THE HIGH COURT

COMMERCIAL

[2017 No. 5675 P]

BETWEEN

DUNNES STORES AND ALMONTE

PLAINTIFFS

AND

PAUL MCCANN

DEFENDANT

JUDGMENT of Mr. Justice David Barniville delivered on the 14th day of March, 2018.

Introduction

1. This is my judgment on an application on an order for discovery sought by the plaintiffs against the defendant and on another application for an order for discovery sought by the defendant as against the plaintiffs.

The Proceedings

2. The proceedings involve a series of disputes between the parties concerning the Ashleaf Shopping Centre in Crumlin, Dublin 12 (the "Centre"). The first named plaintiff, Dunnes Stores, occupies the anchor unit at the Centre. The second named plaintiff, Almonte, is another company within the Dunnes Stores group of companies. For ease of reference, I will call the first named plaintiff, Dunnes Stores and the second named plaintiff, Almonte.

3. The defendant is an insolvency practitioner who was appointed as a Receiver by Allied Irish Banks plc over the secured assets of a Gary Smith by deed of appointment dated 5th February, 2013. I will refer to the defendant as the Receiver.

4. The proceedings concern the operation of the anchor unit and the car park at the Centre. The ownership and operation of the Centre and of the car park is governed by a series of agreements which it is not necessary to describe in detail in this judgment. Briefly, the anchor unit was demised to Dunnes Stores for a term of twenty years by a company called Primeview Company ("Primeview") on foot of a lease dated 5th April, 2000 (the "anchor lease"). AIB was also a party to the anchor lease. On the same date, Primeview demised the reversionary interest in the anchor unit to Almonte for a term of 925 years commencing on the expiration of the anchor lease (the "anchor unit reversionary lease"). AIB was also party to that lease. Primeview was the corporate entity through which the Centre was developed by Frank and John Smith. As regards the car park, by a lease dated 30th June, 1998, Primeview demised the car park (save for about 50 spaces) to Almonte for a term of 925 years (the "car park long lease"). By a further lease dated 27th April, 2000, Almonte demised the car park to John and Frank Smith for a term of twenty years (the "car park occupational lease").

5. In 2006, Gary Smith acquired the interests of John and Frank Smith in the Centre and its car park. He was funded by AIB. This acquisition was effected by means of a series of further agreements. By a licence for assignment dated 24th November, 2006, between Almonte, John and Frank Smith, Gary Smith, Primeview and Dunnes Stores, Almonte consented to the assignment of the car park occupational lease to Gary Smith. The car park occupational lease and the interests of John and Frank Smith in the Centre were assigned to Gary Smith by way of a further deed dated 24th November, 2006, involving a number of parties including Primeview, John and Frank Smith and Gary Smith (the "deed of assignment").

6. In addition, by a mortgage, charge and assignment dated 24th November, 2006, Gary Smith secured his interest in the centre and the car park in favour of AIB (the "AIB mortgage").

7. The plaintiffs allege that the licence for assignment was an integral part of the overall transaction under which Gary Smith acquired the interests of John and Frank Smith in the Centre and the car park. The plaintiffs further allege that Clause 11 of the licence for assignment, which provided for certain monies to be set off against other monies, was "*integral*" to Almonte agreeing to the assignment of the car park occupational lease to Gary Smith and that without it Almonte would not have agreed to that assignment. *Clause 11* of the licence for assignment is described in the pleadings variously as "Clause 11" or as the "*set off clause*". I will adopt those descriptions here.

8. The plaintiffs allege that in accordance with the terms of the set off clause, monies due and owing by Gary Smith to Almonte in respect of the car park (under the car park occupational lease) were to be set off against monies due and owing by Dunnes Stores to Gary Smith in respect of the anchor unit under the anchor lease and that the set off was applied and given effect to by Dunnes Stores, Almonte and Gary Smith. This is denied by the Receiver.

9. The Receiver was appointed by AIB over the Centre and the interest of Gary Smith in the car park and over his interest in the anchor lease and car park occupational lease pursuant to a deed of appointment dated 5th February, 2013. Gary Smith was adjudicated a bankrupt in the Central London County Court on 9th December, 2013. It is alleged by the Receiver that on foot of correspondence from DLA Piper, Solicitors, acting for AIB, Gary Smith's trustee in bankruptcy issued a notice of disclaimer under s. 315 of the (English) Insolvency Act 1986, disclaiming his interest in the car park occupational lease and in respect of another agreement which was entered into at the same time (a put and call option agreement) (the "disclaimer").

10. There is a dispute between the parties about several aspects of the disclaimer. The plaintiffs seek to dispute the validity of the disclaimer in the course of the proceedings. The Receiver maintains that it is not open to the plaintiffs to challenge the validity of the disclaimer and that the Irish courts do not have jurisdiction to deal with that issue. The Receiver contends that the disclaimer is presumed to be valid unless its validity is successfully challenged in the courts in England and Wales and, without prejudice to that, the Receiver pleads that AIB did receive the disclaimer within seven days of its issue. The Receiver claims that by virtue of the disclaimer the obligations and liabilities of Gary Smith under the car park occupational lease and the licence for assignment, including the obligation to pay rent and to permit any set off pursuant to clause 11 were determined as of from the date of the disclaimer.

11. The parties are also in dispute in relation to the occupation, control and management of the car park. The plaintiffs claim that

following his appointment the Receiver commenced occupying, controlling and managing the car park with effect from 5th February, 2013 and continues to do so. The plaintiffs point to various steps allegedly taken by the Receiver in that capacity including collecting and retaining income from the use of the car park, controlling entry to and exit from the car park, maintaining the car park, engaging cleaning contractors to clean the car park and so on. The plaintiffs claim that the Receiver is liable to Almonte in respect of his alleged occupation and use of the car park and that in total the Receiver has a rent liability to Almonte on foot of the car park occupational lease in an amount of in excess of €2.2million. Without prejudice to their claim against the Receiver pursuant to the car park occupational lease, the plaintiffs put forward various alternative grounds on which it is alleged that the Receiver has been in occupation of their car park. They allege that he is liable as a tenant pursuant to an implied lease or tenancy or alternatively, a trespasser liable to Almonte for mesne rates or profits. The Receiver denies that he has been in occupation of the car park under the car park occupational lease and asserts that he has exercised the rights reserved to the landlord under the car park long lease including the right to operate and manage the car park under certain provisions of that lease. He relies on the disclaimer and, in the alternative, pleads that he has no liability to Almonte as a matter of law under any pre-Receivership contracts entered into by Gary Smith. The Receiver denies any alleged tenancy and any liability for mesne rates or profits. The Receiver claims that Dunnes Stores is liable to him in respect of service charges under the anchor lease and that, as of October, 2017, Dunnes Stores was liable in respect of service charges to the Receiver in the sum of almost €2.2 million.

12. The plaintiffs seek to rely on the set off provisions contained in clause 11/the set off clause. The Receiver denies that that clause applies on various grounds including the disclaimer, the fact that the licence for assignment is a pre-Receivership contract which the Receiver says is not binding upon him and that clause 11 contravenes the *pari passu* rule in bankruptcy, is contrary to public policy and is void and ineffective. The issue as to the alleged entitlement of the plaintiffs to rely on the set off provisions contained in clause 11 is clearly a major issue in dispute between the parties.

13. Another issue in dispute concerns the changes allegedly introduced by the Receiver to the service hours during which services are required to be provided by the Receiver to (*inter alia*) Dunnes Stores and allegedly reduced hours in respect of which access is afforded to Dunnes Stores to the service yard at the Centre. The Receiver contends that he is not obliged to provide services for the additional hours requested by Dunnes Stores and is only obliged to provide those services and to afford access to the service yard during what is termed "Shop Opening Hours" under the anchor lease. The Receiver also claims that his obligation to provide services and access to common areas and to the yard is conditional on the payment of service charges by Dunnes Stores and that given Dunnes Stores' refusal to pay service charges, the Receiver has had to fund expenditure on services himself.

14. In an amended statement of claim delivered on 17th October, 2017 the plaintiffs seek various reliefs including declarations as to the basis on which the Receiver occupies the car park, judgment for €2.2 million in respect of arrears of rent allegedly due by the Receiver to Almonte pursuant to the car park occupational lease, declarations that monies allegedly due by the Receiver in respect of the car park are to be set off against sums due and owing by Dunnes Stores under the anchor lease declarations in relation to the provision of services and access to the service areas to facilitate extended trading hours of Dunnes Stores, declarations entitling Almonte to take possession of the car park and damages.

