THE HIGH COURT

[2016 No. 126 S.P.]

BETWEEN

POINT VILLAGE DEVELOPMENT LIMITED

(IN RECEIVERSHIP)

PLAINTIFF

AND

DUNNES STORES

DEFENDANT

JUDGMENT of Ms. Justice Costello delivered on the 14th day of November, 2017

1. These proceedings concern the construction of a settlement agreement entered into between Dunnes Stores and Point Village Development Limited and Henry A. Crosbie which, in turn, amended earlier agreements which had been entered into by those parties. In particular, the court is asked to construe the meaning of two clauses of the settlement agreement.

Background

2. In February 2008 the defendant agreed to acquire from Mr. Henry A. Crosbie (Mr. Crosbie) what was referred to as the anchor site in the development known as Point Village at the North Wall Quay in the City of Dublin and the defendant entered into an agreement with the plaintiff for the construction of a retail store on the site (the store). There was an agreement for sale dated the 26th February, 2008 between Mr. Crosbie as vendor and the defendant as purchaser whereby Mr. Crosbie agreed to sell the anchor site to the defendant by way of a lease for 250 years at a nominal rent (the Long Lease). This agreement was completed by the grant of a lease by Mr. Crosbie to the defendant dated the 28th November, 2008.

3. In addition, the plaintiff and the defendant (with Mr. Crosbie participating to consent to the agreement) entered into a Development Agreement dated the 27th February, 2008.

4. The timing of the agreements proved to be unfortunate as they were overtaken by the economic crisis of 2008-2009 and disputes arose in relation to the development. On the 2nd June, 2009 the defendant commenced proceedings against the plaintiff and Mr. Crosbie in the High Court (Record Number 2009/5004 P) (the 2009 proceedings) in which the parties claimed and counterclaimed against each other in respect of obligations arising from the agreements. The 2009 proceedings were listed for hearing and terms of settlement were reached between the parties on the 7th July, 2010 (the Settlement Agreement).

5. Despite the fact that the Settlement Agreement was intended to dispose of the 2009 proceedings, further disputes arose between the parties and the matter came back before court. The parties subsequently negotiated supplemental terms of settlement which were referred to as the supplemental agreement but the details of which are not relevant to the issues in this case.

The Development Agreement

6. The Point Village Centre (the Centre) was part of a wider ambitious development at the lands situated near the 3Arena in Dublin's docklands. There was to be a signature 39 storey building on the riverfront titled the Watchtower, a U2 Experience/Museum housed in a building called the Spine, the Centre and Point Square between the 3Arena and the Centre. The development was to be a new destination in Dublin for living, tourism, shopping and entertainment. The Development Agreement related to the development of the Centre and Point Square and was entered into in the context of the wider plan for the development of the entire area in accordance with Mr Crosbie's ambitious plans.

7. The plaintiff's obligations under the Development Agreement primarily relate to the "Building Works" which is defined as "the Store Works, the Centre Works and the Minimum Works" (Clause 1.5).

8. The Building Works are precisely defined in the definitions in the Development Agreement by reference to specifications, plans and in the provisions relating to the plaintiffs' obligations to carry out the Building Works. They are set out on six and a half pages in 21 sub clauses.

9. The "Access Date" (Clause 1.2) is defined as: -

> *"…the date on which the Developer's Architect issues written confirmation to Dunnes [sic] representative certifying that the Store Works have reached Practical Completion in accordance with this Agreement and that the remaining Building Works have reached a stage enabling Dunnes and its contractors safely and efficiently to carry out Dunnes Works and use the Fit-Out Compound and safely and efficiently to proceed with and complete Dunnes Works without interruption or delay…*
>
> *[If there is a dispute] as to whether or not the Access Date has properly occurred the matter shall be referred to the Independent Architect. It is expressly provided that the Access Date shall not be deemed to have been achieved until the date of issue to Dunnes of the Access Certificate in accordance with the agreement. The Access Certificate is a certificate of the developer's architect or the independent architect, as the case may be, certifying the Access Date in accordance with the Development Agreement (Clause 1.1).*

10. Clause 11 requires the defendant from the Access Date to procure that the Fit- Out Works (as defined in Clause 1.38) are designed, carried out and completed in a good and workmanlike manner and in accordance with good building practice (Clause 11.4). Under Clause 11.5 the defendant is required with effect from the Access Date diligently to procure the execution and completion of the fit out works within the Fit-Out Period i.e. 26 weeks from the Access Date (with a proviso for an extension of time in certain circumstances).

11. Subject to the achievement of Practical Completion of the Building Works, Clause 11.12 requires the defendant to commence trading to the public from the Store as "Dunnes" and/or "Dunne's Stores" no later than the Store opening date. The Store opening

date is defined as the later of the expiry of the fit out period and centre opening. Centre Opening (subject to provisions in relation to extensions of time) is defined in Clause 1.8 as: -

> *"The date following the Practical Completion of the Building Works in accordance with this Agreement that the Developer formally declares the Centre (other than the hotel and offices) open to the public, which date shall not be later than 26 weeks after the Access Date…"*

Practical completion must be in accordance with the definition in Clause 1.57 and there is provision for the appointment of an independent architect to resolve any dispute as to whether or not practical completion has occurred.

12. Under Clause 1.17 the contract sum originally payable by the defendant was €46 million plus VAT. It was to be paid in stages into a deposit account referred to as the nominated account opened in the joint names of the plaintiff's and the defendant's solicitors at Allied Irish Bank plc. Within five working days of receipt by the defendant of a Payment Certificate certifying Practical Completion of the Building Works the entire amount including accrued interest was to be released to the plaintiff (Clause 9.5).

13. The Development Agreement and Long Lease were each varied by the Settlement Agreement. The relevant provisions of the Settlement Agreement are considered below.

14. Suffice to say at this stage that the consideration payable by the defendant pursuant to the Development Agreement was reduced by the Settlement Agreement from €46 million to €31 million and it was agreed that the defendant would lodge the entire consideration of €31 million to the nominated account. The original payment mechanism was replaced by Clause 11 of the Settlement Agreement which provided a new payment mechanism. This provides that consideration already lodged to the nominated account is to be released to the plaintiff in four tranches upon the plaintiff and Mr. Crosbie achieving certain stipulated milestones.

15. The first tranche fell due under Clause 11 (a) upon the plaintiff achieving practical completion of the Building Works other than the Point Square. The sum of €11,880,000 (plus interest) was released from the nominated account to the plaintiff following the execution of the supplemental settlement agreement in November 2010. Clause J (ii) of that agreement confirmed that this milestone had been achieved. No further monies have been released since that date.

Appointment of Receivers

16. By deeds of appointment dated 17th April, 2013, 18th April, 2013 and 27th May, 2013 Mr. Paul McCann and Mr. Stephen Tennant were appointed as joint receivers and joint statutory receivers of certain assets of Mr. Crosbie and the plaintiff including their respective interests in the Point Village Centre, the Dunnes unit, the Long Lease and the Development Agreement (as amended).

17. Following their appointment the receivers took control of the assets, though there was a delay in obtaining all the relevant files and agreements in relation to the assets that constitute the subject matter of these proceedings. The files were eventually released to the receivers in March 2014 whereupon the receivers engaged with the defendant with a view to completing matters which remained outstanding under the Development Agreement and the Settlement Agreement.

The Dispute

18. It is the plaintiff's case that, acting through its receivers, it has satisfied the requirements of Clauses 6, 11 (b) and 11 (c) of the Settlement Agreement and that in accordance with the terms of Clause 11 (b) and 11 (c) the defendant is obliged to release the sum of €500,000 (Clause 11 (b)) and €15 million (Clause 11 (c)) plus accrued interest. The defendant has not denied the obligation to release the sums payable pursuant to Clause 11 (b) save to say that it is "inappropriate" to do so in circumstances where the parties are otherwise in dispute. It denies that there has been compliance by the plaintiff with the provisions of Clause 6 or Clause 11 (c) and therefore it is not obliged to release the sum of €15 million plus accrued interest from the monies deposited in the nominated account.

19. For the sake of completeness, it should be noted that there is a separate dispute between the plaintiff and the defendant in relation to the completion of the Point Square. This is the subject of separate High Court proceedings and concerns the release of monies pursuant to Clause 11 (d) of the Settlement Agreement.

Issues

20. This Court must determine what is required to satisfy the provisions of Clause 11 (c) of the Settlement Agreement and Clause 6 of the Settlement Agreement. This Court must then determine whether, in fact, the plaintiff has met those requirements. If so, is the defendant obliged to release the sum of €15 million plus accrued interest from monies deposited in a nominated account? I shall consider the separate issue of compliance with Clause 11 (b) at the end of the judgment.

Principles of Construction

21. The task of the court in construing a contract is to ascertain the true meaning and intentions of the parties, which is to be found "from a consideration of the document as a whole and the factual background against which the contract was made" (*Point Village Development Ltd & Anor v. Dunne's Stores* [2012] IEHC 482 per Laffoy J. para. 36). The court looks to "the language used in the contract itself and the surrounding circumstances" per Keane J. in *Kramer v. Arnold* [1997] 3 I.R. 43 p. 55. Further, "[t]he court must not speculate as to [the parties'] intention, apart from their words, but may, if necessary, interpret the words by reference to the surrounding circumstances." *Rohan Construction Ltd. v. Insurance Corporation of Ireland plc* [1988] ILRM 373 per Griffin J.

22. The Supreme Court has set out the five principles of construction in *Analog Devices B.V. v. Zurich Insurance Company* [2005] 1 I.R. 274 which was relied upon by both sides. I have of course had regard to these principles and to the observation of Fennelly J. in the Supreme Court in *ICDL v. European Computer Driving Licence Foundation Ltd* [2012] 3 I.R. 327 where he held that the parties are not permitted to rely upon the factual matrix in an attempt to disregard the natural and ordinary meaning of the words of the contract.

