Neutral Citation Number: [2011] IEHC 119

THE HIGH COURT

2009 4644 P

BETWEEN

PAROL LIMITED

AND

CARROLL VILLAGE (RETAIL) MANAGEMENT SERVICES LIMITED

PLAINTIFFS

AND

FRIENDS FIRST PENSION FUNDS LIMITED

DEFENDANT

AND

SUPERQUINN

THIRD PARTY

JUDGMENT of Mr. Justice Clarke delivered the 25th March, 2011

1. Introduction

1.1 On the 22nd October last I gave judgment on a range of issues in these proceedings ("the Principal Judgment")(Unreported, High Court, Clarke J., 22nd October, 2010). For the reasons set out in the Principal Judgment I came to the view that the closure of a Superquinn supermarket in the Carroll Village Shopping Centre in Dundalk was in breach of the terms of the lease under which that store was held. The lease in question had originally been granted by the first named plaintiff ("Parol") to the third party ("Superquinn"). However, as a result of financing arrangements entered into by Superquinn, the interest of the lessee in that lease had passed to the defendants ("Friends First") with Superquinn holding the property under a sub-lease. It will be necessary to make brief reference to the terms of the respective lease and sub-lease in due course.

1.2 However, for the reasons set out in the Principal Judgment I came to the view that Friends First had been placed in breach of a keep open covenant in the lease by virtue of the closure of the relevant Superquinn store. Likewise, Superquinn was in breach of the sub-lease by closing the store.

1.3 On that basis, I made declarations in the following terms:-

> "1. The Defendant through the action of Superquinn by closing its anchor store at the Carroll Village Shopping Centre Dundalk in February 2009 acted in breach of Clause 3(6) of the lease dated the 11th June 1998.
>
> 2. Superquinn by closing its anchor store at the Carroll Village Shopping Centre Dundalk in February 2009 acted in breach of Clause 3(16) of the sub lease dated the 5th September 2005."

As pointed out in the Principal Judgment all questions relating to damages were left over for further consideration by agreement of the parties and with the approval of the court. However, the parties agreed that Superquinn would fully indemnify Friends First in respect of any damages which might be awarded. On that basis the order of the 22nd October, 2010, contained the following provision at item 3:-

> "The Defendant be excused from attending at the trial of this action insofar as the quantum of damages is concerned on the basis that any award of damages and costs in favour of Plaintiffs as against the Defendant be made with an order over for all such damages and costs as against the Third Party."

1.4 Therefore, in form what I was trying, so far as damages are concerned, was the case made by Parol against Friends First. However, given that Superquinn had agreed, in substance, to indemnify Friends First in relation to any damages and costs that might be awarded, Superquinn took over the defence of the action. As a matter of substance, therefore, as opposed to form, the damages aspect of the case ran as between Parol and Superquinn. Before going on to deal with the damages claimed it is necessary to refer briefly to a complicating factor that arose subsequent to the Principal Judgment. The problem stemmed from the manner of the reopening of the Superquinn store. I, therefore, turn first to that question.

2. The Reopening of the Superquinn Store

2.1 For the reasons set out in the Principal Judgment, I came to the view that it was appropriate to require, in substance, that the store in question be reopened. The order of the 22nd October, therefore, required that Superquinn reopen its anchor store at the Carroll Village Shopping Centre "as a high end supermarket" not later than the 10th December, 2010. In the context of that order it is important to note that the keep open clauses in respectively the lease and the sub-lease were different in terms so far as use is concerned.

2.2 The user clause in the lease provided as follows:-

> "Permitted use means for use as a supermarket and/or superstore (including the sale of intoxicating liquor for consumption off the Property) and for the sale of foods and/or services which may from time to time be sold or provided in supermarkets and/or superstores."

2.3 However, the material provision as to user in the sub-lease (as a result of an amendment put in place at or around the time when the financial arrangements with Friends First occurred) provided as follows:-

> "Use primarily as a high quality supermarket and/or superstore and/or for the sale of intoxicating liquor for consumption off the premise and/or for the sale of sports and leisure wear and sports and leisure accessories and equipment and/or for all such other uses as may be compatible with trends or the future development of or setting of new trends in supermarkets and/or superstores from time to time taking full account of the changing nature of the business and trade of supermarkets/superstore chains in Ireland and worldwide…"

2.4 It should be recalled that one of the issues addressed in the Principal Judgment was as to whether the obligation of Superquinn to open the store under the "keep open" clause in the lease required Superquinn to operate under the Superquinn logo. For reasons set out in the Principal Judgment I came to the view that Superquinn was not so obliged.