15. In addition to denying that the plaintiffs are entitled to the reliefs being sought, the Receiver has also counter claimed for several reliefs. He seeks to recover from Dunnes Stores the sum of almost €2.2 million in respect of service charges. He also seeks declarations in relation to his occupation of the car park and a declaration that set off does not apply. The Receiver also alleges a breach by Almonte of the car park long lease and alleges that as a result of those breaches, he has suffered loss and damage and has been required to operate and manage the car park for the benefit of the Centre as a whole pursuant to the landlord's rights of entry under the car park long lease and has incurred costs and expenses in doing so. He seeks various reliefs including declarations and damages in respect of the alleged breach by Almonte of the car park long lease.

16. I have attempted to describe the various disputes between the parties so as to understand better the issues which have arisen between the parties on these discovery applications. It will be evident from my necessarily incomplete summary of the claims and counterclaims made by the parties that the proceedings involve a whole range of disputes on many different issues some of which may ultimately be regarded as issues of law but all of which will be required to be determined by reference to agreed or disputed facts.

17. I propose first to summarise the procedural background. I will then set out very briefly the applicable legal principles on discovery. I then consider separately the plaintiffs' application for discovery against the defendant and the receiver's application for discovery against the plaintiffs. I summarise my conclusions at the end of the judgment.

Procedural Background
(a) The Plaintiffs Application for Discovery

18. The plaintiffs requested voluntary discovery from the Receiver by letter dated 8th December, 2017 (the "plaintiffs' request"). The plaintiffs' request sought voluntary discovery of ten categories of documents. The Receiver responded to the request by letter dated 20th December, 2017 (the "Receiver's response"). In the response, the Receiver agreed to make voluntary discovery in respect of certain of the categories of documents sought but refused discovery in respect of other of the categories.

19. The plaintiffs then issued a motion seeking an order for discovery against the Receiver on 10th January, 2018. That motion was grounded on an affidavit sworn by Isabel Foley on the same date.

20. A replying affidavit was sworn on behalf of the Receiver by Lisa Smith on 22nd January, 2018. Based on the discovery then being sought by the plaintiffs and on the descriptions of the categories of discovery sought by the plaintiffs, Ms. Smith offered certain views in relation to the potential scope of the discovery being sought based on preliminary scoping searches carried out. Based on an initial search of the Receiver's email files from the Outlook 365 system, Ms. Smith stated that the Receiver would expect an initial responsive data set of in the region of 800,000 documents. Further searches would also have to be carried out on behalf of the Receiver to include email boxes, a file server held by the Receiver on which documents relating to the Receivership are stored, a case management system onto which certain documents are saved, laptops and iPhones and hard copy files. Ms. Smith offered her views on the likely timetable for completing the discovery sought (if ordered) depending on the number of responsive documents (ranging from 200,000 documents, taking 16 weeks, to 800,000 documents, taking 64 weeks).

21. Ms. Foley swore an affidavit in response to Ms. Smith's affidavit on 25th January, 2015, disputing much of what Ms. Smith had stated in relation to the possible numbers of responsive documents and the time which it would be likely to take to review those documents.

22. While the views of Ms. Smith and Ms. Foley are generally of assistance in reminding me that I should be conscious of the

potentially large numbers of documents which may be responsive to a discovery order which I might make, and while I am required to consider whether the discovery sought is proportionate and not oppressive, ultimately, I will have to assess each of the categories of documents in respect of which discovery is sought and determine in accordance with the well established legal principles applicable to discovery, whether discovery should be ordered of those categories of documents. It is also fair to observe at this stage that Ms. Smith's averments in relation to the potentially enormous scope of the discovery sought were influenced to a degree by the very broad terminology used in many of the categories of discovery sought by the plaintiffs which seek discovery of documents "relating to" a particular issue. During the course of engagement between the parties prior to the hearing of the applications for discovery, the plaintiffs agreed to alter many (but not all) of the categories so as to remove the references to documents "relating to" a particular issue and to replace them with the more restricted description of documents "*recording*" a particular issue or matter. This should lead to a reduction in the scope of the discovery being sought by the plaintiffs.

(b) The Receiver's Application for Discovery

23. The Receiver sought voluntary discovery from the plaintiffs in a letter dated 8th December, 2017 (the "Receiver's request"). The Receiver's request sought voluntary discovery of three categories of documents. The plaintiffs responded to the Receiver's request by letter dated 20th December, 2017 (the "plaintiffs' response"). The plaintiffs' response agreed to make voluntary discovery of one of the categories of documents sought by the Receiver (category 1), suggested a revised form of wording in respect of another of the categories (category 2) and refused discovery outright in respect of a third category (category 3).

24. The Receiver's motion for discovery was also issued on 10th January, 2018, and was grounded on an affidavit sworn by Ms. Smith on the same date. The plaintiffs responded to the Receiver's motion by an affidavit sworn by Domhnall Breathnach on 22nd January, 2018. In that affidavit, the plaintiffs slightly improved the terms of their offer in respect of category 2, but maintained their outright objection to the discovery sought in category 3.

Legal Principles on Discovery

25. I propose at this stage merely to summarise the relevant legal principles on discovery. They are well known and well established. It is unnecessary to outline and discuss those principles in any detail in this judgment. There was no great dispute between the parties on those principles save in a couple of respects. I will address those areas of dispute shortly.

26. Before doing so however, I note that the Court of Appeal recently summarised the relevant principles on discovery by reference to a significant body of case law in the area. The Court of Appeal did so in *O'Brien v. Red Flag Consulting Ltd & Ors* [2017] IECA 258 ("*Red Flag*"). In that case, having referred to a number of the leading cases on discovery in Ireland, including *Hannon v. Commissioners of Public Works* [2001] IEHC 59, *Framus Ltd v. CRH Plc* [2004] 2 I.R. 20, *Ryanair Plc v. Aer Rianta CPT* [2003] 4 I.R. 264 and *Hartside Ltd v. Heineken Ireland Ltd* [2010] IEHC 3, Ryan P. in delivering the judgment of the Court summarised the relevant principles as follows:-

> *"1. The primary test is whether the documents are relevant to the issues in the legal proceedings between the parties. [Stafford v. Revenue Commissioners].*
>
> *2. Relevance is determined by reference to the pleadings. O. 31, r. 12 specifies discovery of documents relating to any matter in question in the case. [Hannon, para. 2].*
>
> *3. There is nothing in the Peruvian Guano test which is intended to qualify the principles that documents sought on discovery must be relevant, directly or indirectly to the matter in issue between the parties in the proceedings.*
>
> *4. An applicant for discovery must demonstrate that it is reasonable for the court to suppose that the documents contain relevant information. [Peruvian Guano, p. 65].*
>
> *5. An applicant is not entitled to discovery based on speculation. Neither is it available merely to test averments. [Framus Ltd v. CRH plc [2004] 2 I.R. 20, pp. 34 – 35].*
>
> *6. In balancing procedural justice the court may require a party whose application is based on a mere assertion to satisfy a threshold criterion of establishing a factual basis for the claim. [Hartside Ltd v. Heineken Ireland Ltd, para. 5.9].*
>
> *7. Although relevance is the primary criterion, and when established in respect of documents it will follow in most cases that their discovery is necessary for the fair disposal of those issues, the question of whether discovery is necessary for 'disposing fairly of the cause or matter' cannot be ignored. [Cooper Flynn v. Radio Telefis Eireann [2000] 3 I.R. 344].*
>
> *8. The court should consider the necessity for the documents having regard to all the relevant circumstances, including the burden, scale and cost of the discovery sought. [Ryanair Plc v. Aer Rianta CPT [2003] 4 I.R. 264].*
>
> *9. There must be some proportionality between the extent or volume of the documents to be discovered and the degree to which the documents are likely to advance the case of the applicant or damage the case of his or her opponent in addition to ensuring that no party is taken by surprise by the production of documents at trial. [Framus, p. 38].*
>
> *10. In certain circumstances, a two – wide ranging order for discovery may be an obstacle to the fair disposal of proceedings. [Independent Newspapers (Ireland) Ltd v. Murphy [2006] 3 I.R. 566, p. 572].*
>
> *11. Discovery could become oppressive and the court should not allow it to be used as a tactic in war between parties. [Hannon, para. 4].*
>
> *12. If a party objects to discovery, the Court may reserve the question until a disputed issue in the case has first been decided if it is satisfied that the right to the discovery depends on the decision or that for any other reason it is desirable that any issue or question in dispute in the cause or matter should be determined first and may order accordingly. [McCabe v. Ireland [1999] 4 I.R. 151, p. 156]."*

27. The Irish law on discovery is based on the twin requirements of relevance and necessity. Relevance is still determined by reference to the principles outlined by Brett L.J. in the Court of Appeal in England and Wales in the *Peruvian Guano* case (1882) 1 QBD 55. The requirement to demonstrate that the documents sought by way of discovery are necessary for disposing fairly of the case or for saving costs is a separate requirement. Relevance is determined by reference to the pleadings. If relevance is established, the

documents are normally regarded as being necessary for disposing fairly of the case or for saving costs. However, that is not always the case. An example of where documents were found to be relevant but not necessary is the decision of the Supreme Court in *PJ Carroll & Company Ltd v. Minister for Health and Children (No.3)* [2006] 3 I.R. 431.

