Neutral Citation: [2017] IEHC 147

THE HIGH COURT

[2015 No.5742P]

BETWEEN

CAMIVEO LIMITED

PLAINTIFF

– AND –

DUNNES STORES

DEFENDANT

JUDGMENT of Mr Justice Max Barrett delivered on 2nd March, 2017.

I. Overview

1. At the top of Castle Street in Galway City Centre is the entrance to a retail department store operated by Dunnes Stores ('Dunnes'). The store sits at the far end of a one-time builder's yard that has been converted into an enclave of retail stores known as Edward Square Shopping Centre. The Dunnes unit also opens internally into the larger Eyre Square shopping centre. Part of the lure of cutting up to Dunnes via Castle Street appears to be that it affords an attractive means of accessing the Eyre Square Centre; likewise visitors to the Eyre Square Centre who wish to access the Edward Square stores, or perhaps continue on to William Street, another of Galway's shopping streets, can do so by entering Dunnes from the Eyre Square Centre and exiting into Edward Square and continuing along Castle Street.

2. Pursuant to a Deed of Assurance of 7th May, 2013, Camiveo Limited is the legal owner of the Edward Square Shopping Centre. In particular, the landlord's interest in a lease agreement dated 3rd April, 2000, of a property known as the Anchor Unit, Edward Square Shopping Centre, Galway (the 'Anchor Lease'), together with linked properties known as the Bastion Area, Eyre Square Centre (held under 'the Bastion Lease') and Unit 107, Eyre Square Centre (held under 'the Unit 107 Lease') is vested in Camiveo Limited pursuant to the Deed of Assurance. The tenant's interest under the Deed was transferred to Dunnes on foot of a deed of assignment dated 11th February, 2002.

II. A Fractious History

3. Following the purchase of the Edward Square Shopping Centre by Camiveo, Dunnes stopped paying rent and service charges in respect of the Anchor Unit, necessitating the bringing of summary proceedings by Camiveo to secure payment of the sums due and owing. These proceedings were successful and on 14th July, 2014, the High Court gave judgment for Camiveo in the amount of €1,134,392.32. Dunnes appealed this decision to the Supreme court. It also requested of the Supreme Court that it grant a stay on the order of the High Court, effectively allowing Dunnes to continue to refuse to pay the outstanding rent, service charges and interest, until the appeal was heard. At the hearing of the application to stay the High Court judgment, the Supreme Court invited Dunnes to make some immediate payment on foot of the High Court judgment. In response, Dunnes paid a sum of €750,000 to Camiveo and gave an undertaking to pay service charges as they fell due on an ongoing basis. After hearing the appeal, the Supreme Court rejected all of Dunnes' arguments and dismissed the appeal.

4. Dunnes did not pay any rent arising while the High Court and Supreme Court proceedings were ongoing. As a result, by the time judgment was delivered by the Supreme Court, substantial additional arrears of rent had accrued. On 15th May, 2015, a formal demand was made by Camiveo for payment of €748,979.75, being the outstanding rent and interest accrued from 1st July, 2014. No payment was made by Dunnes in respect of rent and interest following the making of this demand. There was also a significant delay on the part of Dunnes in making payment, on foot of the judgment of the Supreme Court, of the remaining rent and interest on the sum included in the summary proceedings. As of 15th May, 2015, the sum of €384,392.32 was due and owing, representing the balance due pursuant to the summary judgment, together with interest in the amount of €29,477.19. Further demand letters were issued for payment of this amount.

5. On 16th June, 2015, Camiveo's solicitors served copies of the High Court and Supreme Court orders with penal endorsements on Dunnes' registered office at 12:10. Fifty minutes later, at 13:00, a senior executive within Dunnes ordered that the front doors to its Edward Square unit (hereafter generally referred to as the Edward Square doors) be closed. Dunnes gave no reason or rationale for the closure of these doors. However, and the court considers the detail of matters later below, it cannot but be seen as (i) a tactical response by Dunnes to the service of the Supreme Court order upon it, (ii) a continuation of Dunnes' ongoing campaign to cause economic difficulties for Camiveo, and (iii) an attempt by Dunnes to deter Camiveo from exercising its lawful rights, this last-mentioned objective being an aspect of matters that any court of law would naturally find concerning.

6. The closure of the Edward Square doors on 16th June, 2015, was effected by disabling the automatic opening mechanism of the doors. As will be seen hereafter, this closure of the front-doors breached various lease covenants, including the planning covenants in the anchor unit lease. Following the closure of the doors, Galway City Council, in its guise as planning authority, issued a warning letter under the Planning and Development Act 2000, as amended, on the basis that the closure of the Edward Square doors constituted a breach of the planning permission under which Edward Square Shopping Centre was constructed. Notably, the closure of the doors caused loss to Camiveo, difficulties in its relations with its other tenants, and prompted insurance-related concerns.

7. Dunnes finally paid the sum of €342,392.32, due under the Supreme Court order, on 22nd June, 2015. However, Dunnes failed to pay interest on the judgment due and Camiveo's solicitors wrote to Dunnes' solicitors on 25th June, 2015, notifying them that interest of €32,594.45 was payable. Dunnes eventually paid the said interest on 3rd July, 2015. Camiveo then instituted the within proceedings by way of plenary summons on 16th July, 2015, and brought a motion seeking interlocutory injunctive relief. And it issued a motion seeking entry into the Commercial List. On the morning of the application for entry into the Commercial List, Dunnes paid to Camiveo the sum of €1,154,223.00 being the further rent, service charges and interest which had accrued during the summary proceedings and were outstanding as of 15th July, 2015. This was done in an apparent and unsuccessful attempt to reduce the value of the amount in dispute between the parties below the threshold applicable to Commercial List matters so as to frustrate the entry of the within matter into the Commercial List. On 9th September, 2015, the High Court granted Camiveo interlocutory injunctive relief requiring Dunnes to re-open its doors the following day. The doors were re-opened at 10:45 on that date and remain open to this time pursuant to that court order.

8. It is perhaps unsurprising, given the above facts, that relations between Camiveo and Dunnes have been and are somewhat strained. It may be because of this that reference was made at the hearing of the within application to Dunnes' being a 'serial

litigant'. The court is not entirely sure what this phrase is intended to convey, though it seems noteworthy in this regard that the within proceedings have been brought against Dunnes, not by it. Regardless, the court notes in passing that Dunnes enjoys the same right of access to the courts as any other person and is entitled to commence as many proceedings as it considers appropriate to vindicate what it considers are its legal entitlements and rights. It may win such cases, it may lose such cases; it will always get a fair hearing.

III. A Brief Survey of the Anchor Lease

9. As mentioned, three leases are the particular focus of the within proceedings. These are referred to hereafter as the Anchor Lease, the Bastion Lease and the Unit 107 Lease. The Anchor Lease was the primary but not sole focus at the hearing of the within application. Clauses of especial interest in the Anchor Lease include the following:

> *"4. TENANT'S COVENANTS*
>
> *The Tenant to the intent that the obligations may continue throughout the Term HEREBY COVENANTS with the Landlord as follows:*
>
> *4.1 Rents Service Charge and Insurance Premium*
>
> *4.1.1 To pay to the Landlord the rents or increase rents reserved by this Lease and referred to at Clauses 3.1 and 3.2;*
>
> *4.1.2 To pay by way of rent to the Landlord the Service Charge referred to at Clause 3.3;*
>
> *4.1.3 To pay by way of rent to the Landlord the Insurance Premium referred to at Clause 3.4;*
>
> *4.1.4 To pay any additional sums payable herein;*
>
> *at (in the case of all the forgoing) the times and the manner prescribed for the payment of same.*
>
> *4.2 Interest on arrears*
>
> *Without prejudice to any other right, remedy or power herein contained or otherwise available to the Landlord, if any of the rents (including the Service Charge and Insurance Premium) reserved by this Lease or if any other sum of money payable to the Landlord by the Tenant under this Lease shall remain unpaid for more than twenty-one days after the date when payment was due, to pay interest thereon at the Prescribed Rate from and including the date on which payment was due to the date of payment to the Landlord (both before and after any judgment).*
>
> *4.3 Outgoings*
>
> *4.3.1 To pay and indemnify the Landlord against all existing and future rates, taxes, duties, charges, assessments, impositions and outgoings whatsoever (whether parliamentary, parochial, local or of any other description) which now are or may at any time during the Term be charged, levied, assessed or imposed upon or payable in respect of the Demised Premises or upon the owner or occupier of them (excluding any capital or income taxes payable by the Landlord and any taxes occasioned by any disposition of or dealing with the reversion of this Lease);*
>
> *4.3.2 To pay all charges for electricity, gas (if any), water and other services consumed in the Demised Premises, including any connection and hiring charges and meter rents and to perform and observe all present and future regulations and requirements of the electricity, gas and water supply authorities or boards in respect of the supply and consumption of electricity, gas and water on the Demised Premises and to keep the Landlord indemnified against any breach by the Tenant thereof….*
>
> *4.16 Obstruction of Common Areas*
>
> *Not to do anything whereby the Common Areas or other areas over which the Tenant may have rights of access or use may be damaged, or the fair use thereof by others may be obstructed in any manner….*
>
> *4.19 To Open*
>
> *4.19.1 To complete the fitting-out of the Demised Premises in accordance with the Plans and Specifications approved heretofore by the Landlord and once such fitting-out has been completed to open for trade to the general public unless prevented from doing so for some cause outside the Tenant's Control PROVIDED THAT nothing in this Lease or otherwise shall oblige the Tenant to keep the Demised Premises or any part thereof open for trade or business….*
>
> *4.29 Statutory requirements*
>
> *4.29.1 At the tenant's own expense, to comply in all material respects with the provisions of all Acts, statutory Instruments, Bye Laws and other regulations now in force or which may hereafter be in force and any other obligations imposed by law relating to the Demised Premises or the user thereof.*
>
> *4.29.2 To execute all works and provide and maintain all arrangements upon or in respect of the Demised Premises or the user thereof, which are directed or required (whether of the Landlord, Tenant or occupier) by any statute now in force or which may hereafter be in force or by any government department, local or other competent authority or duly authorised officer or court of competent jurisdiction action, under or in pursuance of any statute and to indemnify and keep the Landlord indemnified against all reasonable costs, charges, fees and expenses of or incidental to the execution of any works or the provision or maintenance of any arrangements so directed or required in relation to the Demised Premises;*
>
> *4.29.3 Not to do in or near the Demised Premises, any act or thing by reason of which the Landlord may, under any statute, incur or have imposed upon it or become liable to pay any penalty, damages, compensation, costs, charges or expenses;*
>
> *4.29.4 PROVIDED ALWAYS that the provisions of this clause 4.29 shall not apply to any matters which are the*

responsibility of the Landlord under this Lease.

4.29.5 Not to do anything in the Demised Premises or occupy them in such a way as shall cause any part of the Centre or the Eyre Square Centre not to comply in any material respect with any statute in relation to fire safety. For the avoidance of doubt this clause does not apply to the initial construction of the Demised Premises undertaken by the Landlord and shall not restrict the Tenant from opening for trade.

4.30 Planning Acts, Public Health Acts and Building Control Act

4.30.1 Not to do anything on or in connection with the Demised Premises the doing or omission of which shall be a contravention of the Planning Acts and the Public Health Acts (if applicable) and the Building Control Act or of any notices, orders, licences, consents, permissions and conditions (if any) served, made, granted or imposed thereunder and to the extent that same is the responsibility of the Tenant hereunder to indemnify (as well after the expiration of the Term by effluxion of time or otherwise as during its continuance) and keep indemnified the Landlord against all actions, proceedings, damages, penalties, costs, charges, claims and demands in respect of such acts and omissions or any of them and against the costs of any application for planning permission, commencement notices, fire safety certificates and the works and things done in pursuance thereof.

4.30.2 In the event of the Landlord giving written consent to any of the matters in respect of which the consent of either or both shall be required under the provisions of this Lease or otherwise and in the event of permission or approval from any Local Authority under the Planning Acts, the Public Health Acts and the Building Control Act being necessary for any addition, alteration or change in or to the Demised Premises or for the change of user thereof, to apply, at the cost of the Tenant, to the relevant local authority for all approvals, certificates, consents and permissions which may be required in connection therewith and to give notice to the Landlord of the granting or refusal (as the case may be) together with copies of all such approvals, certificates, consents and permissions forthwith on the receipt thereof and to comply substantially with all conditions, regulations, bye laws and other matters prescribed by any competent authority either generally or specifically in respect thereof and to carry out such works at the Tenant's own expense in a good and workmanlike manner;

4.30.3 To give notice forthwith to the Landlord of any notice, order or proposal for a notice or order served on the Tenant under the Planning Acts, the Public Health Acts or the Building Control Act and if so required by the Landlord to produce the same;

4.30.4 To comply at its own costs with any notice or order served on the Tenant under the provisions of the Planning Acts, the Public Health Acts and the Building Control Act in relation to the Demised Premises to the extent that the same is the responsibility of the Tenant hereunder;

4.30.5 To produce to the Landlord on demand all plans, documents and other evidence as the Landlord may reasonably require (including Certificates or opinions on compliance from a duly qualified Architect or Engineer that the relevant works have been carried out to the Demised Premises in substantial compliance with the requirements of the said Acts and with any consents required thereunder) in order reasonably to satisfy itself that all of the provisions in this covenant have been complied with.

4.31 Statutory notices

Within fourteen (14) days of receipt of the same (or sooner if requisite having regard to the requirements of the notice or order in question or the time limits stated therein) to produce to the Landlord a true copy and any further particulars required by the Landlord of any notice or order or proposal for the same given to the Tenant and relevant to the Demised Premises or the occupier thereof by any government department or local or public or statutory authority, and, without delay, to take all necessary steps to comply with the notice or order in so far as same is the responsibility of the Tenant.

4.32 Fire and safety precautions and Equipment

4.32.1 To comply with the lawful requirements and reasonable recommendations (whether notified or directed to the Landlord and then to the Tenant or directly to the Tenant) of the appropriate local authority, the Insurers of the Centre, the Landlord in relation to fire and safety precautions affecting the Demised Premises;

4.32.2 To keep the Demised Premises supplied and equipped with such fire fighting and extinguishing appliances as shall be required by any statute, the local authority or the insurers of the Centre, or as shall be reasonably required by the Landlord and such appliances shall be open to inspection and shall be maintained to the reasonable satisfaction of the Landlord;

4.32.3 Not to obstruct the access to or means of working any fire fighting, extinguishing and other safety appliances for the time being installed in the Demised Premises or in the Centre or the means of escape from the Demised Premises or the Centre in case of fire or emergency.

4.39 Insurance becoming void

The Tenant shall not do or omit to do anything that could cause any policy of insurance in respect of or covering the Demised Premises or do anything that could cause any policy of insurance in respect of or covering the Centre to become void or voidable wholly or in part nor (unless the Tenant has previously notified the Landlord and agreed to pay the increased premium) do anything whereby any abnormal or loaded premium may become payable and the Tenant shall, on demand, pay to the Landlord all additional expenses thereby incurred by the Landlord in renewing any such policy."

IV. Reliefs Sought

10. In summary, the following reliefs are sought by Camiveo at this time: (1) an order restraining Dunnes from disabling the automatic opening mechanism of the Edward Square doors during the opening hours of the Edward Square Shopping Centre; (2) if necessary, an

order requiring Dunnes to enable the automatic opening mechanism of the Edward Square doors during the opening hours of the Edward Square Shopping Centre; (3) if necessary, an order requiring Dunnes to facilitate the free passage of pedestrians through the Edward Square doors to Castle Street/Barrack Lane during the opening hours of the Edward Square Shopping Centre; (4) an order requiring Dunnes to comply with the covenants contained in clauses 4.1, 4.2, 4.3, 4.16, 4.29, 4.30, 4.32 and 4,39 of the Anchor Lease; (5) an order requiring Dunnes to comply with the covenants contained in clauses 4.1, 4.2 and 4.3 of the Bastion Lease; (6) an order requiring Dunnes to comply with the covenants contained in clause 4.1 of the Unit 107 Lease; (7) an order for specific performance of each of the said leases; (8) damages, including aggravated and exemplary damages, for breach of contract; (9) damages, including aggravated and exemplary damages, for unlawful or wrongful interference with economic interests; and (10) various other reliefs.

V. Proper Plaintiff?

11. There was some suggestion during the proceedings that Camiveo is not the proper plaintiff to bring the within proceedings. This suggestion is, with respect, unfounded. The evidence before the court is that Camiveo is the general partner of the ESQ Limited Partnership and the legal owner of the property that is at the heart of these proceedings and which it holds for the benefit of the limited partnership. As general partner, Camiveo has complete, sole power and responsibility for managing and administering the business affairs of the partnership. In his oral testimony, Mr Hynes explained matters as follows (Day 4, pp. 152-3):

> *"Camiveo is acting on behalf of the general partner. So as I say it's incorrect to say that Camiveo does not, could not incur a loss. Camiveo is acting on behalf of the general partner, acting as general partner on behalf of the limited partners, ESQ",*

continuing:

> *"Camiveo is the general partner. Camiveo as general partner is responsible and obliged to act on behalf of the limited partnership, ESQ, to recover rents, take all actions to manage the partnership in its entirety. Camiveo does have a right when it incurs a loss to claim it back from the partnership. But Camiveo being the legal owner and the general partner is obliged to act on behalf of the limited partners in the context of any transaction, if Camiveo, that's why the structure was set up the way it was as general partner."*

12. So, Camiveo is the general partner in a limited partnership; it has legal ownership of the relevant property and exclusive power to manage and administer the business affairs of the partnership; the rent under the lease is payable to it; it may be that the rent is beneficially payable to another, not unlike the situation where, *e.g.*, a bank has security over a rental stream, but that does not affect the right to sue for the rent where the rent goes unpaid.

13. Having regard to all of the foregoing, the court does not consider any issue to arise as regards the ownership of the property or Camiveo's being plaintiff in the within proceedings.

VI. A Shopping Centre?

14. Though little if anything seems to turn on the point, an issue was raised by Dunnes during the within proceedings as to whether (A) Edward Square Shopping Centre is a shopping centre and (B) Dunnes is an anchor tenant of same. It may perhaps be that Dunnes considered that if it was not perceived to be an anchor tenant of Edward Square Shopping Centre this would diminish (i) the status of the Edward Square doors as comprising a front entrance (which they do) and (ii) the ostensible economic irrationality of a retail department store operator closing the front doors to the department store during store opening hours. Whatever Dunnes' rationale in this regard, Camiveo has pointed to an abundance of instances in the leases and related documentation in which Dunnes has previously had no difficulty with its being described as an anchor tenant and/or with the Edward Square Shopping Centre being described as a shopping centre.

