or permitting Arthur Cox to raise these issues the defendant was seeking to pursue purely legal grounds upon which to obstruct the consent process. The issue was used as an excuse to avoid giving due or proper consideration to the application for consent. I am also of the view that following the production of copies of the current license agreements on 24th October, 2014 Arthur Cox on the defendant's behalf had ample time in which to review them and consult with their client. Accordingly, even if I am wrong, and the defendant raised a bona fide issue, this should reasonably have been regarded as resolved within days of receipt of those copy licenses, and the defendant should have proceeded to consider the application for consent to assignment on its merits. That this did not happen before the proceedings were commenced lands a further support to my findings.

Ulterior Motive

Disputed Evidence on Ulterior Motive
87. Mr. John Ryan of CBRE on behalf of the plaintiffs gave certain evidence of contact with Mr. Fitzgerald prior to the date upon which consent to assignment was sought. The Fitzgerald Group had made an initial offer of €4.625 million for the premises, and at the second stage of the Tender, Starpin Ltd. submitted a tender of €5.2 million. Mr. Ryan gave evidence that on the 3rd July, 2014 he met with Mr. Fitzgerald in the Burlington Hotel and had a conversation around the mechanics of the bid process. He said Mr. Fitzgerald queried if the Schedule of Dilapidations posted in the Data Room had deterred or was likely to deter any party from participating in the bidding process. Although Mr. Fitzgerald in his evidence denied that that conversation took place, for reasons that will become apparent I prefer the evidence of Mr. Ryan on this point.

88. Mr. Ryan stated that he had further telephone conversations with Mr. Fitzgerald on 16th July, 2014, four dates in August and four dates in September. Mr. Ryan's evidence in accordance with his witness statement at para.s 3.6-3.8 was as follows:-

> "3.6 In a telephone call on 6th September, 2014: Louis Fitzgerald telephoned to say that he understood the "sale of Café en Seine was not going his way". He asked if there were any other difficult landlords to deal with in this whole process. I asked what did he mean and he responded by saying he has had considerable difficultly with the tenant and was the Receiver and AC Forde & Co., aware of these difficulties? I responded that I understood that there had been considerable correspondence between his legal advisers and the Receiver particularly in relation to the interim Schedule of Dilapidations. Louis concluded by saying he would be "going to London for his legal advice on this one".
>
> 3.7 In a further telephone call on 10th September: Louis Fitzgerald telephoned and stated that it was all around town that another entity was buying Café en Seine. He said that the Receiver had broken all the rules and he could initiate legal proceedings to get the property back. He further stated that despite repeated requests (referring to the schedule of dilapidations) nothing had been done with the premises, there were unauthorised people on the premises on license agreements that he knew nothing about and for which landlords consent was not granted. He also raised an issue regarding insurance. I responded that he should put his concerns in writing to Pearse Farrell (Receiver) immediately. I also pointed out that no formal decision on the tender process had yet been made and that the decision date was expected on 15th September. As this date was only a few days away Louis responded to say that he would not do anything and would wait to hear from me.
>
> 3.8 I have read the witness statement of Louis Fitzgerald and in particular paragraph 1.5. At no time in any of my conversations with Louis Fitzgerald did he raise the issue of covenant strength of any prospective new tenant with me. His sole focus was on the schedule of dilapidations and landlords consent around the licence agreements".

89. Mr. Ryan was not challenged on this evidence. Under cross-examination Mr. Fitzgerald was asked what he meant by his reference to "other difficult landlords", and his response that it was "… maybe just soft talk or pub talk, to know did he [have] any difficulty with any other landlords" (Day 2, p. 107). A further response from Mr. Fitzgerald was "probably there I was inquiring to know other landlords that would have, also any other issues with other landlords in relation to the sale of the other premises." He denied that there was any threat implicit in the comment.

90. When the comment about "going to London for his legal advice on this one" was put to Mr. Fitzgerald he responded:-

> "I think it was kind of soft talk in relation to possibility, there was a lot of talk going around at the time with NAMA and stuff like that and builders were drinking in the pub and they might have said we are going to London because we have a problem, you know, it was soft talk, it was pub talk, there was nothing in that." (Day 2, p. 110)

Again Mr. Fitzgerald denied that there was any threat contained in this comment.

91. The comment that "the Receiver had broken all rules and that he could initiate legal proceedings to get the property back" was put to Mr. Fitzgerald. He said that he had no memory of that conversation with Mr. Ryan, and denied that he would threaten Mr. Ryan. Mr. Fitzgerald denied that at that time in September he had in mind initiating proceedings to wind up the first named plaintiff to thwart the assignment to Ardan.