> *"Evidence of the surrounding circumstances. but not of subjective intentions, may be admitted to explain the subject-matter and even what particular words used should be understood as referring to**. Such evidence will not normally be allowed to alter the plain meaning of words.**" (Emphasis added)*

23. Also in 2012, the Supreme Court, speaking through McKechnie J. in Marlan *Homes Ltd v. Walsh & Wedick* [2012] IESC 23 at para. 50, referred to the long-standing observation that "courts will not 'easily accept that parties have made linguistic mistakes, particularly in formal documents.'" He said that the words in question must be given in "their ordinary and natural meaning, in a sense as would be understood by a reasonable person having an interest in or knowledge of the material circumstances." He went on to state: -

"51. It is important however to note that where the parties have committed their responsibilities to written form, in a particular manner, it must be assumed that they have intended to give effect to their obligations in that way. Such must be recognised as their right, both commercially and under contract law. Accordingly it is important that, when faced with a construction issue, a court should focus its mind on the language adopted by the parties being that which they have chosen to best reflect their intentions. It is not for the court, either by means of giving business or commercial efficacy or otherwise, to import into such arrangement a meaning, that might also be available from an understanding of the more general context in which the document came to exist, but is one not deducible by the use of the interpretive rules as mentioned.

52. The boundary between what is permissible and not in this context is captured by the following quotation from Charter Reinsurance v. Fagan [1997] A.C. 313 where at p. 388 Lord Mustill stated:-

> *'There comes a point at which the court should remind itself that the task is to discover what the parties meant from what they have said, and that to force upon the words a meaning which they cannot fairly bear is to substitute for the bargain actually made one which the court believes could better have been made. This is an illegitimate role for a court. Particularly in the field of commerce, where the parties need to know what they must do and what they can insist on not doing, it is essential for them to be confident that they can rely on the court to enforce their contract according to its terms.'*

I would respectfully agree with this passage."

McKechnie J. noted that the inevitable and inescapable consequences of applying the appropriate legal principles to the contracts in that case resulted in what he described as an unattractive result when one considers the respective positions of the parties following the judgment. This underscores the limits of the role of the court in relying upon commercial common sense to construe a contract.

24. In addition to these Irish authorities the parties relied on two judgments of the Supreme Court of the United Kingdom. In *Arnold v. Britton* [2015] UKSC 36 Lord Neuberger noted at para. 15 that when interpreting a written contract the court does so: -

> *"by focussing on the meaning of the relevant words, in this case clause 3(2) of each of the 25 leases, in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the lease, (iii) the overall purpose of the clause and the lease, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions."*

He noted that commercial common sense is not to be invoked retrospectively. He said "[c]ommercial common sense is only relevant to the extent of how matters would or could have been perceived by the parties, or by reasonable people in the position of the parties, as at the date when the contract was made." He also noted that while commercial common sense is a very important factor to take into account when interpreting a contract, a court should be very slow to reject the natural meaning of a provision as correct simply because it appears to be a very imprudent term for one of the parties to have agreed, even ignoring the benefit of hindsight.

25. Lord Neuberger noted that despite the unattractive consequences, he rejected the construction of the leases contended by the lessees as it involved departing from the natural meaning of Clause 3 (2) in each of the leases and involved inserting words which were not there.

26. The defendant in particular placed reliance upon the decision of Lord Hoffmann *in Mannai Investment Company Ltd v. Eagle Star Life Assurance Company Ltd* [1997] AC 749. Lord Hoffmann distinguished between the meaning of words and the question of what would be understood as the meaning of the communication. The case concerned the construction of a termination notice served by a tenant on a landlord. Thus, it is important to note that this was not a document that had been negotiated and agreed upon by two parties like in the current case. The tenant was entitled to break the lease by serving notice on the third anniversary of the term commencement date. This date was the 13th January, 1995. The notice served by the tenant stated that it was purporting to terminate the lease pursuant to the relevant clause but named the 12th January, 1995 by mistake rather than the 13th January, 1995. Lord Hoffmann said that the meaning of the notice was clear even though the words used were mistaken. He construed the notice by reference to the lease which it sought to terminate and said that a reasonable recipient of the notice will understand it to mean that the tenant wished to terminate the lease on the date which accords with the relevant clause in the lease. In other words he held that the meaning was clear by reference to the fact that this was a notice intending to terminate a lease even though on its face the wording was incorrect.

27. I shall apply these principles of construction I have set out to the two clauses to be construed in this case.

Clause 11 (c)
28. Clause 11(c) provides: -

> *"The following provisions shall apply to the release of monies in the nominated account:*
>
> *…*
>
> *(c) The sum of €15,000,000 (plus accrued interest to date) shall be released within five working days of receipt by Dunnes [sic] solicitors of confirmation from William Fry that binding agreements for lease or leases have been exchanged with tenants in respect of at least seven of the ground floor units marked X on the annexed ground floor plan, four at least of which shall be internal units. The agreements for lease or leases may contain a clause that is a precondition to the tenant being obliged to enter into the lease that Dunnes should have commenced the fit out of the Store."*

29. This clause reflects the mechanism chosen by the parties to determine when the €15m was to be released from the nominated account. It also determined when the defendant was contractually required to commence fit out of the store in the Centre. Clause 14 of the Settlement Agreement stated that the Access Date shall be 30 days after the date of receipt by the defendant of the clause 11 (c) certificate.[In the decision *Point Village Development Ltd v. Dunne's Stores* [2012] IEHC 482, Laffoy J. held that this referred to the confirmation to be issued under clause 11 (c).] In the decision *Point Village Development Ltd v. Dunne's Stores* [2012] IEHC 482, Laffoy J. held that this referred to the confirmation to be issued under clause 11 (c)]. Under the Development Agreement the

defendant was required to commence fit out of the Store on the Access Date. Therefore this was 30 days after the date of receipt by the defendant of the confirmation specified in clause 11 (c). Both sides agree that this was commercially very significant. In resolving their dispute the parties carefully chose a mechanism to determine when this commercially significant event would occur.

30. The agreement was that solicitors for the plaintiff were to confirm to the defendant that a particular state of facts existed. [William Fry were replaced by McCann FitzGerald as solicitors for the plaintiff when it went into receivership – nothing turns on this point.]

There was no provision for a review of this confirmation. This is in contrast to the provisions of clause 7 of the Development Agreement. There, the plaintiff agreed to give the defendant no less than two months prior written notice of the proposed Access Date and of the Proposed Date of Practical Completion of the Building Works. The defendant's representative was permitted to attend the site with the plaintiff's architect to effect a joint inspection of the Store Works and/or of the remaining Building Works. The defendant was to be afforded the opportunity of making representations to the plaintiff's architect regarding the proposed issue of the Access Certificate and/or the Certificate of Practical Completion of the Remaining Building Works. The plaintiff undertook to procure that the plaintiff's architect took reasonable and proper account of such representations. If any dispute arose in relation to either certificate then the defendant was entitled to refer the matter to the independent architect for expert determination.

31. There is no equivalent involvement by the defendant or a representative of the defendant in the confirmation to be provided by the plaintiff's solicitors as set out in clause 11(c). It follows that the parties have agreed to accept the independent assessment of the solicitors acting for the plaintiff that the binding agreements for lease or leases have been exchanged with tenants in respect of at least seven of the designated units of which at least four are internal units.

32. It is important to note that the confirmation relates to the date it issues. The purpose of the confirmation is to act as a trigger for the release of certain monies in the nominated account and to trigger the obligation of the defendant to commence fit out of the Store. It is not a guarantee that the state of affairs confirmed on that date will continue unaltered into the future.

Binding Agreements
33. The first requirement is that solicitors for the plaintiff should confirm to the defendant that binding agreements for lease or leases have been exchanged with tenants in respect of seven of the ground floor units marked X on the plan, at least four of which are internal units.

34. On 29th February, 2016, Messrs. McCann FitzGerald, the solicitors now acting for the plaintiff, wrote to Dunnes Stores as follows: -

> *"Dunnes Stores v Point Village Development Limited & Harry A. Crosbie*
> *High Court Record Number 2009/5004P.*
>
> *Terms of Settlement dated 7th July, 2010*
>
> *Certificate pursuant to Clause 11 (c)*
>
> *Dear Sirs*
>
> *As you are aware, we act for Paul McCann and Stephen Tenant as statutory receivers of the assets of Point Village Development Limited (in receivership) and certain assets of Harry Crosbie.*
>
> *In accordance with clause 11(c) of the Terms of Settlement we hereby confirm that binding agreements for lease/leases have been exchanged with tenants in respect of nine of the ground floor units marked 'X' on the ground floor plan annexed to the Terms of Settlement, at least four of which are internal units.*
>
> *For good order, we enclose a certificate which highlights the units in respect of which agreements for lease have been exchanged.*
>
> *Take note that as a result of this confirmation:*
>
> > *(i) The sum of €15 million (plus accrued interest to date) must be released from the Nominated Account within five working days of the date of this letter; and*
> >
> > *(ii) in accordance with clause 14 of the Terms of Settlement the 'Access Date' shall be 30 days after the date of the enclosed certificate…"*

35. The letter enclosed a certificate made pursuant to Clause 11 (c) of the Terms of Settlement dated 7th July, 2010, between the parties and McCann FitzGerald as solicitors for the receivers certified that: -

> *"(1) agreements for lease/leases have been exchanged with tenants in respect of nine of the ground floor units marked "X" on the ground floor plan annexed to the Terms of Settlement, at least four of which are internal units; and*
>
> *(2) the agreements for lease/leases referred to in clause 1 have been exchanged in respect of the units outlined in green on the floor plan at Schedule One."*

36. The defendant took issue with the fact that the certificate did not refer to the fact that the agreements for lease/leases were binding. I find no merit in this argument as the covering letter confirms that the agreements were binding. The certificate was enclosed simply for the purposes of good order to ensure certainty as to which particular units were the subject of binding agreements for lease/leases.