15. Some of the more prominent instances adverted to by Camiveo include the following:

> (a) the indenture of lease of 3rd April, 2000, between (1) Radical Properties Limited, (2) Anglo Irish Bank Corporation plc, and (3) Dunnes Stores Ireland Company entitled "*Lease of Anchor Unit Edward Square Shopping Centre Barrack Lane, Galway*";
>
> (b) clause 1.9 of the Anchor Lease coupled with the First Schedule defines "*the Centre*" as, *inter alia*, "*ALL THAT the lands and premises known as Barrack Lane Shopping Centre* [now Edward Square Shopping Centre] *situate at Barrack Lane, Galway…*";
>
> (c) the definition of "*Adjoining Property*" in cl. 1.1 of the Anchor Lease as meaning "*all parts of the Centre* (other than the Demised Premises) *and any land and/or buildings adjoining or neighbouring the Centre* (excluding the Eyre Square Centre)";
>
> (d) the Tenant's covenant at cl. 4.24.2 of the Anchor Lease whereby the Tenant is "*entitled to erect and retain and replace a canopy over the front entrance of the Demised Premises fronting the Common Areas…*";
>
> (e) clause 7.9 of the Anchor Lease (cl. 7 is headed "SERVICE CHARGE") provides that "*The Landlord hereby covenants with the Tenant to provide at the cost and expense of the Landlord all such plant and equipment systems fixtures and fittings for the Common Areas as are necessary or desirable for the operation of the Common Areas as part of a first class shopping centre…*";
>
> (f) the Finance Act Certificate at cl. 11.2 of the Anchor Lease states that "*IT IS HEREBY FURTHER CERTIFIED for the purposes of the stamping of this Instrument that this is an instrument to which the provisions of Section 112 of the Finance Act 1990 do not apply for the reason that the property being leased is a unit in a shopping centre*";
>
> (g) the Deed of Assignment of 11th February 2002 between Dunnes Stores Ireland Company, Dunnes Stores and Radical Properties is entitled "*ASSIGNMENT OF A LEASEHOLD INTEREST ANCHOR STORE, EDWARD SQAURE SHOPPING CENTRE, BARRACK LANE, GALWAY*";
>
> (h) the Schedule to the said Deed of Assignment describes the Premises as "*ALL THAT AND THOSE the hereditaments and premises comprised in and demised by the Lease and described in the Second Schedule thereto as 'ALL THAT the entire of the lands and premises together with buildings erected thereon forming part of the Centre situate at Barrack Lane…'*";

(i) the Deed of Variation of the Bastion Occupational Lease (Eyre Square Centre) of 3rd April, 2000, between (1) Radical Properties, (2) Anglo Irish Bank Corporation plc, and (3) Gerard Barrett (which lease was later assigned to Dunnes) provides, *inter alia*, at Recital D that "*The Lessor has completed the construction of a retail development adjoining the Centre which will link into the Centre at a number of levels and which will incorporate the Anchor Store*"; and

(j) the Deed of Variation Bastion Occupational Lease (Eyre Square Centre) of 3rd April, 2000 between (1) Radical Properties Limited, (2) Anglo Irish Bank Corporation plc, (3) CW Distributors Limited (which lease was later assigned to the Defendant) provides, *inter alia*, at Recital D that "*The Landlord has completed the construction of a retail development adjoining the Centre which will link into the Centre at a number of levels and which will incorporate the Anchor Store*".

16. In truth, the foregoing suffices for the court unhesitatingly to conclude that Edward Square Shopping Centre is a shopping centre. But there is more by way of evidence before the court to support this conclusion:

(1) in his evidence before the court, Mr Slattery, a chartered fire safety engineering consultant retained on behalf of Dunnes as an expert witness, confirmed (Day 14, pp. 147-158) that: the fire safety certificate application made by his firm for Dunnes in 1998 described the Dunnes unit as the 'anchor store', described the Edward Square entrance as the 'main entrance' and also as the 'main front entrance'; and that a later fire safety certificate application, done in 2000, likewise described the Dunnes unit as the 'anchor unit', and referred to the Edward Square entrance as the 'main entrance';

(2) Mr Peter Gee, the Regional Estates Manager (Scotland and Ireland) of Next (Day 3, pp. 63 and 88) effectively confirmed that in his view Dunnes acts as an anchor tenant and viewed the Edward Square Shopping Centre as "an open shopping centre";

(3) Mr Sheridan, the Company Secretary of Dunnes, swore an affidavit of 29th November, 2013, in the summary rent arrears proceedings indicating that Dunnes is the lessee of the anchor unit at Edward Square;

(4) in the Notice of Appeal of 18th July, 2014, in the summary proceedings, Dunnes defined its own occupation of the Demised Premises as being of commercial premises "*at Edward Square Shopping Centre*";

(5) a letter dated 8th July, 2015, written by Dunnes Stores in the course of the interlocutory injunction proceedings and complaining about the attempt by Mr McGuckian, the property manager of both Edward Square Shopping Centre and Eyre Square Centre, was entitled "*Matter: Anchor Store, Edward Square Shopping Centre, Galway*"; and

(6) even Mr Markey, a chartered surveyor retained as an expert witness on behalf of Dunnes acknowledged (Day 14, pp. 21) that Dunnes could be described as the anchor tenant of Edward Square Shopping Centre.

17. Mr McNiffe, the Director of Operations for Dunnes, insisted that Edward Square Shopping Centre is not a shopping centre and that Dunnes is not the anchor tenant of the putative shopping centre. (Day 12, p.82). However, the great weight of the evidence, only some of which is referred to above, is overwhelmingly against Dunnes in this regard. There really can be no doubt but that Edward Square Shopping Centre is a shopping centre and that Dunnes Stores is the anchor tenant of same.

VII. Contractual Interpretation

18. At the heart of the dispute between the parties is the question of whether or not there has been compliance with the terms of the Anchor Lease. The court proceeds later below to consider those terms in some detail. Before doing so, however, it is worth pausing to consider the rules of contractual interpretation as interpreted in four prominent cases, viz. *Analog Devices B.V. v. Zurich Insurance Company* [2005] 1 I.R. 274, *BNY Trust Company (Ireland) Limited and Anor v. Treasury Holdings* [2007] IEHC 271, *Rainy Sky SA v. Kookmin Bank* [2011] 1 W.L.R. 2900 and *ICDL v. European Computer Driving Licence Foundation Ltd*. [2012] 3 I.R. 327.

19. *Analog Devices* was a case concerned with the interpretation of an exclusion clause in an insurance contract. In the course of his judgment for the Supreme Court, Geoghegan J., at 280-281, quoted with approval the following principles of contractual interpretation, as identified by Lord Hoffmann in *Investors Compensation Scheme Ltd v. West Bromwich Building Society* [1998] 1 W.L.R. 896, 912:

"(1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.

(2) The background was famously referred to by Lord Wilberforce as the 'matrix of fact', but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be next mentioned, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.

(3) The law excludes from the admissible background the previous negotiations of the parties and of their declarations of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in ordinary life. The boundaries of this exception are in some respects unclear. But this is not the occasion on which to explore them.

(4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammar; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meaning of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must for whatever reason, have used the wrong words or syntax; see Mannai Co. Ltd v. Eagle Star Assurance Co. Ltd [1997] A.C. 749.

(5) The 'rule' that words should be given their 'natural and ordinary meaning' reflects the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had. Lord Diplock

made this point more vigorously when he said in Antaios Compania S.A. v. Salen A.B. [1985] A.C. 191, 201:

> *'if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business commonsense, it must be made to yield to business commonsense.'"*

20. In *ICDL*, a case concerned with the proper interpretation of a limitation of liability clause in a commercial licence agreement, the Supreme Court also adopted Lord Hoffmann's summary of principle in ICS. In *BNY Trust Company (Ireland) Limited v. Treasury Holdings* [2007] IEHC 271, a case concerned with the proper interpretation of a co-ownership agreement, Clarke J. referred with approval to the above-quoted passage of Lord Diplock in *Antaios Compania Naviera*, and the observations of Lord Steyn in *Mannai Investment Co. Ltd v. Eagle Star Assurance Company* [1997] 3 All E.R. 352 which emphasised the need for a commercially sensitive construction of a commercial contract.

21. One last decision of note when it comes to the general principles of statutory interpretation is the decision of the United Kingdom Supreme Court in *Rainy Sky*, a case concerned with whether or not a bank pay-out was due under certain performance bonds. There it was held that if there are two possible constructions of a contractual provision a court is entitled to prefer the construction which is consistent with business common-sense. Per Lord Clarke, at 2908:

> *"The language used by the parties will often have more than one potential meaning. I would accept the submission made on behalf of the appellants that the exercise of construction is essentially one unitary exercise in which the court must consider the language used and ascertain what a reasonable person, that is a person who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract, would have understood the parties to have meant. In doing so, the court must have regard to all the relevant surrounding circumstances. If there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other."*

22. Armed with the above principles of contractual interpretation the court turns now to consider the various issues presenting in the within proceedings.

VIII. Planning Issues
(i) Clause 4.30.1.

23. Clause 4 of the Anchor Lease identifies Dunnes' covenants as tenant. It provides that "*The Tenant to the intent to the intent that the obligations may continue throughout the Term HEREBY COVENANTS with the Landlord as follows…*" and then, at cl. 4.30, under the heading "*Planning Acts, Public Health Acts and Building Control Act*", provides, *inter alia*, as follows:

> *"4.30.1 Not to do anything on or in connection with the Demised Premises the doing or omission of which shall be a contravention of the Planning Acts and the Public Health Acts (if applicable) and the Building Control Acts or of any notices, orders, licences, consents, permissions and conditions (if any) served, made, granted or imposed thereunder and to the extent that same is the responsibility of the Tenant hereunder to indemnify (as well after the expiration of the Term by effluxion of time or otherwise as during its continuance) and keep indemnified the Landlord against all actions, proceedings, damages, penalties, costs, charges, claims and demands in respect of such acts and omissions or any of them and against the costs of any application for planning permission, commencement notices, fire safety certificates and the works and things done in pursuance thereof".*

24. It is, the court understands, common case between the parties that if Dunnes has breached a condition of the planning permission applicable to the Demised Premises then it is in breach of cl. 4.30.1. The issue arising is whether Dunnes is in fact in breach of the planning permission.

(ii) Framing the Issue Presenting.

25. By way of preliminary remark, the court recalls the evidence of Ms Auveen Byrne (Day 10, p.89). Ms Byrne is a town planner and was retained on behalf of Dunnes as an expert witness. In her evidence she accepted that Galway City Council (as planning authority) and An Bord Pleanála had the power to impose a condition requiring pedestrian access to be afforded through the anchor unit to Eyre Square Centre. Ms Byrne also accepted that if such a condition was imposed it would be a breach of same, and constitute unauthorised development, if the doors were shut on a permanent basis. And she accepted, as a matter of principle, that if it was spelled out in the application or related documentation that such access aforesaid was provided, then Condition 1 of the planning permission would have the effect of imposing an obligation to provide that access. She acknowledged that it was for this Court, in looking at this aspect of matters, to determine whether the application material as a whole allows for such access.

(iii) Case-law on Construction of Planning Permissions.

26. Guidance for the court, in approaching the last-mentioned task, is to be found in a helpful sextet of authorities, viz. *Kenny v. Dublin City Council and anor* [2009] IESC 19, *Weston Limited v. An Bord Pleanála* [2010] IEHC 255, *Dublin County Council v. Jack Barrett (Builders) Limited* (Unreported, Supreme Court, 28th July, 1983), *Coffey v. Hebron Homes Limited* (Unreported, High Court (O'Hanlon J.), 27th July, 1984) and the respective decisions of the High Court and Supreme Court in *Lanigan v. Barry and anor* [2008] IEHC 29, [2016] IESC 46.

a. *Kenny v. Dublin City Council and anor*.

27. This was one of a number of cases brought by Mr Kenny concerning whether or not Trinity College had acted in compliance with the terms of the planning permission applicable to the college's construction of new halls of residence in Dartry. At p.8 of his judgment for the Supreme Court, Fennelly J. identifies certain principles applicable to the interpretation of planning permission that are of interest in the context of the within proceedings, stating as follows:

> *"24…The planning permission is a formal and public document. The applicant, the planning authority and the public have participated in a formal statutory procedure, leading to its grant. The permission enures to the benefit of the land on which the permitted development is to be carried out.*
>
> *25. Consequently the planning permission is to be interpreted according to objective criteria. The subjective beliefs either of the applicant or the planning authority are not relevant or admissible as aids to interpretation. (see Readymix*

(Éire) v. Dublin County Council, Supreme Court, unreported, 30th June 1974)….

26. It follows from the principle of objective interpretation that the correct interpretation is a matter of law and can ultimately be decided only by the court. In Gregory v. Dun Laoghaire Rathdown County Council (Supreme Court, unreported, 28th July 1977)…the respondent planning authority had submitted that the interpretation it had placed on a planning condition, even if erroneous, was reasonable. Murphy J., speaking for the majority of this court described that argument as 'unsustainable'. He explained:

> *'The proper function of the Council was the implementation of the condition imposed by the Board. If they erred in that regard the error was as to the nature of their duties rather than the performance thereof. The only power exercisable by the Council was to agree details in relation to the revision of plans on the basis of the implementation of the condition imposed by the Board. Any agreement reached without that condition having been fulfilled was necessarily ultra vires the Council.'*

27. However, an objective interpretation will not provide the complete answer in every case. It is not a synonym of literal interpretation. All parties to the present appeal accepted the following statement of McCarthy J. in Re XJS Investments Ltd v Dun Laoghaire Corporation [1986] IR 750 at 756:

> *'Certain principles may be stated in relation to the true construction of planning documents:*
>
> *(a) To state the obvious, they are not Acts of the Oireachtas or subordinate legislation emanating from skilled draftsmen and inviting the accepted canons of construction applicable to such material.*
>
> *(b) They are to be construed in their ordinary meaning as it would be understood by members of the public without legal training as well as by developers and their agents, unless such documents, read as a whole, necessarily indicate some other meaning…".*
>
> *28. A court, in interpreting a planning permission, may need to go no further than the planning document itself, or even than the words of a condition in issue within the context of the permission. The words may be clear enough. However, it will very often need to interpret according to context."*

28. Fennelly J. then moves on to consider the decision in *Gregory* in a little more detail. *Gregory* featured an application for retention of what was described as a garage/loft. An Bord Pleanála, on appeal, had imposed a condition requiring that the loft be omitted and that the garage be a single-storey construction. The planning authority then agreed revised details, purportedly in compliance with the said condition, whereby the loft was to be omitted but the height of the building was retained, so leaving what was a two-storey construction with only one storey. Both the High Court and the Supreme Court considered that this agreement was not in compliance with the condition imposed as the height of the structure, though not specified, was viewed by those courts as the main concern presenting. Per Fennelly J., at p.10, *et seq*. of his judgment:

> *"33. The Council argued, in defence of its decision, that the condition had been complied with: the loft was omitted; the garage was single storey. That was a literal approach. The Council argued that if the Board had intended that the height was to be reduced, 'it would have expressly so provided.' It had not done so. This Court, on appeal, relied heavily on the reason for the complaint which had been made by the objector, which had led to the imposition of [the] condition. His only concern was with the height of the structure. He was not in any way concerned with the internal layout. Murphy J. said:*
>
> *'By imposing the condition in question they clearly required the reduction of the height of the structure by the removal of the loft area as shown on the plans before them and the second storey which constituted that loft. The omission or deletion of the loft was the means by which the reduction in height of the structure was to be achieved.'*
>
> *34. Thus, the principle of objective interpretation excludes purely subjective considerations, such as the understanding of the developer or the planning authority, but it does not provide a result where a provision is unclear, ambiguous or contradictory.*
>
> *35. The principle does not resolve the problem [then before the Supreme Court] which, as I explain later, arises in respect of Condition No. 2, namely that the condition is, itself, contradictory or, at least, ambiguous. The Gregory case shows that the court does not confine itself to a purely literal interpretation of a condition. It will seek to ascertain its true meaning from its context in the planning process."*

29. Although the court proceeds, later below, to identify the principles that it considers to present in the sextet of authorities now under consideration, it seems to it that this last-quoted sentence captures the essence of what the court is about when it seeks to interpret a planning permission or an element of same: it is seeking to ascertain true meaning within the context of the applicable planning process.

30. Having raised the issue presenting as regards Condition 2 of the planning permission before the Supreme Court, Fennelly J. then proceeds to consider the substance of the issue presenting in the following terms, at 11–13:

> *"37. Condition No. 2 required that building No. 3 on the Dartry Road elevation be 'reduced in height by the omission of the first floor…'. The reason for the condition was the 'interest of visual amenity.'*
>
> *38. It is common case that Trinity omitted a floor other than the first. The condition was interpreted by the Council as requiring that the overall height of the building be reduced by one floor….*
>
> *43. Condition No. 2 presents a problem of interpretation. It is clear from the terms of the condition itself that the purpose of the removal of the first floor was the reduction of the height of the building….[Yet [t]]he Inspector's report did not recommend the removal of any floor….*
>
> *44. This means that there was a contradiction or ambiguity at the heart of the condition. Condition No. 1 required the development to be carried out in accordance with the plans submitted except as may otherwise be required in order to comply with the following conditions. Compliance with Mr Kenny's proposed literal interpretation of Condition No. 2 would lead to inconsistency with Condition No. 1 by altering the façade. I do not agree with the submission made on behalf of Mr Kenny that it is plain and unambiguous. I am satisfied that the true objective of Condition No. 2 was the reduction in*

the height of the building. This objective has been achieved. There is no evidence that An Bord Pleanála chose the elimination of the first, rather than any other floor in order to secure the desired reduction in height or that it wished to alter the composite elevation in any way. I am satisfied that the Council acted within the scope of its powers by approving the compliance plans submitted by Trinity in August and November 2001."

31. For the purposes of the within proceedings, perhaps the key lesson to be drawn from *Kenny* is just how (very) far the Supreme Court was prepared to go in seeking to ascertain the true intent of the planning authority: the planning condition before the Supreme Court expressly required that the first floor be removed, yet the Supreme Court concluded that what was truly intended was the reduction in the height of the building and this was achieved by the removal of any floor. Notably, in pursuit of the true meaning of a condition, the Supreme Court was prepared not just to look beyond the literal wording of a condition but to allow the doing of something which was entirely contrary to the literal wording of a condition. It is perhaps difficult not to feel a sneaking sympathy for Mr Kenny as regards the court's decision; but be that as it may, the decision in *Kenny* is binding on the court.

32. In passing, the court notes that in arriving at its decision in Kenny, the Supreme Court looked to the contents of a report of an inspector of An Bord Pleanála and took them into account in reaching its conclusions. So it is clear that this Court too can have regard to the report of an inspector of An Bord Pleanála when interpreting a planning condition.

b. *Weston Limited v. An Bord Pleanála*.

33. This was a case concerning *Weston* Airport in Lucan and whether there had been an intensification of use there such as to yield unauthorised development. In the course of his judgment, Charleton J. turned to the principles applicable to the interpretation of a planning permission, observing as follows, at 15-16:

"28…Planning controls operate within the community on the basis that the developer will make an honest application for planning permission, stating precisely what is proposed; the public will, on reading that application, realise what affect the grant of permission may have on them and make observations accordingly; and the planning authority will, after independent inspection and verification, adjudicate on the application objectively to ensure that there is proper and sustainable development within an area in accordance with the environmental contract as to planning that the development plan for the area represents. In consequence, planning permissions are construed not simply on the basis of the decision, but by reference to an active consideration as to what has been sought. As O'Hanlon J. stated in Coffey v. Hebron Homes (Unreported, High Court, O'Hanlon J., 27th July, 1984):-

'I am satisfied that where the documents lodged in support of the application for planning permission include plans and specifications, and permission is granted by reference to these documents, then the developer must be regarded as being in breach of planning permission if he fails to buil[d] in accordance with those plans and specifications.'"