28. It is also clear from the summary of the principles on discovery conveniently set out by Ryan P. in *Red Flag* that an excessively broad or "*too wide ranging*" order for discovery may amount to an "*obstacle to the fair disposal of proceedings*", and that there must be some proportionality between the extent or volume of the documents to be discovered and the degree to which they are likely to advance the case of the party seeking discovery or to damage the other side's case.

29. In the present case, particularly on the plaintiffs' application for discovery against the Receiver, it was suggested that rather than directing discovery of the documents sought, information could and should more appropriately be sought by way of interrogatories. Reliance was placed by the Receiver on the decision of Kelly J. (as he was) in *Anglo Irish Bank Corporation Ltd v. Browne* [2011] IEHC 140.

30. In that case, in considering the availability and appropriateness of interrogatories, particularly in cases to which the provisions of O. 63A (commercial proceedings) of the RSC apply, where interrogatories may be delivered without leave of the court, Kelly J. stated:-

> *"Discovery ought not to be ordered where the information sought to be gleaned by it is capable of being obtained by an alternative less expensive and less time consuming method. In this regard, I have in mind the use of interrogatories. In the Commercial List, interrogatories may be delivered as of right. No recourse to the court is necessary and they are capable of being administered in every case.*
>
> *Interrogatories are in many instances superior to discovery. That is so for a trinity of reasons. First, they ask a direct question. Thus the questioner instead of having to sort through what may be hundreds or thousands of documents in an effort to find out whether a particular state of affairs existed or not, simply asks the relevant question. Second, the interrogatories must be answered. Moreover, they are answered under oath. Third, the interrogatories, once answered, may be utilised as evidence in the trial thereby avoiding the necessity to call one or more witnesses.*
>
> *Interrogatories need no longer be framed in an archaic form by posing questions in the negative. They can ask direct questions. I have seen many cases in this division of the court where a large reduction in discovery and considerable shortening of trial time was achieved by the answering of, by times, in excess of a hundred interrogatories.*
>
> *Given the easy availability of interrogatories in the Commercial List, it is important that practitioners utilise that facility. When seeking to obtain information from their opponents, the first port of call ought not to be requests for discovery if it is probable that the information which is being sought is capable of being elicited by an adroit use of interrogatories."* (per Kelly J. at pp. 3 – 4)

31. Kelly J. went on to find that in respect of certain of the categories of discovery sought in that case, interrogatories should be delivered rather than discovery ordered.

32. A similar view was expressed by Kelly J., while a member of the Court of Appeal, in *McCabe v. Irish Life Assurance Plc* [2015] 1 I.R. 346. In delivering the judgment of the Court of Appeal in that case, Kelly J. referred to the judgment of Walsh J. in the Supreme Court in *J&LS Goodbody Ltd v. The Clyde Shipping Company Ltd* (Unreported, Supreme Court, 9th May, 1967) which encouraged a greater use of interrogatories. Kelly J. continued:-

> *"3. Often the delivery of interrogatories can obviate the necessity for expensive and time consuming discovery, can dispose of issues prior to trial, can lessen in the number of witnesses and result in an overall shortening of trials. In many cases which lend themselves to the delivery of interrogatories the procedure is simply ignored." (per Kelly J. at 348 – 349).*

33. Kelly J. noted that when the commercial court was established in 2014, the rules of that court permitted parties to deliver interrogatories without leave of the court and that that change gave rise to "*a much more extensive use of interrogatories in commercial court proceedings"* and that they "*have been beneficial in achieving the desired results*" (per Kelly J. at 349).

34. The Receiver argues in respect of some of the categories of discovery sought by the plaintiffs that the use of interrogatories would be more appropriate and would avoid some of the concerns expressed by the Receiver in relation to the scope of discovery sought by the plaintiffs.

35. I accept as a matter of principle that, where appropriate, the adroit use of interrogatories is appropriate and can obviate the requirement for voluminous discovery. When considering the categories of discovery sought by the plaintiffs, I will comment where appropriate on those categories where I believe interrogatories should be used rather than pursuing the request for discovery of the documents sought in that category.

36. It was argued on behalf of the plaintiffs that the refusal of discovery on the grounds that the discovery sought is not necessary as the applicant already has alternative sources of information or evidence available should be treated as the exception rather than the norm. In this regard, the plaintiffs rely on the views of Abrahamson in *Discovery of Disclosure*" (2nd Ed., 2013) at paras. 6-57 to 6-63. It seems to me however that this is but an element of the obligation that the party seeking discovery must demonstrate that the discovery sought is necessary in the sense of being required for the fair disposal of the case, or for saving costs. If it can be shown that there are alternative means of establishing the issues in respect of which the discovery is sought other than by discovery, then the party seeking discovery may have a difficulty in discharging the onus of showing that the discovery sought is necessary in that sense. It is true that this will not arise in most cases and the cases in which it has arisen such as *PJ Carroll & Co (No.3), Linfen Ltd v. Rocca* [2009] 2 ILRM 504 and Hansfield *Developments v. Irish Asphalt Ltd* [2009] IESC 4, probably represent the relatively small number of cases in which this issue will arise, and in which discovery although relevant may nonetheless be found not to be necessary for the fair disposal of the case or for saving costs. However, where an alternative means of proving the relevant issue is available or where some alternative means of getting at that information such as by way of interrogatories exists, as in *Browne and McCabe*, the court should be scrupulous to ensure that the discovery sought is really needed and to refuse such discovery where interrogatories would be more appropriate or where an alternative means of proof is available to the applicant for discovery.

37. The parties were also in dispute in relation to another aspect of the law on discovery. While accepting that the court could refuse

discovery if the discovery sought was excessive and disproportionate, it was argued on behalf of the plaintiffs that the issue of proportionality, in the sense of the discovery being disproportionate, could be addressed when it came to complying with the order for discovery having regard to the provisions of O. 31, r. 12(11) of the RSC. The Receiver submitted that the issue of proportionality ought properly to be taken into account when considering the terms of the discovery to be ordered.

38. Order 31, r. 12(11) provides as follows:-

> *"Any party concerned by the effect of an order or agreement for discovery may at any time, by motion on notice to each other party concerned, apply to the court for an order varying the terms of the discovery order or agreement. The court may vary the terms of such order or agreement where it is satisfied that –*
>
> > *(i) …*
> >
> > *(ii) the discovery originally ordered or agreed is unreasonable having regard to the cost or other burden of providing discovery."*

39. While a party faced with an order or agreement for discovery may seek to vary the terms of the order or agreement under this provision, it is well established that the court can, and should, in the first instance consider the question of proportionality at the time it is considering the terms of the order for discovery to be made. This is clear, for example, from the observations of Murray J. (as he was) in Framus. There, Murray J. observed that:-

> *"…there must be some proportionality between the extent or volume of the documents to be discovered and the degree to which the documents are likely to advance the case of the applicant or damage the case of his or her opponent in addition to ensuring that no party is taken by surprise by the production of documents at a trial." (per Murray J. at 38)*

Similar views were expressed by Fennelly J. in the Supreme Court in *Dome Telecom Ltd v. Eircom Ltd* [2008] 2 I.R. 726.

40. It is appropriate that the issue of proportionality should be considered at the stage at which the terms of the order for discovery itself are being determined rather than waiting until it comes to complying with the order. While O. 31, r. 12(11), introduced in 2009 by the Rules of the Superior Courts (Discovery) 2009 (S.I. No. 93 of 2009), does allow the court to reconsider the scope of the discovery ordered or agreed in terms of the cost or burden of providing it, that provision does not absolve the court from the obligation to consider the proportionality of the discovery sought when considering the order to be made and the scope of discovery to be ordered in the first place. It is necessary, therefore, in the present case to consider the proportionality of the discovery sought in certain of the categories of discovery sought both by the plaintiffs and by the Receiver so as to ensure that the discovery is not disproportionate or excessive in the circumstances.

41. With those principles in mind, I will now consider the terms of the discovery sought by the plaintiffs against the Receiver.

(a) The Plaintiff's application against Receiver

42. The plaintiffs initially sought discovery of ten categories of documents. Through constructive engagement by the parties, some of the category descriptions were amended and agreed in amended form, another category was agreed in part and a number of categories remain in dispute. The categories agreed in full, on the basis of amendments to the category descriptions, are categories 4, 7, 8 and 10. Category 5 is agreed in part. Categories 1, 2, 3, 6 and 9 remain fully in dispute. I set out below the arguments of the parties in relation to each category and my conclusions on that category.