2.5 When Superquinn reopened the store, it did so using the title Carroll Village Supermarket. Having regard to the findings in the Principal Judgment there was clearly nothing wrong with that. In addition, it appears to be the view of Parol that the store as opened does not meet the quality requirements set out in the sub-lease or the "high end supermarket" requirement set out in the court order, to which I have referred. Friends First, at a case management hearing, indicated that it reserved its position as to whether it wished to pursue a claim arising out of an alleged breach of the order referable to the standard of supermarket that was opened. In addition, Friends First reserved its position as to whether it might wish to claim any damages on the same basis arising out of a possible breach of the terms of the sub-lease. There was, however, a real issue of substance as to whether it was open to Parol to seek to place any reliance on the quality of the supermarket as the basis of a cause of action in damages, for the terms of the lease (as opposed to the sub-lease) did not make any reference to a requirement that the supermarket be high end or high quality. On that basis it was said by Superquinn that the only party who had any business seeking to argue that the supermarket as opened was not of sufficient quality was Friends First. Friends First not being desirous, at least for the present, of pursuing such a claim, it was said on behalf of Superquinn that it was not open to Parol to claim any damages arising on that basis.

2.6 Perhaps put more rigorously it was said on behalf of Superquinn that what was due to be heard was a claim for damages by Parol against Friends First in respect of which damages Superquinn had agreed to provide an indemnity. However, the starting point of any such claim was, it was argued, necessarily that Parol had a claim against Friends First. As the lease made no provision for the quality of supermarket, it was said that Parol could not have any claim under the lease against Friends First which derived from the quality of the supermarket actually opened. It followed, it was said, that Superquinn could have no obligation to indemnify Friends First, for Friends First had no liability itself in the first place. A number of other connected issues concerning the consequences of the court order made for any potential damages were also canvassed at the case management hearing.

2.7 In the end it was decided that the best course of action to adopt would be that two questions would initially be listed for hearing. The first was as to the damages to which Parol might be entitled as against Friends First, without having any regard to a possible claim deriving from the quality of the supermarket. For the reasons already addressed that claim would, as a matter of substance though not of form, be run as and between Parol and Superquinn. Second, there was then listed to follow a hearing of the issues relevant to the question of whether there was any legal basis on which Parol could put forward a claim deriving from the quality of the supermarket. When the hearing of the first set of issues had concluded it was intimated by counsel on behalf of Parol that Parol did not wish to pursue the issue in relation to a possible claim deriving from the quality of the supermarket opened. That issue no longer, therefore, arises. The assessment of damages is confined, therefore, to damages said to flow from the closure of the supermarket and not from any damages which might be said to be attributable to an allegation that the supermarket as reopened in December, 2010 was of a quality which was in breach of any obligations owed to Parol.

2.8 It is important to note that procedural history for the witness statements filed on behalf of Parol for the purposes of the damages hearing included proposed evidence which would only have been relevant to a possible claim for damages related to the quality of the supermarket as opened. Where relevant it may, therefore, be necessary to make some reference to those witness statements where they are material to what turns out to be a significant issue in the case which is the need to differentiate between those aspects of the situation on the ground today (and, indeed, as may be expected to arise into the future) which are attributable to, on the one hand, the fact that no supermarket at all operated for the best part of two years and, on the other hand, the fact that the supermarket now operating is one which may be different in the nature of the goods and services offered to the one which was present before closure.

2.9 Against that background it is necessary to turn to the claim in damages made by Parol.

3. Parol's Claim

3.1 On the 16th January of this year Parol furnished updated particulars of the losses which it says are attributable to the closure of the supermarket. It is convenient to group the losses claimed in those updated particulars under three headings.

3.2 The first heading concerns rent said to have been lost in relation to five units within the shopping centre which remained open at the time of the closure of the Superquinn store. The total rent payable under the five relevant leases was €347,332.00 per annum. The Superquinn store closed on the 21st February, 2009. It is said, therefore, that the total rent that would have been achieved from those five units up to the latter part of February of this year would have been €694,664.00. It is said that the total rent actually achieved during the period in question was €249,487.00. The shortfall or difference is, therefore, said to be €445,177.00. It is said on behalf of Parol that that shortfall was a consequence of the closure of the Superquinn store in that it was necessary for Parol to give the relevant tenants significant concessions in order to keep their units open.