92. In considering this evidence I bear in mind that Mr. John Ryan was subjected to cross-examination limited to the question of whether or not Mr. Fitzgerald had raised, as he contended, the question of the financial strength of the incoming tenant in any of their conversations. Mr. Ryan's evidence was that the financial strength of any proposed assignee was never raised with him by Mr. Fitzgerald, and he emphasised this on several occasions (Day 2, pp. 50-52). Not only was Mr. John Ryan not challenged in relation to the content of the conversations described in his witness statement, but no reason was suggested as to why his recollection or evidence should be disbelieved or disregarded.

93. I also take into account the fact that the Fitzgerald Group holds extensive assets and is very successful, and that Mr. Fitzgerald could be described as a businessman of substance. His evidence was that the Fitzgerald Group consists of over thirty companies, and holds twenty-three or twenty-four licensed premises, and engages in other enterprises such as letting apartments and bookies offices, and that one way or another it holds up to thirty different premises. Accordingly, I give great weight to Mr. Fitzgerald's statement that "myself and my son Eddie purchased Café en Seine with the intention that someday we might own it" (Day 2, p. 78), meaning that they had purchased the freehold and intended that some day they would be the occupiers. I have also come to the conclusion that Mr. Fitzgerald was not indulgencing in "soft talk or pub talk" in his conversations with Mr. John Ryan. My finding is

that in mentioning "other difficult landlords" and similar matters, and in saying that "he was going to London for his legal advice", and that the "Receiver had broken all the rules" Mr. Fitzgerald was giving a clear indication to the Receiver's selling agent that he would not accept the outcome of the tender process, that he would use the position of landlord to prevent the assignment proceeding, and that he would take all possible steps "to get the property back". While there was insufficient evidence to satisfy me that as of 6th or 10th September, 2014 Mr. Fitzgerald had decided to attempt to put the first named plaintiff into liquidation in order to force a forfeiture of the Leases, I am satisfied that at least from that point onwards he was actively engaged with his management and advisors in obstructing the completion of any assignment of the leasehold interests, and seeking to advance the objective of obtaining possession of the premises. Accordingly, I am satisfied that prior to the date upon which consent to assignment was sought the defendant through the control of Mr. Fitzgerald intended to pursue an ulterior motive, namely the desire to obtain possession of the Premises, in addressing the anticipated request for consent to assignment.

The Petition

94. In a Petition dated 14th January, 2015 Avalondale Ltd. applied to wind up the first named plaintiff on the basis of a debt of €105,857.07. The debt arose on foot of goods supplied and delivered by Comans Wholesale ("Comans"). On the 22nd December, 2014 Comans had sent a simple demand for payment within twenty-one days. The Petition alleged that a "Debt Transfer Agreement" was entered into on the 13th January, 2015 whereby Comans transferred the debt to Avalondale Ltd., and notice of such transfer was giving to the first named plaintiff on 14th January, 2015. The Petition was signed by Hugh J. Ward & Co. solicitors, and Hugh J. Ward, as a Director of Avalondale Ltd., swore the affidavit verifying the Petition and a further affidavit in support of it.

95. Affidavits were sworn by and on behalf of the Receiver in opposition to the Petition. Objection was taking on various grounds including that there was no reference to consideration in respect of the assignment of the debt; that Avalondale had never issued a separate letter threatening proceedings to wind up prior to issuing the Petition; that at least part of the alleged debt was disputed or the Receiver was willing to discharge part; that the Petitioner was an unsecured creditor and there was no prospect of any dividend to unsecured creditors; that "the only rational explanation for the Petition – and indeed the apparent sale of debt that proceeded it – is that it has the very real potential to stymie the sale of the Leases, and to effectively short circuit the [consent] Proceedings, and was indeed, designed for that purpose"; and that there was a very real prospect, if the company was wound up, of rendering the secured creditor unable to realise some €5 million in value of its security (see the affidavit of the Receiver dated 18th February, 2015). In an affidavit sworn on 13th February, 2015 in opposition to the Petition by Mr. Eamonn Fleming, the purchasing manager of Café en Seine, he deposed to a meeting he attended with Comans representative Mr. Costello from which it emerged that the debt in question was an old debt that had arisen from the examinership period which predated the receivership of the plaintiff company. At para. 8 of that affidavit Mr. Fleming averred that:-

> "Mr. Costello contributed most to the discussion and while he was unaware of the connection of Splash Hospitality to the purchase he freely indicated that he was aware of the purpose of the acquisition of the Comans debt by Avalondale and of the intention to use the enforcement of that debt via a winding up petition to collapse the Leases of the Company in receivership for the benefit of the landlords."