(1)Category 1

The discovery sought

43. The discovery sought in this category is as follows:

> *"All documents evidencing and/or recording the Licence for Assignment including, but not limited to, all documents evidencing and/or recording the entry into the Licence for Assignment by Gary Smith and/or any of the other parties thereto."*

The arguments on this category

44. The plaintiffs claim that the documents sought in this category are relevant. They refer to paras. 20 and 23 of the amended statement of claim. At para. 20, it is pleaded that the licence for assignment was an "*integral part*" of the "*overall transaction*" implemented in November, 2006 whereby Gary Smith, funded by AIB, acquired the interest of John and Frank Smith in the Centre and the car park. At para. 23 the plaintiffs refer to and set out the provisions clause 11 of the licence for assignment i.e. the set off clause which it is pleaded was "*integral*" to Almonte agreeing to the assignment of the car park occupational lease to Gary Smith and that Almonte would not have agreed to that assignment without the set off clause. The plaintiffs then refer to paras. 22 and 27 of the amended defence and counter claim which put those pleas in issue. At para. 22, the Receiver denies that the licence for assignment was an integral part of any overall transaction as alleged. At para. 27, the Receiver denies that clause 11 was "*integral*" to Almonte agreeing to the relevant assignment. It should be noted that para. 27 goes on to plead that the assertions about one party's subjective state of mind regarding the negotiation of the licence are irrelevant to the meaning and legal effect of the licence and are inadmissible in evidence.

45. The plaintiffs contend that the documents sought concerning the licence for assignment are relevant based on the pleadings. They further contend that the discovery sought is necessary as that term is properly understood as the documents sought will assist in establishing the plaintiffs' claim and their defence to the Receiver's counterclaim and in undermining the Receiver's defence and counterclaim and that discovery will result in a saving as to costs and better facilitate the efficient and expeditious determination of the proceedings.

46. The Receiver has refused to make voluntary discovery of the documents sought in this category on the basis that the only real dispute between the parties in relation to the licence for assignment was as to the legal effect and enforceability of clause 11 and that there were no factual issues in dispute which would require discovery. The Receiver further contends that while he is denying that the licence formed an integral part of the relevant transaction, nothing turns on this and that the subjective importance which one party attaches to a clause in a contract at the time the contract is entered into is irrelevant to, and inadmissible as to, the legal effect of that clause. In those circumstances, the Receiver maintains that the plaintiffs do not need discovery of these documents to make the case which they wish to make. He further contends that the plaintiffs can give evidence on this issue (if admissible) and

that such documents as may exist are likely to be inter partes documents or other documents which the plaintiffs will already have. The Receiver further makes the point that he was not a party to the licence or to the transaction in 2006 and had no role to play in relation to the Centre or the car park until his appointment in February, 2013 and as a consequence is unlikely to have any relevant documents which it will be necessary for the plaintiffs to obtain by way of discovery. The Receiver also makes the case that the category description is extremely broad and, if ordered, would be disproportionate.

47. These arguments were reiterated in the affidavit sworn by Ms. Foley on behalf of the plaintiffs and by Ms. Smith on behalf of the Receiver and in the submissions of the parties at the hearing. The plaintiffs further relied on a passage from the judgment of Fennelly J. in *Ryanair* where he observed that it was relevant to take into account the behaviour of the party imposing the discovery and that it is difficult for a party who contests all of the relevant facts on the pleadings to deprive its opponent of access to documents which would enable the party seeking discovery to prove matters which it disputes.

My conclusions on this category
48. I am not satisfied that the documents sought in this category are either relevant or necessary for the fair disposal of the issues in this case or for saving costs. It is true, as the plaintiffs contend, that issue is joined on the pleadings as to whether the licence for assignment formed "*integral part*" of the overall transaction in November, 2006 whereby Gary Smith acquired the interests of John and Frank Smith in the Centre and the car park for which he was funded by AIB and whether clause 11 was "*integral*" to Almonte agreeing to the assignment. However, that does not mean that the documents actually sought in this category are themselves relevant to the issues raised on the pleadings.

49. Whether or not the licence was an integral part of the overall transaction or whether or not clause 11 was "*integral*" to Almonte agreeing to the assignment does not require discovery to be established. The documents entered into at the time of the so called "*overall transaction*" are admitted on the pleadings. The Receiver admits the licence for assignment at para. 21 of the amended defence and counter claim. He admits the two transfer deeds which were entered into on 24th November, 2006 at para. 24 of the amended defence and counterclaim which includes the deed of assignment referred to at para. 21 of the amended statement of claim although the Receiver denies the legal effect of that deed alleged by the plaintiffs. The Receiver further admits the AIB mortgage entered into on the same date at para. 25 of the amended defence and counterclaim. The Receiver also admits that the provisions of clause 11 of the licence for assignment are as set out at para. 23 of the amended statement of claim.

50. All of these documents are, therefore, admitted by the Receiver and all formed part of the "*overall transaction*" under which Gary Smith acquired the interests of John and Frank Smith in the Centre and the car park.

51. What is in dispute between the parties is the legal effect of clause 11 and whether it binds the Receiver, as the plaintiffs contend. Either clause 11 had the legal effect contended for by the plaintiffs and bound the Receiver or it did not. That issue is not affected by whether either the licence for assignment or clause 11 itself was "*integral*" to or formed an "*integral part*" of the overall transaction. Clause 11 either has the legal effect which the plaintiffs contend as a matter of interpretation and as a matter of law or it does not. It is well established that evidence of the subjective intentions of the parties to a contract or of their prior negotiations is not admissible. The position was neatly summarised by Fennelly J. in *ICDL v. European Computer Driving Licence Foundation Limited* [2012] 3 I.R. 327 where, having summarised the appropriate principles of contractual interpretation, he stated:

> "*The exercise is to be conducted objectively. The parties are not permitted to give evidence of their subjective intentions or of the negotiations leading to the conclusion of the contract*." (per Fennelly J. at para. 69, p. 352).

52. The question of whether the plaintiffs or any other party to the legal agreements under which Gary Smith acquired the interests of John and Frank Smith in the Centre and the car park regarded the licence or clause 11 itself as being integral or forming an integral part of the overall transaction is, therefore, neither here nor there. To the extent that the plaintiffs may be in a position to give evidence of this (and I offer no view on this save to say that it is not clear that such evidence would be admissible), I do not believe that discovery of the documents sought in this category can advance the position one way or the other.

53. In these circumstances, having regard to what is admitted on the pleadings and on the stated basis on which the plaintiffs require discovery of the documents sought in this category, I am not satisfied that the documents sought here are relevant or necessary for the fair disposal of the issues in this case or for saving costs. Accordingly, I refuse to order discovery of the documents sought in category 1.

(2) Category 2

The discovery sought
54. The documents sought in this category are as follows:

> *"All documents evidencing the manner in which the Set off clause (also defined as clause 11 in the amended defence and counter claim) was applied and/or given effect to by Gary Smith and/or the Receiver and/or the plaintiff."*

The arguments on this category
55. The basis on which it is said by the plaintiffs that the documents sought in this category are relevant is that it is pleaded at para. 25 of the amended statement of claim that following the execution of the licence for assignment and up to the appointment of the Receiver, the set off clause was applied and given effect to by the plaintiffs and by Gary Smith by the mutual discharge of their respective liabilities to one and other and that, in recognition of the set off clause, neither party discharged its respective liabilities until the other was also in a position to do so.

56. This is denied at para. 29 of the amended defence and counterclaim where it is denied that clause 11 was applied and given effect by the plaintiffs and by Gary Smith in the manner described at para. 25 of the amended statement of claim or at all. Paragraph 29 goes on to plead that even if before the Receiver's appointment the plaintiffs and Gary Smith did act in the manner pleaded, it is denied that those actions are of any legal relevance to the proceedings.

57. The plaintiffs claim, therefore, that the documents sought in this category are relevant. They also claim that it is necessary that they obtain discovery for the same reasons as were advanced in respect of category 1.

58. The Receiver's position is that documents sought in this category are neither relevant nor necessary. The Receiver points out that para. 25 of the amended statement of claim mentions the plaintiffs and Gary Smith and does not mention the Receiver. He notes that para. 25 does not plead that the set off clause was applied and given effect to by the Receiver. As regards the manner in which

the clause was applied as between the plaintiffs and Gary Smith, the Receiver contends that discovery of these documents is not necessary on the basis that documents are likely to be available to the plaintiffs in any event and further that there is no reason to believe that the Receiver would have any such documents.

59. The parties elaborated upon and reiterated the reasons given for seeking and refusing discovery of the documents sought in this category in the affidavits sworn by Ms. Foley and by Ms. Smith and in submissions made at the hearing of the application.