3.3 The second heading is a claim for €65,000.00 which is said to be rent lost by virtue of the possibility of further units opening beyond those which remained open as of February, 2009 when the supermarket closed (it will be recalled that details were set out in the Principal Judgment of the fact that many units were vacant at the time of the closure of the supermarket). Evidence was given of negotiations with potential new tenants in that regard. The sum of €65,000.00 is said to be an estimate of the amount of rent which could have been achieved during the relevant two year period from such new tenants in the event that the Superquinn store had been open during that period.

3.4 The third head of claim is for loss into the future. This claim was put on behalf of Parol on an alternative basis. The starting point for the claim on either basis was the assertion that, were it not for the closure of the Superquinn store, the full rent of €347,332.00, to which I have already referred, would have continued to be achieved more or less indefinitely. In the light of the closure of the Superquinn store, and its reopening, it is said that the rent which will now be achievable is unlikely to exceed €125,000.00. On that basis it is said that a shortfall of €222,332.00 per annum will continue to be suffered by Parol.

3.5 In that context it is important to note that the extent of any obligation on Friends First in favour of Parol (to ensure that Superquinn keeps the store open) relates to an obligation which ends on the 25th February, 2019, for the keep open clause in the lease does not place any obligation after that date. On that basis it was agreed that no losses could continue beyond that date for Superquinn would be entitled to close their store as of that time. I am not sure that the position adopted on that point is strictly speaking technically correct. It would be theoretically possible that consequences of the Superquinn store being closed for most of 2009 and 2010 could continue to have an effect on the ground beyond 2019, even though any such consequences would need to seen against the background of the fact that Superquinn would have been entitled to close their store as of that time in any event. However, as the point was not argued, I do not propose to deal with it.

3.6 As already noted, Parol's case under this heading is that it has lost an income stream into the future. Two ways of assessing that income stream were put forward in the alternative. A simple calculation of the actual amount of rent said to be likely to be lost was given in the sum of €1,777,176.00 which is a simple multiplication of the annual rent said to be lost (€222,332.00) by the eight years between now and the expiry of the keep open clause. Alternatively, it was said that a capital value could be placed on that rent in the sum of €1,350,000.00. In substance, it seemed to me that, in truth, the sum of €1.35m was simply a discounted current value of the income stream to which I have referred. In any event, it was agreed that Parol could not claim both of those sums for the capital loss of €1.35m was the same loss as the gross rental figure to which I have referred.

3.7 I propose dealing with each of the heads of claim in turn. As the second and smallest of the above claims can, in my view, be easily dealt with, I propose turning first to the claim under that heading. I then propose to deal with some general issues which arise under both of the remaining two headings before going on to deal specifically with the respective claims that arise under those headings. I, therefore, turn to the claim which is based on an allegation of lost tenants.

4. The "Lost Tenants" Claim

4.1 At this stage it is appropriate to recall a number of facts that were determined in the Principal Judgment. First it became clear at the hearing which led to the Principal Judgment that a significant portion of the shopping centre was not in fact owned by Parol but rather by its principal Mr. Gerard Maguire and his wife, both in a personal capacity. It is was, therefore, absolutely clear that no claim for losses in respect of those units owned by Mr. Maguire and his wife in that personal capacity could be maintained in these proceedings for they were not parties. The damages claim was, therefore, necessarily confined to those units which were owned by Parol.

4.2 Second, it is clear that a significant portion of the shopping centre had become vacant prior to the closure of the Superquinn store. The circumstances surrounding that very high vacancy rate are set out in the Principal Judgment and it is unnecessary to repeat same here. It is, however, important to recall that no new letting had occurred in the three years immediately before the Superquinn closure. However, evidence was given at the trial of the damages issue, by Mr. Maguire, of negotiations which he had with a number of potential new tenants. Those negotiations occurred after the Principal Judgment had been given in October last and where there was a prospect, therefore, of a reopening of the Superquinn store. However, it is clear that none of the relevant prospective tenants now appear to be prepared to take lettings. It also seems clear that the reason for the reluctance of the relevant tenants to take up lettings is the nature of the store which has been opened by Superquinn and which now trades as the Carroll Village Supermarket.