96. On 2nd March, 2015 Mr. Fitzgerald swore an affidavit in support of the Petition proceedings. In para. 1 he stated that he was a Director of Feldway Ltd., and that company held a minority shareholding in Avalondale Ltd., the Petitioner. At para. 2 he stated:-

> "2. I am a Director of a shareholder in the Petitioner herein and I say that the acquisition by the Petitioner of the debts owed to Comans Wholesale by Perfect Pies Ltd. (in Receivership) … was done for sound commercial reasoning. I confirm that one of the reasons for making the petition herein is that there may also be a commercial benefit to the landlord of the Company, which I am a Director, in addition to benefits to the Petitioner." [Emphasis added].

97. At para. 17 he referred to the consideration for the acquisition of Coman's debt and confirmed "… that the consideration as agreed between the parties pursuant to the Agreement aforementioned was paid by Avalondale Ltd. (the Assignee and therein) to Comans (the Assignor) on the 13th January, 2015."

Pointedly nowhere in this affidavit or in the Petition papers is the amount of the consideration mentioned. At para. 34 of that affidavit Mr. Fitzgerald stated:-

> "34. I say that the presentation of the Petition now properly before the Court was motivated by the interests of the shareholders in Avalondale having taken a commercial view on the potential to recover a long outstanding debt offered to the Company by way of assignment in full from a creditor who had received no assurances that it would ever recover monies owed to it. Further to same, the shareholder of whom I am a Director, was motivated by a connection to the Landlord of the property, whose rights and entitlements were being ignored. This is not, as is suggested, an ulterior motive, this was a motivation behind the involvement of Feldway Limited in Avalondale. This is never been hidden."

98. This led to a further round of affidavits, and in his affidavit sworn on 6th March, 2015 the Receiver alleged that Mr. Fitzgerald was acting "… not for objectively legitimate commercial purposes, but only in the light of the disappointed bid of Starpin", and that this was "… his attempt to set up the right to forfeit … evoking the jurisdiction of this Honourable Court, and undermining the jurisdiction of the Commercial Court – it is quite simply an abuse of process on two fronts" (para. 10). He alleged that the Petition "… only serves to advance the commercial ambitions of Mr. Fitzgerald and Starpin, the disappointed bidder".

99. The Petition was in due course heard on affidavit by Ms. Justice Kennedy and on 12th June, 2015 she ordered – (1) that the said Petition be refused and (2) "that the Petition herein do stand adjourned with liberty to re-enter same on seven days notice with the stay on the proceedings herein pending the determination of the hearing before the Commercial Court on the 6th day of October, 2015".

100. The reference to the latter hearing is to these proceedings. I was informed that the costs of the Petition were also not dealt with by Ms. Justice Kennedy.

101. In his witness statement before this Court Mr. Fitzgerald at para. 5.1 rejected the suggestion that the defendant had an ulterior motive in not providing consent to the proposed assignment, and rejected the inference that the plaintiffs sought to draw that the objections raised by the defendant were other than bona fide. He was cross-examined in relation to the Petition proceedings at some length, and additional facts emerged. He admitted (Day 3, p. 37) that "… basically we were a bit disgruntled …" at losing the tender. He accepted that he used a different set of legal advisors in pursuing the Petition, and that Arthur Cox's were kept in ignorance of that proceeding.

102. Mr. Fitzgerald in his oral evidence indicated that the idea for bringing a Petition originated with a telephone call to his office from

a person unknown to him, but known to his manager Mr. Pat Walsh. Initially Mr. Fitzgerald stated that this call came in December, 2014 "… from a legal person, Cormac, his second name is Brogan". Mr. Fitzgerald said that "this person rang out of the blue" (Day 2, p. 120), and that he didn't know why he had made contact. In his evidence which continued on the following day Mr. Fitzgerald revised his evidence stating:-

> "I looked in my diary last night and Cormac Gordon is his name. He is a solicitor and a property person. He operates around Baggott Street I am told. He contacted our office in relation to a possible legal avenue we could take and that was pursued. And that is how that came to pass. … I thought it was very early December, or late November – early December" (Day 3, p. 34).

103. Mr. Fitzgerald also agreed under cross-examination that he did not inform Arthur Cox solicitors of the Petition proceedings, and that he also did not inform his accountants Farrell Grant Sparks, notwithstanding that these were the professionals upon whose advice he was "very dependent" (Day 2, p. 114).