60. It was submitted on behalf of the plaintiffs that their case is that the Receiver is bound by the Set off clause and that the fact that the Receiver and the plaintiffs did not discharge their respective liabilities to one another since the Receiver's appointment in 2013 is demonstrable proof of that. The plaintiffs further submitted that their case is that on his appointment the Receiver stepped into the shoes of Gary Smith and is bound by the set off clause. The plaintiffs submitted that since these claims are all denied by the Receiver the application of the set off clause is a central issue in dispute between the parties and the documents sought are, therefore, relevant and necessary.

61. In response, it was submitted on behalf of the Receiver that the plaintiffs themselves know well how the set off clause is alleged to have operated and do not require documents to establish this. The Receiver further submitted that the set off clause had not in fact been operated by the parties since his appointment save that Dunnes Stores had withheld payment of service charges under the anchor lease.

My conclusions on this category

62. I am satisfied that some discovery should be ordered in respect of the documents sought in this category. However, it is necessary to distinguish between the documents sought evidencing the manner in which the set off clause was applied or given effect to by Gary Smith and the plaintiffs from those evidencing the manner in which it is alleged that that clause was applied or given effect to by the Receiver. Paragraph 25 of the amended statement of claim on which the plaintiffs rely to demonstrate the relevance of the documents sought in this category refers only to the plaintiffs and Gary Smith and the period following the execution of the licence for assignment and prior to the appointment of the Receiver. It does not include any plea to the effect that the set off clause was applied or given effect to by the Receiver following his appointment. Paragraph 29 of the amended defence and counterclaim contains the Receiver's denial of what is pleaded at para. 25 of the amended statement of claim which, as noted, does not concern any alleged application of or giving effect to the set off clause by the Receiver. I have looked elsewhere in the amended statement of claim and amended defence and counterclaim to see whether there are any other pleas which might make relevant documents evidencing the manner in which it is alleged the set off clause was applied or given effect to by the Receiver. I could find no such other relevant pleadings. At para. 45 of the amended statement of claim it is pleaded that the plaintiffs had not pursued the liability of the Receiver on his occupation and use of the car park on the basis that such liability had continuously been set off against the liability of Dunnes Stores to the Receiver in respect of service charges pursuant to the anchor lease. This plea is directed to what the plaintiffs have done and not what the Receiver has done in purportedly applying or giving effect to the set off clause and so does not assist the plaintiffs in seeking the discovery sought in this category. It is that plea which is denied at para. 49 of the amended defence and counterclaim. Paragraph 46 of the amended statement of claim contains the plaintiffs' claim as to what should happen in relation to the Receiver's liability to Almonte in accordance with the set off clause. That plea is responded to at para. 50 of the amended defence and counterclaim to the effect that even if the Receiver did have a liability to Almonte (which he denies), such liability could not be set off against the liability of Dunnes Stores to the Receiver, whether pursuant to Clause 11 or otherwise. These pleas, therefore, are based on what the plaintiffs alleged they have done or what they allege the position should be under the set off clause but not what the Receiver actually did following his appointment. Again, therefore, they do not assist the plaintiffs.

63. It does not seem to me that insofar as the documents sought in this category evidence the manner which it is alleged the set off clause was applied or given effect to by the Receiver. They are relevant to any issue raised on the pleadings. I do not believe that they are.

64. It will ultimately be a question of law as to whether the Receiver is bound by the set off clause and the question of the disclaimer is certainly relevant to that issue. The question of law will also be dependent upon facts. However, having regard to the manner in which the case has been pleaded as against the Receiver, documents evidencing the manner in which the set off clause was allegedly applied or given effect to by the Receiver is not relevant to the pleaded case relied upon by the plaintiffs to support a request for discovery or to any other pleadings which I can discern. Accordingly, I refuse to order the Receiver to make discovery of documents evidencing the manner in which it is alleged the set off clause was applied or giving effect to by him.

65. However, the plaintiffs have clearly pleaded that the set off clause was applied and given effect to by the plaintiffs and by Gary Smith following the execution of the licence for assignment and prior to the appointment of the Receiver. That plea is contained in para. 25 of the amended statement of claim and is denied at para. 29 of the amended defence and counterclaim. Insofar as the plaintiffs seek discovery in this category of documents evidencing the manner in which the set off clause was applied and/or given effect to by Gary Smith and/or the plaintiffs, the discovery is clearly relevant to matters in issue between the parties. While it is stated on behalf of the Receiver that it is unlikely that he has any documents falling within this category, that is not a reason for not ordering the discovery providing it is relevant and necessary. If the Receiver does not have any such documents then he can confirm that in his affidavit of discovery. Similarly, merely because it is possible or indeed perhaps likely that the plaintiffs themselves may have documents evidencing the manner in which the set off clause was applied or given effect to by Gary Smith and themselves following the execution of the licence for assignment and prior to the appointment of the Receiver, there is not a reason for not ordering discovery of those documents. It is possible, for example, that the Receiver will have documents concerning the manner in which the set off clause was allegedly applied or given effect to by Gary Smith in respect of the period prior to the appointment of the Receiver. I am satisfied that discovery of documents evidencing the manner in which the set off clause was applied and/or given effect to by Gary Smith and/or the plaintiffs in respect of the period following the execution of the licence for assignment and prior to the appointment of the Receiver are both relevant and necessary for fairly disposing of an issue in the proceedings.

66. In the circumstances, I will make an order directing the Receiver to make discovery of documents falling within this category, as amended. In particular, I will direct the Receiver to make discovery of the following documents:-

> *"All documents evidencing the manner in which the set off clause (also defined as clause 11 in the amended defence and counterclaim) was applied and/or given effect to by Gary Smith and/or by the plaintiffs following the execution of the licence for assignment on 24 November 2006 and prior to the appointment of the Receiver on 5 February 2013."*

(3) Category 3

The discovery sought

67. The documents in respect of which discovery is sought by the plaintiffs in this category are as follows:-

> *"All documents evidencing the basis of the Receiver's occupation, management and/or control of the car park and/or the manner in which the Receiver has occupied, controlled and/or managed the car park, including, but not limited to, all documents evidencing the alleged exercise by the Receiver of the rights reserved to the landlord under the car park long lease and/or the manner in which the Receiver invoked the landlord's right of entry."*

The arguments on this category

68. The plaintiffs contend that the documents sought in this category are relevant to issues raised in the proceedings. They refer to paras. 33 and 28 of the amended statement of claim. At para. 33 of the amended statement of claim, it is pleaded that following his appointment on 5th February, 2013, the Receiver, replacing Gary Smith, commenced occupying, controlling and managing the car park and continues to do so and that, following his appointment, there was no practical change in the manner in which the car park was occupied, controlled and managed. At para. 38 it is pleaded that immediately prior to the appointment of the Receiver, Gary Smith was in occupation of the car park pursuant to the car park occupational lease and that following his appointment, the Receiver stepped into the shoes of Gary Smith and assumed the benefit of the car park thereafter. It is further pleaded that the Receiver's continued occupation and use of the car park was based on the car park occupational lease and that, in taking the benefit of the car park, the Receiver also assumed the corresponding obligations thereunder including the liability to pay rent to Almonte under the relevant lease.

69. These pleas are denied by the Receiver at paras. 38, 39 and 44 of the amended defence and counterclaim. At para. 39, the Receiver pleads that, following his appointment, he has not been in occupation of the car park pursuant to the tenant's interest under the car park occupational lease but rather he has exercised the rights reserved to the landlord under the car park long lease to operate and manage the car park pursuant to certain provisions of that lease.

70. That plea concerning the basis on which the Receiver has operated and managed the car park is denied by the plaintiffs at para. 8 of the reply and defence to counterclaim. The plaintiffs further rely in support of their application for discovery of these documents on para. 50.5 of the reply and defence to counterclaim where it is pleaded that insofar as the Receiver claims to operate and manage the car park pursuant to the landlord's rights of entry under the car park long lease, the plaintiffs deny that the Receiver properly invoked the landlord's rights of entry thereunder. In particular, the plaintiffs plead that the Receiver failed, refused or neglected to provided any notice to Almonte of his alleged exercise of the landlord's right of entry.

71. It is contended, therefore, on behalf of the plaintiffs that the documents sought in this paragraph insofar as they are directed to the basis of the Receiver's occupation, management and control of the car park and the manner in which he has occupied, controlled and managed it are relevant to matters in issue in the proceedings. It is also contended that the documents sought in this category are relevant to the issue as to whether the Receiver is bound by pre-Receivership contracts and, in particular, the car park occupational lease and the set off clause contained in the licence for assignment in that if the Receiver sought to benefit from such contracts, he should be deemed to have adopted them and be bound by them thereafter. There is a further basis on which it is said that the documents sought in this category are relevant. The plaintiffs contend that discovery of these documents is necessary for the same reasons as are advanced in category 1.