4.3 The term "offering" is used in the retail sector to describe the types of products and services that may be offered in a particular retail unit. The traditional Superquinn offering is well known and involves a reasonably upmarket product range, together with individual facilities such as bakery, butchers, delicatessen and the like. It would seem that many of those items are not provided in the offering currently available in the Carroll Village Supermarket. However, as pointed out earlier, the only claim with which I am concerned is a claim for damages associated with the closure of the Superquinn store, rather than any possible claim based on an allegation that the current offering in the Carroll Village Supermarket is in breach of any legal obligations.

4.4 It seems to me to be absolutely clear that the reason why the relevant potential tenants did not ultimately sign up was because they were not happy with the current offering in the Carroll Village Supermarket and do not consider that offering to be conducive to the kind of business which they would hope to conduct in units within the shopping centre. There is no real basis, therefore, for suggesting that an inability to sign up the tenants in question is attributable to the closure of the Superquinn store as opposed to the nature of the offering currently available in the store as reopened. The fact that the supermarket had been closed for over a year and a half was not a barrier to the individuals concerned being interested in taking lettings if a "traditional" Superquinn offering were to come on stream by the reopening of the store, even if not necessarily under the Superquinn logo. It was when it became clear to those tenants that the offering would not be a traditional Superquinn offering that their interest waned. The reason for the loss of those tenants cannot, therefore, in my view be attributed to the closure of the store but rather to the nature of the offering currently available in the supermarket. As damages are not being claimed deriving from the nature of the offering, then it does not seem to me that the loss of the tenants in question has any causal connection with the wrongdoing with which I am concerned in this assessment of damages. Those tenants were lost, not because Superquinn closed but rather because the opening of Superquinn disappointed the potential tenants by virtue of the offering made available in the Carroll Village Supermarket. I am concerned with assessing damages that are attributable solely to the closure of the supermarket and not to the offering currently available. The loss of those tenants is not, therefore, causally connected with the wrongdoing with which I am concerned.

4.5 In addition it needs to be taken into account that no new letting had been achieved during the last three years when Superquinn was, in fact, open. It may be that some of the problems (particularly in the latter part of the run up to the closure of Superquinn) were derived from rumours which seemed to have been circulating in Dundalk as to the likelihood of Superquinn closing. There must, therefore, be some possibility that during the two years when the store was closed, Parol might have been able to secure an additional tenant or two, had Superquinn remained open. However, having regard to the fact that no new tenants had been secured, even with Superquinn open, in the three proceeding years and the fact that those tenants who appeared to be potential new operators within the centre, disappeared when Superquinn reopened with an offering which did not satisfy them, it seems to me to follow that the chances of having secured any new tenants for the vacant units owned by Parol during the two years in question was very small. The assessment of damages under this heading seems to me to be properly met by the assessment of a very small amount of general damages to reflect the loss of opportunity attributable to the added difficulty in securing tenants with Superquinn closed as opposed to the undoubtedly already difficult situation that would have obtained even with Superquinn open. I assess damages under this heading in the sum of €10,000.00.

4.6 As already indicated, before going on to address the specific issues which arise under the other two headings of claim, it is necessary to deal with some general considerations.

5. General Considerations

5.1 It must be recalled that the underlying principle behind the assessment of damages in any case is to attempt to put the wronged

party back into the position in which that party would have been had the relevant wrong not occurred. The wrong in this case is the fact that the supermarket was closed for the best part of two years. The assessment of damages must, therefore, at the level of principle, be based on attempting to assess the difference (if any) between what would have occurred had the supermarket not closed and what has actually happened.

5.2 As pointed out earlier the remaining damages arise under two headings, being in substance losses said to have arisen in the two years from the closure of Superquinn to-date and future losses said to be referable to the eight years from now until the expiry of the keep-open clause in February, 2019. What has actually happened to date is clear. As pointed out the rent received from the five units which remained open when Superquinn closed, during the two year period to-date, was the sum of €249,487.00. That sum is, of course, significantly below the rent provided for in the leases in question which, during the same period, amounted to just short of €700,000.00. There is no doubt but that Parol was legally and theoretically entitled to collect that sum of just less than €700,000.00 from the tenants in question. It is equally clear that it did not do so.