34. In essence, Charleton J. highlights that the planning process works on the basis of an applicant for permission approaching the application honestly and stating precisely what is proposed, with the result that "*the public will, on reading that application, realise what affect the grant of permission may have on them and make observations accordingly*".

c. *Dublin County Council v. Jack Barrett* (Builders) Limited.

35. This was a case concerned with the construction of a link-road in Raheny. Layout drawings had been submitted and they indicated that certain infrastructure was going to be constructed by the planning authority and certain infrastructure was going to be constructed by the developer. The particular issue presenting in the case was whether the developer was obliged to construct the link-road. But the peculiar significance of the case in the context of the within proceedings is that in *Jack Barrett* the evidence of a Mr Morris, the architect who had prepared the relevant plans and application, was relied upon by the Supreme Court in resolving the case before it. In these proceedings the court has heard evidence from, amongst others, Mr Grace and Mr McKeon. They, respectively, are a planning consultant and a onetime planning officer who was working with Galway Corporation (now Galway City Council) when the planning application for Edward Square Shopping Centre was made. There was some suggestion in the course of the within proceedings that the court could not properly have regard to their evidence; but Jack Barrett offers an example, from the very highest level, of like evidence being relied upon to resolve an issue that went, in that case, to the Supreme Court for resolution.

d. *Coffey v. Hebron Homes Limited*.

36. This was a case involving the question of whether there had been compliance with the conditions of a planning permission. Two points of especial interest arise in the judgment of O'Hanlon J. in the High Court. First, he observes as follows, at 2:

"I am also satisfied that the matters relied on by the Applicant, and substantiated by the evidence in this case, disclose quite serious breaches by the developers of their obligations under the Planning Permission when they elected to proceed with the development. Roads were inadequately surfaced; kerbs were left incomplete; the cross-falls on the roads were unsatisfactory in many places; gullies were omitted or were located in unsuitable locations; no evidence could be found by the Applicant's engineer of the existence of two of the soakways which should have been provided; the plans lodged with the planning application showed provision made for a shiplap and post and wire fence dividing the estate from the pump house and marshy ground which adjoined it – this appears to have been erected in such a fashion that it was rapidly demolished by the elements, and therefore can hardly be regarded as sufficient compliance by the developer with its obligations."

37. The court must admit that some of the technical development features referred to by O'Hanlon J. are beyond its ken, but the significance of the quoted text is that O'Hanlon J. read into the permission a requirement that the relevant works not only be done, but that they be done to a certain level of durability. This is of relevance in the context of the within proceedings because there has been suggestion by certain of the expert witnesses retained by Dunnes (Mr Bamford and Ms Byrne) that it sufficed for the purposes of the planning permission at issue in the within proceedings that the doors were used once or were theoretically capable of being used. It seems to the court, with respect, that that is to place too constrained a reading on the planning permission in issue.

38. The second point of interest in O'Hanlon J.'s judgment is the below-quoted observation, made at 3, in the immediately next-succeeding text to that quoted above:

"I am of opinion that where the documents lodged in support of an application for planning permission include plans and specifications, and permission is granted by reference to these documents, then the developer must be regarded as being in breach of the planning permission if he fails to build in accordance with those plans and specifications. I am

further of the opinion that there is an implication of law that he will use reasonable care and skill and provide proper and adequate materials for the purpose of the building works unless the specifications lodged by him qualify this obligation in some way and are accepted in such qualified form by the planning authority."

39. What is the significance of this last-quoted text in the context of the within proceedings? It is this. O'Hanlon J. clearly considers that when plans and specifications indicate that something be done it follows that it must be done well. It does not seem a great leap of logic to proceed from O'Hanlon J.'s conclusion that if plans and specifications indicate that something is going to be available for use, here a set of doors, then it is reasonable to construe an obligation that they will be available for such use. One will look long and hard in the planning documentation in issue in the within proceedings for a representation by the developer that the doors will be open during particular hours, but what is there, what was represented to the public, is that there would be doors through which the public would enjoy some meaningful level of access and egress, with the minutiae as to the precise hours when such access and egress would be available to be left to the developer and/or the occupant of the development.

e. *Lanigan v. Barry and anor*.

40. This is a relatively recent decision of the Supreme Court. In terms of facts, the case was concerned with the operation of a motor track in County Tipperary. Planning permission had been obtained for the construction of the motor racing track and its use as same. In the application documentation indications had been given as to the intensity of usage. However, over the years the intensity of usage had significantly increased. So much so that a number of locals brought proceedings in nuisance and under s.160 of the Planning and Development Act 2000, as amended, alleging that the operation of the racing track was both a nuisance and an unauthorised development. In the High Court, Charleton J. found that there was both a nuisance and an unauthorised development and granted an injunction. On appeal, the case revolved largely around the terms of this injunction. However, there was also an issue as to whether the claim under s.160 was statute-barred – and this question inevitably triggered the issue of whether there was a breach of the planning permission (there being no time-limit applicable to the enforcement of a condition of a planning permission). The breach contended for was a breach of the customary Condition 1 of a planning permission that the development will be carried out in accordance with the plans and particulars submitted. Giving judgment for the Supreme Court, Clarke J. observed as follows, at 5, et seq:

"2.4…Tullamaine [the Applicant/Respondent] argued that, on a proper construction of the planning permission as a whole, it should be held that there were conditions thereby imposed on Tipperary Raceway as to the maximum scale and timing of its operations. Tipperary Raceway argued, to the contrary, that no specific condition concerning the scale or timing of operations had been imposed. While it was accepted that the content of the documents in question, to which it will be necessary to refer in due course, might legitimately be taken into account in identifying the broad scope of the scale of use for which permission was granted (by reference to which the question of whether there had been a sufficient intensification to amount to a material change of use could be judged), it was argued that, on a proper construction, no relevant condition as such had been imposed. Thus there was a clear issue between the parties as to whether, on a proper construction of the planning permission concerned, it could be said that there was a condition relating to scale and timing of operation….

3. The Interpretation of the Planning Permission

3.1 The starting point has to be a consideration of the grant of the planning permission itself which occurred in the earlier part of 1981. The permission was subject to a number of conditions….However, the only conditions which could have any potential relevance to the issues which arise in this case are condition 1, which is in the usual form requiring that the development be carried out in accordance 'with the applicant's submitted drawings and outline specifications'…

3.4 That in turn requires one to look back to the application for outline planning permission approval which was submitted by a John McHugh on the 13th November, 1980. The details set out are relatively brief. The track is described as being one on which it was proposed to race 'Hot-Rod' cars with the relevant dimensions of the proposed track being set out. So far as the scale and timing of operation is concerned it is necessary to quote points 3 and 4 in full. They provide as follows:

'3. It would be intended to operate the race track on Saturday or Sunday evenings from April to October, if a motoring organisation wished to practise or use the track during weekday evenings under the proprietors supervision and control, it would be proposed to utilise the track for such purposes.

4. The duration of each race track operation would approximate three hours maximum.'

….3.6 The real question is as to whether it is appropriate to interpret those provisions as amounting to part of the 'outline specifications' so that they might be said to have been the subject of the condition to comply with such specifications already referred to. The details cited are clearly not 'drawings' as such….

3.7 In the context of that issue it is important, in my view, to distinguish between a general description of the scale of operation of a facility which might be anticipated, on the one hand, and a specific condition limiting the maximum scale of the operation concerned, on the other. The distinction may be easy to define in some cases but there may well be grey areas in other cases. For example, a retail unit might be described as being likely to attract a certain level of footfall. That description might, indeed, be relevant for planning purposes for it would undoubtedly affect traffic and potentially the amenity of other property occupiers in the vicinity. But such a description would be unlikely to be taken as imposing an absolute limit on the amount of customers which the retail unit would be permitted to entertain on any given day. Likewise, the documents filed in respect of a planning application might suggest that a retail unit was designed for daytime use. That might indicate the sort of use which might implicitly be approved by the granting of planning permission for the unit concerned. It is well settled that, in considering the use which may be regarded as being permitted, it is possible to look at the development for which permission has been granted together with any documents submitted in the context of the relevant planning application.

3.8 In such a case the Planning Authority might choose to impose a specific condition concerning hours of opening. If it did so choose then the matter would be clear and it would be a breach of the relevant condition for the retail unit to open outside the hours as specified. However, even if no such specified opening hours were included as conditions attached to the planning permission, it would always be open to a court to consider whether opening significantly outside the parameters which were contemplated by the planning application itself might amount, in all the circumstances, to a sufficient intensification of use (over the use impliedly authorised by the permission) so as to justify a finding of a

material change. However, in that latter case it would be necessary to take into account a range of factors, including the degree of difference from the use to which it might be inferred had been permitted by the planning permission, so as to access whether any variation from that contemplated use could be said to involve a material change of use.

3.9 Thus, at the other end of the spectrum, descriptions of the likely scale and timing of operations may simply be matters which go to the information on which a planning authority must make its decision and may inform the broad level of use for which it might be inferred that permission has been granted. In such a case a deviation would not, in and of itself, be a breach but rather the relevant information may provide the benchmark against which a decision as to the permitted type and scale of use might be made thus in turn informing any decision as to whether current use might be said to be materially different to a sufficient extent and thus involve an unauthorised development.

3.10 The distinction is between a specific requirement which must be obeyed more or less to the letter, on the one hand, and a general indication which may inform the baseline use by reference to which the materiality of an intensification of use may be judged. An assessment as to which of those two categories any particular description may fall into is one involving the proper construction of the planning permission as a whole including how that planning permission should be construed in the light of the documents filed by the applicant insofar as it can be said that those documents have been incorporated by reference in the permission itself.

3.11 The principles applicable to the construction of a planning permission are, of course, well settled and were described by McCarthy J. in the oft-quoted passage from In re XJS Investments Ltd [1986] IR 750 as requiring the Court to construe planning documents not as complex legal documents drafted by lawyers but rather in the way in which ordinary and reasonably informed persons might understand them. It might, in passing, be appropriate to note that this was, perhaps, an early example of the move towards what has been described as the 'text in context' method of construction appropriate to the determination of the meaning of all documents potentially affecting legal rights and obligations. This approach has now become well established. The 'text in context' approach requires the Court to consider the text used in the context of the circumstances in which the document concerned was produced including the nature of the document itself."

41. What is one to take from the above-quoted text? Dunnes contends that *Lanigan* is authority for the proposition that, absent some specific limit or requirement in planning application documentation, a court should not imply an obligation into the customary Condition 1 of a planning permission. However, that approach sits askance with the other case-law considered above, and there is no indication in the judgment of Clarke J. that the Supreme Court intended so marked a departure from existing precedent. In truth, one need only look at the last-quoted passage to recognise that the Supreme Court perceives the principles applicable to the construction of a planning permission to be well settled since at least the mid-1980s. Rather than representing a departure from previous case-law, the decision in *Lanigan* is but a further exposition of applicable principle, consistent with decisions past, which envisions the courts inferring obligations into or from a planning permission as part of their ordinary interpretative function. In *Lanigan*, the information provided in the original application for outline planning permission as to the expected scale and timing of operation of the race-track offered a base-line by reference to which the court could identify whether such intensification of use as had occurred was of such a degree as to involve unauthorised development.

42. Where *Lanigan* differs from the within case is that it involved an assessment of whether the degree of usage had passed a particular point. Here the circumstances presenting are rather starker: doors were used; doors are no longer used. Did the planning documentation submitted in respect of Edward Square Shopping Centre anticipate that the Edward Square doors would be used? And is the literal switching off of the doors so that they no longer open a breach of what the planning permission contemplated. As will be seen, the court's answer to both of these questions is 'yes'. Beyond that Camiveo does not now seek to go: it has come to the court contending that Dunnes' complete closure of the Edward Square doors is a breach of the applicable planning permission; so far as opening is concerned, it raises no objection to the doors being opened only during Dunnes' normal opening hours, whatever those may be; this was the reading of the planning permission contended for by Mr Grace as correct and it seems also to the court to be correct, achieving a proper balance between achieving the objectives of the planning authority and realising what the developer represented to the public in the original planning application, while at the same time acknowledging the varying demands of practical reality.

43. Clarke J. moves on in para. 4 of his judgment to apply the general principles of interpretation to the facts at hand, stating, at p.12:

"4.1…To interpret a general clause such as condition 1 (which imposes an obligation to carry out the development in accordance with the drawings and specifications submitted) in a way which imposes very specific obligations in the absence of a specific condition does, in my view, require that what might reasonably be considered to be the drawings and specifications be clearly of a nature designed to identify specific and precisely enforceable parameters for the development (including its use).

4.2 Obviously physical plans easily meet that test. A standard clause such as condition 1 in this case clearly requires that any physical building permitted is carried out in substantial conformity with the plans submitted.

4.3 But the information supplied by the applicant for the permission in this case was not at all specific so far as the scope of use was concerned….

4.4…I am not satisfied that it is appropriate to construe the two paragraphs cited as containing the sort of defined commitment to specific limits which could be taken to have been incorporated into a planning permission by virtue of a general condition such as the one which was imposed in this case. That is not to say that there might not be occasions where the language contained in a document submitted might properly be construed as amounting to a clear commitment that particular limits of one sort or another would be complied with. In such a case it might be possible to construe a general condition such as condition 1 as importing that commitment into the permission itself by means of a condition. But for that to be the case it seems to me that it would be necessary that it would be appropriate to construe the documents submitted by the applicant for planning permission as giving a clear and specific commitment rather than a general indication concerning the scale and timing of operation. I am not satisfied that the documents in this case can be so construed."

44. Perhaps the key lesson to be drawn from Clarke J.'s various observations is that to contend successfully, in the absence of a specific condition, that a planning permission imposes a specific obligation, one has to identify a clear and specific commitment, and not just a general indication, in the relevant planning application documentation. Applying that precept to the facts of the within

proceedings, the question that presents is whether in the planning application documentation concerning Edward Square Shopping Centre there was a commitment that access and egress would be available for pedestrians via the Edward Square doors.

45. The court does not see that it can convincingly or correctly be contended that by submitting planning application documentation which featured doors at the top end of Edward Square, there was no commitment from the applicant that there would be pedestrian access and egress to and from those doors. What reasonable member of the public looking at the application materials would say: 'I wonder if those are the kinds of store entrance doors that are usually kept shut? Maybe I had better check'? And who builds a unit intended for retail use with the intention that the doors to that unit will generally be closed? The answers to the questions posed are simply stated. No reasonable member of the public would think as the court has posed. Nobody builds a retail unit with that intention. It makes no sense to read the relevant planning documentation other than as Camiveo contends. And the absence of an express condition concerning the availability of the doors as an entrance is in any event readily explainable in this case by reference to two factors. First, the linkages were provided by the developer at the behest of the local authority and the local authority having obtained as it sought was hardly going to condition into the ensuing planning permission that it should get what it had already been given. Second, the planning authority can be forgiven for not conditioning into a planning permission a requirement that a trader not undertake the almost incredible and possibly even irrational step of closing its own front door ordinarily to business during its own trading hours. (Mr Grace states (Day 6, p.84) that there is no necessity to have a condition for something already proposed and agreed; and Mr McKeon (Day 8, p.70) intimated that the reason for non-inclusion of a condition as to keeping the front doors open during the hours that what is now the Dunnes unit was open lay in its being inconceivable that a trader would do otherwise).

46. One final and perhaps minor point to note is that it has been contended by Dunnes that the decision of the Supreme Court in *Lanigan* represents an abandonment of the interpretative principles identified by Charleton J. in his High Court decision in the case. One need but look at paras. 36-37 of the judgment of Charleton J. to see that the interpretative approach that he identifies there is entirely consistent with that identified by Clarke J. in the Supreme Court; and there is no sense from the judgment of either court that Charleton J. or, on appeal, Clarke J. for the Supreme Court, considered what they were saying to represent a departure from the well-settled principles applicable to the interpretation of a planning permission.

(iv) The Principles to be Derived.

47. Perhaps nine key principles arise from the above-mentioned case-law: (1) when it comes to the interpretation of a planning permission that is a pure question of law; (2) a planning permission falls to be given its ordinary meaning as it would be understood by a member of the public, unless the document read as a whole necessarily indicates some other meaning; (3) a member of the public will give a planning permission a common-sense meaning, not a technical interpretation; (4) a planning permission is to be given a purposive interpretation, not a literal one; (5) planning permission is to be interpreted objectively, not by reference to the subjective intentions of an applicant or planning authority; (6) a court can have regard to the context in which a planning permission was granted; (7) a court will look at a permission and the documents on the planning file as a whole, including the description of the development applied for, the information provided by the developer as part of the application, and any report of an inspector; (8) the obligation imposed on a developer by a planning condition is not confined to the literal terms of the condition but extends to achieving the objective of the condition; and (9) the obligation on a developer to carry out a development in accordance with the plans and particulars submitted will extend to any obligations which can reasonably be inferred from those plans and particulars.

(v) The Substance of the Planning Permission.

a. The planning permission granted on appeal.

48. So far as relevant to the within proceedings, the planning permission, as granted on appeal, provides as follows:

> *"DECISION: Pursuant to the Local Government (Planning and Development) Acts, 1963 to 1998, it is hereby decided, for the reason set out in the First Schedule hereto, to grant permission for the said development in accordance with the said plans and particulars, subject to the conditions specified in the Second Schedule hereto, the reasons for the imposition of the said conditions being as set out in the said Second Schedule and the said permission is hereby granted subject to the said conditions.*
>
> *FIRST SCHEDULE*
>
> *Having regard to the location of the proposed development in the city centre, to the objectives and policies of the current Galway County Borough Development Plan and to the terms of the Local Government (Planning and Development) General Policy Directive (Shopping), 1998, it is considered that, subject to compliance with the conditions set out in the Second Schedule, the proposed development would be an appropriate use for this urban backland area, would be acceptable in terms of traffic safety and convenience, would not seriously injure acceptable in terms of traffic safety and convenience, would not seriously injure the amenities of property in the vicinity, and would be in accordance with the proper planning and development of the area.*
>
> *SECOND SCHEDULE*
>
> *1. The proposed development shall be carried out in accordance with the plans and particulars lodged with the application as supplemented and amended by the plans and particulars received by the planning authority on the 14th day of October, 1997, the 3rd day of November, 1997 and the 18th day of November, 1997 and by An Bord Pleanála on the 6th day of March 1998 and the 20th day of July, 1998, except as may otherwise be required in order to comply with the following conditions.*
>
> *Reason: To clarify the development permitted."*

49. There are a number of points to note about the above-quoted extract from the permission. First, the development is located in the City Centre. Second, the application has been considered in the context of the Galway County Borough Development Plan. Third, the reference to the proposed development being "*an appropriate use for this urban backland area*" is of some significance. The evidence of Mr McKeon and Mr Grace points to the appropriateness of the usage as having derived from the fact that the development would see a link established between Eyre Square, Castle Street and out into William Street. Fourth, Condition 1 requires that the proposed development be done in accordance with the plans and particulars lodged with the application "*as supplemented and amended*" by plans and particulars received by the planning authority on particular days. All of the documents that Camiveo seeks to rely upon are documents that were furnished on one or other of the dates specified.

b. The original planning permission.