37. The defendant submitted that the plaintiff had to prove to the court that there were binding agreements in order to prove compliance with Clause 11 (c). This argument is misconceived. The parties bargained that the issue was to be resolved by confirmation by a reputable firm of solicitors that such binding agreements had been exchanged with tenants. The plaintiff has proved that the solicitors confirmed that there were binding agreements exchanged within the meaning of Clause 11 (c) and this is sufficient for the purposes of Clause 11 (c).

38. There was no agreement that the defendant would be entitled to look behind this confirmation. It follows that it cannot do so absent fraud, or manifest error. Fraud has not been alleged in this case.

Was there Manifest Error?
39. The defendant advanced an argument that the solicitors erred on two accounts. It was submitted that two of the alleged agreements were not binding within the meaning of Clause 11 (c). In respect of the first agreement, the plaintiff's solicitors agreed with the proposed tenant to terminate the agreement for lease some two years after the agreement for lease had been entered into. Before the agreement for lease could be rescinded the proposed tenant was dissolved. Thus, the agreement for lease terminated as a result of the dissolution of the tenant.

40. The defendant argued that in the circumstances, there was no binding agreement for lease in respect of this unit and this was, therefore, fatal to the purported compliance with the provisions of Clause 11 (c).

41. This point was considered previously by the High Court. On the 15th September, 2017 the defendant sought to inspect the agreements for lease which McCann FitzGerald confirmed were binding agreements for lease on 29th February, 2016. It alleged that the letter of McCann FitzGerald dated 4th July, 2017 whereby the receivers were replacing one tenant with another amounted to a manifest error which would justify the High Court in looking behind the confirmation and ordering inspection of the six agreements for lease. Twomey J. stated in his *ex tempore* judgment as follows: -

> *"This Court does not find this argument persuasive. In this Court's view there is nothing illogical in the statement by McCann FitzGerald that at any stage during the term of a legally binding agreement between two parties, both parties to that agreement can agree to terminate that agreement, in which case the agreement ceases to be legally binding, but that this termination does not result in the agreement being deemed to never having been legally binding in the first place. Thus, this Court does not accept that the statement by McCann FitzGerald on 4th July, 2017 amounts to a manifest error by that firm regarding the law of contract.*
>
> *For this reason, this Court cannot conclude that a manifest error has occurred as envisaged by Hogan J. so as to justify this Court in looking behind the confirmation issued by McCann FitzGerald that the agreements are binding."*

42. While I accept that this decision of Twomey J. is not binding upon this Court, I endorse his reasoning and accept it. The validity of the confirmation has to be assessed at the date it issued. There is no basis for asserting that an agreement which terminated by dissolution of one of the parties nearly two years after it was entered into was not therefore at all times binding prior to that date. The subsequent history of this agreement for lease does not invalidate the confirmation of 29th February, 2016. It certainly does not amount to a manifest error on the part of McCann FitzGerald in issuing the confirmation.

43. The second matter related to the agreement for a lease dated 25th August, 2015 in respect of Unit 23 at the Centre entered into by Rossport Retail Services Limited trading as Kix ("Kix"). Clause 2 of that agreement for lease provided: -

> *"2.1. This Agreement is conditional upon the Anchor Tenant [the defendant] commencing its fit out of the Anchor Unit on or before the Long Stop Date.*
>
> *2.2 In the event that the Anchor Tenant does not commence its fit out of the Anchor Unit on or before the Long Stop Date then either party shall be at liberty to rescind this Agreement on giving to the other party 7 Working Days' notice in writing whereupon this Agreement shall be null and void and of no further force or effect but without prejudice to any antecedent breach of the terms of this Agreement or the Lease by either party."*

44. The long stop date was two years from the date of the agreement. By letter dated 11th September, 2017 Kix notified the receivers that pursuant to Clause 2.2 of the agreement for lease it was terminating the agreement. This was received by the receivers on 14th September, 2017. The plaintiff's solicitors notified the solicitors for the defendant of this fact by letter dated 21st September, 2017 and by letter dated 27th September, 2017 the defendant's solicitors asserted that the agreement for lease with Kix was not binding within the meaning of Clause 11 (c) of the Settlement Agreement. Accordingly, the defendant's solicitors continued to contest the assertion that the agreements for lease the subject of the confirmation letter were properly binding as required by Clause 11 (c).

45. Clause 2.2 of the agreement for lease shows that the agreement for lease entered into between the plaintiff and Kix was a binding agreement at the date it was entered into and that there was a possibility of rescinding the agreement. The argument that the possibility of rescinding the agreement meant that there was no binding agreement in existence at the date of the agreements is logically not sound. It also ignores the fact that Clause 11 (c) in fact contemplates that agreements which satisfy Clause 11 (c) may themselves be conditional agreements for lease. It is clear that the agreement for lease was binding on both parties on 29th February, 2016 and there was no possibility of rescinding the agreement pursuant to Clause 2.2 until at least 25th August, 2017. It follows, the argument that this agreement of 25th August, 2015 was not a binding agreement for the purposes of Clause 11 (c) must be rejected. Specifically, there is nothing in the terms of Clause 11 (c) to suggest that the agreements which satisfy that clause could not contain break clauses, as is fairly standard practice in commercial leases.

46. Separately, the defendant argued that the agreements for lease were not binding because it was *possible* that they did not include certain restrictions which are required by the terms of Clauses 4.7.1 and 4.7.2 of the Long Lease to be included in third party leases. This argument is pure speculation on the part of the defendant. There is no requirement that the confirmation for the purposes of Clause 11 (c) also confirmed that the agreements for lease comply with the requirements of Clauses 4.7.1 and 4.7.2 of the Long Lease. Speculation on the part of the defendant that the agreements for lease may not comply with these clauses comes nowhere near to establishing manifest error on the part of McCann FitzGerald in their confirmation of the 29th February, 2016. Even if it were established that there was a failure to include appropriate restrictive covenants in the agreements for lease, this does not invalidate those agreements, even if it amounted to a breach of the provisions of the Long Lease.

47. The evidence established that the agreements for lease were entered into on the 25th August, 2015 and were exchanged with the tenants in September 2015. The confirmation of the 29th February, 2016 identified nine ground floor units marked X on the ground floor of the Centre annexed to the terms of settlement of which at least four were internal units.

Clause 6
48. The next matter for consideration is the meaning of Clause 6 of the Settlement Agreement and whether the plaintiff in fact satisfied the requirements of Clause 6. I shall construe the language of Clause 6 itself. In doing so I shall consider the clause in the context of the Settlement Agreement as a whole and in the context of the Development Agreement and the Long Lease.

49. Clause 6 of the Settlement Agreement reads as follows: -

> *"The developer/landlord [the plaintiff] will discuss with Dunnes [the defendant] the tenant mix for the ground floor of the Centre prior to entering into binding agreements for lease with tenants."*

Role of the Defendant in Relation to Tenant Mix in the Centre

50. The only clause dealing with the letting of the Centre in the Development Agreement is Clause 7.6.1 which states that: -

> *"The Developer and Mr Crosbie shall each:*
>
> *procure that the Centre is launched to the public as the new Point Village Shopping Centre on the date of Centre Opening and shall each use all reasonable endeavours to maximise the number of retail units in the Centre which have been fitted-out and opened for trade on the date of Centre Opening and in this regard the Developer and Mr Crosbie shall encourage so far as is commercially reasonable tenants and prospective tenants to achieve this".*

51. It is thus clear that the express terms of the Development Agreement do not constrain the plaintiff's freedom to contract with tenants other than the defendant in any way.

52. The defendant accepted that originally it had no role in selecting the tenant mix of the Centre but argued that the tenants in the Centre were to be high quality tenants. It relied upon several clauses in the Development Agreement and Long Lease in support of this argument. The first was Clause 7.5 of the Development Agreement which reads: -

> *"The Developer shall ensure that all retail or commercial units or buildings in the Centre or facing Point Square which are not open for trade or business on the Centre Opening are temporarily boarded up and decorated with attractive murals or signage appropriate to a high quality modern retail and mixed-use development pending the opening of such units for trade or business."*

53. In my opinion the construction contended for by the defendant of this clause is mistaken. The clause deals with the physical appearance of the Centre and the units facing Point Square on the date that the Centre opens for trade pending the opening of such units for trade or business. Clause 7.5 is not concerned with the occupiers of the units as opposed to the physical appearance of the vacant units. This is in keeping with the involvement of the defendant in the physical development of the Centre as outlined above, where the Development Agreement gives the defendant an express say in relation to the Building Works and the appearance of the Centre. It has no such role under the Development Agreement in relation to the other prospective occupants of the Centre.

54. The defendant also relied upon Clause 4.7.1 of the Long Lease. The clause provides as follows: -

> *"4.7.1 So as to bind the Landlord its successors and assigns and all tenants, sub-tenants, occupiers or traders at any time of or in the Relevant Property or any part thereof and so as to bind the Relevant Property and every part of it by whomsoever owned as restrictive covenants and for the protection and benefit of the Premises and every part thereof and separately for the benefit of the Tenant and to the full extent permitted by law:*
>
> *(a) not to use or permit or suffer to be used the Relevant Property or any part thereof as a supermarket, hypermarket, grocery store, discount food store, frozen-food outlet, mini food market, convenience store or any similar premises or, save as expressly permitted in […] Clause 4.7, for the sale of any food, food products or groceries provided that this restrictive covenant shall not apply to one other Unit in the Relevant Property not exceeding 500 square metres of Gross Internal Area for so long as it is used as either:*
>
> *(i) A Marks & Spencer Simply Food outlet; or*
>
> *(ii) a high quality food hall trading in a range of up-market specialty food products and which is of a trading format and style which is substantially the same as Fallon & Byrne on Exchequer Street, Dublin but not, for the avoidance of doubt, of a style or format similar to that carried on by traders such as Donnybrook Fair, Fresh or Superquinn or any similar traders.*
>
> *and the Landlord reserves the right to sell (by way of long lease) or lease any part of the Relevant Property to this style of operator….."*

55. In addition Clause 4.8 prohibits the use of any unit or any premises in the Centre in connection with rehabilitation of or the provision of probation services to prisoners or ex prisoners or as a drug rehabilitation facility or as a drug treatment facility or as a methadone or similar clinic or for the provision of needle exchange services. The sale, supply or dispensing of methadone or any substance which may be used as a part of a maintenance or withdrawal programme for the treatment of the dependency on opiates or other drugs (with the exception of one pharmacy unit) are not permitted or allowed.