5.3 The first general question that I need to address is, therefore, to assess Parol's efforts to collect rent. Clearly any unreasonable failure on the part of Parol to actually collect rent due to it cannot form the basis for a claim in damages against Friends First and, through them, Superquinn. Parol has a duty to mitigate its loss. Parol has an obligation to attempt to collect as much rent as it can.

5.4 However, I have come to the view that there is no evidence on which I could safely conclude that Parol has failed to collect as much rent as it could. The circumstances in which Parol found itself were undoubtedly difficult. It will, of course, be necessary to analyse the extent to which those circumstances might not have been difficult in any event, even if Superquinn had not closed. However, irrespective of the source of the difficulties concerned, it seems to me to be clear that Parol was faced with a situation where insisting, in most cases and at most times, on the payment of the full amount of rent provided for in the respective leases, would have driven the tenants concerned out of business. The shopping centre has operated for the last two years at only a tiny fraction of its capacity. The Superquinn store was closed. A very high proportion of the remaining units were also closed. If the shopping centre were not to close altogether, then it was necessary to do what could be done to keep the existing tenants in business.

5.5 I am satisfied that the actions taken by Parol in making concessions to those tenants over the last two years were reasonable in all the circumstances. It follows that I should accept that the sum of €249,487.00 in rent was the maximum that Parol could reasonably have been expected to have collected from its tenants during the period in question.

5.6 Under the two headings of damages which remain for consideration there are, in each case, two questions. The first is as to what the position would have been had Superquinn not closed. The second is as to what the position actually is (or, in the case of the future, will be). There are, therefore, four matters to be assessed. What would have been the rental income that could have been collected in the two years from the closure of the Superquinn to date, if that store had not closed? That is obviously a hypothetical question and is one to which I will have to turn shortly. From that sum needs to be deducted the actual rent collected, which, for the reasons which I have already sought to analyse, I am satisfied was the maximum that could have been collected in the period in question. The difference is the appropriate amount to allow under this heading.

5.7 The same two questions arise in respect of the future. What would have been the rent into the future, in the event that the Superquinn store had never closed? What will be the rent into the future in the light of the fact that the Superquinn store did close but has now reopened? There must, necessarily, be some degree of speculation in the answers to both of those questions. However, there is always speculation in the assessment of consequential damages and in particular damages into the future, for the likely course of future events (whether actual events or events which might hypothetically have occurred in the absence of wrongdoing) necessarily involves some degree of estimation, although the extent to which it will be possible to form a view on such questions with any real degree of accuracy may vary significantly from case to case (see the comments which I made in this regard in *Greenband v. Bruton and Others* (Unreported, High Court, Clarke J., 9th March, 2011) and *Mount Kennett Investment Company and Anor. v. O'Meara and Ors* (Unreported, High Court, Clarke J., 9th March, 2011). However, there are two general observations that need to be made at this stage before embarking on an attempt to measure the three remaining elements identified above.

5.8 First, as no case is being made to the effect that the current user of the supermarket is in breach of any enforceable obligation, it follows that Superquinn could have changed the nature of the offering available in their Dundalk store to that which is currently being offered in the Carroll Village Supermarket without that change being in breach of any legal obligation. It seems to me to follow that the assessment of the rent which might have been hypothetically recovered (either to-date or into the future), in the absence of breach of covenant, must, therefore, take into account the fact that the offering could have changed without any breach of covenant. To the extent, therefore, that there might be an effect on the level of rent which has been recovered to date and which might be expected to be recovered into the future, deriving both from the closure of the supermarket between February, 2009 and December, 2010 and the change in the offering in that supermarket when it reopened in December 2010, it is necessary, for the purposes of calculating damages, to attempt to segregate the effect of both of those phenomena, even though it is, as all of the expert witnesses seemed to agree, a difficult task to make such a segregation. The reason why it is necessary to distinguish those consequences is that the first is a consequence deriving from a breach of covenant in respect of which damages lie, while the second does not derive from any wrongdoing and cannot give rise to any legitimate damages.