72. In response, the Receiver advances a number of reasons for refusing discovery of the documents in this category. First, it is argued on his behalf that it is not in dispute that the Receiver has operated and managed the car park since his appointment (and reference is made to para. 39 of the amended defence and counterclaim). It is submitted that most of the factual details of that operation and management are not the subject of any factual dispute. Second, it is argued that the issues in dispute are, in reality, issues of law rather than issues of fact and that those issues include whether the Receiver was exercising rights under the car park long lease, the car park occupational lease or otherwise and whether, as a matter of law, the Receiver's actions constituted "occupation" on the car park. Third, insofar as there are any factual issues in dispute, it is contended that discovery is not necessary to determine such issues. In that regard, it is submitted on behalf of the Receiver that his actions in relation to the car park following his appointment and all of the communications between the Receiver and the plaintiffs in relation to the car park are within the plaintiffs' own knowledge and range of proof and that if the plaintiffs wish to make the case that the Receiver has occupied the car park under the car park occupational lease since his appointment, the plaintiffs can do so on the evidence of their own witnesses and on the basis of documents already available to them which they do not require by way of discovery. Fourth, it is submitted that the category is excessively broad and will encompass irrelevant and unnecessary documents.

73. The parties reiterated the basis upon which discovery of the documents sought in this category is being sought and the basis for the objections raised on behalf of the Receiver in the affidavits sworn by Ms. Foley and by Ms. Smith. They maintained those grounds and the reasons for rejecting the discovery sought in this category in submissions at the hearing.

My conclusions on this category

74. I am satisfied that it would be appropriate to direct the Receiver to make discovery of certain of the documents sought in this category. It is clear from a review of the pleadings and, in particular, from paras. 33 and 38 of the amended statement of claim and from paras. 38, 39 and 50 of the amended defence and counterclaim that the basis upon which the Receiver came into occupation and commenced operating and managing the car park is in dispute between the parties and will require to be determined at the trial of this action. While it is true that the basis of the Receiver's occupation, management and control of the car park may ultimately be a legal issue, that legal issue can only be determined on the basis of facts. It is possible that the Receiver will have documents which disclose the basis on which he commenced occupying and then managed, operated and controlled the car park following his appointment. Those documents are, in my view, relevant to an important issue in the proceedings. While it is true that many of the facts may not ultimately be in dispute, I cannot say at this stage that the relevant facts are all admitted and so documents evidencing the basis of the Receiver's occupational management and/or control of the car park are relevant and it may well be necessary for the plaintiffs to obtain the discovery of those documents for the purposes of fairly addressing that issue at the trial.

75. However, I do not believe that it is necessary for the plaintiffs to obtain discovery of documents evidencing the manner in which the Receiver has occupied, controlled or managed the car park. It does not appear to me in dispute that the Receiver has, in fact, occupied, controlled and managed the car park following his appointment. Indeed, the Receiver's occupation, control and management of the car park must be clear for all to see. The plaintiffs can give evidence of the objective manifestation of the Receiver's occupation, control and management of the car park without the need for discovery of the documents sought in this category on that issue. Further, the manner of the Receiver's use of the car park is addressed in another category, category 5 in respect of which there is partial agreement between the parties. I do not believe, therefore, that any further discovery directed to the manner of his occupation, management and control is necessary.

76. In those circumstances, I will direct the Receiver to make discovery of the following documents in respect of category 3 (as amended by me)

> *"All documents evidencing the basis of the Receiver's occupation, management and/or control of the car park including, but not limited to, all documents evidencing the alleged exercise by the Receiver of the rights reserved to the landlord under the car park long lease and/or the manner in which the Receiver allegedly invoked the landlord's right of entry under that leave."*

(4) Category 5 (balance in dispute)

The discovery sought

77. The plaintiffs initially sought discovery of the following documents under this category:

> *"All documents evidencing and/or relating to the use by the Receiver of the car park, including, but not limited to, use by the Receiver of the car park in any of the ways particularised in para. 34 of the amended statement of claim."*

78. Through the constructive engagement of the parties, it has been agreed that the Receiver will make discovery of the following documents under this category:

> *"(i) Car park income statement for the period of the Receivership.*
>
> *(ii) Copies of all rates and utilities invoices and receipts in respect of the car park.*
>
> *(iii) A document setting out details of expenditure in relation to the car park. The plaintiffs reserve the right to raise further queries on this document.*
>
> *(iv) Copies of all leases or licences entered into by the defendant with tenants of the Centre.*
>
> *(v) Copies of all leases or licences or other contracts relating to the retained part of the car park.*
>
> *(vi) Any side agreements entered into by the defendant with tenants of the centre in respect of the use of any part of the car park."*

79. The plaintiffs have maintained their request for discovery of the following documents said to fall within this category over and above the documents which the Receiver has agreed to discover:

> *"All documents evidencing the matters pleaded at paras. 34.2, 34.3, 34.6 and 34.8 of the amended statement of claim."*

The arguments on this category

80. The plaintiffs contend that the documents of which they are maintaining their request for discovery in respect of this category are relevant to matters in issue in the proceedings. They refer to certain provisions of para. 34 of the amended statement of claim. That paragraph provides particulars of the occupation, control and management of the car park by the Receiver and follows on from the plea at para. 33 that the Receiver commenced occupying, controlling and managing the car park as and from the date of his appointment on 5th February, 2013 and continues to do so in circumstances where there was no practical change in the manner in which the car park was occupied, controlled and managed following his appointment. At para. 34, the plaintiffs plead that since his appointment the Receiver has done certain things in pursuance of his occupation, control and management of the car park. Amongst the actions taken by the Receiver which are relied upon to support the discovery sought in what is left of this category are the following:

> *"34.2 Controlled and operated entry to and exit from the car park.*
>
> *34.3 Relied on the car park to attract new tenants to the Centre.*
>
> *34.6 Retained cleaning contractors to clean the car park on a regular basis.*
>
> *34.8 Maintained and coordinated a number of services connecting between the car park and the centre."*

81. Paragraph 38 of the amended defence and counterclaim contains a general denial by the Receiver of (*inter alia*) the contents of para. 34 of the amended statement of claim. As noted earlier, para. 39 of the amended defence and counterclaim goes on to plead that the Receiver has exercised the rights reserved to the landlord under the car park long lease to operate and manage the car park and has not been in occupation of the car park pursuant to the tenant interest under the car park occupational lease. While the plaintiffs rely on para. 41 of the amended defence and counterclaim in support of their contention that the documents in respect of which the discovery request under this category is being maintained are relevant, para. 41 is not directed to any of the pleas in respect of which the discovery request is being maintained. Paragraph 41 is a plea in response to paras. 34.9, 34.10, 34.11 and 35 of the amended statement of claim and not in response to paras. 34.2, 34.3, 34.6 and 34.8. The latter pleas are, however, denied in general terms in para. 38 of the amended defence and counterclaim. In addition to contending that the documents are relevant having regard to these pleas, the plaintiffs also contend that they are relevant to the issue as to whether the Receiver is banned by pre-Receivership contracts and to the issue as to whether the Receiver has sought to benefit from such contracts such that he must be deemed to have adopted them. On the requirement of necessity, the plaintiffs rely on the same reasons as are advanced in respect of category 1.

82. On behalf of the Receiver, it is submitted that the documents in respect of which discovery has been offered under this category are sufficient and that anything else is unnecessary. As regards the matters pleaded in paras. 34.2, 34.6 and 34.8 of the amended statement of claim, it is contended that those issues can adequately be dealt with by way of oral evidence and that discovery is, therefore, not necessary. As regards the documents sought in respect of para. 34.3, the Receiver contends that the offer he has made to discover copies of all leases or licences entered into by him is sufficient. It is further contended in response to the documents sought in this category that the Receiver swore an affidavit in response to the application for interlocutory injunctive relief in the proceedings in which he stated that he does not dispute that he has arranged for the provision of the cleaning services to the car park.

83. These points are reiterated and elaborated upon in the affidavits sworn by Ms. Foley and by Ms. Smith and in the submissions advanced by the parties at the hearing. The plaintiffs again rely on the *dicta* of Fennelly J. in *Ryanair*. They make the further point that while the Receiver has offered to discover leases and licence entered into by him, that is not sufficient and it may very well be the case that the Receiver unsuccessfully sought to coax potential tenants in circumstances where no lease or licence was ultimately executed and that documents evidencing any such attempts would be relevant.