56. It is clear that Clause 4.7 is in effect a non-compete clause and it does not restrict the plaintiff in respect of the type of tenant to whom units in the centre may be leased. Neither does it establish that the tenants in the remaining units in the Centre must be of a particular high quality or standard.

57. Clause 4.10.1 of the Long Lease concerns the common parts of the Centre and differentiates between the Centre on the one hand and Point Square on the other hand. The obligation on the plaintiff is "*efficiently to maintain manage and operate Point Square as a high quality public plaza for the benefit of the Development*." The clause does not restrict or prescribe the retail trade in the Centre in any other unit and sets no specifications for the quality of tenants to operate in the Centre.

58. It is clear that neither the Development Agreement nor the Long Lease gave the defendant any right to discuss the tenant mix of the Centre with the plaintiff. The issue is, to what extent did Clause 6 of the Settlement Agreement alter this position?

59. Clause 6 introduced a role for the defendant in relation to the tenant mix of the ground floor of the Centre which it did not previously enjoy under the earlier agreements.

60. The defendant argued that in order to have a meaningful discussion as required by Clause 6 it must be informed as to the identity of the proposed tenants and be furnished with the relevant information concerning each of the proposed tenants. Mr. Thomas Sheridan swore the replying affidavit on behalf of the defendant. He averred that the defendant was entitled to participate in the

identification of the appropriate tenant mix for the Centre. He said: -

> *"In the absence of the appropriate tenant mix being confirmed following satisfaction of clause 6 of the Settlement Agreement, the Plaintiff cannot secure any tenants so as to give effect to clause 11(c) of the Settlement Agreement.*
>
> *[The defendant] believes that the obligation on the Plaintiff under clause 6 of the Settlement Agreement goes beyond a mere discussion in general terms of the types of tenants that the Plaintiff might secure for the Point Village Centre, but rather requires that [the defendant] be provided with sufficient information and details in relation to the actual tenants being proposed for the Point Village Centre, such that some form of meaningful engagement in relation to tenant mix could take place between the parties so as to ensure that the quality of the tenants to be secured reflects the high quality of the Point Village Centre."*

61. The defendant argued that the plaintiff must provide information to the defendant regarding both its plans for the Centre as a whole, including the overall tenant mix and the terms and current status of the proposed leases and/or binding agreements for lease that the plaintiff intends to enter into or has entered into. While at one point counsel for the defendant accepted that under the Development Agreement the defendant had no involvement in the tenanting of the Centre, on the other hand he also argued that the Development Agreement gave the defendant the right to object to tenants in other units if they were not of a high quality. He said that the defendant was not exercising a veto on the plaintiff's freedom to let the Centre on the basis that the defendant would not be interfering if the tenants were "what everyone had understood the tenants to be". He said the defendant would be entitled to argue that the plaintiff was frustrating the Development Agreement if the plaintiff was entitled to let the units to any tenants of any standard. He emphasised that the right asserted by the defendant arose from the Development Agreement.

62. This construction seriously overstates the meaning of Clause 6 and what is required by this clause. The plaintiff agreed to discuss with the defendant the tenant mix for the ground floor of the Centre. It did not agree to discuss the tenant mix for the whole Centre. The agreement was to discuss the tenant mix, not prospective tenants for each of the units of the ground floor. Thus, for example, the defendant may suggest certain types of tenants would be appropriate to be included on the ground floor such as, for example, fashion retail, accessories retailer or a pharmacy. It might even suggest that certain categories of tenants are better located on the upper floor of the Centre rather than the ground floor. In relation to the mix on the ground floor, the map annexed to the Settlement Agreements shows that seven units were designed for possible occupation as a café in that they were provided with gas piping and kitchen canopy extract duct work. This implies that the parties accepted that these units so equipped could be used as cafés or food outlets.

63. The discussion in relation to tenant mix for the ground floor of the Centre was to occur prior to the plaintiff entering into binding agreements for lease with tenants. There was no requirement that the plaintiff enter into a significant number of agreements for leases or indeed any agreements shortly following this discussion. The implications of the defendant's construction of Clause 6 is that the defendant was entitled to discuss each and every prospective tenant for each unit of the ground floor prior to the plaintiff entering into a binding agreement with each individual tenant. But the plaintiff was entitled to place tenants for the units on the ground floor on a phased, indeed, piecemeal fashion. Or, to put it the other way, it was not obliged to enter into more than one agreement at a time. It would be impossible to discuss tenant mix of a 35 unit Centre (or even the ground floor of the Centre) in respect of just one or two prospective tenants if the discussion related to actual proposed tenants rather than the tenant mix in general. Yet Mr. Sheridan clearly stated that in the absence of the appropriate tenant mix being confirmed following satisfaction of Clause 6 the plaintiff could not secure any tenants so as to give effect to Clause 11 (c). It could not, on this interpretation of Clause 6, enter into any binding agreements until it was in a position to do so with prospective tenants for most of the ground floor of the Centre. This is not what Clause 6 provides. It is important to construe the document by what was permitted by Clause 6 and not in the light of what actually happened in this case. The fact that the plaintiff entered into seven agreements for leases in August 2015 does not imply that it was required to do so.

64. The plaintiff could legitimately satisfy the requirements of Clause 6 before any prospective tenant was lined up by discussing with the defendant the mix of tenants it proposed to seek for the ground floor or it could seek the defendant's views as to the mix of tenants that it would favour on the ground floor before the plaintiff had any prospective tenant lined up. In contrast to the detailed provisions in Clause 4 of the Development Agreement relating to the involvement of the defendant in the Building Works and the dispute resolution mechanism provided in case the defendant was not satisfied that its representations in respect of the Building Works had been adequately accounted for by the plaintiff's architect, Clause 6 is very limited in its effect. The plaintiff is not obliged to have regard to any representations made by the defendant and there is no reference to any dispute resolution mechanism in the event that the defendant is dissatisfied with the proposed tenant mix of the ground floor of the Centre. I find this latter point to be particularly significant as the Settlement Agreement was agreed after the parties had been in dispute and in litigation for more than a year. There is no reference to furnishing the defendant with any information or documents about prospective tenants in contrast to specific clauses in the Development Agreement which gave the defendant an entitlement to receive documentation relating to the Building Works and the development consents. The clause does not confer any right on the defendant to have a say in the terms of the leases to be granted (over and above the provisions of Clauses 4.7 and 4.8 of the Long Lease) nor does it confer any say as regards the identity of individual proposed tenants.

Did the Plaintiff Comply with Clause 6?

(I) The Sequence of Events

65. On the 30th April, 2014 the receivers wrote to the defendant stating that they would like to schedule a meeting with the defendant to discuss progressing the proposed tenancies of the Centre. They received no reply to the letter so they wrote on the 8th May, 2014 requesting a response before close of business on the 14th May, 2014. They stated that *"[i]f we do not hear from you by that date, we will have no option but to conclude that you do not propose to cooperate with us and it will be necessary for us to instruct our solicitors in this matter."* They received no reply to that letter and accordingly their solicitors wrote on the 11th June, 2014 to solicitors for the defendant noting that there had been no response to the two previous letters. They stated that: -

> *"There are a number of tenants interested in entering into agreements for lease with the Receivers and in accordance with Clause 6 of the Terms of Settlement, we would like to arrange to meet with you to discuss the proposed tenant mix in that respect."*

66. No reply was received to the letter of the 11th June, 2014 so Messrs. McCann FitzGerald wrote again on the 8th July, 2014 stating: -

> *"In our letter of 11 June, 2014, we also indicated our willingness to meet with you, in accordance with clause 6 of the Terms of Settlement, to discuss the proposed tenant mix at the ground floor of the Point Village. Our clients are*

available to meet you on 17 or 18 July 2014 between 9 am – noon for this purpose. Please let us know if either of these times is convenient for you or if not, please suggest an alternative time within the next fortnight and our clients will try to accommodate you. If we do not hear from you, we will take it that your client does not wish to discuss the proposed tenant mix prior to the receivers entering into binding agreements for lease with prospective tenants."

67. The defendant did not reply to the letters and did not seek any information about the prospective tenants but its property manager, Mr. Dominic Deeny, contacted the receivers' managers of the Centre, CBRE. Mr. Deeny followed up his conversation with an email on 17th July, 2014 to Mr. Simon Cooper of CBRE stating:-

"Following our conversation earlier I would like to arrange a visit to the Point Shopping Centre tomorrow at 2pm if that is possible. The purpose is to view the DS unit and to walk the centre as built to see how it is set up. I also believe that there is a request from your client's architects to inspect the property to agree what works need to be undertaken to achieve completion. If appropriate we will instruct an architect to undertake this assessment."

The email made no reference to discussing tenant mix on the ground floor.

68. On the 18th July, 2014 Nicholas O'Dwyer and John Boland of Grant Thornton met with Mr. Deeny and one of his colleagues at the Centre. Mr. Tennant in his grounding affidavit stated that at the meeting the parties discussed the proposed tenant mix for the Centre in general terms and by reference to sector rather than individual operators, for example, a "coffee house" was referred to rather than Starbucks and a "fast food operator" rather than Eddie Rockets.

69. Mr. Sheridan stated in his replying affidavit that: -

"Dunnes Stores was not provided with the names or any details of any of the actual tenants that were being proposed. Furthermore, only four types of tenants were discussed at that meeting, including a pharmacy, convenience food unit, and a coffee shop/café."