5.9 The second general observation that needs to be made at this stage arises from an argument made on behalf of Superquinn. As was clear at the time of the Principal Judgment, the Carroll Village Shopping Centre had suffered significant trading difficulties which were independent of the closure of Superquinn. In assessing what would have happened in the absence of the closure of Superquinn it is necessary, therefore, to pay full regard to those difficulties. On Superquinn's case the shopping centre was in terminal decline and was likely to have closed in the medium term irrespective of whether Superquinn itself closed. Parol, on the other hand, suggests (while acknowledging the undoubted difficulties which the shopping centre faced) that the added burden of the closure of Superquinn has (notwithstanding its reopening) caused a significant blow to an already vulnerable commercial enterprise. On Parol's case the shopping centre would have survived albeit in very difficult trading conditions. It is still hoped by Parol that the shopping centre will survive. To the extent that its continuing survival may be at risk, it is said that that risk is attributable to Superquinn's closure. It will be necessary to address those issues as they arise. I, therefore, turn to the losses to date.

6. Losses to Date

6.1 As already pointed out the actual rental receipts are a given. What is next necessary to estimate is the extent to which more rent might have actually been secured by Parol in the two years between the closure of Superquinn and the hearing, had Superquinn not closed. For the reasons already analysed, it is also necessary to attempt that exercise by excluding any possible benefit which might have been achieved from Superquinn continuing with its previous offering, for the change from that offering to the current offering is not, in itself, in breach of any legal obligation (at least for the purposes of this hearing) and cannot, therefore, give rise to any claim in damages.

6.2 It seems to me that a number of facts need to be taken into account in addressing the assessment with which I am currently engaged. First, it does appear that, in the year immediately prior to the closure of Superquinn, almost all of the rent due under the five leases concerned was, in fact, collected. It is true that one tenant had been given initial terms in their lease which provided for a reduction, of the order of €17,000.00, in the rent for the first five years. That five year period expired a few months before Superquinn closed. However, Mr. Maguire indicated in evidence that no attempt had been made by Parol to suggest that the rent actually be increased to reflect the expiry of the reduced rent period. That is understandable. The shopping centre was already under great pressure. It does not seem to me that there was, in truth, any reality, in the circumstances that pertained in the latter part of 2008 and the early part of 2009, in Parol actually securing that increase in rent. The rent actually being collected as of the time of the closure of Superquinn was, therefore, €17,000.00 less than the theoretical amounts specified in the five relevant leases. Rather than €347,332.00 the actual amount being collected was €330,332.00. For the reasons already analysed I am not satisfied that there was any reality to the rent going up to €347,332.00. The starting point has, therefore, to be that the true rent being collected in accordance with the leases as of the time of the closure of Superquinn was of the order of €330,000.00.

6.3 The second general consideration is to have regard to the fact that all of the tenants in Carroll Village had been pressing, for some time prior to the closure of Superquinn, for concessions deriving from the poor trading conditions being experienced. It seems to me that it necessarily follows that, even if Superquinn have not closed, those demands would have become all the more pressing and would almost certainly have to have been acceded to to some extent by Parol if the relevant tenants were to remain and be able to trade on a viable basis. In addition, if Superquinn had changed from its traditional offering to something along the lines of that which is now available in the Carroll Village Supermarket (without any significant closure), a course of action Superquinn would have been entitled to take, then the pressure for concessions could only have become more acute.

6.4 There was some conflict between the views of the two expert valuers called by the respective parties as to the open market rent of the five units concerned at the time in question. Mr. John Stewart (who gave evidence on behalf of Parol) estimated the open market rent as being of the order of €200,000.00. Mr. Peter Rowan (who gave evidence on behalf of Superquinn), put the figure closer to €150,000.00. There can be little doubt that estimating the open market rent of retail premises must be a difficult task in the current climate. Likewise, the added complication of the fact that Carroll Village was a shopping centre in trouble in any event makes the task all the more difficult. All in all I have come to the view that the open market rent of the five units in question, over the last two years, was something of the order of €170,000.00 per annum.

6.5 It follows that the starting point of any negotiations which the relevant tenants might have had with Parol was the fact that the rent which they were paying was close to double the going rent at which similar units might be let. Against that background, it is difficult to avoid the conclusion that the tenants would have been successful in securing significant concessions. Whether those concessions would have brought the rent down to the open market value may be open to at least some question for Parol had at least available to it as a bargaining chip the fact that the tenants were committed by contract to pay the higher rent. The lessees in many cases were with individuals rather than corporate entities so that a personal liability would have attached to the operator for non-payment of the full rent. The extent to which that bargaining chip could be deployed must, of course, be viewed against the practical commercial situation and the fact that you cannot get blood from a stone so that, irrespective of the legal entitlements of Parol, it would have been necessary to take those commercial realities into account.