104. Mr. Fitzgerald told the Court that Mr. Pat Walsh took up the running of the Petition proceedings, along with Mr. Cormac Gordon, but that he was kept informed of what was going on (Day 3, p. 47). In response to questions from the Court Mr. Fitzgerald said that after the initial telephone call from Mr. Gordon the Fitzgerald Group were looking for a debtor of the first named plaintiff company and they approached Mr. Geoff Coman, a director/owner of Comans with whom Mr. Fitzgerald was acquainted, to enquire as to whether he would be interested in selling Comans debt to the Fitzgerald Group. Mr. Fitzgerald had known Mr. Coman over some 20 years, and had regarded him as a casual friend. In relation to the purchase of the debt of approximately €105,000 the deal verbally agreed was that if the Fitzgerald Group succeeded in the Petition proceedings brought by Avalondale Ltd Comans would be paid in full, regardless of whether there were assets in the first named plaintiff available to discharge that indebtedness. Furthermore, it was verbally agreed that there was to be an initial consideration of €10,000, which was to be a credit against €105,000 in the event that the petition was successful (Day 3, pp. 54-55). Mr. Fitzgerald confirmed that this deal with Comans was concluded before the letter of demand dated 22nd December, 2014 was served on the first named plaintiff.

105. In that the contract between the Fitzgerald Group/Avalondale Ltd. and Comans Wholesale was partly oral and partly in writing, the orally agreed terms were not put before the High Court in the affidavits sworn by or on behalf of Avalondale in the Petition proceedings. The only information provided to the Court was in the form of a written "debt transfer agreement" dated 13th January, 2013 which did not state the amount of the consideration, but stated at clause 1.B:-

> "Provided that the consideration (as agreed between the parties) for the Debt has been paid by the Assignee to the Assignor, immediately upon the execution of this Agreement, the Assignor assigns to the Assignee as legal and beneficial owner and free from any encumbrance, the Debt and all rights and obligations arising from same."

106. This expressed provision in the written agreement was contradicted by the evidence of verbal agreement given by Mr. Fitzgerald in his oral evidence to this court, and as outlined above – and from which it is apparent that all of the consideration had not been paid prior to the written agreement of 13th January, 2015 because, if the Petition was successful, a balance of approximately €95,000 fell to be paid to Comans Wholesale. It is therefore the case that Avalondale Ltd./the Fitzgerald Group and the deponents of affidavits on there behalf, including Mr. Fitzgerald, failed to make full disclosure of all relevant facts to the High Court in the Petition proceedings.

107. Under cross-examination Mr. Fitzgerald was also pressed in relation to his reasons for commencing the Petition proceedings. It was put to him that he commenced the petition to procure the liquidation of the first named plaintiff, and he appeared to agree (Day 2, pp. 116- 117). This question was put again by the Court at p. 118:-

> "Q. … [Counsel] asked you was the reason that you went down the forfeiture route, forfeiture, not to collect the debt, was solely to ultimately try and get procession of the property and your response to that was "yes"?
>
> A. My response to that was yes, I did go down that route for that reason."

108. The oral evidence given by Mr. Fitzgerald at the trial of this action in relation to the Petition proceedings leads me to the following conclusions:-

> 1. As the entire contract between Avalondale Ltd./the Fitzgerald Group and Comans Wholesale for the acquisition of the Colman debt envisaged, if the Petition was successful, repayment of the full amount of that debt by Avalondale Ltd. to Comans Wholesale (regardless of what might be recovered in the liquidation), there was in fact no commercial benefit to Avalondale Ltd., Feldway Ltd., the Fitzgerald Group, or the defendant in these proceedings, in bringing the Petition.
>
> 2. It follows that Mr. Fitzgerald attempted to mislead the High Court hearing in the Petition when he averred, in his affidavit sworn for those proceedings on 2nd March, 2015:-
>
> "34. I say that the presentation of the Petition now properly before the Court was motivated by the interests of the shareholders in Avalondale having taken a commercial view on the potential to recover a long outstanding debt offered to the Company by way of assignment in full from a creditor who had received no assurances that it would ever recover monies owed to it."
>
> 3. This is confirmed by Mr. Fitzgerald's admission in evidence before this Court that forfeiture of the Leases on liquidation of the first named plaintiff was the sole motive for the Petition.
>
> 4. It also follows that Mr. Fitzgerald's averment in para. 2 of his affidavit that "one of the reasons for making the Petition herein is that there may also be a commercial benefit to the landlord of the Company, of which I am a director, in addition to benefits to the Petitioner", was deliberately false and misleading: in fact the benefit to the landlord was the only reason for the Petition.
>
> 5. The manner in which the defendant through its solicitors Arthur Cox responded to the request for consent to assignment between 15th September and 18th November, 2014 must now be assessed in the light of these findings. They corroborate the plaintiffs' contention that the defendant never intended to give due or proper consideration to the request for consent, and that its responses through Arthur Cox reflected the ulterior motive of trying to obtain possession of the Premises.