Thus, to that extent, Mr. Sheridan corroborates the evidence of Mr. Tennant.

70. At the hearing of the action, counsel for the defendant placed great emphasis upon the email sent by Mr. Cooper to Mr. O'Dwyer on the 18th July, 2014 after the meeting which stated: -

"The meeting ended very positively. Thank God Mark was there!

I gave Dominic a very vague overview of the leasing and I asked him if they had a timescale with regards to a potential opening date. He said that subject to shareholder support they were aiming for Autumn 2015."

71. On the 6th August, 2014 McCann FitzGerald wrote to Eversheds solicitors for the defendant stating that: -

"On 18 July, 2014 your client's representative met with our clients' agent for a walk-through of the Centre. We are instructed that the proposed tenant mix was discussed on that date. Unless we hear otherwise, we will take it that your client does not require any further discussion in this regard. Please note that our clients expect to enter into binding agreements for lease in early September 2014 in respect of 7 units at the Centre in accordance with clause 11 (c) of the Terms of Settlement."

72. Eversheds forwarded the letter of the 6th August, 2014 to their client on the 7th August, 2014. There was no reply from either the defendant or its solicitors disputing the statement that the proposed tenants mix of the Centre was discussed on the 18th July, 2014 or indicating that the defendant required further discussion of the proposed tenant mix. This was despite the fact that it was clearly intimated that the receivers expected to enter into binding agreements for lease in early September 2014 in respect of seven units at the Centre in accordance with Clause 11 (c) of the Settlement Agreement.

73. The defendant wrote directly to McCann FitzGerald on the 8th August, 2014 referring to the letter of the 11th June, 2014 but apparently ignoring the intervening correspondence and meeting of the 18th July, 2014. At point 6 of the letter the defendant requested: -

"Please provide full details of the proposed tenants and tenant mix. When we have considered this information, we will contact you to arrange to discuss it".

There was correspondence between the parties on the 11th and 14th of August 2014 regarding Clause 11 (d) of the Settlement Agreement which is not directly relevant to the issues in this case. On the 18th August, 2014 McCann FitzGerald wrote to the defendant in reply to its letter of the 8th August, 2014. In relation to the issue of tenant mix the letter stated: -

"The Receivers are currently negotiating non binding heads of terms with prospective tenants for the ground floor of the Point Centre. The nature of the proposed tenant mix was discussed at a meeting on site at the Point Village with your representative, Dominic Deeny and with representatives from the Receivers' office and from STW on 18 July 2014."

The letter went on to point out that the receivers' only obligation was to discuss the tenant mix with the defendant and not to provide full details of the proposed tenants as requested.

74. The defendant did not contest this statement; it did not seek a further meeting with the receivers or their representatives to discuss tenant mix and did not press the issue of further information regarding the proposed tenants.

75. On the 13th July, 2015 McCann FitzGerald wrote to both the defendant and their new solicitors, DAC Beachcroft, in relation to discussion of the tenant mix. They reiterated the fact that representatives of the receivers met with Mr. Deeny of the defendant on 18th July, 2014 to discuss with the defendant the tenant mix for the ground floor of the Centre prior to entering into binding agreements for lease with tenants in accordance with the obligations under Clause 6 of the settlement agreement. The letter continued: -

"In circumstances where the receivers propose to enter into binding agreements with a number of tenants shortly, the receivers wish to extend a further invitation to Dunnes to discuss the tenant mix for the ground floor of the Centre before they enter into any binding agreements for lease. Please confirm within fourteen days from the date of this letter

whether a representative of Dunnes wishes to meet with representatives of the receivers to discuss tenant mix for the ground floor of the Centre.

Please note that if we do not receive a response from you within fourteen days, we should assume that your client does not wish to engage in any further discussions, in accordance with the Terms of Settlement, in respect of the tenant mix for the ground floor of the Centre"

DAC Beachcroft replied on the 28th July, 2015 stating that Clause 6 did not contain any temporal limit which it said McCann FitzGerald sought to impose in its correspondence. They said: -

"Our client is considering your response and will reply in early course. In the meantime any attempt by your client to impose arbitrary and unfounded timelines is not appropriate and a 'failure' by our client to comply with a timeline which is unilaterally imposed by your client, is of no legal consequence to either party."

76. On the 7th August, 2015 McCann FitzGerald replied stating that the defendant had been afforded the opportunity to discuss the tenant mix with the receivers over a year ago in the letters of the 11th June, 2014 and 8th July, 2014 and that they did in fact discuss the proposed tenant mix with Mr. Deeny on 18th July 2014. This was pointed out to the defendant in the letter of the 18th August, 2014 and they had heard nothing from the defendant in relation to the issue until now. The letter sent by McCann Fitzgerald set out that five tenants were interested in entering into binding agreements for leases in respect of seven units. The proposed tenants and the units, including the four internal units, were identified. The letter continued: -

"…whilst our clients sought to be reasonable by offering your clients a further opportunity to meet with them to discuss the above tenant mix, they are not prepared to indefinitely impede the progress of the receivership to accommodate your client's vague commitment to meet with them in 'early course', particularly where an identical commitment made on behalf of your client on 30 June has still not yielded any reply, over a month later.

Consequently, if your client's representatives wish to further discuss the above tenant mix our clients are prepared to make a final offer to meet with you within the next 14 days. If the meeting does not take place within 14 days from the date hereof, our clients will continue their dealings with the proposed tenants without further reference to you."

77. More than fourteen days later on the 26th August, 2015 DAC Beachcroft replied to the letter of the 7th August, 2015 acknowledging receipt of the additional information provided and confirming that Mr. Deeny was happy to meet with the receivers to discuss the proposals. The letter requested that a meeting take place during the weeks commencing 14th or 21st September. It continued: -

"In advance of any such meeting however our client does require more information in relation to the six parties identified in your letter. Some of these parties are not known to our client and accordingly our client require sight of any financial information and other background documentation which may have been provided by the proposed Lessees together with copies of any draft Heads of Terms, in advance of the meeting taking place."

78. McCann FitzGerald replied on the 28th August, 2015 confirming that as they had not heard from the defendant in relation to discussing tenant mix at any time between 7th August and 21st August, 2015 the receivers had executed agreements for leases on the 25th August, 2015 with the tenants set out in the letter of the 7th August, 2015.

79. In response Messrs. DAC Beachcroft asserted that the receivers had not complied with the obligation under Clause 6.

***(II) Was There a Discussion of the Tenant Mix*?**

80. The defendant argued that the meeting of the 18th July, 2014 did not comply with the requirements of Clause 6. Counsel argued that there was no affidavit from anyone present at the meeting giving direct evidence of what occurred. The emails of the 17th and 18th July, 2014 suggested that in fact there was no discussion of tenant mix at all. The emails did not indicate that the meeting was for the purpose of discussing tenant mix and at a minimum the meeting ought to have identified that the meeting was for that purpose. It was argued that because the meeting was instituted by the defendant it could not thereby be a meeting that could satisfy Clause 6. Separately it was argued that the prior correspondence was from solicitors rather than from their clients and that the meeting was arranged directly by Mr. Deeny and Mr. Cooper and therefore was not in response to the correspondence.

81. It is not open to the defendant to argue that there was no discussion of tenant mix for the purposes of Clause 6 at the meeting of the 18th July, 2014. Both Mr. Sheridan for the defendant and Mr. Tennant for the plaintiff stated on affidavit that tenant mix was discussed at this meeting. The defendant cannot resile from the averment of its deponent and it cannot do so on the basis of the emails of the 17th and 18th July 2014 when the authors of the emails did not swear affidavits. Furthermore Mr. Sheridan did not dispute Mr. Tennant's account of the discussion of the 18th July, 2014.

82. Secondly it is highly relevant that Mr. Deeny, the defendant's representative who attended the meeting, has not contested that tenant mix was discussed at the meeting nor asserted that the July emails supported the view that tenant mix was not discussed.

83. The consistent reiteration in the correspondence from McCann FitzGerald that tenant mix was discussed at the meeting of the 18th July, 2014 as I have outlined above was never contradicted until after McCann FitzGerald notified DAC Beachcroft on the 28th August, 2015 that binding agreements for leases had been entered into by the receivers with the proposed tenants.

84. For these reasons I reject the submission that there was no discussion for the purposes of Clause 6 of tenant mix of the ground floor of the Centre at the meeting of the 18th July, 2014.

***(III) Was There* Discussion as Contemplated by Clause 6?**

85. The real issue is whether the defendant can successfully argue that the discussion which took place did not satisfy the obligations of the plaintiff under Clause 6. It is accepted that the discussion was at a high level and that four categories of tenant were discussed. The true question for consideration is whether the defendant has valid ground for arguing that there has been a failure to comply with this clause. It cannot be the case that if one party were to refuse to enter into any discussions at all that it could then be heard to argue that there had been no discussion and so a failure to comply with the requirements of Clause 6. Such an outcome in the circumstances of this case would mean that the defendant could prevent the plaintiff from entering into binding agreements for lease with any tenants of the ground floor of the Centre indefinitely by its own refusal to enter into any discussions. Clearly such conduct would amount to a frustration of the clause. It is therefore a question of degree: was the failure of the defendant to respond to the offers of the plaintiff to discuss tenant mix such that the plaintiff was entitled to treat this as declining

to discuss tenant mix further and thereby forgoing any entitlement to further discussions of tenant mix of the ground floor of the Centre?

86. It is clear from the evidence I have detailed above that the plaintiff made many attempts over a period from 30th April, 2014 to 26th August 2015 to meet the defendant to discuss the tenant mix of the ground floor of the Centre. The defendant failed to respond to the correspondence substantively. No explanation for this failure was advanced. A representative of the defendant attended a meeting on the 18th July, 2014 though the defendant now contends that that meeting either was not for the purposes of discussing tenant mix or did not satisfy the requirements of Clause 6. The defendant neither took up any of the offers of the receivers to meet to discuss the issue nor suggested any meeting of their own. More than 15 months after the receivers first attempted to schedule meetings to discuss the tenant mix and in the absence of any indication from the defendant that it wished to meet or(following the meeting on the 18th July, 2014) to meet again the receivers proceeded to enter into agreements in respect of seven units on the ground floor of the Centre.