50. In the course of the hearing, the court was provided with the site notices and advertisements that were a feature of the original planning application and which described the development for which application was made. The description also features in the original planning permission which states itself to be as follows:

> *"Permission for a mixed development on lands between Barrack Lane/Castle Street and Whitehall (formerly Corbett's Yard), and at No. 11, Abbeygate Street. The development comprises residential, office use and retail linking into the existing Eyre Square Shopping Centre in Galway City Centre. Permission (1) to construct a building of four storeys above ground floor and lower ground floor to provide 7,499 sq. m. retail floor space (department store, and up to 8 no. retail units and extension to existing retail unit), 72m2 retail kiosks, 343 sq. m. office floor space and 3,749 residential floor space (49 No. residential units), including alterations to existing Eyre Square Shopping Centre to facilitate proposed linkages[1], (2) to demolish (a) part of 2 storey building in retail use (rear of No. 33 William St), (b) 3 storey office building, including basement (at Corbett's Yard), (c) 2-storey retail outlet (Arcadia Antiques, Castle Street), (d) 2-storey building, comprising 4 No. retail units and 2 No. habitable dwellings (Corbett House, Castle St.) and (e) miscellaneous single storey redundant buildings (on site of Corbett's Yard car park), and (3) to extend lower and upper floors of existing dwelling at No. 11 Abbeygate St. with change of use to ground floor retail, and extensions to upper floor residential to provide for additional habitable dwellings, and to provide a pedestrian access from Whitehall Close onto Abbeygate Street."*
>
> [1] What is a "*linkage*"? The Concise Oxford English Dictionary (12th ed.) defines the word, perhaps somewhat tautologously, to mean "*the action of linking or the state of being linked*". But it is when one turns to the Dictionary's helpful definition of "*link*" that one gets a full sense of what is at play, this last word being defined as, *inter alia*, "*a relationship or connection between people or things* □ *something that enables communication between people* □ *a means of contact or transport between two places*". What seems abundantly clear from the foregoing is that the word "*linkage*" embraces a facilitation of connection and movement between people and places. It goes without noting but it is worth noting anyway that where an element of the linkage (the Edward Square entrance) is permanently closed the desired "*relationship or connection between people or things"/"means of contact or transport between two places*" is thereby necessarily, and completely, frustrated.

51. A number of points arise from the above description: (1) the site is the urban back-land accessed off Castle Street; there is also access from Abbeygate Street; (2) the link into Eyre Square Centre is given some prominence; (3) the description relates to permission for physical development, but not physical development simpliciter; rather it envisions a physical development that facilitates identified uses, including the linkage between the new development and Eyre Square Centre; (4) the description expressly states that "*The development comprises residential, office use and retail linking into the existing Eyre Square Shopping Centre in Galway City Centre*". (Emphasis added). So the whole development links into the existing Eyre Square Centre; (5) the 'orphaning' of the remaining Edward Square Shopping Centre stores from the Eyre Square Centre, thanks to the closing of the doors through which the anticipated linkage was to be (and for a long time was) facilitated was not only never anticipated but the exact opposite of what was anticipated; (6) the court recalls the previously quoted observation of Charleton J. in *Weston* that "*Planning controls operate within the community on the basis that the developer will make an honest application for planning permission, stating precisely what is proposed*", couples that with the evidence of Mr Grace and Mr McKeon that if there was no access onto Edward Square from Dunnes then that would be a misrepresentation of what the developer (honestly) sought, and concludes that it favours an interpretation (in truth the only rational interpretation) of the above-quoted text that there was intended to be link onto and from Edward Square/Castle Street; (7) Dunnes has sought to make some play of the fact that there is a reference in the above-quoted text to "*a pedestrian access from Whitehall Close onto Abbeygate Street*", suggesting that the express reference to this pedestrian access, and the absence of any access into and egress from what is now the Dunnes unit, should lead the court to infer that the latter means of access and egress was simply never intended. But this, with respect, ignores the explanation offered by Mr Grace in evidence (Day 6, p.53), and accepted by the court, that the reason for the specific reference to Abbeygate Street was to alert residents of Abbeygate Street of the potential impact for them of the proposed development (thereby fulfilling the obligation on developers that Charleton J. identifies in *Weston*). The same need does not arise in respect of what are now the Dunnes' doors. After all, what would one use an ordinary entrance to a retail unit for but as a means of access and egress to and from the unit?

(vi) Plan L003.

52. The court has been provided with a number of plans that formed part of the original application. One of these was Plan L003. This is a drawing that issued as part of the exercise of seeking planning permission; it is not a construction drawing. Down at the Castle Street entrance this plan shows a rather large box that has become the double-door lobby which, as was explained in the expert evidence (*e.g.* Mr McKeon (Day 8, p.57), Mr Grace (Day 6, p.54)) is customarily used at a retail entrance (it seems to minimise the heat loss that arises through the constant opening and closing of doors to the outside world). It is readily apparent from the map that this is to be a major entrance that will be extensively used and which will provide access to the Eyre Square Centre through the relevant access/egress points elsewhere in what is now the Dunnes unit. Notably, Ms Byrne, who was retained by Dunnes as an expert witness, accepted in her evidence (Day 11, pp. 49-51) that the just-described lobby arrangement would indicate to a planner that the doors thereat would be opening and closing regularly, with it being a reasonable inference to make that they would be used regularly. And Mr Grace indicated in his evidence (Day 6, pp.163-4) that the plan clearly indicates to planners, or indeed anybody looking at it, that were such development to be constructed there would be free movement between Edward Square Shopping Centre and Eyre Square Centre. All this being so, the court considers it is, with respect, wrong to suggest that no breach of the planning permission that issued in part on the basis of Plan L003 would arise were this double door lobby permanently to be closed.

(vii) Drawing L37.

53. Drawing L37 was a particular placed before An Bord Pleanála on appeal. It is therefore among the "particulars" to which Condition 1 of the planning permission refers when it states that "*The proposed development shall be carried out in accordance with the plans and particulars lodged with the application as supplemented and amended by the plans and particulars received* [on stated dates]." It states itself to be a "*Block Plan*" and gives an aerial view of Galway City Centre and by means of large dots gives a sense of how people are expected to move around the Edward Square Shopping Centre and Eyre Square Centre, and into and from some of the streets beyond.

54. Mention was made in argument that some of the dots appear to stop at walls; in fact the drawing appears to have been prepared and/or printed in such a way that the dots overlay the city plan, sitting on top of the detail below and yielding a sense of intended circulation. The drawing is not drawn to scale, but not all plans submitted to An Bord Pleanála are required to be drawn to scale, and in truth the drawing appears as detailed as it needs to be for the purpose for which it is intended. Any reasonable reader looking at

the drawing would understand from it that what it intends to convey is the ability for there to be free movement up, say, William Street into Castle Street, through Dunnes, on into Eyre Square Centre and out into Eyre Square proper (or *vice versa*) and so, *inter alia*, to make commercial use of the urban back-land where the old builder's yard sat before it was transformed into what is now the Edward Square Shopping Centre.

55. Obviously, if the doors to Dunnes are permanently closed the ability of pedestrians to circulate as anticipated is entirely frustrated. The reasonable reader would find his just-described understanding of Drawing L37 to be buttressed and enhanced by the evidence of Mr Grace (Day 6, pp. 58, 67, and 135), quoted below

> *"Counsel – …[H]ow would the location of an anchor as part of the Edward*
>
> *Square Shopping Centre benefit retailers then on William Street or*
>
> *Shop Street?*
>
> *Mr Grace – Well, by bringing people to and fro in that area, increasing footfall in those shopping streets as people moved through the new development , the complex of the Eyre Square Shopping Centre and Corbett Court and Edward Square….*
>
> *[…]*
>
> *Counsel – Does it [Drawing L37] imply anything in terms of when that access would be provided?*
>
> *Mr Grace – I think the implication of looking at the drawing is that during normal trading hours, whatever they may be, it would be available for people to use, yes….*
>
> *[…]*
>
> *Counsel – …I don't want to be unfair to you, Mr Grace; [what] are you saying now?*
>
> *Mr Grace – …There is nothing new on this. This is simply illustrating what was being proposed, which was that there would be access from various places through the proposed Edward Square development into other parts of the development."*

(viii) The Brady Shipman Martin Letter.

56. Brady Shipman Martin is a prominent firm of architects and planners. In July 1998, it was acting for Radical Properties Limited, the original owner of Edward Square Shopping Centre. In a letter of 17th July, 1998, that appears on the planning file it makes various observations concerning the application of the Local Government (Planning and Development) General Policy Directive (Shopping) 1998 (S.I. No.193 of 1998). However, the letter also makes a couple of observations that are of interest in the context of the within proceedings. Thus the letter observes as follows, at para. 11:

> *"The proposed scheme is a stand-alone development which will be owned by Radical Properties. Our client Radical Properties has no interest, direct or indirect, in Drakebury Ltd., the owners of the adjacent Eyre Square Shopping Centre, despite the proposals to create pedestrian linkages between the two developments and to share rationalised servicing arrangements. These have been proposed at the instigation of the local authority, in the interests of town centre management and negotiated with adjacent owners to their mutual commercial agreement, for a financial consideration. In no way should they be regarded as evidence of common ownership",*

and later, at para. 21:

> *"Moreover, at the instigation of the local authority and with the agreement of the owners of the Eyre Square Centre, Drakebury Ltd., new pedestrian linkages will be created between the existing Eyre Square Centre and the proposed development, to ease pedestrian movements through the block".*

57. A number of points arise from the foregoing. First, it is clear that the "proposals to create pedestrian linkages between the two developments and to share rationalised servicing arrangements" are at the behest of the local authority. Second, the pedestrian linkages are intended "*to ease pedestrian movements through the block*". On a separate note, in his evidence (Day 8, p.49) Mr McKeon indicated that he was "*very pleased, very pleased*" with the proposals made by the developer regarding the intended pedestrian linkages; thereafter, the planning authority having got in effect what it wanted, the linkages did not feature as a consideration in the planning application or, indeed, on appeal.

(ix) The Planning Inspector's Report.

58. As mentioned above, it is clear from the decision of the Supreme Court in Kenny that this Court can have regard to the report of an inspector of An Bord Pleanála when interpreting a planning permission. Here the inspector of An Bord Pleanála, in a report of August, 1998, following a site visit at end-April, and with the benefit of, *inter alia*, Plan L003 and Drawing L37, observed, *inter alia*, as follows, at 2:

> *"The proposed development is located on the other side of the City Wall which will form a key feature with public access. In addition to the pedestrian linkage there would be access to the existing multi-storey car park on Merchant's Road. Another major access point will be from William Street (this forms part of the major shopping street in the city centre connecting Shop Street to Eyre Square) via Barrack Lane…",*

and later, at 3:

> *"As originally indicated the proposed development involves a modernistic design extending to five-storeys above lower ground floor level….The centre would have a single department store (on three levels), eight retail units, five of which would flank the Barrack Lane access leading up to the department store…".*

59. A number of points arise from the above-quoted text.

60. First, the shopping centre will comprise an enclave of shops, the dominant shop being that now occupied by Dunnes, flanked by smaller units and with the desired pedestrian linkage to which the court has previously mentioned. There is no suggestion that the new enclave of shops will function as some sort of fancy cul de sac in which high-end retailers will congregate; the linkage is an important feature…and to attain that linkage it follows as a matter of simple logic that the doors to the dominant shop unit cannot permanently be closed. Second, it is true as Dunnes suggest that the Inspector does not devote a great deal of space to the issue of linkage. But this is for the reason mentioned above: the planning authority having got in effect what it wanted in terms of the linkage that the developer proposed, the issue of linkage did not thereafter feature as a consideration in the planning application or, indeed, on appeal. The inspector was hardly going to focus his time and efforts on something that was, to use a colloquialism, a 'given'.

(x) The Reasonable Reader.

61. In approaching the totality of the evidence before the court, and ultimately it must be approached holistically and not in an atomistic or sequential manner, what would a reasonable, informed person make of the planning arrangements at issue in the within proceedings? In this regard it is perhaps helpful to consider the analysis undertaken in a planning inspector's report from 2012 that was focused on a planning application made in respect of Eyre Square Centre. He observes, *inter alia*, as follows:

> *"1.13 A route is marked on the ground within the middle level of Dunnes Stores between the Edward Square entrance and the bridge to the Eyre Square Centre….*
>
> *1.14 There are a number of secondary routes within and between the various parts of the larger [Eyre Square] shopping centre, along with stairs and escalators. There are however only two main through-routes, from Eyre Square to Whitehall via the lower mall and from Eyre Square to William Street via the upper mall and Corbett Court or Edward Square….*
>
> *2.3.1 Prior to issuing a decision, the planning authority sought further information on 8 points [a portion of which is quoted below]….*
>
> *Planning authority request*
>
> *Applicant's response*
>
> *1. The function of the site in providing access to the Eyre Square Shopping Centre and as a link to the pedestrian zone must not be detrimentally affected. Refers to specific movements, the development of Ceannt Station, and the extension of the retail core east across Eyre Square. The proposal is unacceptable. Redesign and an analysis of footfall is requested.*
>
> *☐ The developers have already created Edward Square, which more than any other element has stitched in the Eyre Square Shopping Centre to the pedestrian/shopping fabric of the city. The Dunnes Entrance is in fact the most important ahead of Corbett Court and Eyre Square….*
>
> *8.2.6 The two busiest entrances are through Edward Square (in place 11 years) and Corbett Court (in place 20 years), both controlled by other landlords, and neither of which have caused problems. It is these entrances that primarily deliver footfall past the appellant's premises….*
>
> *10.3.2 As set out in Section 1.12 above, there are two main through-routes through the Eyre Square/Corbett Court/Edward Square complex, both of which start at Eyre Square in the subject building. The upper route follows the 'up' ramps to the centre's upper mall, turns right, and exits through Corbett Court onto Williamsgate Street. An alternate route passes a bridge over the city walls into Dunnes and out onto Edward Square/Castle Street/Barrack Lane and on to William Street….*
>
> *10.3.6…The two through-routes through the shopping centre provide valuable east-west through routes as well as addressing the deficit in permeability in a general sense….*
>
> *10.3.7 The planning officer's first report states that the function of these routes must not be underestimated, and the original shopping centre was designed with specific consideration of the linkages in all directions. The planning officer also recognises the dual role of the entrance as both a way into the centre as part of these through-routes. I have had sight of the application drawings for Edward Square online, and these routes are indeed shown on the drawings."*

62. What leaps from the above-quoted text is that an informed and reasonable man coming to the Eyre Square-Edward Square construct and having "*had sight of the application drawings for Edward Square online*" (including presumably, though this is not stated, Plan L003 and Drawing L37) sees a though-route through what is now the Dunnes unit allowing pedestrians precisely the form of pedestrian access that Camiveo contends to arise whereby one can enter Dunnes via the Edward Square doors and exit the Eyre Square Centre at the far end, or enter Eyre Square Centre, cut through Dunnes and exit into Edward Square and from there down Castle Street into William Street. That is but one man's objective assessment of matters based on the information before him. The court does not have to agree with him. But, as it happens, when the court undertakes its own objective assessment and reads all the material before it, it respectfully arrives at a similar conclusion: the circulation through the Dunnes unit just described, and the access and egress via the doors that form Dunnes' Edward Square entrance, all subsist exactly as Camiveo contends, and manifestly so.

(xi) The Warning Letter.

63. On 14th July, 2015, Galway City Council, in its guise as a planning authority, wrote a warning letter to Camiveo and Dunnes. This letter stated, *inter alia*, as follows:

> *"Dear Sir/Madam*
>
> *It has come to the attention of the Galway City Council…that unauthorised development is being carried out by you in contravention of Section 34 of the Planning & Development [Act] 2000, at Edward Sqaure/Castle Street, Galway….*
>
> *Namely:- Unauthorised works, namely closure of pedestrian access point between Edward Square/Castle Street and Eyre Square Shopping Centre via Dunnes Stores.*

I am to inform you that this development is considered by the planning authority to be unauthorised. The pedestrian access point referred to was shown on the original drawings submitted with planning register reference no. 97/449 (i.e. Drawing No. PL003 and Drawing No. L37). The pedestrian access point should be reinstated immediately".

[Emphasis in original].

64. The above-quoted text clearly involves a direction from the planning authority to Dunnes. This letter was not complied with by Dunnes (and the doors are now only opened pursuant to court order). Camiveo contends that this failure to do as directed placed Dunnes in breach of clauses 4.29.2, 4.29.3, 4.30.4 and 4.31 of the Anchor Lease. Dunnes maintains that it did not have to comply with the warning letter because the planning authority because the planning authority was wrong. But before proceeding to consider the respective positions of Camiveo and Dunnes in this regard, it is perhaps helpful to quote the just-mentioned clauses:

"4. TENANT'S COVENANTS

The Tenant to the intent that the obligations may continue throughout the Term HEREBY COVENANTS with the Landlord as follows….

4.29 Statutory requirements….

4.29.2 To execute all works and provide and maintain all arrangements upon or in respect of the Demised Premises or the user thereof, which are directed or required (whether of the Landlord, Tenant or occupier) by any statute now in force or which may hereafter be in force or by any government department, local or other competent authority or duly authorised officer or court of competent jurisdiction action, under or in pursuance of any statute and to indemnify and keep the Landlord indemnified against all reasonable costs, charges, fees and expenses of or incidental to the execution of any works or the provision or maintenance of any arrangements so directed or required in relation to the Demised Premises;

4.29.3 Not to do in or near the Demised Premises, any act or thing by reason of which the Landlord may, under any statute, incur or have imposed upon it or become liable to pay any penalty, damages, compensation, costs, charges or expenses….

4.30 Planning Acts, Public Health Acts and Building Control Act….

4.30.4 To comply at its own costs with any notice or order served on the Tenant under the provisions of the Planning Acts, the Public Health Acts and the Building Control Act in relation to the Demised Premises to the extent that the same is the responsibility of the Tenant hereunder.

4.31 Statutory notices

Within fourteen (14) days of receipt of the same (or sooner if requisite having regard to the requirements of the notice or order in question or the time limits stated therein) to produce to the Landlord a true copy and any further particulars required by the Landlord of any notice or order or proposal for the same given to the Tenant and relevant to the Demised Premises or the occupier thereof by any government department or local or public or statutory authority, and, without delay, to take all necessary steps to comply with the notice or order in so far as same is the responsibility of the Tenant."