6. These findings also raise serious doubts over Mr. Fitzgerald's credibility when, in his evidence, he stated that his real concern in the context of consenting to an assignment was the strength of the financial covenant on offer. Quite apart from the fact that this was not raised at any point on the defendant's behalf in Arthur Cox's correspondence with the plaintiffs' solicitors, I reject as untrue Mr. Fitzgerald's evidence that he considered or entertained any real concerns over the strength of the financial covenant offered prior to the issue of these proceedings.

Conclusions

109. I therefore conclude that the defendant unreasonably withheld its consent to the assignment to Sequana on the basis of ulterior motive, namely the desire to obtain possession of the Premises. Regrettably, in order to achieve this ulterior motive the Fitzgerald Group/Mr. Fitzgerald were prepared to take extraordinary measures in bringing the Petition proceedings which, in the light of the oral evidence adduced before this Court (but not available to the Court hearing the Petition) were, in the opinion of this Court, an abuse of the process. This abuse was seriously exacerbated by the fact that Mr. Fitzgerald made positive averments on affidavit before that Court that he contradicted in admissions and credible evidence of the verbal terms of the agreement with Comans in his evidence before me. The seriousness of this abuse will be readily appreciated: had the Court been misled by those averments into ordering winding up of the first named plaintiff, and the Leases had thereby become forfeit, the Fitzgerald Group would have obtained possession of the Premises at little or no cost (at worst €10,000 and some legal costs) notwithstanding that some months earlier Mr. Fitzgerald on behalf of Starpin Ltd., a company controlled by his son, had offered in excess of €5 million to buy the leasehold interests.

110. I find that this ulterior motive prompted the defendant to rely on spurious reasons, namely non-repair and lack of consent to licensees, to decline to consider the plaintiff's application for consent to assignment. If there was any material want of repair, this was easily remediable, and was satisfactorily addressed (as the defendant appeared to accept) by the undertakings from Sequana and Ardan to be responsible for any outstanding works. With regard to licenses the defendant was aware of the licensees and the nature of their occupation at least since July, 2013, and raised no objection, and was aware of the up to date position following access to the Receiver's Data Room during the tender process, and was furnished copies of the licenses in good time to review them prior to initiation of these proceedings. These were all short-term and no suggestion was ever made that any licensee could acquire landlord and tenant rights or that the licenses could otherwise prejudice the landlord's interest in the Premises. It is clear from this and the timing of the raising of this issue that it was not raised as a *bona fide* objection to consent to assignment.

111. Insofar as the defendant might now be adjudged to have had good reason to withhold or refuse consent based on the adequacy or otherwise of the sureties offered and the financial references provided for the assignee and the proposed sureties, a subject that I address shortly, I find that the defendant deliberately elected not to consider these issues at the relevant time because of its ulterior motive. The defendant in this case cannot now retrospectively in this Court rely on such issues to suggest that it acted reasonably in withholding consent prior to the issue of proceedings in the light of my findings. It patently did not act reasonably. The defendant cannot rely on authorities such as *Rice, Irish Bottle Glass and Boland v. Dublin Corporation* to give new reasons for refusing consent to this Court when during the relevant period (15th September, 2014 up to the issue of proceedings) the defendant withheld consent for improper motive. If it were permitted to do so landlords could with impunity refuse or decline consent for improper motives and then later seek to rely upon some good reason. Furthermore, how could it be said, on an objective basis, that the landlord can now rely on a 'good' reason when my finding is that objectively and subjectively it never had any intention of addressing the request for consent on any *bona fide* basis and was intent on preventing the assignment proceeding; this would seem to be contradiction in terms. It seems to me that a practice of refusing or declining consent for an improper motive, and then later attempting to rely on a 'good' reason, is something that the courts should not encourage or permit, particularly in a case such as the present where the defendant's desire is still to recover possession, and Mr. Fitzgerald persists in the notion that Avalondale Ltd.'s Petition might be re-activated after these proceedings are determined. Mr. Fitzgerald in his own evidence said that he and his son's real objection to giving consent *at the time* was the inadequacy of the 'financial covenant', yet they never raised this and chose to rely instead on spurious grounds of objection. I do not accept Mr. Fitzgerald's evidence on this point, but even if I did, a landlord surely cannot be permitted to deliberately keep secret from the tenant what it claims to be the real reason for declining consent and later produce it like a rabbit out of the hat and rely on it in court.