87. In these circumstances, I find no merit in the defendant's argument that the receivers failed to carry out their obligations under Clause 6. Insofar as the discussions which occurred on the 18th July, 2014 may be considered to be inadequate (and I am expressly not so holding) for the purposes of Clause 6, the blame for the state of affairs rests squarely with the defendant and is not attributable to any wrongful act or omission on the part of the plaintiff. In my opinion it is implicit in this Clause that it is for the benefit of the defendant and that if it in fact chooses not to avail of reasonable opportunities to have discussions with the plaintiff over a long period of time then it amounts to a waiver of the clause such that the plaintiff is then entitled to proceed to enter into binding agreements for lease with tenants without pursuing the issue of discussions with the defendant further.

88. I do not accept the submissions of the defendant that it was the receivers who refused to discuss the tenant mix when their solicitors wrote on the 26th August, 2015 suggesting a meeting in the second half of September 2015. In advancing this argument it was remarkable that there was no explanation for the failure of the defendant to respond to the offers to discuss tenant mix commencing on the 30th April, 2014 up until the 26th August, 2015 (other than the meeting of 18th July, 2014 which counsel for the defendant argued did not involve a meaningful discussion of tenant mix).

89. The defendant also argued that it was not possible to have a discussion about tenant mix if the defendant was not provided with the necessary information to enable it to have a meaningful discussion about the proposed tenants. This argument is based on a misreading of the obligations of the plaintiff under Clause 6. In any event if the argument were to have any credibility one would have expected the defendant to have tried to engage with the plaintiff and to have sought information from the plaintiff in a proactive way once the plaintiff approached it to discuss tenant mix. This did not occur. Nowhere was there any evidence that Mr. Deeny required or requested information regarding the proposed tenant mix. In response to the letter from McCann FitzGerald, the defendants then solicitors, Eversheds, on the 7th August, 2014 did not request any information concerning the proposed tenant mix. By letter dated the 8th August, 2014 the defendant did seek information as I have set out but it appeared to have accepted the arguments of McCann FitzGerald in the replying letter of 18th August, 2014 as it never followed up on this point or disputed what it stated in the letter of the 18th August, 2014.

90. The issue of discussions of the tenant mix was raised again by McCann FitzGerald on the 13th July, 2015 but the reply of DAC Beachcroft of 28th July, 2015 made no reference whatsoever to the defendant's letter of 8th August 2014 and it did not request any information regarding the proposed tenants. On the 7th August, 2015 McCann FitzGerald identified the proposed tenants, the proposed units and whether the units were internal or external. It was only after the agreements for lease had been executed on the 25th August, 2015 that DAC Beachcroft replied by letter dated 26th August, 2015 to McCann FitzGerald and sought certain financial information and background documentation in respect of the proposed lessees together with copies of any draft Heads of Terms in advance of any meeting to discuss tenant mix. This failure to pursue the provision of information about individual tenants for nearly sixteen months after it was first invited by the receivers to discuss tenant mix of the Centre in accordance with Clause 6 strongly suggests that the defendant knew that the parties had not agreed that it would be provided with the information its solicitors subsequently sought.

91. The extent of the obligation on the plaintiff under Clause 6 was to discuss the tenant mix of the ground floor of the Centre with the defendant. There was no obligation to discuss any individual proposed tenant with the defendant and therefore there was no requirement to provide any information, whether financial or otherwise, to the defendant concerning any particular proposed tenant. Such information is not relevant to the question of the tenant mix on the ground floor of the Centre. There was no agreement to provide information regarding the proposed tenants. The construction of Clause 6 advanced by the plaintiff amounts to inserting words into the clause which are simply not there.

Conclusion on Clause 6

92. In light of all of the above in my opinion the plaintiff complied with its obligations under Clause 6 and accordingly the receivers were free to enter into binding agreements for lease with the proposed tenants on the 25th August, 2015. The fact that belatedly the defendant at that point in time sought to discuss the tenant mix and in particular to dispute the propriety of entering into leases with the proposed tenants does not alter this conclusion.

93. The defendant argued that the issue of whether there had been a discussion of the tenant mix of the Centre on 18th July, 2014 required to be determined following an oral hearing. I do not agree. It is not necessary to hear oral evidence on the issue of the discussions which occurred on the 18th July, 2014. The defendant was free to adduce whatever evidence it saw fit in these proceedings. Mr. Sheridan has sworn an affidavit, Mr. Deeny has not. The defendant was given liberty to apply to court for leave to either adduce oral evidence or to cross examine any of the plaintiff's deponents. It did not avail of either opportunity. There is no conflict in the testimony before the court: there was a high level discussion of tenant mix on the 18th July, 2014. There is no conflict of fact which requires to be resolved in relation to this matter. It follows that it is not necessary to refer the case to plenary hearing based on the need to adduce oral evidence on this point.

"Tenant"

94. The remaining matter for resolution is the proper construction of the word "tenant" in Clause 11 (c) of the Settlement Agreement. This term is to be construed in accordance with the principles of construction I have outlined earlier in this judgment. In this case, the term is to be construed in the context of Clause 11 (c), the whole Settlement Agreement, the fact that the Settlement Agreement was reached as a compromise of litigation, the Development Agreement and the Long Lease.

95. The court should give the word its ordinary and natural meaning, in the sense as would be understood by a reasonable person having an interest in or knowledge of the material circumstances. However, evidence of the surrounding circumstances should not normally be allowed to alter the plain meaning of words. In particular, the warning of Lord Mustill, approved by McKechnie J. in *Marlan Homes*, against forcing upon the words a meaning which they cannot fairly bear is particularly apposite in this case. It is to substitute

for the bargain actually made one which the court believes could better have been made and that is not permissible.

96. The defendant argued that the word "tenant" must be understood to mean high quality tenant: it did not simply mean a party holding a unit or units for a term under a lease. The plaintiff said it should be given its ordinary and natural meaning.

97. The Settlement Agreement compromised the 2009 proceedings and amended the parties' obligations under the Development Agreement, the contract for sale and the Long Lease. Clause 17 of the Settlement Agreement provided: -

> *"Words and expressions defined in The Development Agreement or, as the case may be, The Lease shall where the context so admits or requires have the same meaning where they appear in this agreement."*

It was stated that in the event of any inconsistency between the terms of the existing contracts and the Settlement Agreement the Settlement Agreement was to prevail. "Tenant" is not defined in any of the agreements.

98. The Long Lease governs the relationship between the plaintiff and defendant as landlord and tenant. The defendant relied upon Clause 4.7.1 of the Long Lease in support of the submission that "tenant" must be construed to mean high quality tenant. The plaintiff as landlord entered into restrictive covenants with the defendant in terms of Clause 4.7.1 which I have quoted in para 54. The restrictive covenants are to bind the plaintiff, its successors and assigns and all **tenants, sub-tenants, occupiers or traders** at any time of or in the Relevant Property as defined in the Long Lease. Clause 4.7.2 refers to *"each transferee assignee tenant licensee or other disponee"* and refers to *"every lease or other deed or document which they may enter into in respect of the [sic] any estate or interest in the Relevant Property."* Clause 4.10.4 refers to *"tenants, occupiers and licensees from time to time of [the] premises"* Clause 4.15 requires the defendant: -

> *"To take all necessary and reasonable steps to enforce compliance with all the material covenants and obligations entered into or to be entered into by other tenants and **occupiers** of the Development with the Landlord." (Emphasis added)*

99. It is clear from all of the above that the Long Lease envisages that the other traders occupying the units in the Centre may be either tenants, sub-tenants, occupiers or other licensees. They are not required to be tenants. There is a restrictive covenant regarding the sale of food, food products or groceries. There is an exception to this restrictive covenant in respect of one unit not to exceed 500 sq. m. so long as it is used as either a Marks & Spencer Simply Food outlet or a high quality food hall trading in a range of upmarket speciality food products and which is of a trading format and style which is substantially the same as Fallon & Byrne.

100. The restrictions in Clause 4.7 regarding the sale of food or food products does not apply to: -

> *"(i) speciality food outlets such as (but not limited to) a greengrocer, butcher, delicatessen, bakery, fish shop, health food shop or other food specialists but limited in each case to one [principle] speciality food use in each Unit and one such Unit (not exceeding 280 sq. m. of Gross Internal Area) within the Centre for each such [principle] speciality food use; or*
>
> *(ii) Any premises used as a restaurant, theatre, public house, café, sandwich bar, food court, cinema or hotel or similar establishment(s) within the Relevant Property."*

A similar exception to the restriction applies to the sale of food or products from a pharmacy in relation to speciality health food products normally sold in a pharmacy.

101. Three points emerge from these provisions of the Long Lease.

> (i) It is expressly acknowledged that other traders occupying the Centre may be tenants, sub-tenants, occupiers or licensees.
>
> (ii) The only permitted competitor with the defendant in relation to the sale of food, food products or groceries is one high quality food hall occupying a unit not exceeding 500 sq. m. Other units may be occupied by one of each of a greengrocer, butcher, delicatessen, bakery, fish shop or health food shop or pharmacy or off licence or wine shop not exceeding 280 sq. m. (Clause 4.7.1(d) (ii)).
>
> (iii) The restriction is for the purpose of limiting competition with the anchor tenant (the defendant). It is not prescribing any particular specific quality for other traders, who may be engaged in fairly standard enterprises.

There is nothing in these clauses in the Long Lease which substantiates the defendant's argument that the tenants of the other units were required to be high quality tenants or that the defendant had any entitlement to object to any other tenant on grounds other than breach of the restrictive covenants to be included in their leases or other contracts.