65. So, is Dunnes right? Does it retain the freedom, notwithstanding the above-quoted provisions, to consider, for example, whether the warning letter that it received from Galway City Council in July, 2015 is right or wrong in what it alleges and then decide whether or not it is going to comply with same? The terms of the above-quoted provisions are such that the court must admit to some surprise that the matter has been presented to it for adjudication. Patently, when one looks to the above-quoted provisions, Dunnes does not retain the right contended for. And the reasons why this is so were well captured by counsel for Camiveo in his closing submissions (Day 15, pp.102-105):

"Counsel – [W]hen you look at each of the clauses [as set out by the court above] they impose an absolute obligation to comply with regulatory requirements, whether it be statutory provisions or whether it be notices that are served or directions that are given by statutory agencies….[The clauses do] not say you will comply with these, if you consider that they have been lawfully given, or that the requirements are lawfully imposed. It is a clear obligation to comply with the regulatory obligations full stop. There is a good reason for that because if you look at what happened here, the warning letter was served, not just on Dunnes, but also on Camiveo and any notice such as that, be it a warning letter under the Planning Acts, be it an enforcement notice, [etc.]…there is any number of regulatory codes where there is an exposure, not just on the part of the tenant who is in situ in the unit, but also the landlord. The landlord wants to have protection against possible prosecution, fines or even just having to deal with these types of matters. So the obligation is, if a notice is served you comply with it. Full stop. And therefore the landlord is not exposed to any risk in relation to the matter and the landlord doesn't have to wait around to see whether a court decides that the regulatory body or the statutory body is right or wrong in relation to the matter. That is how the clauses are drafted and…that is the commercially sensible construction of the clauses.

Judge – And what if the planning authority, or the Council asked you to do something completely mad, just absolutely mad, you say you'd still have to do it?

Counsel – I say you would still have to do it, yes, unless you went in…and got a stay on it so that it no longer was a notice that had legal efficacy….So, for example, if an enforcement notice was served on you and you applied for and obtained leave to apply for judicial review and you got a stay on it, then I don't think the landlord could say, well you have to comply with [the notice notwithstanding]….Other than that, you can't have a situation where the tenant gets to pick or choose whether they are going to comply with it or not….Because if it were otherwise, and just posit the opposite: let's say that there was a condition in the planning permission here that said, unequivocally, you must maintain access at all times during normal trading hours, so that there couldn't be a row about whether there was an obligation to do it or not, but Dunnes just decided not to do it….The planning authority then has to go down the road of instituting proceedings, maybe they decide to institute proceedings against Dunnes alone, maybe they don't, maybe they decide to institute them against Camiveo, they have to wind their way through court and orders made. Dunnes look for a stay on it and it goes on for years. Is the landlord meant to wait while Dunnes challenges this, at every step of the way,

meanwhile exposing the landlord potentially [to] civil penalties and perhaps even to criminal penalties because…a breach of planning permission is a criminal offence?"

66. Lest there be any doubt, the answer to the last-posed question is 'no'.

67. The court cannot but conclude on the evidence before it that Dunnes has breached cl. 4.30.1 of the Anchor Lease.

IX. Fire
(i) Relevant Contractual Obligations.

68. The court turns now from planning matters to the issues raised in the proceedings regarding fire safety. The relevant clauses of the Anchor Lease, clauses 4.29.2, 4.29.5, 4.32.1, and 4.32.3 are quoted below:

"4. TENANT'S COVENANTS

The Tenant to the intent that the obligations may continue throughout the Term HEREBY COVENANTS with the Landlord as follows….

4.29 Statutory requirements….

4.29.2 To execute all works and provide and maintain all arrangements upon or in respect of the Demised Premises or the user thereof, which are directed or required (whether of the Landlord, Tenant or occupier) by any statute now in force or which may hereafter be in force or by any government department, local or other competent authority or duly authorised officer or court of competent jurisdiction action, under or in pursuance of any statute and to indemnify and keep the Landlord indemnified against all reasonable costs, charges, fees and expenses of or incidental to the execution of any works or the provision or maintenance of any arrangements so directed or required in relation to the Demised Premises…[1]

[1] There has been suggestion by Dunnes that the above provision only applies in the context of, for example, a direction or requirement of a duly authorised officer issued under a particular statutory provision. However, the court does not read cl. 4.29.2 so. Rather it considers it to refer simply, in this context, to a duly authorised officer acting "under or in pursuance of any statute", so in an official guise, e.g. a fire officer discharging his role as fire officer under the Fire Services Acts.

4.29.5 Not to do anything in the Demised Premises or occupy them in such a way as shall cause any part of the Centre or the Eyre Square Centre not to comply in any material respect with any statute in relation to fire safety. For the avoidance of doubt this clause does not apply to the initial construction of the Demised Premises undertaken by the Landlord and shall not restrict the Tenant from opening for trade….

4.32 Fire and safety precautions and Equipment

4.32.1 To comply with the lawful requirements and reasonable recommendations (whether notified or directed to the Landlord and then to the Tenant or directly to the Tenant) of the appropriate local authority, the Insurers of the Centre, the Landlord in relation to fire and safety precautions affecting the Demised Premises…[2]

[2] Dunnes has suggested that the requirement "[t]o comply" does not entail an obligation immediately to comply. Certainly the provision must be read as allowing reasonable time for the subject of the lawful requirement and/or reasonable recommendation to do whatever is required and/or recommended. But the reasonable timeframe falls to be gauged by reference to the task at hand. Here the task at hand is merely that doors which had been closed should be opened again; that is the work of seconds; and in that context the obligation "[t]o comply" does, to the court's mind, entail a near-immediate obligation.

4.32.3 Not to obstruct the access to or means of working any fire-fighting, extinguishing and other safety appliances for the time being installed in the Demised Premises or in the Centre or the means of escape from the Demised Premises or the Centre in case of fire or emergency."

(ii) The Closing of the Doors.

a. Mr Cunningham's Visits.

69. Perhaps the best place to begin with a consideration of the fire safety-related implications of the closing of the Edward Square entrance is with the e-mail of complaint made by Camiveo's solicitors to Galway County Council's fire officers at 10:40 on 19th June, 2015. This read as follows:

"Dear Sirs

We act for Camiveo Limited, the Landlord of Edward Square Shopping Centre. It has come to our client's attention that one of our tenants, Dunnes Stores, at 4pm on Wednesday 17 July, closed the doors of their unit which provides access from the centre onto the laneway that leads to Shop Street. The doors remained closed yesterday with signs on the doors stating that the main door of the unit (which is located within the Shopping Centre) should be used to access the unit. Our client has serious concerns that Dunnes Stores intends to keep the doors shut indefinitely which may be a breach of fire safety regulations.

We would be obliged if you would confirm if, from your point [of] view, the closure of this point of access and egress from the Centre would be considered to be a potential fire hazard and/or if Dunnes are in breach of fire safety regulations. Obviously, any such breach would have an impact on our client's insurance policy for the Centre….".

70. At 16:26, the following reply issued from Mr Michael Cunningham, Assistant Chief Fire Officer to, inter alia, Camiveo's solicitors:

"On foot of your mail…the Fire Officer visited Dunnes Stores, Edward Square this afternoon and spoke with…[Dunnes'

local] Security Manager &…Textiles Manager. The doors in question from the store onto Edward Square are closed, but they are not locked. The powered automatic opening function has been turned off, but the doors can be slid opened by hand. The Fire Officer was also informed by the Security Manager that the doors were connected to the fire alarm system and they would actuate on its activation.

The Fire Officer informed the representatives of Dunnes Stores that these doors were designated fire exits, and cannot be locked during the hours the premises is open to the public. They were instructed by the Fire Officer to put signs adjacent to the ones currently in place to carry a notice informing the public that the doors are not locked. The Fire Officer will follow up to verify this action has been satisfactorily carried out…".

71. Regrettably, what the Fire Officer was told by the Security Manager involved an untruth. The doors were not connected to the fire alarm system. In fact, as of 19:36 on the evening of the Assistant Chief Fire Officer's visit arrangements were still being made by Dunnes so that the doors would open automatically in the event of the fire alarm being triggered. In fairness to Dunnes, the fact that a Fire Officer was misled was dealt with all seriousness by it after the fact of the deception was discovered.

72. Mr Cunningham returned to Dunnes on 20th June and sought a demonstration that the door was hooked up to the alarm system; had he understood the true position as of the 19th it seems reasonable to assume that he would have required that the doors immediately be re-opened. So clearly the need for the doors to open in the event of a fire was (rightly) treated as a matter of some significance.

b. Mr Slattery's Evidence.

73. When it comes to the need for the doors to be kept open in the event of a fire, Mr Michael Slattery, a chartered fire safety engineering consultant retained on behalf of Dunnes as an expert witness, gave evidence regarding compliance, and the need for compliance, with para. 1.4.3.2 of *Building Regulations 2006 Technical Guidance Document B – Fire Safety* (2006), as published by the Department of Enterprise and Local Government. This Guidance Document provides guidance on the requirements of Part B (Fire) to the Building Regulations. Para 1.4 is entitled "*General Provisions for Means of Escape*", and para. 1.4.3.2 reads as follows:

"*1.4.3.2 Door fastenings – In general, doors on escape routes, whether or not the doors are fire doors, should either not be fitted with lock, latch or bolt fastenings, or they should only be fitted with simple fastenings that can be readily operated in the direction of escape without the use of a key.*

Where security on final exit doors is an important consideration, such as some assembly or commercial uses, panic bolts should be used to secure doors. Where additional security is required when the premises is not in use, hardware which is fully removable should be used. The following recommendations apply to buildings, or parts of buildings which are used for assembly or recreation (Purpose Group 5):-

(a) Exit doors from areas holding more than 50 people should either be free from fastenings or be fitted with panic bolts complying with I.S. EN 1125 1997.

(b) Doors, other than those covered by item (a), should be fitted only with simple fastenings that can be operated from the escape side of the door without the use of a key.

Attention is drawn to the provisions of the Fire Safety in Places of Assembly (Ease of Escape), Regulations, 1985 (S.I. No. 249 of 1985).

Information about door closing and hold open devices for fire doors is given in Appendix B."

74. Mr Slattery's evidence was premised on what he perceived as the need, pursuant to para. 1.4.3.2, for there to be automatic doors that would open up when the fire alarm was triggered. Pressed by counsel on the position presenting when the doors were not designed automatically to open so, the following exchange occurred (Day 14, p.177):

"Counsel – [T]hat would be a serious matter, wouldn't it?

Mr Slattery – Well, I think in the context of the auto sensor being disabled then the doors would have to be physically slid open and then become sliding doors. And unless you had very strong management protocols in place to open the door, it would be an issue I think you would have to address in a risk assessment. I mean, clearly the mitigating factor here is that there is an abundance of exits. But at the same time, it is an issue….Or it was an issue if that's the question.

– Yes. But I mean, there was a clear breach of Technical Guidance Document B in circumstances where the doors were not connected to the fire alarm system and this was a designated exit?

– There was a clear…conflict with the fire cert as granted. Now, as I say the potential mitigating factor was at the same time the doors to the centre were available. However, these doors continue to be marketed as exit doors, so it does raise a question."

75. Not so much a question as a problem, and the problem is this: when the Edward Square doors were closed permanently there was a breach of fire safety requirements because the escape strategy on which the applicable fire certificate was granted was not operable as envisioned. And, this being so, once the doors were closed, they were closed in breach of the above-quoted lease provisions.

c. Mr Kelly's Intervention.

76. On 16th July, 2015, Mr Kelly, Galway City Council's Senior Assistant Chief Fire Officer (Mr Cunningham's workplace superior) visited Dunnes' store at Edward Square. It appears from an internal e-mail between relevant Dunnes Stores staff that took place immediately after the visit (and which is quoted below) that the tone of the visit was rather more terse than when Mr Cunningham visited:

"…As per our conversation, below is what took place in the last ten minutes with Senior Assistant Chief Fire Officer Joseph Kelly.

He approached…[the] security manager and asked how the [Edward Square] door could be opened. He persisted with

this, and identified himself…..[The security manager] called me and…[the] drapery assistant manager.

He went on to say that the fact that the door is connected to the fire alarm is irrelevant. Any changes made to entrances/exits to the store must have a fire safety application attached as the store is part of a shopping centre and so, without this we are in breach of building regulations. He also stated that the fire safety application process can take up to two months during which the door must be operational.

I questioned why this wasn't brought up during the numerous visits from his colleague Michael Cunningham, who told us that we were compliant, to which he replied that he is talking about what needs to happen now.

He also said that if we intend to keep those doors closed they must be converted to push bar doors (swing doors). Sliding doors are not acceptable as fire doors.

He told me that he will return again at 9am tomorrow morning to ensure that the doors are open. If they are not then the council will start litigation procedures which can include a closure order."

77. As can be seen from the foregoing, Mr Kelly was clearly of the view that the closure of the doors in the circumstances presenting was entirely objectionable and there was the clearest of directions that at the present time they be re-opened ("be operational") – which direction went unobserved in breach of the above-quoted provisions. Mr Kelly called on the 17th to see had the doors been opened and was told that they had not; in fact, Mr McNiffe indicated in the course of evidence (Day 13, p.85) that (remarkably) no consideration was given by Dunnes to re-opening the doors.

78. Dunnes has sought to suggest that there is an inconsistency between the approach of Mr Cunningham and Mr Kelly. To the extent that this is so (if so) the court sees nothing more than a more senior fire officer visiting a site, with the same objective as a more junior officer who has previously visited, that objective being fire safety, with the more senior officer taking a different tack from the junior officer as to how their shared objective is best to be achieved. It is no different from a director of Dunnes taking a view as to how to maximise profitability in the year ahead and the board of directors collectively taking a different view: director and board have the shared objective of maximising profits but the board has the final call.

d. Recommendation of the Chief Fire Officer.

79. On 22nd July, 2015, Mr Michael Raftery, the Chief Fire Officer of Galway County Council wrote to the then solicitors for Dunnes, responding to a letter received from those solicitors concerning the fire issues presenting. In the course of this letter, the Council observed as follows:

"We strongly recommend in the interim that the presence sensing devices to the main entrance/exit doors from Dunnes Stores directly to open air to be reactivated. The door in its current arrangement poses a risk in terms of…BS 7306 Part 0 2014, as people approach the door with [the] expectation that it will open automatically. Alternatively this door can remain as a manual door but as manual swing doors provided with…panic bolts.

Please note it is not the intention of Galway Fire Service to be involved in a [c]ommercial/civil dispute between Dunnes Stores and Edward Square Shopping Centre. However, we are concerned that [the] safety of the occupants in [the] Dunnes Stores store in Edward [S]quare may be compromised due to current means of escape arrangements."

80. In the above-quoted extract one sees a strong recommendation by the Chief Fire Officer that certain measures be undertaken by Dunnes in the interests of fire safety. Yet, remarkably, when Mr McNiffe was questioned as to Dunnes' response to this strong recommendation, he indicated (Day 13, p.90) that, to his knowledge, Dunnes did not consider re-opening the Edward Square entrance despite the Chief Fire Officer's intervention and despite the fact that the Chief Fire Officer made entirely clear that his concern was the safety of persons in Dunnes' Edward Square premises in the event of fire and had nothing to do with whatever private dispute was ongoing between Camiveo and Dunnes. Eventually, following a meeting of 31st August, 2015, Dunnes agreed with the fire authority that it would, subject to the approval of the Dunnes board of directors, install panic bolts on the Edward Square doors.

81. Camiveo contends that Dunnes' failure to comply with the Chief Fire Officer's recommendation involved a breach of the requirement in cl. 4.32.1 of the Anchor Lease that the Tenant (Dunnes) "*comply with…lawful requirements and reasonable recommendations*". Dunnes maintains that (i) it has a right to assess the recommendations of the Chief Fire Officer and determine whether they agree with same, and (ii) that the test of reasonableness is to be done by reference to the applicable fire regulations.

82. As to (i), it seems to the court that one can assume that a fire authority is generally going to act sensibly and reasonably and that unless there is something completely contrary to any semblance of sense in what it recommends then one ought, if subject to a provision like cl. 4.32.1 (a fairly routine clause in commercial leases) to comply with such recommendation as is made by that authority, and here by no less an official than the Chief Fire Officer himself. Fire safety involves public safety and the public deserve more than that the recommendations of public officials expert in fire safety should be second-guessed.

83. As to (ii), compliance with statutory obligations is separately addressed in the Anchor Lease and it appears to the court that to assess reasonableness, for the purposes of cl. 4.32.1, by reference to the applicable statutory obligations (a) might well reduce the import of cl. 4.32.1 to a nothing, transforming it from what it is into but a further requirement to comply with statutory obligations (even though this has already been provided for) and (b) involve a misapplication of 4.32.1 which in its construct seems to the court to be designed to allow, *inter alia*, for recommendations that go outside what black-letter law requires and allow for some 'plugging of the gaps' that can so easily arise when the necessarily generic provisions of statute and regulation come to be applied to the innumerable vagaries of reality. In passing, the court notes that (I) testament to the reasonableness of what the Chief Fire Officer sought in this case is that at the meeting of 31st August, 2015, Dunnes agreed to do as the Chief Fire Officer had recommended, and (II) not a screed of evidence was presented by Dunnes during the hearing to suggest that Mr Slattery's recommendation was anything other than reasonable.

84. The court cannot but conclude on the evidence before it that Dunnes has breached clauses 4.29.2, 4.29.5, 4.32.1, and 4.32.3 of the Anchor Lease.

X. Insurance

85. Clause 4.39 of the Anchor Lease provides as follows:

"4. TENANT'S COVENANTS

The Tenant to the intent that the obligations may continue throughout the Term HEREBY COVENANTS with the Landlord as follows….

4.39 Insurance becoming void

The Tenant shall not do or omit to do anything that could cause any policy of insurance in respect of or covering the Demised Premises or do anything that could cause any policy of insurance in respect of or covering the Centre to become void or voidable wholly or in part nor (unless the Tenant has previously notified the Landlord and agreed to pay the increased premium) do anything whereby any abnormal or loaded premium may become payable and the Tenant shall, on demand, pay to the Landlord all additional expenses thereby incurred by the Landlord in renewing any such policy."

86. The clear purport of the above clause, and a reading that chimes with commercial and common-sense, is that Camiveo (as landlord) is not to bear the risk arising from any act or omission of Dunnes (as Tenant) which would have as its consequence that an insurer would refuse to indemnify upon claim being made. In coming to the above clause the court is not required to determine the substantive issue whether an insurer has properly indicated a perception of heightened risk, but rather whether the Tenant has done anything that "*could cause any policy of insurance in respect of or covering the Centre to become void or voidable*". (Emphasis added). As will be seen, it has.

87. The shopping centre is insured by Camiveo with Mitsui Sumitomo. General Condition 1 of the Policy provides that it shall be voidable in the event of misrepresentation, mis-description, or non-disclosure in any material particular. General Condition 2 provides that the policy shall be terminated where there is any alteration in the insured's business or in the premises or property, or "*any other circumstances, whereby any risk under the policy is increased*". Following the closure of the Edward Square entrance, Camiveo 'touched base' with its insurer to see how it was positioned from an insurance perspective. On 10th July, 2015, Mr Hynes' agent was informed by the insurer that if a claim was made as a result of the Edward Square doors being closed, it was likely that its claims department would refuse to indemnify Camiveo. On 15th July, Camiveo's solicitors wrote to Dunnes to apprise them of the insurance concerns presenting and recommending that the doors be re-opened. This letter was ignored.