112. I find that up to the date of issue of these proceedings the refusal to consider the application amounted to an unreasonable withholding of consent such that the plaintiffs were justified in applying to this Court for a declaration under s. 66. ***Accordingly, I will grant a declaration that the defendant, in delaying and failing to consent to the plaintiffs' request for consent to assignment dated the 15th September, 2014, acted unreasonably within the meaning of the Leases and s. 66 of the Landlord and Tenant (Amendment) Act, 1980.***

113. I do not consider that this is an appropriate case in which to dispense with the defendant's consent to assignment however, assuming that the court has the power to make such an order (an issue that I do not decide). The reason for this is that, had the defendant given due and proper consideration to the application for consent to assignment, it would have been reasonable to refuse consent on a number of grounds related to shortcomings in the sureties offered and the financial references provided *prior to the commencement of these proceedings*. I propose to address these shortcomings given the likelihood that there will be a renewed application for consent.

The Financial Covenant

114. Both in the correspondence post the issue of these proceedings and in argument before this Court the parties addressed at some length the adequacy or otherwise of the security offered by the plaintiffs, and the financial strength of the proposed assignee/its parent company and the proposed guarantors. Insofar as the plaintiffs choose to maintain or renew their request for consent following this judgment, and in deference to the parties' arguments, it is appropriate to comment on the reasonableness or otherwise of sureties and financial information proffered and the respective positions taken by the parties on these issues since the commencement of these proceedings.

115. This is particularly so having regard to the recently expressed willingness of the proposed assignee to provide reasonable additional security requirements. Of course the landlord cannot take unfair advantage of such a commitment, and it must be viewed in the light of the jurisprudence to which I have referred earlier in this judgment. In particular what is reasonable or unreasonable from the landlord's perspective is an objective test, and one that takes into account the existing level of security over the payment of rent under the Leases. It also takes into account that what was originally prescribed by the Leases by way of guarantee may no longer be relevant or may not be objectively reasonable, but some replacement surety may be reasonable and appropriate.

116. The following comments are made *obiter* and seek to address only those issues that were disputed in these proceedings (many of the other elements of financial comfort tendered in respect of the assignee and offered sureties were not controversial):-

(1) Sequana - there will be many instances in which a shelf or start-up company, or 'special purpose vehicle', without a financial track record, will take on a tenancy. This of itself is not a reasonable ground for rejecting the proposed tenant, but is a good reason for requiring one or more guarantors with sound financial credentials. Projected EBITDA for Sequana reviewed by reputable chartered accountants is a not unreasonable offering to demonstrate likely financial standing once trading commences.

(2) Splash Hotels Ltd. – the fact that the assignee may wish to operate the business through a management agreement may be unusual but is not of itself, and without more, a good reason for withholding consent. Many tenants will engage managers to operate all or part of their business on the premises, and it seems to me that a landlord refusing consent on this basis would have to identify some further factor capable of prejudicing the recovery of rent before this could objectively amount to a good reason.

(3) Ardan – while some landlords might well accept as adequate the financial information furnished in respect of this proposed surety, closer scrutiny raises questions. It is also a new company, incorporated in 2012, that only commenced trading last year, and it is a holding company whose interests are intended to encompass Sequana (the Premises) as well as three other licensed premises acquired from the plaintiffs. The PWC letters relating to Ardan's net assets and projected EBITDA are based not on any audit or even full accounts, but rather on "assumptions" prepared and furnished by the directors, and not surprisingly the letters and PWC terms of engagement are replete with reservations and disclaimers. Clearly PWC carried out an examination of limited scope. Although PWC confirm Ardan's bank balance at 11th September, 2014 as €10 million, and the Balance Sheet (prepared by the directors) shows net assets of €10 million, the information furnished raises questions as to how it has been funded, and how it will continue to be funded, particularly in light of the fact that the overall cost of acquiring the four premises is €15 million (before any repairs or renovations are considered). Moreover, it appears from Appendix 2 to PWC's letter of 4th September, 2014 that Ardan planned to acquire the freehold in two of the licensed premises; and it is implicit from the "Consolidated EBITDA Projections", which project a €873,000 reduction in rental payments by Ardan between 2014 and 2015 and a commensurate increase in EBITDA, that Ardan planned to buy out these freeholds, but no information is provided as to how these buy outs would by funded. Evidence was given by Mr. Potter that a buy out could cost ten times the rent i.e. some €8.7 million, thus depleting Ardan's assets. Further and of some significance, Ardan's property interests are already covered by a Debenture issued in favour of Ulster Bank Ireland Ltd. registered on 25th May, 2015, and further property interests acquired by it would be similarly encumbered.

Of course it may be that with the passage of time audited accounts for Ardan have or will become available and these may give a more accurate picture of its financial strength, and enable the presentation of firmer projections.

(4) Accordingly, it was not unreasonable for the defendant to seek one or more additional sureties, particularly having regard to the amount of the rent and the commitment of the incoming tenant to address repairs. If one or more sureties with reasonably vouched and satisfactory financial status were offered, it would not be reasonable for the landlord to insist that these sureties be directors, or even shareholders, in Sequana. This is because the essence of the surety is that it should be a person or body to whom the landlord will be able to have practicable recourse to ensure that rent or other dues are paid.