102. The defendant also referred to Clause 7.5 and 7.7.2 of the Development Agreement in support of the argument that the word "tenant" meant a high quality tenant. Clause 7 of the Development Agreement is concerned with the Access Date and the date of Practical Completion of the Building Works. I have quoted Clause 7.5 in para 52 and noted that it is concerned with the appearance of units or buildings in the Centre or facing Point Square which are not open for trade or business on the date of Centre Opening. The plaintiff is required to ensure that all such units are temporarily boarded up and decorated with attractive murals or signage "appropriate to a high quality modern retail and mixed use development". It is not concerned with the quality of traders operating in the Centre.

103. Clause 7.7.2 is concerned with Point Square rather than the Centre. It provides that the plaintiff shall procure that: -

> *"[T]he design and specification for Point Square shall be to a first class standard appropriate to a prestigious shopping centre commensurate with the newly re-developed Eyre Square in Galway and Grand Canal Square, Dublin and the Civic Plaza at Dundrum Town Centre."*

This clearly relates to the physical design and finish of Point Square. It acknowledges that the Centre is to be a prestigious shopping centre but that is a far cry from saying that the plaintiff was constrained in its freedom to control the Centre in the manner contended by the defendant on the basis that the word "tenant" in Clause 11 (c) (which is concerned with triggering obligations of the defendant) must be understood to mean high quality tenant.

104. It will be recalled that the Development Agreement contains very detailed provisions in relation to the Building Works and the involvement of the defendant in the building of the Centre and Point Square. On the other hand neither the Development Agreement nor the Long Lease confer on the defendant any involvement in selecting tenants or indeed other occupiers of the remaining units at the Centre. This underscores the fact that neither the Development Agreement nor the Long Lease imposes an obligation on the plaintiff to secure only high quality tenants for the Centre. The agreements do not limit the plaintiff's freedom to contract with whomsoever it chooses in its absolute discretion. The only restrictions are in relation to uses as set out in the Long Lease.

105. Finally, it should also be noted that Clause 25 of the Development Agreement is an entire agreement clause in the following terms: -

> *"The [plaintiff] and [the defendant] each acknowledge that the terms and conditions set out and incorporated in this Agreement constitute the entire contract and arrangement between them relating to the subject matter of this Agreement."*

The defendant accepted that the clause precluded the introduction of implied terms into the Development Agreement based upon materials produced or representations made prior to the conclusion of the Agreement. But it did not accept that it precluded reliance on such materials to construe the terms of Development Agreement. On that basis, it sought to rely upon marketing materials issued by the plaintiff or Mr. Crosbie prior to the date of the Development Agreement to assist in the construction of clauses 6 and 11 of the Settlement Agreement. The difficulty with this argument is that such material is permitted to be introduced to aid the construction of a clause in the contract. However, there is no clause in either the Development Agreement or the Long Lease where the question of the meaning of the word tenant falls to be construed. Therefore it is not permissible to consider these materials as part of the exercise conducted by the court in construing the clauses in issue in this case

106. The Settlement Agreement amends the terms of the Development Agreement and the Long Lease. The Settlement Agreement covers a wide range of alterations and amendments to the two agreements. It was entered into after the parties had been engaged in lengthy litigation and introduced radical changes to the previous contracts and obligations binding the parties. The plaintiff was released from any contractual obligation to construct the iconic Watchtower and the Spine Building which was to house the U2 Experience/Museum. The demise of the lease to the defendant was varied. The contract sum was reduced from €46 million to €31 million together with VAT. The plaintiff agreed not to vary the Building Works in relation to the Point Square and to commence the outstanding works within twelve weeks. These might be described as the "big ticket" amendments.

107. There were also specific, detailed amendments to both the Development Agreement and the Long Lease. For example Clause 7 set out detailed provisions for replacing the plaintiff's mechanical and electrical engineer under the Development Agreement. At Clause 4 the defendant agreed not to object to any sale by the cinema in the Centre of sweets, popcorn, beverages and other similar products. At Clause 9, Clause 4.6.1 of the Long Lease was varied so that persons spending €10 as opposed to €25 were to be entitled to free car parking. For the period of one year from the date the premises first opened for trade, retail customers of the premises were to be given not less than two hours free parking. In Clause 16 the plaintiff agreed to consult with the defendant with a view to deciding within 28 days whether or not to approve the additional signage shown on an attached signage plan. In Clause 18 it was agreed that the plaintiff may operate a market in Point Square for a further period of twelve weeks. On the completion of the Point Square Mr. Crosbie and the defendant agreed to meet to discuss in good faith what form of market (if any) might be suitable to operate in Point Square. It is thus apparent that the Settlement Agreement introduced considerable changes in the pre-existing contractual obligations of the parties and covered matters of great detail as well as matters resulting in radical changes to the previous agreements.

108. Clause 11 of the Settlement Agreement introduced a radical new series of provisions applying to the release of monies to the plaintiff in the nominated account. Under the Development Agreement, they were to be released in full (subject to a retention of 2%) upon receipt by the defendant of a Payment Certificate Certifying Practical Completion of the Building Works. Under the Settlement Agreement payment (with the exception of the retention) was to be in four parts. The clause in full provides as follows: -

> *"The following provisions shall apply to the release of monies in the nominated account:*
>
> *(a) The sum of €11,880,000 (plus interest accrued to date) shall be released within five working days of the later of (a) receipt by Dunnes of a Payment Certificate certifying Practical Completion of the Building Works with the exception of those of the Building Works on Point Square and (b) the date that Dunnes or its solicitors receive the documents provided for in Clause 10 of the Development Agreement with the exception of the documents referred to in para. (b) below.*
>
> *(b) The sum of €500,000 (plus interest accrued to date) shall be released within five working days of receipt by Dunnes or their solicitors of a solicitors certified copy of the receipts or other evidence from Dublin City Council/DDDA of compliance with the financial conditions payable on foot of the section 25 certificates insofar as they relate to or affect the store or as varied by agreement with Dublin City Council/DDDA (as the case may be) or by order of the court.*
>
> *(c) The sum of €15,000,000 (plus accrued interest to date) shall be released within five working days of receipt by Dunnes solicitors of confirmation from William Fry that binding agreements for lease or leases have been exchanged with tenants in respect of at least seven of the ground floor units marked X on the annexed ground floor plan, four at least of which shall be internal units. The agreements for lease or leases may contain a clause that it is a precondition to the tenant being obliged to enter into the lease that Dunnes should have commenced the fit out of the store.*
>
> *(d) The sum of €3,000,000 (plus accrued interest to date) shall be released within five working days of receipt by Dunnes of a certificate by PVDL's architect (or, in the event of a dispute, the Independent Architect within the meaning of the Development Agreement) confirming that the Point Square has been completed in accordance with the Development Agreement."*

109. The defendant argued that it was so obvious that everyone was speaking about high quality tenants that it did not need to be mentioned. It was urged that it was not credible that the defendant would negotiate that there must be binding agreements for lease or leases in respect of seven units marked X on the ground floor plan of which four were to be internal units while remaining indifferent as to the quality of the tenants to operate from the units. It referred to the common intention of the parties that the Centre was to be a high quality development on a par with the Dundrum Plaza in Dublin or Eyre Square in Galway. The requirement that there be high quality tenants in the units in the Centre sprang inexorably from the nature of the development. This became even more important

after the Settlement Agreement as other iconic aspects of the overall project – the Watchtower, the Spine and the U2 Experience – were no longer to proceed. It was argued that it was improbable that the defendant agreed to undertake the obligations in Clause 11 (c) absent tenants of a type as understood by the parties at all material times prior to then. Having "conceded" the loss of certain key aspects of the development, it was submitted that it was commercially implausible and irrational to suggest that the defendant also agreed to radically and fundamentally alter the entire scheme of the Centre by agreeing to tenants other than those of a high quality triggering the defendant's liability under Clause 11 (c).

110. But this argument begs the question. The defendant may well have been far from indifferent as to the quality of tenants in the other units but it by no means follows that the plaintiff agreed that the tenants referred to in Clause 11 (c) all had to be high quality tenants as determined by the defendant. On the contrary, Clause 11 and in particular Clause 11 (c) reflects a compromise reached by the parties. The clause must be construed objectively by reference to the language chosen by the parties, and not by reference to the subjective intentions of one – or even both – of the parties.

111. Further the implications of the construction of the word "tenant", and thus the meaning of Clause 11 (c) of the Settlement Agreement as construed by the defendant, is to impose three obligations which are not to be found anywhere in the Development Agreement, Long Lease or the Settlement Agreement.

> (i) A restriction on the plaintiff's freedom to contract with tenants as it can only contract with high quality tenants;
>
> (ii) If the defendant is of the opinion that any or all of the seven tenants in seven of the units marked X is not a high quality tenant (as defined by it) then the defendant is not obliged to release the money in the nominated account in accordance with the provisions of Clause 11 (c);
>
> (iii) The plaintiff is obliged to provide detailed financial information about the prospective tenants of the seven units in order that the defendant may satisfy itself that they are high quality tenants.

112. The plaintiff says that the word "tenant" means a tenant as opposed to a licensee or occupier of a unit on any other basis. No particular quality is to be attached to the tenants of the seven units. It was at all stages acknowledged that there was to be a mix of tenants in the Centre. This necessarily means that not every tenant in the Centre has to be of high quality as contended by the defendant. It follows that some of the units could be let to tenants who did not satisfy the standard demanded by the defendant and there was nothing to say that these could not include some of the seven units referred to in Clause 11 (c).

113. The plaintiff says that the Settlement Agreement is a commercial contract which was heavily negotiated on an arms length basis by two sophisticated counter parties with the benefit of legal advice and the meaning attributed to the words used in the contract should be the literal, ordinary meaning. If the parties had intended that it was not sufficient that the agreements be executed just with "tenants" but that tenants had to be of a particular type or standing or of a certain financial net worth or whatever the plaintiff may mean by "high quality tenant", the parties could and would have said so. They did not so specify and the ordinary meaning of Clause 11 (c) is that once agreements were executed with tenants for the seven units, the money would be released.