My conclusions on this category
84. I am satisfied that the offer made by the Receiver in respect of the documents to be discovered under this category is sufficient. While it might be said that having regard to the pleadings, the documents are relevant, I cannot see how it is necessary for the fair disposal of the case that the plaintiffs obtain discovery of the further documents which they seek over and above those which the Receiver has agreed to discover under this category. I am not persuaded that it is necessary for the plaintiffs to obtain discovery of these additional documents for the fair disposal of the case or that such discovery will result in a saving as to costs. The contrary will, in my view, be the case. It is unclear from the document descriptions or from the reasons advanced as to what documents the plaintiffs in reality seek under the balance of this category which remains in dispute. Nor does it appear that there is any real factual dispute between the parties as to what the Receiver has or has not done in terms of his occupation, control and management of the car park. The real dispute appears to be the basis upon which the Receiver has taken the steps he has taken, which is primarily a legal issue. I am also satisfied that if the plaintiffs do require further information in relation to the steps or actions taken by the Receiver in respect of the matters alleged at paras. 34.2, 34.3, 34.6 and 34.8 of the amended statement of claim, it would be open to the plaintiffs to seek this information by raising interrogatories. I refer in this context to the observations of Kelly J. in the High Court in *Browne* and in the Court of Appeal in *McCabe* as to the usefulness of interrogatories in lieu of discovery. Those observations are particularly apposite in the context of the request for discovery of the balance of the documents sought in this category.

85. Consequently, I am persuaded that the Receiver's offer of discovery in respect of documents under this category is sufficient and that no further discovery is required. Therefore, I refuse to direct the Receiver to make discovery of the remaining documents sought under this category. The plaintiffs can, if they wish, serve interrogatories seeking any additional information which may be required in relation to the actions or steps allegedly taken by the Receiver as referred to in the relevant sub paras. of para. 34 of the amended statement of claim.

(5) Category 6

The discovery sought in this category
86. The documents which the plaintiffs seek by way of discovery in this category are as follows: -

> *"All documents evidencing and/or relating to the disclaimer, including, but not limited to all documents evidencing and/or relating to the validity of the disclaimer and/or the receipt of the disclaimer by the Receiver and/or AIB."*

This is one of the categories in which the plaintiffs have not replaced the words "*relating to*" by the words "*recording*".

The arguments on this category
87. The plaintiffs contend that the documents sought in this category are relevant to a matter in issue in the proceedings. The plaintiffs refer to para. 32 of the amended statement of claim. That paragraph follows a number of paragraphs (paras. 29-31) under the heading "*The purported disclaimer of the car park occupational lease*". In para. 30 of the amended statement of claim, it is stated that the Receiver contends that Gary Smith's trustee in bankruptcy in England and Wales issued a notice of Disclaimer under s. 315 of the Insolvency Act, 1986, purporting to disclaim his interest in the car park occupational lease and in a put in call option agreement in respect of the car park. At para. 32 it is pleaded that the disclaimer was not received by Almonte until it was sent under cover of a letter dated 25th September, 2015. At para. 32, it is stated that the letter contends that AIB received the disclaimer within seven days of its issue but that that is not accepted by the plaintiffs. It is then stated that the plaintiffs contend that as a matter of English law in order for the disclaimer to be valid it must have been received by AIB within seven days of its issue and that AIB and the Receiver have yet to establish the validity of the disclaimer to the satisfaction of the plaintiffs. In those circumstances, it is pleaded that the plaintiffs dispute the validity of the disclaimer. The plaintiffs contend that this plea is not accepted by the Receiver and refer to para. 35 of the amended defence and counter claim. At para. 35 the Receiver pleads the following: -

> "(a) As a matter of English law, the disclaimer is presumed to be valid unless its validity is successfully challenged in the English courts.
>
> (b) Neither the plaintiffs nor any other party have ever sought to challenge the disclaimer, or contest its validity, in England.
>
> (c) It is not open to the plaintiffs in these proceedings to challenge the validity of the disclaimer or insist on proof that procedural requirements of English law were observed. The Irish courts do not have jurisdiction to invalidate an act of a trustee in an English bankruptcy on the grounds of non-compliance with English procedural rules. The Receiver contends that at the disclaimer must be treated as valid and effective unless the English courts reach a contrary conclusion.
>
> (d) Neither AIB nor the Receiver bears any onus of establishing the validity of the Disclaimer to the satisfaction of the plaintiffs.
>
> (e) In any event, the Receiver asserts that AIB did in fact receive the disclaimer within seven days of its issue and that he has already adduced evidence of this in the application for the interlocutory injunction brought by the plaintiffs in these proceedings."

88. The plaintiffs then refer to para. 5 of the reply and defence to counterclaim which joins issue with what is said at para. 35 of the amended defence and counter-claim and asserts that the Irish courts do have jurisdiction to consider whether or not the disclaimer is valid. The plaintiffs further do not admit that AIB in fact received the disclaimer within seven days of its issue (para. 5.5 of the reply and defence to counterclaim). Further, paras. 6 and 7 of the reply and defence to counterclaim deny that the disclaimer is valid. In those circumstances, the plaintiffs contend that the documents sought in this category are relevant to matters in issue in the proceedings. They further contend that discovery of the documents sought in this category is necessary for the same reasons as are advanced in respect of Category 1.

89. The Receiver does not accept that the documents sought are relevant or necessary. The Receiver contends that the validity of the disclaimer is not an issue in the proceedings and that the plaintiffs do not seek any relief in relation to the disclaimer. He further contends that even if the validity of the disclaimer, which he says is a matter of English law in respect of which the Irish courts have

no jurisdiction, is a matter in issue in the proceedings, it is an issue of law in respect of which no discovery is required. The only factual issue which arises, according to the Receiver, is whether notice of the disclaimer was received by AIB within seven days of its issue. On that point, the Receiver contends that he does not bear any onus of establishing this nor does he have any right to obtain from AIB any documentation relating to AIB's receipt of the notice of disclaimer and AIB is not a party to these proceedings. Notwithstanding this, the Receiver states that he has obtained AIB's consent to make discovery of an email dated 30th April, 2015 from DLA Piper UK LP ("DLA") to AIB enclosing the notice of disclaimer. He does so on the basis that disclosure of that document does not amount to a waiver of any legal privilege that may attach to any other document. The Receiver contends that that document establishes the date of service of the notice of disclaimer on AIB and that no further documents are relevant or necessary to resolve any factual issue in dispute in the proceeding on this question.

90. The affidavits of Ms. Foley and Ms. Smyth and the submissions of the parties at the hearing reiterated and expanded on these various points. It was further submitted on behalf of the Receiver that the plaintiffs have already been furnished with a copy of the email from DLA to AIB enclosing the notice of disclaimer as it was exhibited to an affidavit sworn on behalf of the Receiver in the interlocutory injunction application. The Receiver further stressed that the validity of the disclaimer is not an issue in the proceedings and is a matter of English law in respect of which the Irish courts do not have jurisdiction.

My conclusions on this category

91. I am not persuaded that the plaintiffs are entitled to discovery of any documents under this category over and above the documents already offered on behalf of the Receiver, namely, the email dated 30th April, 2015 from DLA to AIB enclosing the notice of disclaimer. While the plaintiffs have sought to put in issue the validity of the disclaimer in para. 32 of the amended statement of claim, and in paras. 5, 6 and 7 of the reply and defence to counterclaim, no relief is sought by the plaintiffs in relation to the validity of the disclaimer. The Receiver contends that the validity of the disclaimer is a matter of English law and is a matter which can only be determined by the English courts on an application brought before those courts to challenge its validity, however, that is a matter to be addressed at the trial and is not something I can rule on in the context of this discovery application. However, it does not seem to me, based on my review of the pleadings and of the affidavits and submissions made in respect of this category, that there is in reality any factual dispute between the parties touching on the issue of the validity of the disclaimer as such save on the question as to whether notice of the disclaimer was served on AIB within seven days of its issue. That is a factual issue that arises on the basis of the pleadings, although it is not clear what an Irish court could do even if it were satisfied that notice of the disclaimer was not served within the seven day period. Nonetheless, it is an issue raised in the pleadings in respect of which some discovery may arise. The Receiver has offered to discover the email dated 30th April, 2015 from DLA to AIB enclosing the notice of disclaimer. It seems to me that this offer is sufficient. I do not accept that any further documents are relevant to matters at issue in the proceedings or necessary for the purpose of discovery. So I refuse the balance of the plaintiffs' request in respect of this category.