(5) Apart from Ardan three other sureties are offered. I note that two of these, DP International Ltd. and J.T. Magen & Co. Inc., are in fact shareholders in Sequana, and one is a bank on a limited basis. I will address each of these, but I should first comment on the request in Arthur Cox's letter of 18th November, 2014, repeated in their letters of 5th December, 2014, and 30th September, 2015, for directors to be guarantors i.e. for personal guarantors, based on the content of clause 3.21.3 of the Leases. This was supported by the evidence of Mr. David Potter to the effect that personal guarantees would "…not be flavour of the month with tenants at the moment for obvious reasons. Nobody likes giving them. Under normal circumstances with a trading entity they may not be required." (Day 3, p. 94).

I do not accept it as reasonable for the landlord to insist on this requirement provided that corporate or banking sureties that are reasonably financially sound are offered. The case law cited earlier demonstrates that while the defendant has a legitimate interest in protecting himself from a tenant who may be unable to pay the rent or comply with the covenants, this interest may be just as well protected by a replacement guarantor (see Millett L.J. in Kened Ltd.), and there is no authority to suggest that this cannot be a corporate or banking guarantor or a third party who is not a director or personal shareholder.. Mr. Potter effectively accepted that since the recession it has been problematic obtaining personal guarantees for trading entities; given the extent to which personal guarantors have faced serious financial consequences in recent years, of which this Court is all too aware, that is not surprising.

(6) DP International Ltd. – although this company appears from the PWC report to have very substantial net assets, the difficulty is that three year's audited accounts were requested to vouch this company's financial status, but these were not available. The reason, which was not disputed, is that the company is based in Malta and is not required to file such accounts under domestic legislation. The PWC report of 5th September, 2014 is not based on a full audit and has reservations that limit its value in providing comfort. It also lists the values of some unlisted investments at cost, while other assets are valued using a fair value model. The evidence of Mr. Melia, an expert Chartered Accountant called by the defendant, was that this approach to valuation is inconsistent with the guidance in s. 9.26 of the F.R.S. 102 , an accounting standard/guidance that applies in Ireland. That is only a guideline, and if that were the only objection to the PWC report it might well be unreasonable to decline to accept DP International Ltd. as a surety on that basis alone.

However, it seems to me that a prudent landlord would insist on seeing audited accounts for at least the last accounting year of this company before accepting it as a surety. Moreover, its financial strength is based on its 100% ownership of Danu Investment Partners Ltd., which in turn owns various percentages of nine further companies six of whom are registered in Ireland, including a shareholding in Ardan. Within 'the Ardan Group' there is clearly quite a complex company structure, and this in itself might give rise to some legitimate concerns. It also begs the question why a guarantee is not offered by a more proximate company within the group e.g. Danu Investment Partners Ltd., or why the PWC report does not focus on that company.

(7) The mere fact that DP International Ltd. is registered abroad in Malta is said to be a reason why a reasonable landlord would not accept it as a surety. The reason suggested for this by Mr. Potter is the potential for difficulty in enforcing the security, or the perception of landlords that enforcement may be difficult. Where the surety offered is registered and has its centre of business or administration within the territory of an EU member state (such as Malta), I tend to the view (while not deciding this issue) that this would no longer be a valid objection because of the facility with which

enforcement of judgments of the courts in one member state can now take place in another member state under EU law. This is particularly so where the proposed surety agrees to submit to the jurisdiction of the Irish courts and that their guarantee will be governed by Irish law, and where they nominate Irish solicitors to accept service of proceedings/notices. It would be wrong in a time of free market within the EU for potential sureties based in other member states to be effectively discounted as potential guarantors simply because they are based abroad. I do not regard the general perception of landlords that it may be difficult to enforce against foreign guarantors to be reasonable, at least in its application to this case.

(8) J.T. Magen & Co. Inc. – a guarantee from this company was offered by A.C. Forde & Co. in their letter to Arthur Cox of 24th November, 2014 on the basis that audited accounts would be furnished if the defendant executed a confidentiality agreement ("NDA"), and copy of which was enclosed. The defendant argued that the requirement that it sign an NDA was unreasonable as it would need to be able to disclose such financial information as it held on any guarantor in the event that the defendant was disposing of its interest in the Premises.

In my view this point was well made. It might be otherwise if the NDA was framed to allow the landlord to make limited and similarly protected disclosure to any potential purchaser of its interest in the Premises. In such circumstances it is hard to see how the landlord could refuse to enter into the NDA.