6.6 Having regard, therefore, to the fact that the starting point (at the beginning of the two year period) was that rent of €330,000.00 was actually being paid, to the fact that the lessees had a legal obligation to pay that amount which in many cases fell on private individuals rather than corporate entities, but also having regard to the fact that the negotiating position of the tenants would have been strengthened by the knowledge of all concerned that similar units elsewhere could be rented for a total of something of the order of €170,000.00 and that paying significantly more than that sum would have been likely to have rendered many of the businesses unviable, I have come to the view that, in the absence of a closure of Superquinn, rent of the order of €250,000.00 might actually have been secured in the first year after the closure of Superquinn but rent of the order of €200,000.00 was all that would have been secured in the second year. I differentiate between the two years because it does not necessarily follow that any of the concessions which I have found were likely to have been made by Parol would have been made right from the beginning of the period in question, so that the effect of those concessions would have been more pronounced in the second year than the first. It follows that, in my view the best estimate of the total rent that would have been obtained had Superquinn not been in breach of its obligations is €450,000.00 for the two year period in question. Having regard to the fact that the amount actually recovered during the period in question was almost €250,000.00, it seems to me to be appropriate to award damages of €200,000.00 under this heading. It is next necessary to turn to damages into future.

7. Future Damages

7.1 There is necessarily some degree of estimation in both sides of the equation under this heading. What would the income stream for the next eight years have been had Superquinn remained open even with a reduced offering? What will it actually be in all the circumstances of the case? Both assessments involve a significant degree of estimation. Two significant general issues need to be addressed.

7.2 The first concerns the question of whether the shopping centre is, in truth, viable. Put another way, will the shopping centre actually survive for the eight year period in question? It seems to me that it is necessary to factor in at least some realistic possibility that it will not prove to be viable to keep the shopping centre open. I do not think that the evidence supports the view that its closure is a given. I do think the evidence supports the view that there is, however, a real possibility (though not, in truth, a probability) that it will ultimately close in the period in question.

7.3 On the other side of the coin it is also necessary to assess whether all or part of that risk of closure derives from the fact that Superquinn was closed for two years. In that regard I had the benefit of the evidence of Mr. William McMillan, who has significant expertise in the supermarket business. I accept Mr. McMillan's view that the fact that Superquinn was closed for two years (even though it is now open) has had a significant effect on the overall prospects of the shopping centre. Mr. McMillan's evidence was that supermarkets do their best not to close at all (even when a refit is required) and when forced to close for short periods, attempt to minimise the length of the closure and surround the closure with appropriate advertising and promotion designed to keep customers on board. As Mr. McMillan points out, much supermarket shopping is governed by habit. If people get used to going somewhere else they may be hard to win back. Therefore, a significant closure necessarily places a supermarket in a position where it will have to win back customers who have formed the habit of going elsewhere during the closure. Customers will not necessarily be won back quickly (or in some cases at all) even if there is a reopening. This will be particularly so where, as appears to be the case on the facts here, little promotion was engaged in to boost the likelihood of customers formerly lost returning. It must be taken into account that a change from the traditional Superquinn offering to that now available in the Carroll Village Supermarket would, of itself, almost certainly have lost some customers. Any such loss cannot, however, provide a basis for the calculation of the damages in this case for the reasons already analysed. I am also satisfied that there would have been some risk that the Carroll Village Shopping Centre would have proved unviable in the medium term even if Superquinn had remained open and most particularly, if Superquinn had made a decision to move

to the offering currently being provided in the Carroll Village Supermarket. However, it seems to me that Mr. McMillan's evidence is compelling as to the fact that whatever risk there may be of closure has been exacerbated by the fact that an already vulnerable commercial enterprise had to endure two years without any supermarket.