88. The court cannot but conclude that by refusing to re-open the Edward Square doors, Dunnes breached, and would be continuing to breach but for the interlocutory injunctive relief in place, the obligation in cl. 4.39 that "*The Tenant shall not do or omit to do anything that could cause any policy of insurance in respect of or covering the Demised Premises or do anything that could cause any policy of insurance in respect of or covering the Centre to become void or voidable wholly or in part*".

XI. Non-Structural Alterations

89. Clause 4.23.3 of the Anchor Lease provides as follows:

"4. TENANT'S COVENANTS

The Tenant to the intent that the obligations may continue throughout the Term HEREBY COVENANTS with the Landlord as follows….

4.23 Alterations…

4.23.3 Not to make any alterations or additions of a non-structural nature to the Demised Premises without obtaining the prior written consent of the Landlord, (such consent not be unreasonably withheld or delayed)"

90. It appears to the court that the closure of the Edward Square doors and their conversion to doors that can only be used in the case of emergency constitutes an alteration of a non-structural nature for which the prior written consent of Camiveo was not sought or obtained.

91. The court cannot but conclude on the evidence before it that Dunnes has breached cl. 4.23.3 of the Anchor Lease.

XII. Common Areas

92. Clause 4.16 of the Anchor Lease provides as follows:

"4. TENANT'S COVENANTS

The Tenant to the intent that the obligations may continue throughout the Term HEREBY COVENANTS with the Landlord as follows….

4.16 Obstruction of Common Areas

Not to do anything whereby the Common Areas or other areas over which the Tenant may have rights of access or use may be damaged, or the fair use thereof by others may be obstructed in any manner."

93. The point made by Camiveo in respect of clause 4.16 is quite simple, namely that by closing the Edward Sqaure entrance as it did, Dunnes prevented customers and prospective customers from accessing the Common Areas and thus the fair use of same, such customers and/or prospective customers having become accustomed in the previous years to entering Dunnes Stores via the Edward Square entrance and continuing on into Eyre Square Centre, or to entering Eyre Square Centre and cutting through Dunnes and out into Edward Square and the streets beyond.

94. Dunnes contends that there is alternative access available via Corbett Court, a strip of mall that sits in to the left as one looks up Edward Square and which does not form part of Eyre Square Centre or Edward Square Shopping Centre. But the photographic evidence before the court suggests Corbett Court to be a radically inferior means of access, the entrance to which sits down an unattractive alley-way that is a world removed from the fancy glass and aluminium portico of the Dunnes store. And if the court was not satisfied with what it has seen in the photographic evidence, it also has the testimony of Mr Hynes and Mr McGuckian, a director in the property consultancy firm of Lambert Smith Hampton and the property manager of both Edward Square Shopping Centre and Eyre Square Centre, which the court accepts, that the alternative access via Corbett Court is both inadequate and also an inconvenience. Mr Hynes explained in his evidence why there is no comparison between (a) access to Dunnes and the Eyre Square Centre via the Edward Square entrance, and (b) access via the Corbett Court entrance to Dunnes (Day 2, p.87):

> *"The Dunnes Stores unit, as you have seen from the photographs, and the front doors of that unit face you when you come up [from the Castle Street end]. There is Barrack Lane and Castle Street effectively. The suggestion that…[you enter] through Corbett Court would mean you would be effectively taking a left down quite a dark, narrower laneway in through another shopping area, which is separately owned, what can only be described as a convoluted way to get back into Eyre Square. Failing that you would have to go completely around yourself onto Eyre Square to come back into the unit."*

95. Speaking in a similar vein, Mr McGuckian observed, *inter alia*, as follows (Day 7, pp.66, 61 and 57), first in relation to Corbett Court:

> *"It's an inferior mall that was originally…an access into the previous car park and dilapidated areas. To someone unfamiliar with the area Corbett Court means very little. Edward Square, Eyre Square would be identified as shopping centres. Corbett Court Mall, people would even now…consider the Eyre Square Centre as the shopping centre and it [the Court] to be part of it. But the laneway that we were directing people down into Corbett Court would have brought you on to the first floor of the Eyre Square Centre. What they don't point out is obviously people went in through the door of the upper floor in the anchor unit and would have gone down the travelator into the grocery department and down into the lower level of the Eyre Square Shopping Centre and we had received a number of complaints from other tenants, internally in that mall";*
>
> *and second, as to the fact that he had seen people seeking to access Dunnes via the Edward Sqaure entrance and then turning back:*
>
> *"I witnessed that on a number of occasions where people continued, right up until September surprisingly….[S]o they would have gone up to the door to try and access into Eyre Square. And similarly, I would have seen people at the other side of the set of double doors trying to come out from the courtyard area, well from my position in the courtyard area";*
>
> *and, third, on the inconvenience occasioned to shoppers as a result of the Edward Square entrance being closed:*
>
> *"I can't fathom…why you would cut off the circulation from Shop Street…with the hope…that they will come to you via Corbett Court or some other alternative route. I think customers and pedestrians generally take a direct route where they're going and some shoppers would have a plan in their head. I'm going to Dunnes, going to Penneys, I'm going to nip over to Debenhams, or whatever the case might be, and maybe pop into Next en route. So I just – I can't understand it."*

96. The court's decision has been drawn in the context of its consideration of cl. 4.16 to the decision of Laffoy J. in *Conneran v. Corbett & Sons* [2004] IEHC 389. Interestingly, that was a case which concerned the Corbett Court Mall that adjoins Edward Square Shopping Centre and the Eyre Square Centre. The plaintiffs held leases in Corbett Court and claimed rights in the nature of easements to bring deliveries of stock through a car-park and loading area. Laffoy J. noted in that case that each of the leases gave an express right to use the car-park delivery doors and the internal common parts for receiving deliveries and even required that these be used. And Laffoy J. found that there had been a total obstruction of the car-park delivery doors and that limited access to the rear of the mall from Barrack Lane via the passage that had formerly been part of the car-parking area was "*totally unsuitable and impractical for effecting deliveries to and from the plaintiff's retail units*". In the circumstances, the court was satisfied that there had been "*a real and substantial interference with the express and implied rights acquired by the Plaintiffs under the leases*" and that it was no answer to say that there were other routes available, in circumstances where the plaintiffs had been deprived of "*not only of the most convenient route but of the only suitable route for efficient bulk deliveries of merchandise*." The analogy to be drawn with the circumstances at hand is that the cutting off of direct access to the Common Areas either constitutes a breach of cl. 4.16 or it does not, and it is irrelevant in this regard that indirect access might otherwise be gained to the Common Areas, here via the separately-owned, and entirely inconvenient, Corbett Court means of access.

97. The court cannot but conclude on the evidence before it that Dunnes has breached cl. 4.16 of the Anchor Lease.

XIII. The "To Open" Clause

98. Clause 4.19.1 of the Anchor Lease provides as follows:

> *"4. TENANT'S COVENANTS*
>
> *The Tenant to the intent that the obligations may continue throughout the Term HEREBY COVENANTS with the Landlord as follows….*
>
> *4.19 To Open*
>
> *4.19.1 To complete the fitting-out of the Demised Premises in accordance with the Plans and Specifications approved heretofore by the Landlord and once such fitting-out has been completed to open for trade to the general public unless prevented from doing so for some cause outside the Tenant's Control PROVIDED THAT nothing in this lease or otherwise shall oblige the Tenant to keep the Demised Premises or any part thereof open for trade or business."*

99. This clause played a prominent part in the within proceedings. It requires Dunnes to fit out the Demised Premises and then open them for trade, but thereafter Dunnes is not obliged to keep the Demised Premises or any part of them open for trade or business. In a nutshell, cl. 4.19.1 is concerned with the fitting out and use of the Demised Premises, not with the means of access thereto or egress therefrom. Once the initial fit-out and opening are done, the clause authorises Dunnes to cease keeping the store open "*for trade or business*" – though as other payment obligations would continue post-closure, *e.g.*, rates, rent, service charges, the store operating in the Demised Premises would want to be performing very badly indeed for Dunnes to cease keeping all or part of the Demised Premises open for trade or business.

100. Dunnes contends that the fact that the Edward Square doors are a part of the Demised Premises, has the result that is entitled by cl. 4.19.1 to close that entrance. But that contention fails on a number of grounds. First, under Analog Devices the court is required to look at the "*To Open*" clause as a whole and to honour its commercial purpose – which is that the Demised Premises must be fitted out and opened "*for trade*", subject to the proviso (which must refer back to the first part of the "*To Open*" clause) that once open, the store (in whole or in part) need not be kept open for trade or business. Second, again having regard to the commercial purpose of the clause, it cannot properly be read as having the effect that upon closure of all or part of the store, Dunnes

is relieved of the payment of all or part (as appropriate) of the other payments due under the Anchor Lease. To reach that conclusion would require a distorted reading of its words and a disregard for the commercial purpose of the clause. Third, as regards the contention that a door is a part of the Demised Premises, that "*nothing in this lease or otherwise shall oblige the Tenant to keep the Demised Premises or any part thereof open for trade or business*", and the door – being a part of the Demised Premises – need not therefore be kept open, this is an utterly unconvincing contention. The term "*Demised Premises*" is defined via cl. 1.12 and the Second Schedule of the Anchor Lease as meaning, *inter alia*:

> *"ALL THAT the entire of the lands and premises together with buildings erected thereon forming part of the Centre…and including (but without prejudice to the generality thereof) the entire structure [of the Demised Premises]…and the foundations thereunder but excluding everything above the external surfaces of the roofs of the Demised Premises…and excluding also the internal surfaces and finishes of and everything within the areas shown shaded green on the Plans".*

101. The effect of the foregoing is that the Demised Premises includes, for example the internal wall surface and the internal ceiling surfaces of the Demised Premises. If Dunnes is correct, the effect of cl. 4.19.1 would be that Dunnes is not required to keep an internal wall surface or an internal ceiling surface "*open for trade or business*" and that, with every respect, is fanciful. Clause 4.19.1 has and can only have the meaning ascribed to it by the court above.

102. The court cannot but conclude on the evidence before it that clause 4.19.1 of the Anchor Lease is an irrelevance to the within proceedings. Camiveo's entirely correct contention, as touched upon previously above, is that when Dunnes is open for trading it is required to keep the Edward Square doors open (and not that Dunnes has to keep trading). Clause 4.19.1 simply does not become engaged in any way in the action at hand.

XIV. Losses Suffered
(i) Diminution in Value.

103. Included among the claims is a claim for the diminution in value of the Edward Square Shopping Centre that is alleged to have arisen as a result of the Edward Square entrance to Dunnes Stores being closed. However, the court understands it to be accepted by Camiveo that if the court grants the injunctive relief that is being sought (and it will) then any diminution in value will be recovered in time and thus this limb of its claim need not be considered.

(ii) Consequences of the closure of the Edward Square Entrance.

104. Mr Hynes (Day 2, p.126) gave evidence that HMV stopped paying rent following the closure by Dunnes of the Edward Square entrance, citing the fact that the doors were closed and suggesting that their footfall and turnover had been affected. Legal proceedings had to be commenced against HMV. In the end, the net loss arising for Camiveo, after Camiveo agreed to an assignment of the lease to Elverys, was €53,860.50, being €45,768.11 in unpaid rent and €8,182.39 in legal fees. This was after accounting for €50,000 received from Elverys by way of so-called 'key money'. Mr Hynes also gave evidence in respect of complaints made by other tenants of Edward Square Shopping Centre, such as Next, Miss Selfridge, and Topshop who complained of the impact on trade and footfall that the closure of the Edward Square entrance had for them.

105. Mr Gee, of Next indicated, *inter alia*, in evidence that: Next had suffered an 8.4 per cent reduction in its sales as a result of Dunnes' closure of the Edward Square doors; Mr Deeney, an employee of Dunnes, confirmed to him that Dunnes had also suffered financially as a result of the entrance being closed; and that he had sought to exert pressure on Camiveo to resolve the closure of the Edward square entrance.

106. Although Dunnes has sought to suggest that there was no reduction in footfall or trade at the Edward Square Shopping Centre following the closure of the doors, Mr Guckian indicated precisely the contrary in his oral testimony, stating, *inter alia*, "*In my opinion and experience from what I saw on the ground I wouldn't have seen the same level of traffic following that route during the period while the doors were closed*" (Day 7, p.56), and continuing, *[V]isibly the pedestrian flow from the corner of the HMV as it was at the time up to Dunnes Stores had reduced from what it would have been had the doors been opened. You would visibly see people coming out of Dunnes, visiting the shops on the courtyard itself*". Mr McGuckian also confimed (Day 7, p.65) that there were complaints received by his office from the general public and from retailers in the wider city concerning the closure by Dunnes of the Edward Square doors:

> *"[O]ur office received some complaints….Eyre Square Shopping Centre, which is managed by us…would have received complaints from the general public….And ultimately I would have relations with a number of shopkeepers and business owners throughout the city, and they were – they didn't know what the issue was or why it would be done but they commented that it was an inconvenience to the circulation of pedestrians throughout the city."*

107. Mr Hynes (Day 2, p.130) explained to the court that the withholding of rent by tenants (actual in the case of HMV and threatened by others) would have irreparable and knock-on consequences for the viability of Edward Square Shopping Centre as a whole. He explained that the Centre had been purchased with a loan facility from National Asset Loan Management Limited (NALM), continuing:

> *"There are certain milestones within the credit facility that we must produce information in terms of validating that we're meeting all our covenants, our financial covenants. And on the basis that they were fully aware that Dunnes Stores hadn't paid rent for the previous two years and they were aware also, there was an obligation on us to advise them if any other tenants didn't pay rent – HMV were now not paying rent – it basically caused them to write to us and formally advise us that we were at risk of coming into breach, which we were."*

108. In short, the evidence before the court is that Camiveo has suffered loss and damage, including loss of rent from HMV (against which Camiveo was obliged to bring summary proceedings), a breakdown of commercial relationships with other tenants, loss of use of associated rent roll, and various legal costs arising. Having regard to all of the foregoing and to the general behaviour of Dunnes, Camiveo contends that this is a suitable case in which to award aggravated or exemplary damages in addition to compensatory damages.

XV. Some Points of Note
(i) Overview.

109. There are a number of notable features with regard to the manner in which Dunnes has behaved towards Camiveo and which are of relevance to the decision as to whether or not the court should grant the reliefs sought of it by Camiveo, not least the order of

specific performance of the various leases and the payment of rent and service charges in accordance with the provisions of same. In general terms, these features are as follows: (1) in the past Dunnes stopped paying rent and service charges without any explanation or legal justification; (2) Dunnes has refused in the past to comply in a timely manner with orders of both the High Court and even the Supreme Court requiring it to pay monies to Camiveo – this is a matter to which any court would naturally attach great significance; and (3) all the evidence points to Dunnes having closed the Edward Square entrance as a retaliatory measure, done it seems almost out of pique and to cause damage to Camiveo. The court touches on each of these matters in further detail below.

(ii) Refusal to pay rent and service features.

110. Almost from the date of acquisition of Edward Square by Camiveo, Dunnes refused, without any explanation or legal justification, to pay the rent and service charges due under the Anchor Lease. In the course of his evidence, Mr McNiffe (Day 12, p.149) accepted under cross-examination that the three reasons why difficulties had arisen in the relationship between Camiveo and Dunnes were as formulated by counsel for , viz. *"(1) there had been an increase in the rent, (2) there were concerns about service charges; and (3) there was an issue about the identity of the landlord*". It seems to the court, however, that each of these reasons is spurious. First, the rent increase was built into the leases. It was not done at the design of Camiveo. And if there was some objection to the increase in rent, one might expect to see in the hurly-burly of everyday life a temporary refusal to pay the increase until some compromise was perhaps reached (even though such a refusal would itself be a breach) but not a refusal to pay the entirety of the rent due. Moreover, one would expect to see a tenant engage with its landlord in such circumstances whereas Dunnes, to borrow from the closing submissions of counsel for Camiveo simply "*refused to pay, refused to engage* [and]…*refused to explain*". Second, as to the non-payment of service charges, although there were brief exchanges between Camiveo and Dunnes as to what Dunnes was getting in return for the service charges, such queries as were raised by Dunnes were met with a response and there is no reason why the service charges were not paid (or why both rent and service charges should have been stopped). Third, as to the identity of the landlord, the evidence before the court is that Dunnes has previously acknowledged in separate proceedings that Camiveo is the landlord at Edward Square Shopping Centre.

111. The truth is that there is no proper reason why Dunnes has in the past refused to pay rent and service charges. Throughout the entirety of the summary rent arrears proceedings previously brought by Camiveo, Dunnes declined during the currency of those proceedings to pay the ongoing rent arising. And when the within proceedings were initiated, there was in excess of €1.1m of rent then outstanding; on the morning of the application for admission to the Commercial List this was paid and it was then argued (though the argument was rejected) that the proceedings ought not to be admitted to the Commercial List because the proceedings were not worth in excess of a million euro. Such procedural 'gaming' is ever likely to be a factor in a court's reasoning when deciding what remedies to grant against such a party (if the proceedings against such party are, as here, successful). Dunnes is now paying the rent and service charges, it is true, but that is against a background of two years of breaches of the covenant to pay, and no assurance that, once judgment is given in the within proceedings, Dunnes will continue to pay rent and services as due. Indeed, the shadow-boxing engaged in by Mr McNiffe with counsel for Camiveo when Mr McNiffe was giving evidence left the court with the decided impression that, sooner or later, Camiveo may yet be left whistling for its rent and service charges, a state of affairs that cannot be allowed to stand in any system that has respect for the rule of law, including the law of contract. The most pertinent of those exchanges went as follows (Day 12, p.195):

> *"Counsel – …Are you in a position to give an undertaking to the court that Dunnes will continue to pay rent and service charge?*
>
> *Mr McNiffe – I don't have the cheque book, Judge. So I'm certainly not in a*
>
> *position to do that.*
>
> *– So you are asking the court then to just rely on Dunnes' past behaviour to be satisfied that Dunnes will pay its rent and service charges going forward?*
>
> *– Dunnes Stores are compliant.*
>
> *– Now.*
>
> *– Now. On paying service charges and rent. I can't speak about the future and I can't, and I'm certainly not going to give any commitment that Dunnes Stores will or will not do whatever in the future….I'm not in a position to do that. I'm an employee at the end of the day. I don't have the cheque book.*
>
> *– So…*
>
> *– And I don't make those decisions.*
>
> *– …you are not giving any assurance in relation to the future conduct of Dunnes?*
>
> *– Well, I'm surprised that you even ask me that question. I'm not in a position to do that.*
>
> *– But again, Mr McNiffe, you're the only Dunnes witness, you're the only person I can put this question to. And your evidence on this is clear; you are not providing to the court any comfort or assurance whatsoever as to Dunnes' future compliance with its obligations in respect of rent or service charges?*
>
> *– I couldn't answer that question. I'm not in a position.*
>
> *– I'm not asking you to answer the question. I'm asking you are you in a position to give to the court any comfort or assurance in relation to Dunnes' future conduct in respect of the payment of rent or service charges?*
>
> *– Dunnes are currently paying rent and service charges on this unit. Who knows what's around the corner, Judge? I don't know. And I'm not in a position to give any commitment as to what happens around the corner in the future.*
>
> *– So Dunnes might decide, as soon as the court gives judgment, they might decide to stop paying rent and service charge again?*
>
> *– They're your words, they're certainly not mine."*

(iii) Delayed compliance with court orders.