In any event, I note that the requirement of the plaintiffs that the defendant enter into an NDA has now been dropped so that there is currently no impediment to the defendant considering Magen's accounts and assessing its financial suitability as a guarantor.

(9) Assuming that Magen is financially suitable to be a guarantor, insofar as jurisdictional certainty is concerned I am again of the view that if Magen agrees that Irish law is to apply, that Irish courts have jurisdiction, and nominates Irish solicitors to accept service of proceedings it would prima facie be unreasonable for the landlord to withhold consent on the basis that Magen is incorporated and based in the U.S.A.

(10) The fact that Ardan is contractually obliged in the Tender Document to provide a guarantee from Magen, and that this was not offered initially in the letter of 15th September, 2014, does not seem to me to be a relevant consideration. It is to be expected that in many, if not most, instances concerning commercial premises there will be some negotiation over the terms of a consent to assignment, and the tenant would not in normal circumstances have an obligation to put all their cards on the table at the outset. Moreover, that Agreement at clause 10.3 specifically envisaged consent being sought in the first instance without the offer of this further guarantee, on the basis that if the sureties first offered were inadequate or unacceptable it would then be offered.

(11) HSBC – a draft Letter of Credit from HSBC was furnished by A.C. Forde & Co to Arthur Cox with their letter of 24th November, 2014. It would not be unreasonable for a landlord to withhold consent based on this draft for a number of reasons. It is from HSBC Bank USA, and governed by New York State law, even though there is an HSBC bank operating and based in the UK. The offer of this guarantee was not accompanied by any offer to agree to submit to Irish law and jurisdiction or appoint Irish solicitors to accept service of proceedings. I note that although the draft says it is limited to $125,000 A.C. Forde & Co. clarified that this should have been redacted.

(12) Also it will be recalled that in their letter of 15th September, 2014 A.C. Forde & Co. had offered:-

"…a Guarantee in favour of your client from HSBC Bank for an amount equal to the aggregate rent currently payable pursuant to the Leases for a period of 5 years or until such time as the consolidated EBITDA for Ardan Advisory Limited (as certified by a chartered accountant) exceeds 3 times the aggregate annual rent payable in respect of the Leases, whichever date shall be the earlier."

One point made on the defendant's behalf is that such a guarantee is subject to the frailty that the consolidated EBITDA for Ardan might exceed three times the rent for the Premises in the first year. Based on the projected EBITDA furnished this was a distinct possibility. The guarantee might therefore have a very limited life (or no life at all) and would not give much comfort to the landlord.

I regard this as a reasonable apprehension, and it follows that a better guarantee should be offered that is not constrained by Ardan's EBITDA. The consensus seemed to be that it need not be for more than 5 years. While an Irish bank might be the defendant's preference, I would be slow to regard as reasonable a refusal of a suitable guarantee from a UK bank. I would add however that in considering whatever may be offered, the landlord is not entitled to a gold-plated guarantee. As Charlton J. observed in Cregan, the landlord's entitlement is only to the "same benefit in terms of financial reward and care of the premises" as enjoyed with the current tenant. It must be born in mind that the original guarantee in respect of the 1993 Lease was for three years only, that there has been no guarantor in place for the 1997 Leases since the defendant acquired its interest in October, 2010 (the original guarantee Break for the Border Group Plc., later Capital Bars Plc., was delisted in 2002 and went into examinership in 2009), and none of the guarantors were banks. In my view, it was also unreasonable of the defendant to require that in lieu of an Irish bank guarantee it should receive a security deposit equivalent to 18 months rent and rates. This is clearly something that was never envisaged under the Leases and is to seek an advantage from the granting of consent to which the landlord is clearly not entitled.

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[1] S.1(6) of the UK Landlord and Tenant Act, 1988 has reversed the onus of proof in that jurisdiction. S. 1(3) also imposes duties on the landlord to decide "within a reasonable time" and to serve notice of its decision and reasons if consent is withheld

[2] 28th Edition, looseleaf, Sweet & Maxwell, 2015

[3] It is well established in this jurisdiction that in considering an application for consent a landlord must not act arbitrarily or capriciously: White v. Carlisle [1976] ILRM 311.

[4] This is established in this jurisdiction: see Cahill v. Drogheda Corporation 58 ILTR 26 and OHS Ltd. V. Green Property Co. [1986] I.R. 39.

[5] Irish authorities for the proposition that the landlord is entitled to consider its own interest in deciding whether or not to give consent include: W&L Crowe Ltd v. Dublin Port & Docks Board [1962] I.R. 294, and Irish Glass Bottle Co. v. Dublin Port Co. [2005] IEHC 89.

[6] Landlord and Tenant (Ireland) Act, 1861