7.4 It seems to me, therefore, that I need to approach the question of the calculation of damages under this heading on the basis of a number of facts which I find to be the case on the evidence. First, there was a risk that Carroll Village could close in any event even if Superquinn were not guilty of any breach. However, that risk has become greater because of the two year closure of the anchor store. Second, for reasons similar to those which I addressed in considering damages to date, even if Superquinn had not been guilty of any breach of covenant, the rent likely to be currently being paid by the relevant tenants would be of the order of €200,000.00. I am satisfied that, even if Superquinn had not been guilty of any breach of covenant, there would remain pressure from the tenants to reduce that sum further in the future. On the hypothesis, therefore, that there was no breach of contract, it seems to me that the sort of rental income that Parol could have expected over the next eight years would have been below €200,000.00 per annum. In coming to that view I have taken into account the possibility that some other units might have been let but have also had to take into account the countervailing possibility that some of the existing units might not have remained let. I have also taken into account the fact that the current open market rent is of the order of €170,000.00 but that that figure might improve over the eight year period.

7.5 I am satisfied that the estimate, given by Parol, of the rent likely to be actually secured over the next eight years (€125,000.00 per annum) is reasonable and realistic. I have already indicated my view that the open market rent of the five units in question is currently of the order of €170,000.00. However, there is no guarantee that all of those units will remain open. The very difficult situation in which the shopping centre finds itself, with the vast majority of its units remaining closed, will necessarily make the collection of even the open market rent difficult. It seems to me that I should approach the question of damages into the future against the background of the fact that Parol would, in the absence of wrongdoing, be entitled to expect a rental income of something under €200,000.00 per annum but that Parol, because of the wrongdoing, can now only expect a rental income of €125,000.00.

7.6 The next question is as to whether that loss is likely to continue for the full eight year period or is likely to diminish. It could be said to be likely to diminish for one or both of two reasons. First, a better economic climate might lead to the gap, between the hypothetical situation derived from assuming no breach by Superquinn and the actual situation on the ground, narrowing. Second, in the other direction, it is necessary to take into account the risk that Carroll Village would have closed in any event but also having regard to the possibility that it might now have to close in circumstances where it would not have closed were it not for Superquinn's wrongdoing. It seems to me that only a general view can be taken of these items. The appropriate approach is, therefore, in my view, to initially calculate damages on the basis of the full current loss of rental income (which, for the reasons already set out, I estimate at being something under €75,000.00 per annum) but to discount that figure to reflect the possibility that it might decline or disappear altogether for any or all of the reasons which I have just addressed.

7.7 It is necessary, in any event, to discount the gross figure for loss of rent to reflect the fact that that figure represents a continuing loss over an eight year period and that some account must be taken of the fact that money lost in eight years time (but being compensated for today) needs to be appropriately discounted to reflect that time delay.

7.8 Just taking the income stream lost without taking into account any possibility that it might change in scale, it seems to me that the loss would approximate to €500,000.00 (being a sum of something under €75,000.00 for eight years discounted conservatively simply to reflect that it is an income stream rather than immediate entitlement). From that must be deducted a further amount to pay proper regard to the risks that that lost income stream might, for one reason or another, not continue to be lost, or be lost to the same extent, for the full eight year period. It seems to me that it is appropriate to discount the figure to a sum of €350,000.00 to have proper regard to those factors.

7.9 Put another way, it seems to me that the best estimate that can be made as to the present value of the loss of income over the next eight years which is attributable to the fact that the Superquinn store was closed for two years and the consequences which that has had for the future operation and, indeed, potential viability of the centre, is of that order. I, therefore, propose to award €350,000.00 under this heading.

7.10 Finally, I should note that it does not seem to me to be necessary to have regard to any taxation issues in the calculation of these damages. Obviously any additional income which Parol might have earned would have been potentially subject to tax on the basis that that additional income would have increased Parol's profits. However, equally, any damages which Parol now receives will have to be accounted for and is likely to be taxed either as corporation profits or capital gains. The taxation question is, therefore, neutral.

8. Conclusions

8.1 For the reasons already analysed I am, therefore, satisfied that it is appropriate to allow a sum of €10,000.00 in respect of the loss of opportunity to obtain new tenants in the two years to date. In addition, it is appropriate to allow €200,000.00 to reflect loss of rent to date. Finally, it is appropriate to allow €350,000.00 to reflect the present value of rent lost into the future.

8.2 For those reasons it seems to me that Parol is entitled to an award of €560,000.00 as against Friends First. Friends First is, in turn, entitled to an indemnity in respect of the full sum against Superquinn.