112. The summary rent arrears proceedings have been touched upon elsewhere above. It is worth mentioning them again here. The Supreme Court delivered judgment in those proceedings on 15th May, 2015, concluding that Dunnes did not surpass the very low threshold for matters to be sent to plenary hearing. On the same day as the judgment, Camiveo sought payment of the balance of the arrears outstanding, being just over €384k (€750k having then been paid, in effect at the behest of the Supreme Court). Separately to this €384k, a further almost €750k of unpaid ongoing rent had built up, rent that was also clearly due having regard to the conclusions reached in the High Court and Supreme Court judgments (albeit that they were not concerned with the €750k liability). No response was received to the demand of 15th May. Indeed, a 'Property & Asset Management' spreadsheet report that was discovered as part of these proceedings and, it seems, prepared internally within Dunnes states in respect of Edward Square, as of 26th June, "*In litigation – Continue to pay service charge going forward; do not pay rent*". Coming six weeks after the Supreme Court judgment, it seems unusual that the indication remained not to pay rent. In the end, the High Court and Supreme Court orders, inscribed with penal endorsements, were served by Camiveo on Dunnes on 16th June, 2015. They were received sometime after mid-day and made their way, via a couple of in-house solicitors, to Ms Margaret Heffernan, who appears to be a leading figure within the higher echelons of the Dunnes executive team. The e-mail went to her at 12:49. Eleven minutes later, Ms Heffernan sent the below e-mail to Mr McNiffe:

> "*…Subject: Edward Square*
>
> *John*
>
> *[Redacted text] but can you arrange for the [Edward Square] Door…to be closed ASAP*
>
> *Discuss with Paul they should put a fixture of Ladies in front of it and out notice entrance from main to store*
>
> *Can you get this done ASAP*
>
> *It only needs to have foo [sic] closed and a fixture that I can move if we change to closing another door*
>
> *Let me know when it can be done"*

113. By 13:38, Mr McNiffe was back with the following reply:

> "*This can be closed from tomorrow morning….*
>
> *I am not clear what you mean when you say about moving fixture*
>
> *I will have to double check…if we require this as a fire exit which means it will be closed but in case of fire it opens easily"*

114. In the early hours of the following morning, Ms Heffernan responded to this last e-mail as follows:

> "*…Subject: Re: Edward Square*
>
> *Why should we have as a fire exit? You can check anyway!*
>
> *What I mean is just put Rails across the door so people know it is closed and use as part of dept display*
>
> *We need to look at what we are paying for this area in service charge….*
>
> *We need to look at other things we can do like is car park a Walk through?"*

115. It is very difficult not to conclude from the just-described sequence of events that the closing of the Edward Square doors was done as a retaliatory measure by Dunnes following the service of the orders of penal endorsement, and with the intention of punishing Camiveo for insisting on its lawful rights. The doors were to be closed, they were to be closed "*ASAP*", but in such a way that they could be re-opened if it was desired to close another door instead. The last-quoted sentence "*We need to look at other things we can do…*" seems imbued with a desire to bring pressure to bear on Camiveo. It is in any event now pleaded in the Defence that *"[T]he closure of the doors was in response of the service on the Defendant…of the penally endorsed Orders"*, though the court cannot but note that this is an amended Defence which, prior to the completion of discovery read that "The Defendant expressly denies that the closure of the doors was a retaliatory measure". The court fully accepts that business life is intensely combative, involving a constant effort to survive and succeed in a fiercely competitive world. But the combative strays into the improper when the end it is sought to achieve is to punish and cause harm to another for seeking to enforce its entitlements at law.

116. In passing, the court notes that when it comes to the summary proceedings, the court is not confronted with a Henderson-style scenario (see *Henderson v. Henderson* (1843) 3 Hare 100) whereby the reliefs now sought by Camiveo could or ought to have been sought as part of the summary proceedings. In particular, Camiveo could not have known or anticipated how Dunnes would react to the making of the Supreme Court order, it could not have known or anticipated that Dunnes would seek to frustrate Camiveo in its enforcement of the orders that it had received (by the retaliatory closing of its doors), and it could not therefore have known or anticipated that specific performance of the leases would become an issue. Moreover, the court notes that Camiveo has not come to court seeking to re-litigate the issues that former part of the summary proceedings. All that said, it is of course legitimate and proper for the court to have regard to Dunnes' conduct and motivation vis-à-vis Camiveo since Camiveo acquired Edward Square Shopping Centre.

(iv) Drawing Adverse Inferences.

117. A consequence of the decision by Dunnes to call only Mr McNiffe as a witness from Dunnes' staff is that Dunnes has failed to rebut the reasonable inferences, which fall properly to be drawn from the documentary and other evidence before the court, that Dunnes is engaged in what can reasonably be described as a 'campaign' against its landlord whereby Dunnes seems only to comply with its obligations under the leases whenever it considers it to be commercially advantageous to it so to do.

XVI. Non-Derogation from Grant

118. In the event that the court determines that Dunnes is required under the Anchor Lease to keep the Edward Square entrance open, then it is the position of Dunnes that, in seeking and obtaining such relief, Camiveo has impermissibly derogated from the grant provided by its predecessor in title as landlord, especially cl. 4.19.1. This derogation from grant, it is contended, arises through Dunnes being required to 'keep open' its store notwithstanding the provisions of cl. 4.19.1. The court has already reached the conclusions that it has reached in respect of cl. 4.19 and explained its reasoning therefor. Suffice it to note at this point that the natural and ordinary meaning of cl. 4.19.1 is but to relieve Dunnes of the obligation to keep the premises open for trade or business; it does not empower Dunnes to keep the Edward Square entrance closed when the Demised Premises are open for business; and it does not relieve Dunnes of the obligation to comply with the other provisions of the Anchor Lease.

119. Wylie's Irish Land Law (5th ed., 2013), at 382, in a passage relied upon by Laffoy J. in *Conneran v. Corbett & Sons* [2004] IEHC 389, describes the principle of non-derogation from grant in the following terms:

> *"As regards the rule that a man may not derogate from his grant, the philosophy here is that, when a man transfers his land to another person, knowing that it is going to be used for a particular purpose, he may not do anything which is going to defeat that purpose and thereby frustrate the intention of both parties when the transfer is made. Usually application of this principle creates property rights in favour of the grantee which take the form of restrictions enforceable against the grantor's land."*

120. Counsel has also referred the court, *inter alia*, to the long-ago case of *Birmingham, Dudley & District Banking Co. v. Ross* (1888) 38 Ch. D. 295, a case concerned with whether there had been a grant of a right to uninterrupted light, and to the explanation therein of the "*maxim that a grantor shall not derogate from his own grant, a maxim which is really as old, I will not say as the hills, but as old as the Year Books and a great deal older*" (per Bowen L.J. at 312) as involving, in essence, "*that a grantor having given a thing with one hand is not to take away the means of enjoying it with the other*" (per Bowen L.J. at 313).

121. In *Connell v. O'Malley* (Unreported, High Court, Barron J., 28th July, 1983), a case in which the defendant undertook a number of measures to abort a particular disposition of land, including the erection of 15 foot gates to prevent uninterrupted access to the site and with the intention of preventing its development, Barron J., at 14, had the following to say in respect of the doctrine:

> *"The doctrine of derogation from grant imposes implied obligations which arise where the owner of land disposes of part of it while retaining the balance. The most usual application is in relation to easements, but it is not limited to the creation of easements by implied grant. The obligations which are implied depend upon the particular nature of the transaction and arise from the presumed intention of the parties",*
>
> *adding, at 19:*
>
> *"The obligation imposed on the grantor is not to use the land retained by him in such a way as to render the land granted unfit or materially less fit for the particular purpose for which it was acquired. The extent of the obligation depends on the extent of the knowledge which can be imputed to the grantor of the conditions required to render it fit to be so used."*

122. The court does not see that the doctrine of non-derogation from grant has any applicability in the context of the within proceedings. All Camiveo is seeking is that Dunnes adhere to the provisions of the First Lease. Requiring that a lessee conform with the terms of a lease to which it is contractually bound is the very opposite of a derogation from grant; it is an insistence on the terms and conditions of the grant – terms and conditions which in this instance were observed for the first 15 years of operation of the Dunnes department store, and continuing adherence to which simply involves the continuation and/or restoration of the status quo.

XVII. Injunctive Relief
(i) Injunctive Relief Sought.

123. Camiveo has sought certain orders of injunctive relief/specific performance that seek in essence to restrain the defendant from closing the doors in breach of covenant in circumstances where, absent such relief, it appears that the intention of Dunnes, certainly as manifested in its past actions, would be to close the doors. Camiveo also seeks orders requiring Dunnes to comply with the rental covenants in the Anchor Lease, the Bastion Lease and the Unit 107 Lease. Dunnes is obliged to pay rent, interest and service charges in accordance with the covenants contained in those leases, in particular under clauses 1, 3, 4.1-3 and 7 of the Anchor Lease, clauses 1, 3, 4.1-3 of the Bastion Lease (and clauses 4.1 and 4.7 of the Deed of Variation of the Bastion Lease), and clauses 1, 3, 4.1-3 of the Unit 107 Lease (and clause 4.1 of the deed of Variation of the Unit 107 Lease).

124. It is often possible to phrase or frame an essentially negative form of relief in positive terms; however, it seems to the court that the relief being sought by Camiveo in the within application is, in truth, prohibitory relief. The court notes that a similar view was taken by McGovern J. in the application for interlocutory injunctive relief that preceded the hearing of the within application (see *Camiveo Limited v. Dunnes Stores* [2015] IEHC 568. There, McGovern J. observes as follows, at para. 5:

> *"Moving to the application for an interlocutory injunction I am satisfied…that this is, in reality, an application for a restraining or prohibitory injunction and not a mandatory injunction. One of the important agreed facts in this case is that, up until the doors in question were closed on the 17th June, 2015, they had been operating normally for a period of fifteen years as a means of access to and egress from the premises during normal shopping hours. That represents the status quo so far as this application is concerned",*

and continues in a similar vein, at para 7:

> *"Having regard to the agreed facts in this case I am satisfied that this application is once brought by the plaintiff to restrain the defendant from keeping the doors closed at all times and in particular during the opening hours of the defendant's premises. In seeking such an order the plaintiff is seeking to maintain the status quo pending the determination of the issues in dispute between the parties".*

125. This Court respectfully agrees with the above-quoted reasoning. But to the extent, if at all, that the relief sought is mandatory, and the court considers it to be, in essence, prohibitory, it is best viewed as a form of relief that directs Dunnes to comply with its known obligations, i.e. an enforcing mandatory injunction. When it comes to such a form of injunction the court recalls the reasoning of Geoghegan J., in his judgment for the Supreme Court in *Noel Ó Murchú t/a Talknology v. Eircell Limited* (Unreported, High Court, Geoghegan J., 21st February, 2001). That was an appeal from an order of the High Court refusing a number of interlocutory injunctions, the effect of which would have been to compel Eircell, until further order, to continue supplying or permitting the supply

of 'Ready to Go' mobile phones to Talknology and to treat Talknology as an authorised agent for this purpose. Affirming the decision of the High Court, Geoghegan J. observed, *inter alia*, as follows, at 5:

> *"There are different kinds of mandatory injunctions. Undoubtedly, if a plaintiff is looking for a mandatory injunction requiring a wall to be knocked down he may in fact be attempting to obtain at an interlocutory stage what effectively is his final relief. Once the wall is gone it may not be practicable to rebuild it. That is the classic form of mandatory injunction which a court will rarely grant. Although the injunctions sought in this case may arguably be classified as 'mandatory' they are not of that type. They are directed simply towards retaining the status quo pending the outcome of the action, which is the normal purpose of a prohibitive injunction. I see no reason therefore why the traditional principles would not be relevant to this case."*

126. The relief sought in the within application is a relief which, as McGovern J. identified, seeks to restore the status quo (or at least the status quo that pertained previous to the closing of the doors that prompted the application for, and granting of, the interlocutory injunctive relief that is presently in place).

(ii) Academic Commentary.

127. It is useful to consider some relevant academic commentary concerning the granting of injunctive relief. Spry's *The Principles of Equitable Remedies* (7th ed.) contains the following useful observations, at 546 et seq:

> *"When on an application for a mandatory or restorative injunction it is shown that a particular state of affairs has arisen through wrongful acts on the part of the defendant and that he might earlier have been restrained from performing those acts, if due application had been made in time and if the court had thought fit to issue an injunction in the exercise of its discretion, the question arises whether the court should now exercise its discretion so as to grant mandatory relief.*
>
> *It has already been seen that where there is a sufficient risk of a future breach of the rights of the plaintiff, prima facie a court with equitable jurisdiction exercises its discretion so that a prohibitory injunction issues. In the case of mandatory injunctions the position is different in so far as the burden on the defendant that would be caused by the making of an order is often found to be greater than in the case where a prohibitory injunction is in question. Indeed, it has been said, 'A mandatory injunction can only be granted where the plaintiff shows a very strong probability upon the facts that grave damage will accrue to him in the future'."*

128. The last-quoted reference in the above-quoted text is taken from the judgment of Lord Upjohn in *Redland Bricks Ltd. v. Morris* [1970] A.C. 652, 665. That was a case in which a trial judge had granted an injunction whereby Redland Bricks was to take all necessary steps to restore support to land that had suffered slippage as a result of Redland Brick's excavation works. Redland Bricks appealed on the grounds that damages would have been an adequate remedy and also that the form of injunction which had been secured in the trial court was contrary to established practice in that it failed to inform Redland Bricks what it was ordered to do. The appeal was successful, the case being of continuing note because of Lord Upjohn's observations as to the granting of mandatory injunctions, from which the above-quoted extract is taken. However, as Spry observes, at 547, Lord Upjohn's comments "*cannot be accepted without qualification*", continuing as follows:

> *"[He] does not take account of cases where, for example, the apprehended damage to the plaintiff cannot be described as grave, but compliance on the part of the defendant, such as by removing a hoarding, would cause little if any inconvenience. In circumstances such as these a mandatory injunction ordinarily issues, in the absence of special circumstances such as laches or acquiescence. It is hence preferable to state generally that whenever an injury to the plaintiff is shown, being an injury that might, before it took place, have been enjoined by a prohibitory injunction if the court thought fit, a mandatory injunction may be granted unless consequent prejudice to the defendant is so disproportionate that that course is unjust in all the circumstances."*

129. This is a case in which Dunnes would be required to keep a door open that it kept open for 15 years, before, in what seems to be little more than pique at the fact that its landlord sought to enforce its legal entitlements, Dunnes closed the doors. The doors can be opened literally at the flick of a switch and the court has already examined the planning and fire safety issues presenting if the doors are not kept open during Dunnes' trading hours. It is a case in which granting the injunctive relief sought, to borrow from Spry, "would cause little if any inconvenience". And, as Spry continues, "In circumstances such as these a mandatory injunction ordinarily issues".

130. Bean's *Injunctions* (the court has been referred to the 10th edition) goes into a little more detail as to the types of consideration to be brought to bear in an application for *quia timet* injunction, *i.e.* an injunction to restrain wrongful acts which are threatened or imminent but have not yet commenced (or re-commenced in the present case, given that there is an interlocutory injunction in place maintaining the status quo that existed in the 15 years prior to the commencement of the difficulties between plaintiff and defendant that form the basis of the within application). Per Bean, at 25-26:

> *"A mandatory injunction may also be sought where no damage has yet occurred. Such orders may not involve the undoing of what has already been done, but may still be troublesome and costly for the defendant. The principles to be considered in a quia timet application for a mandatory injunction were laid down authoritatively by Lord Upjohn in Redland Bricks….He began by noting that the grant of a mandatory injunction is entirely discretionary, and unlike a negative injunction it can never be 'as of course'; every case must depend essentially upon its own particular circumstances, but the following general principles apply:*
>
> *(1) A mandatory injunction can only be granted where the claimant shows a very strong probability upon the facts that grave damage will accrue to him in the future….*
>
> *(2) The claimant must also show that damages will not be a sufficient or adequate remedy if such damage does happen….*
>
> *(3) Finally, Lord Upjohn mentioned an important factor – the need for precision in a positive injunction….The requirement of precision applies to prohibitory injunctions as well (and indeed to all orders of a court), but it is in the field of mandatory orders that the problem is most acute in practice."*

131. Turning to domestic commentary, former Chief Justice Keane in *Equity and the Law of Trusts in the Republic of Ireland* (2d ed.,

2011), makes some observations of interest with regard to enforcing mandatory injunctions, remarking, at para. 15-97, that

> *"An enforcing mandatory injunction is in many respects similar to a decree for specific performance, with one notable difference: the court may be asked to enforce a single term of a contract. The court will, accordingly, have to consider whether the term would be capable of being specifically performed if it stood alone and whether in all the circumstances it should be enforced on its own",*
>
> *adding, at para. 16.01, in respect of an order seeking specific performance of part of an already executed contract that this is "more akin to the injunctive relief…than true 'specific performance".*

132. And when it comes to prohibitory injunctions, Kirwan, in *Injunctions Law and Practice* (2nd ed., 2015) observes as follows, at 318:

> *"To obtain a prohibitory injunction it must be shown that there is something to be enjoined on an ongoing basis. If that can be shown, a court will intervene and grant an injunction as appropriate on the basis that an injury is continuous in order to prevent the necessity of bringing a series of actions in relation to the wrong alleged. As was observed in Ronson Products Ltd v. Ronson Furniture Ltd [[1966] Ch. 603] in the context of proceedings for contempt of court, the distinction in law between an order to do an act and an order prohibiting an act is not merely historical or technical, but rather depends upon practical considerations. As pointed out by Stamp J., if a man is ordered to do an act so that his failure to do it may lead him to prison, justice requires that he should know precisely what he has to do and by what time he has to do it."*

(iii) Damages and Property Rights.

133. When it comes to property rights, the fact that a value may be placed on lost property rights does not mean that damages will invariably fall to be treated as an adequate remedy, and for good reason. As Sugden L.C. observed in *French v. Macale* [1835-42] All ER Rep. 6, 9:

> *"The general rule of equity is that if a thing be agreed to be done, though there is a penalty annexed to secure its performance, yet the very thing itself must be done….So if a man covenant to abstain from doing a certain act and agree that, if he do it, he will pay a sum of money, it would seem that he will be compelled to abstain from doing that act. Just as in the converse case, he cannot elect to break his engagement by paying for his violation of the contract".*

134. The rationale as to why this should be so was explained by Clarke J. in the following terms, in the somewhat more recent case of *AIB plc v. Diamond* [2012] 3 I.R. 549, at 590:

> *"Even though there may be a sense in which it may be possible to measure the value of property lost, declining to enforce property rights on the basis that the party who has lost its property can be compensated in damages would amount to a form of implicit compulsory acquisition. If someone could take over my house and avoid an injunction on the basis that my house can readily be valued and he is in a position to pay compensation to that value (even together with any consequential losses), then it would follow that that person would be entitled, in substance, to compulsorily acquire my house. The mere fact that it may, therefore, be possible to put a value on property rights lost does not, of itself, mean that damages are necessarily an adequate remedy for the party concerned is entitled to its property rights instead of their value."*

(iv) Injunctive Relief and Covenants.