114. Clause 11 (c) has to be seen in the correct context. Detailed agreements were entered into between the parties in 2008 which, as I have discussed above, gave the defendant no involvement in the choice of the tenants for the Centre and established no quality threshold for any of the tenants in the Centre. On the eve of the trial of the 2009 proceedings the parties reached a detailed, thorough compromise agreement. The terms of settlement clearly reflect the terms upon which the parties were prepared to compromise the 2009 proceedings. There were very specific provisions agreed governing the release of substantial sums of money. In respect of Clause 11 (c) €15,000,000 was to be released within five working days of receipt by the defendant's solicitors of confirmation from the plaintiff's solicitors that binding agreements for lease or leases have been exchanged with tenants in respect of at least seven of the ground floor units marked X on the annexed ground floor plan, four at least of which were to be internal units. The Clause ties in with Clause 15 of the Settlement Agreement which says that the defendant shall have no obligation to open its door to trade "until at least seven of the ground floor units marked X on the annexed ground floor plan have opened to the public for trade, four of which are to be internal units" and there has been compliance with Clauses 11 (a) and 11 (d). It does not tie in with Clause 6. In these circumstances the silence of all agreements on the meaning to be attributed to the word "tenant" in this Clause is significant.

115. It is also relevant to consider how Clause 11 (c) would operate, if the defendant's construction of "tenant" is correct. Other than the meaning of the word tenant (if the defendant's construction is accepted) the matters outlined in Clause 11 (c) are relatively easily verified. The units were clearly identified and the solicitors would be in a position to say whether or not binding agreements for lease had been exchanged in respect of those units. On the other hand the solicitors are not qualified to determine, and not in a position to confirm, that any particular proposed tenant is a high quality tenant. It follows that if the parties intended that tenant is to mean high quality tenant and the plaintiff's solicitors are to verify that the tenants who have entered into binding agreements for lease or leases satisfy this standard, the parties needed to establish criteria setting out the threshold or standard required so that the solicitors could reach such determination in respect of each tenant. They did not. This weighs against the construction advanced by the defendant.

116. The Settlement Agreement is conditional upon the plaintiff's bank, AIB, consenting to the Agreement. As such, it was the intention of the parties and essential that the terms upon which the monies in the nominated account would be released could be clearly understood by that third party. The defendant's construction of the word "tenant" in Clause 11 (c) as meaning a high quality tenant means that "in the absence of the appropriate tenant mix being confirmed [by the defendant] following satisfaction of Clause 6…the plaintiff [could not] secure any tenants so as to give effect to Clause 11(c)" is not apparent from an objective reading of the documents. There was nothing in any of the documentation agreed between the parties which could have alerted AIB to this construction with the implication that in effect the defendant had a veto on the release of the €15 million to the plaintiff. This weighs very heavily against the construction of the clause advanced by the defendant.

117. In addition, the defendant's construction of the word tenant in Clause 11 (c) is by reference to what it says is an appropriate tenant mix for the Centre as a whole. It says the Centre as a whole requires high quality tenants and therefore tenant within the meaning of Clause 11 (c) must also mean high quality tenant. I do not accept that this is the correct approach to the construction of Clause 11 (c). That clause is not to be construed by reference to the tenant mix of the whole Centre. It refers expressly to seven units out of a total of thirty-five which must be selected from certain units marked X on the ground floor of the Centre. Three of the units may be external units. Only five external units were marked with the letter X and four of these were identified as outlets designed as a café. Thus it was expressly contemplated that three of the seven units could be cafés or other food outlets. This underscores the fact that letting seven units (which does not necessarily imply seven different traders) is not to be equated with establishing a tenant mix for the Centre as a whole or even of the ground floor.

118. The defendant relied heavily on the judgment of Lord Hoffmann in *Mannai Investments*. This judgment does not assist in the construction of Clause 11 (c). In *Mannai Investments* the tenant drafted the notice which fell to be construed by the court. It was not a document negotiated between two parties, as in this case. In *Mannai Investments*, the meaning of the notice was clear by reference to the lease which it sought to terminate. The court gave effect to the clear meaning of the document, notwithstanding the fact that the tenant mistakenly named the date for termination of the lease as the 12th of January 1995 as opposed to the 13th of January 1995. The reasonable person in receipt of the notice of termination would have clearly understood the meaning of the document.

119. This is in marked contrast to the situation in this case. The meaning of Clause 11 (c) is clear as construed by the plaintiff, but not as construed by the defendant. The construction contended for by the defendant if anything introduces uncertainty. Most importantly the argument to justify the proposed construction amounts not so much to construing the word "tenant" as rewriting the contract agreed by the parties.

120. The defendant argued that in order to properly construe the document it was important to have regard to the background or "factual matrix". In order so to do, it was submitted that oral evidence was required as to the mutual understanding of the parties as to the type of tenant who would be granted leases in the other units in the Centre. It was also said that it was necessary to consider expert evidence as to the approach of reasonable developers to establishing a tenant mix for a shopping centre and the requirements with regard to creating a world class shopping centre.

121. I do not accept that such oral evidence is required in order to construe the terms at issue in the Settlement Agreement. I have construed the clauses by reference to the terms of the Settlement Agreement itself and the fact that it recorded the compromise reached by the parties to settle High Court litigation. I have construed the Settlement Agreement in the light of the original contracts, the Development Agreement and the Long Lease, precisely in the manner in which Laffoy J. construed the Settlement Agreement in her decision in earlier proceedings between the parties construing Clause 11 (a) referred to above. I am satisfied that I am in a position to construe this document without the need for oral evidence and so it is not necessary to refer this special summons for plenary hearing.

122. In my opinion there is no reason to construe the word tenant in Clause 11 (c) as meaning anything other than its natural and ordinary meaning. This is consistent with the language used by the parties in the contract they negotiated. It reflects the purpose of the Clause which is to provide a verifiable mechanism for the release of sums in the nominated account by the defendant to the plaintiff. It is a clause to be found in a compromise of proceedings and as such reflects the compromises to which each side was prepared to agree. It reflects the fact that the defendant obtained a degree of comfort in relation to the tenanting of the Centre prior to being obliged to release the €15 million and thereafter to commence the fit out of its store. But the comfort does not go as far as contended by the defendant. The construction contended for by the plaintiff is entirely consistent with all of the contracts entered into by the parties and is consistent with the standard position that a landlord is free to contract with whomsoever he wishes as a tenant without the prior consent of its anchor tenant (subject to the terms of any restrictive covenants or prohibited users).

Compliance with Clause 11 (c)
123. On the 29th February, 2016 McCann FitzGerald sent a letter confirming that binding agreements for leases had been exchanged with tenants in respect of nine of the ground floor units marked X on the plan annexed to the Settlement Agreement, four at least of which were internal units. The letter sufficed to comply with the requirements of Clause 11 (c) of the Settlement Agreement. The proper construction of the word "tenant" in this clause is the natural and ordinary meaning of the word tenant. It is not to be construed as a high quality tenant. The letter of the 29th February, 2016 was not invalidated by reason of any manifest error based on events which occurred more than a year after the date of the letter. The plaintiff had complied with the requirements of Clause 6 prior to entering into binding agreements for leases with tenants and therefore there was no impediment to the plaintiff entering into such agreements. It follows that the requirements of Clause 11 (c) of the Settlement Agreement were complied with in full by the plaintiff upon receipt by the defendant of the letter of the 29th February, 2016 and the defendant is required forthwith to release the sum of €15 million plus accrued interest to the plaintiff from the nominated account.

Compliance with Clause 11 (b)
124. The dispute in these proceedings exclusively concerned Clauses 6 and 11 (c) of the Settlement Agreement. However, the proceedings also related to Clause 11(b) of the Settlement Agreement. It provided that: -

> *"The sum of €500,000 (plus interest accrued to date) shall be released within five working days of receipt by Dunnes or their solicitors of a solicitors [sic] certified copy of the receipts or other evidence from Dublin City Council/DDDA of compliance with the financial conditions payable on foot of the section 25 certificates insofar as they relate to or affect the Store or as varied by agreement with Dublin City Council/DDDA (as the case may be) or by order of the court."*

125. By letter dated 28th August, 2015 McCann FitzGerald provided certified copies of correspondence from Dublin City Council and the Dublin Docklands Development Authority confirming compliance with the financial conditions payable on foot of the s. 25 certificates referred to in Clause 11 (b) as they relate to or affect the Store. Accordingly the defendant was obliged to release the sum of €500,000 plus accrued interest to date within five working days from receipt of the letter. By letter dated 26th August, 2015 the defendant's solicitors stated that because the parties were in dispute in relation to the plaintiff's compliance with the terms of the Development Agreement and the Settlement Agreement that it was "clearly inappropriate" for the defendant to proceed to release the monies from the nominated account. It indicated that it would release the sums "in accordance with Clause 11 (b) of the Terms of Settlement" within 30 days of the plaintiff complying in full with its obligations in respect of the completion of Point Square as per the Development Agreement. Patently this is not what Clause 11 (b) provides.

126. The proceedings commenced on the 8th April, 2016. Mr. Sheridan's replying affidavit on the 9th May, 2016 did not so much as even refer to the Clause 11 (b) or advance any reason why the plaintiff had not complied with the terms or advanced any defence to the claim. The proceedings were listed for hearing for three days on the 10th October, 2017. On the 6th October, 2017 the defendant's solicitors wrote consenting to the release from the nominated account of the sum of €500,000 together with interest accrued to date thereon. Thus it is now clear that there is no dispute that the defendant is obliged to release the sum together with accrued interest from the nominated account to the plaintiff.

127. The plaintiff is entitled to the reliefs sought in the special summons and I so order.