135. Precedent clearly establishes that covenants can be enforced via injunctive relief. So, for example, in *Gaw v. CIE* [1953] I.R. 232, a mandatory injunction was granted to enforce the execution of repairs in accordance with a covenant. In *Sibra Building Company v. Ladgrove Stores* [1998] 2 I.R. 589, an injunction was granted to enforce a restrictive covenant relating to the sale of alcohol from Palmerstown Shopping Centre. In *Carrick v. Morton* [2002] IEHC 65, an interlocutory injunction was obtained by the renowned artist Desmond Carrick which prohibited the defendant from continuing to build a dwelling-house on land which surrounded the plaintiff's property and which was the subject of a restrictive covenant that had the effect of sterilising the development of certain land. In *Hughes, Dickson & Co., Ltd v. Hughes* [1924] 1 I.R. 113, specific performance of covenants for lease renewal was granted. In *Whelan v. Madigan* [1978] ILRM 136, injunctions were granted by Kenny J. in the High Court to restrain the defendant landlord from interfering with his plaintiffs' quiet and peaceful enjoyment and possession of the flats let to them. In *Wanze Properties (Ireland) Ltd v. Five Star Supermarket* (Unreported, High Court, Costello J., 24th October, 1997), a case with a certain resonance in the context of the within proceedings, and where there had been, per Costello P,. at 2, "*quite clearly a flagrant breach and a deliberate breach*" of covenant, granted an interlocutory injunction requiring the defendant supermarket chain to keep its premises open for trade in circumstances where it had closed a supermarket in a shopping centre in breach of covenant. In *Parol Ltd v. Friends First Pension Funds Ltd* [2011] IEHC 119, another case with some resonance in the context of the within proceedings, Clarke J. ordered a shopping centre anchor tenant that was in breach of a 'keep open' clause to re-open the store. It may be – though this is perhaps to read too much into a judgment of the Supreme Court that does not expressly address this issue in detail – that negative covenants are a species of right which the courts will normally enforce by way of interlocutory injunction: *Dublin Port and Docks Board v. Britannia Dredging Company Ltd* [1968] I.R. 136.

136. In *Thomas Thompson Holdings Limited v. Musgrave plc* [2016] IEHC 28, Hedigan J refused an interlocutory injunction to compel the observation of a 'keep open' clause in circumstances where this would have required a company trading at a loss to continue so to do. But here Camiveo is not seeking to enforce a 'keep open' clause, it is not seeking to force Dunnes to trade or carry on a business, and it is not seeking to do so in the context of a loss-making facility. All it seeks is that Dunnes comply with the covenants that require it to keep its doors open during trading hours (in circumstances where the evidence points to the expected fact that not to do so is even having an adverse effect on Dunnes itself). So in this case, the court is not presented with obligations that it would shrink from enforcing in the circumstances presenting. It is presented with obligations that can be enforced by way of injunction and which ought to be enforced by way of injunction, with no countervailing considerations arising, or at least none that would cause the court to shrink from enforcing those obligations so.

(v) Conclusion.

137. From the time Camiveo acquired the Edward Square Shopping Centre in 2013 up to the entry of the within proceedings into the Commercial List, Dunnes did not pay the rent and service charges under the applicable leases when and as due. Camiveo had to issue proceedings to bring about any payment; and it seems eminently clear from the facts as described and considered in this judgment

that Dunnes will continue to act in the future as it has acted in the past if and when it considers it to be somehow in its interest so to do…unless it is restrained from so doing. It is in these circumstances that Camiveo seeks to compel Dunnes to do as is required of it under the leases and to pay its rent and service charges as due when due. These, Camiveo rightly contends, are specific obligations and do not require the constant supervision of the court for them to be achieved. What is required of Dunnes is readily done; any breach is readily identified; and the court will only be troubled in the presumably unlikely circumstance that Dunnes would not readily observe a High Court order. The breaches of covenant arising have the result that Camiveo is exposed, for example, to the potential for planning enforcement proceedings, criminal prosecution under the Planning Acts, a loss of relevant insurance cover, and very real interference with the enjoyment of its property. It has seen rent withheld by another tenant at the Edward Square Shopping Centre, with other tenants threatening like action. And it faces the prospect of default on its loan facility arrangements with NALM. Having regard to these factors and the considerations aforesaid it seems to the court that the case for granting the injunctive reliefs sought is amply satisfied.

XVIII. Causing Loss by Unlawful Means

(i) Overview.

138. Included among Camiveo's claims is a claim for damages arising from Dunnes' perpetration upon it of the tort of causing loss by unlawful means. Here one enters the domain of an extant but inexactly settled tort. Thus McMahon and Binchy in *Law of Torts* (4th ed., 2013) observe, at 1168, that "*It is not easy to speak with confidence about the precise basis and scope of the tort of causing loss by unlawful means*." Even so, the learned authors manage to reduce the tort to three key elements: (i) intention; (ii) unlawful means, and (iii) harm.

(ii) Intention.

139. Writing of the intention dimension of the tort, McMahon and Binchy, at 1169, state as follows:

> *"It is clear that the tort is based on intention rather than negligence. If, for example, I commit a tort (which is one type of 'unlawful means') which results in foreseeable but unsought damage to another (whether the victim of that tort or a third party), I shall not be liable on that account to that other person for the tort of causing loss by unlawful means. Conversely, if I commit a tort with the intention of causing such loss, I will be so liable."*

140. In *OBG Ltd v. Allan* [2008] 1 A.C. 1, in which the House of Lords sought to clarify the law on torts affecting business relations, Lord Nicholls made the following helpful observations, at paras. 164–166:

> *"A defendant may intend to harm the claimant's business either as an end in itself or as a means to an end. A defendant may intend to harm the claimant as an end in itself where, for instance, he has a grudge against the claimant. More usually a defendant intentionally inflicts harm on a claimant's business as a means to an end. He inflicts damage as the means whereby to protect or promote his own economic interests.*
>
> *Intentional harm inflicted against a claimant in either of these circumstances satisfies the mental ingredient of this tort. This is so even if the defendant does not wish to harm the claimant, in the sense that he would prefer that the claimant were not standing in his way.*
>
> *Lesser states of mind do not suffice. A high degree of blameworthiness is called for, because intention serves as the factor which justifies imposing liability on the defendant for loss caused by a wrong otherwise not actionable by the claimant against the defendant. The defendant's conduct in relation to the loss must be deliberate. In particular, a defendant's foresight that his unlawful conduct may or will probably damage the claimant cannot be equated with intention for this purpose. The defendant must intend to injure the claimant. This intent must be a cause of the defendant's conduct…".*

141. What is one to make of the foregoing? The division between negligent and intentional wrongs is established in Irish law. In intentional torts, wrongfulness turns on the subjective mind of the wrongdoer. But when treating with a negligent wrong, one looks to an objective standard of conduct. Intentional torts require that the interaction between wrongdoer and victim was to some extent intended, including a level of intention as to the harm suffered by the victim of the wrong done. The tortfeasor must have acted either with the intention of invading the victim's interests or, acted in the knowledge that such invasion was likely to occur, even if its occurrence was not sought. There is no requirement as to malice (which is analytically distinct from intention because malice entails considerations of motive).

(iii) Unlawful Means.

142. The scarcity of Irish precedent in this area means that the court must again rely upon the assistance of McMahon and Binchy learned treatise, coupled with such insights as are to be gleaned from OBG. Per McMahon and Binchy, at 1170-2:

> *"[32.61] The question as to what constitutes 'unlawful means' for the purposes of this tort is far from settled. Some cases are clear enough: if the defendant commits a tort against a third party who is in an economic relationship with the plaintiff, resulting in intended economic loss to the plaintiff, liability will attach to the defendant for causing this loss. Beyond this, there is an ongoing debate among judges and academic commentators alike.*
>
> *[32.62] Before OBG and Total [Network SL v. Revenue and Customs Commissioners [2008] A.C. 1174, which latter case, with OBG, comprises two relatively recent decisions of the House of Lords that sought, with mixed success, to clarify the law on torts affecting business relations], it was not clear whether 'unlawful means' should be limited to a tort committed against a third party with the intent of causing economic loss thereby to the plaintiff or should be extended to embrace breaches of contract or of equitable obligations or even criminal offences that did not generate civil liability to the victim; moreover, there was debate as to whether the tort necessarily involved a 'three-party' scenario rather than also including cases of 'two-party' wrongs…*
>
> *[32.63] Matters have not been fully resolved by OBG and Total. A narrow understanding of 'unlawful means' was favoured by the majority in OBG but the underlying philosophy of Total appears consistent, and perhaps even consistent only, with a broader perception of 'unlawful means', not merely for the tort of unlawful means conspiracy, which was in issue in Total, but also for the tort of causing loss by unlawful means.*
>
> *[32.64] In OBG, Lord Hoffmann considered that the essence of the tort of causing loss by unlawful means was '(a) a*

wrongful interference with the actions of a third party in which the claimant has an economic interest and (b) an intention thereby to cause loss to the claimant.' Having noted that '[i]n principle', the earlier cases had established that intentionally causing a person loss by interfering with the liberty of action of a third party in breach of contract with that third party was unlawful, Lord Hoffmann went on to state:

'In my opinion, and subject to one qualification, acts against a third party count as unlawful means only if they are actionable by that third party...'

[32.65] Lord Nicholls, with no support from his colleagues, adopted a far broader approach which brought all unlawful means within the remit of the tort. By this, Lord Nicholls envisaged 'all acts which a person is not permitted to do'. The concept, he acknowledged, stretched far and wide:

'It covers common law torts, statutory torts, crimes, breaches of contract, breaches of trust and equitable obligations, breaches of confidence, and so on.'

[32.66] Lord Nicholls noted that the principal criticism of this approach was that 'it 'tortifies' criminal conduct', but he did not perceive this as a sound argument:

'It would be very odd if…the law were to afford the claimant a remedy where the defendant committed or threatened to commit a tort or breach of contract against [a] third party but not if he committed or threatened to commit a crime against him."

143. It seems to the court that the last-quoted observation of Lord Nicholls is logically unassailable, that the common good is best served by protecting people from improper conduct intended to cause economic injury to them (regardless of whether that conduct occurs in two-party or three-party situations) and that a requirement as to breach of some law, whether civil or criminal (here contractual) may assist both in constraining the tort in scope and also in reducing the scale of the task involved in discerning hidden intention in manifest behaviour.

(iv) Harm.

144. As McMahon and Binchy observe, at para. 32.81 "*The tort* [of causing loss by unlawful means] *is generally considered to require that the claimant be harmed*". Such harm can assume manifold forms and can include, as in the within proceedings, loss of rent, corruption of commercial relationships, and legal costs.

(v) Conclusion as to Commission of Tort.

145. The court has concluded elsewhere above that Dunnes closed the Edward Square doors as a retaliatory measure, consequent upon receipt of the penally endorsed orders, and is satisfied from the evidence before it, not least from the internal e-mails unearthed in the discovery process and which issued following receipt of the orders aforesaid and the content of which is recited elsewhere above, that this act of retaliation was done with the intention of (a) inflicting inconvenience and loss on Camiveo, so as (b) to dissuade Camiveo from seeking to rely and insist upon its lawful entitlements. The court is entitled to take a particularly dim view of (b) in light of the fact that the retaliatory step was done after High Court and Supreme Court proceedings in which Camiveo's right to the sums sought therein was completely vindicated and thus appears to seek to punish Camiveo for accessing the courts or to dissuade it from doing so in the future. This is something which no court of law operating in a system grounded on the rule of law can tolerate and is a matter that falls to be reflected in damages, for there will be damages payable. The court finds that Dunnes has interfered with the economic interest of Camiveo, that it has intentionally caused loss to Camiveo by unlawful means (the closure of the doors in breach of covenant) and as a retaliatory measure, that Camiveo has suffered loss and damage that includes loss of rent from other tenants (whom it had to sue for same), corruption of commercial relationships, loss of use of rent-roll, and legal costs, and thus that the tort of causing loss by unlawful means has been committed by Dunnes.

XIX. Level of Damages

146. In *Conway v. INTO* [1991] 2 I.R. 305, 317, where the issue of liability for exemplary damages fell to be considered in the context where a trade union was liable in conspiracy, Finlay C.J. describes, as follows, the three types of damages available under Irish law for, *inter alia*, the commission of a tort:

"They are:-

1. Ordinary compensatory damages being sums calculated to recompense a wronged plaintiff for physical injury, mental distress, anxiety, deprivation of convenience, or other harmful effects of a wrongful act and/or for monies lost or to be lost and/or expenses incurred or to be incurred by reason of the commission of the wrongful act.

2. Aggravated damages, being compensatory damages increased by reason of

(a) the manner in which the wrong was committed, involving such elements as oppressiveness, arrogance or outrage, or

(b) the conduct of the wrongdoer after the commission of the wrong, such as a refusal to apologise or to ameliorate the harm done or the making of threats to repeat the wrong, or

(c) conduct of the wrongdoer and/or his representatives in the defence of the claim of the wronged plaintiff, up to and including the trial of the action.

Such a list of the circumstances which may aggravate compensatory damages until they can properly be classified as aggravated damages is not intended to be in any way finite or complete. Furthermore, the circumstances which may properly form an aggravating feature in the measurement of compensatory damages must, in many instances, be in part a recognition of the added hurt or insult to a plaintiff who has been wronged, and in part also a recognition of the cavalier or outrageous conduct of the defendant.

3. Punitive or exemplary damages arising from the nature of the wrong which has been committed and/or the manner of its commission which are intended to mark the court's particular disapproval of the defendant's conduct in all the circumstances of the case and its decision that it should publicly be seen to have punished the defendant for such

conduct by awarding such damages, quite apart from its obligation, where it may exist in the same case, to compensate the plaintiff for the damage which he or she has suffered. I have purposely used the above phrase 'punitive or exemplary damages' because I am forced to the conclusion that, notwithstanding relatively cogent reasons to the contrary, in our law punitive and exemplary damages must be recognised as constituting the same element."

147. In addition to compensatory damages, the court considers that this, regrettably, is a case in which aggravated damages ought also to be payable by Dunnes. For here Dunnes has not just committed the tort of causing loss by unlawful means, it has not just acted in a manner that is high-handed and cavalier (and, to some extent, economically strange in that it appears to have adversely affected its own levels of trading) but its retaliation and its infliction of injury on Camiveo, were (a) done in response to, and to dissuade, Camiveo from insisting upon its proper legal entitlements (an aspect of the matters presenting that is especially objectionable) and (b) involved so many transgressions of the lease arrangements between landlord and tenant that it is impossible to believe, and the court does not believe, that Dunnes did not know itself, from the very earliest stage, to be acting entirely in breach of contract in what it was doing. The nature of the wrong committed, the manner in which it was committed and the circumstances in which it was committed all point to this being a case in which aggravated damages must be payable. There is nothing wrong with being tough in business, in truth one has to be tough to survive and thrive in business, but commercial actors, however big or small, are as constrained by the law as any other person; sometimes they may transgress the law and yet attract no sanction; sometimes they may stray a little further and incur mild sanction; sometimes, as here, they may act in a manner that is so objectionable as to merit severer sanction, here in the form of aggravated damages, imposed by the court with some regret that they should require to be ordered but with the conviction that such requirement presents.

XX. Conclusion

148. The court indicates below the reliefs that have been sought by Camiveo and whether it is satisfied to grant such relief at this time. In each case the relief is granted for the reasons outlined in the court's judgment above:

(1) An order restraining Dunnes from disabling the automatic opening mechanism of the doors from its unit in Edward Square Shopping Centre onto William Street during the opening hours of the Edward Square Shopping Centre.

The court will grant this relief, save that it will confine it to the opening hours of the Dunnes Stores department store at Edward Square Shopping Centre.

(2) If necessary, an order requiring Dunnes to enable the automatic opening mechanism of the doors from its unit in Edward Shopping Centre onto William Street during the opening hours of the Edward Square Shopping Centre.

The court will grant this relief, save that it will confine it to the opening hours of the Dunnes Stores department store at Edward Square Shopping Centre.

(3) If necessary, an order requiring Dunnes to facilitate the free passage of pedestrians through the doors from its unit in Edward Square Shopping Centre to Castle Street/Barrack Lane during the opening hours of the Edward Square Shopping Centre.

It does not appear to the court that this order is necessary. Apart from closing the doors, it does not appear that Dunnes has previously done anything to interrupt the free passage of pedestrians as described.

(4) An order requiring Dunnes to comply with the covenants contained in clauses 4.1 ("Rents Service Charge and Insurance Premium"), 4.2 ("Interest on arrears"), 4.3 ("Outgoings"), 4.16 ("Obstruction of Common Areas"), 4.29 ("Statutory requirements"), 4.30 ("Planning acts, Public Health Acts and Building Control Act"), 4.32 ("Fire and safety precautions and Equipment") and 4.39 ("Insurance becoming void") of the Anchor Lease.

The court will make this order.

(5) An order requiring Dunnes to comply with the covenants contained in clauses 4.1, 4.2 and 4.3 ("Tenants Covenants") of the Bastion Lease.

The court will make this order.

(6) An order requiring Dunnes to comply with the covenants contained in clause 4.1 of the Unit 107 Lease ("To Pay Rent, Additional Rents and Interest").

The court will make this order.

(7) An order for specific performance of each of the Anchor Lease, Bastion Lease and Unit 107 Lease.

To the extent necessary, given the other orders that the court has indicated that it is satisfied to make, the court will order specific performance of the rent, interest and service charges in accordance with the covenants contained in those leases and related deeds of variation, more particularly under clauses 1, 3, 4.1-3 and 7 of the Anchor Lease, clauses 1, 3, 4.1-3 of the Bastion Lease (and clauses 4.1 and 4.7 of the Deed of Variation of the Bastion Lease), and clauses 1, 3, 4.1-3 of the Unit 107 Lease (and clause 4.1 of the deed of Variation of the Unit 107 Lease).

(8) Damages, including aggravated and exemplary damages, for breach of contract.

The court will order the payment of aggravated damages for the breaches of contract presenting. The court is not in possession of sufficient detail to determine what quantum of damages ought to be ordered and will hear both parties later in the term in this regard.

(9) Damages, including aggravated and exemplary damages, for unlawful or wrongful interference with economic interests.

The court will order the payment of aggravated damages for Dunnes' commission of the tort of unlawful or wrongful interference with economic interests, (the tort of causing loss by unlawful means). The court has not heard any argument

as to the quantum of damages and will hear both parties later in the term in this regard.

149. Nothing in the order that issues from the court or in this judgment should be read or construed as preventing Dunnes from temporarily closing the Edward Square entrance in an accident and/or emergency situation so as to preserve life or avoid injury to persons or damage to property.

150. The court will hear the parties on the question of costs.