92. I will direct the Receiver to make discovery of the following documents under this category : -

> *"The email dated 30th April 2015 from DLA Piper UK LLP to AIB enclosing the notice of disclaimer.* "

(6) Category 9

The discovery sought in this category

93. The documents sought by the plaintiffs in this category are as follows:

> *"All documents evidencing and/or recording the alleged breach by Almonte of the car park long lease, including but not limited to, the alleged breaches particularised at para. 94 of the amended defence and counterclaim."*

The arguments on this category

94. The plaintiffs contend that the documents sought in this category are relevant and necessary. On the question of relevance, the plaintiffs refer to para. 94 of the amended defence and counterclaim. In that paragraph, the Receiver alleges that Almonte has breached the car park long lease by failing, refusing or neglecting to perform the covenants owed to the Receiver under the lease. The Receiver contends that Almonte has failed to do certain things including keeping the car park open and operating as an efficient shopping centre car park, paying and indemnifying the Receiver against rates, taxes, duties, charges and other outgoings, paying all charges for electricity, gas, water and other services, keeping the car park in a clean and tidy condition, maintaining insurance in respect of the car park and so on. The plaintiffs have denied these allegations at paras. 48 and 49 of the reply and defence to counterclaim. On that basis, it is contended by the plaintiffs that the documents sought in this category are relevant. It is further contended that discovery of the documents sought is necessary for the same reasons as are advanced in respect of category 1.

95. The Receiver does not accept that the documents sought in this category are relevant or that discovery of these documents is necessary. It is submitted on his behalf that there is no material factual dispute to which the documents sought in this category could relate. It is contended on behalf of the Receiver that it is the plaintiffs' case (as set out in the amended statement of claim) that the Receiver has operated the car park since his appointment and that (referring to para. 34 of the amended statement of claim) the Receiver has taken certain steps and actions in relation to the car park, such as discharging the rates and utilities of the car park, retaining cleaning contractors, engaging in the general maintenance, upkeep and repair of the car park and so on. The Receiver submits that the only dispute between the parties is a legal dispute which turns on the interpretation of the two leases in relation to the car park on the question as to whether Almonte was obliged to perform those tasks and functions in relation to the management and operation of the car park as alleged by the Receiver and that such a dispute can be resolved without discovery. Furthermore, the Receiver submits that insofar as there is any factual dispute in relation to the matters pleaded in para. 94 of the amended defence and counterclaim, it is not necessary to obtain discovery for the purpose of resolving that dispute in that the plaintiffs (and, in particular, Almonte) can call witnesses if they wish to make the case (contrary to what it has pleaded in the amended statement of claim) that Almonte has managed the car park since the appointment of the Receiver in February 2013, has discharged the rates and utilities and performed the various other services referred to and can adduce documents to prove this if it is the case. It is, therefore, contended that discovery of the documents sought in this category is not necessary.

96. These points were elaborated upon in the affidavits of Ms. Foley and Ms. Smyth. Ms. Smyth makes the further point that discovery of the documents sought in this category would be oppressive and disproportionate. She further asserts that the fact the plaintiffs are seeking discovery with a view to proving a negative proposition, namely, that the Receiver did not take the various steps pleaded in respect of the car park, in circumstances where the plaintiffs make the case in the amended statement of claim that he did undermines the basis for the request. It is also said that insofar as any information is required in respect of the matters dealt with in para. 94 of the amended defence and counterclaim, that information can be sought by way of interrogatories.

97. In submissions at the hearing, the plaintiffs contended that the Receiver had put these matters in issue by the way in which para. 94 of the amended defence and counterclaim was pleaded, namely, that Almonte was in breach of the provisions of the relevant lease. The plaintiffs submit that while the question as to whether certain matters amount to a breach of the lease may be a legal issue, the facts giving rise to the alleged breach and how Almonte has allegedly failed to perform the relevant covenants are factual issues which are in dispute between the parties.

98. On behalf of the Receiver, it was again submitted that the issue is a legal one and that by virtue of the disclaimer of the car park occupational lease, Almonte has obligations under the car park long lease to maintain the car park, which it has not done. The Receiver submits that the plaintiffs do not need any discovery in respect of this issue as they know what Almonte has or has not done in relation to the maintenance of the car park under the car park long lease and what the Receiver himself has done. Therefore, the receiver submits that there are no factual issues in dispute which would require discovery.

My conclusions on this category
99. The request contained in this paragraph is a very unusual one. In their amended statement of claim the plaintiffs plead that the Receiver has taken certain steps and actions in relation to the car park, such as discharging rates and utilities, retaining cleaning contractors, engaging in general maintenance, upkeep and repair of the car park and maintaining and coordinating services in relation to the car park (para. 34 of the amended statement of claim). In its amended defence and counterclaim the contents of (*inter alia*) para. 34 of the amended statement of claim are denied in general terms at para. 38 of the amended defence and counterclaim, although it is then pleaded, at para. 39, that the Receiver has exercised the landlord's rights under the car park long lease to operate and manage the car park. At para. 94 and subsequent paras. of the amended defence counterclaim, the Receiver pleads that Almonte has in breach of the provisions of the car park long lease failed, refused or neglected to take certain steps or actions in relation to the operation and maintenance of the car park and that he has been required to operate and manage the car park and has incurred costs and expenses in doing so. Those pleas are in turn denied by the plaintiffs at paras. 48, 49 and 50 of the reply and defence to counterclaim. The dispute between the parties on this issue as appears from the pleadings appears to be a rather contrived one at least insofar as it is relied on to suggest that there are factual issues in dispute. In reality the dispute is a legal one as to the basis on which the Receiver took up occupation and provided the various services in relation to the car park since the date of his appointment and, specifically, whether he did so qua landlord under the car park long lease as the Receiver contends, or qua tenant under the car park occupational lease, as the plaintiffs claim. Insofar as there are any factual issues between the parties on the question as to the steps or actions the Receiver took as particularised at para. 94 of the amended defence and counterclaim, and I am not convinced that there are, it does not seem to me that discovery of documents evidencing those various matters, even if they could in light of the rather unusual nature of the pleadings be regarded as relevant within the strict meaning of that term, is necessary or specifically that it is necessary that the plaintiffs obtain discovery of documents evidencing the various matters particularised in para. 94 of the amended defence and counterclaim for the fair disposal of the claim. Moreover, discovery of such documents would certainly not lead to a saving as to costs. Rather it would have the opposite result. This is particularly so in circumstances where the Receiver has agreed to make discovery in respect of documents sought at category 10 including documents setting out expenditure and income in relation to the car park and documents in relation to the loss, damage and expense allegedly suffered by the Receiver as a result of the alleged breaches by Almonte of the car park long lease and in respect of the costs and expenses allegedly incurred by the Receiver in the operation and management of the car park as a result of the alleged failure by Almonte to perform its covenants under the car park long lease. For these reasons, I am not satisfied that it is necessary that the plaintiffs obtain discovery of any additional documents under category 9.

100. The essential dispute between the parties in respect of the matters covered by para. 94 of the amended defence and counterclaim is a legal one. Insofar as it is alleged that the breaches alleged have led to the Receiver incurring costs and expenses in maintaining the car park, documents in relation thereto will be provided by the Receiver on the terms agreed in respect of category 10. Insofar as any further information may be required by the plaintiffs in respect of the matters pleaded at para. 94 of the amended defence and counterclaim, and I am not convinced that any further information is necessarily required, such information can be sought by way of interrogatories in lieu of discovery. I again refer with approval to the observations of Kelly J. in the High Court in *Browne* and in the Court of Appeal in McCabe in relation to the usefulness of interrogatories in lieu of discovery in appropriate cases. This may be such a case.

101. Accordingly, I refuse the plaintiffs' request for discovery in respect of the documents sought in this category.

(b) The Receiver's application against the plaintiffs
102. As noted earlier, the Receiver initially sought voluntary discovery from the plaintiffs of three categories of documents. Through the constructive engagement of the parties, agreement was reached in respect of one of those categories (category 1). An offer was made on behalf of the plaintiffs in respect of another of the categories (category 2). However, that offer was not acceptable to the Receiver. The plaintiffs were not prepared to make voluntary discovery of the third category of documents (category 3). Therefore, there are two categories in issue. I will consider each of them in turn.

(1) Category 2

The documents sought in this category
103. The documents sought by the Receiver under this category are as follows:

> *"All documents evidencing any loss or damage suffered by Dunnes Stores as a consequence of the changes to the Service Hours and Service Yard Access Hours implemented on 1 December 2017 including, without prejudice to the generality of the foregoing, the following:*
>
> > *(b) All management accounts for the Dunnes Stores store at Ashleaf Shopping Centre in respect of all periods between 5 February, 2013 and the time of trial;*
> >
> > *(c) All documents evidencing the number of customers using the Dunnes Stores store at Ashleaf Shopping Centre, and the value of sales at that unit, between 5 February, 2013 and the time of trial;*
> >
> > *(d) All documents evidencing any reputational damage suffered by Dunnes Stores as a result of the changes to the Service Hours and Service Yard Access Hours;*
> >
> > *(e) All documents evidencing any disruption to Dunnes Stores' supply and distribution network as a result of the changes to the Service Hours and Service Yard Access Hours;*
> >
> > *(f) All documents evidencing the labour costs incurred by Dunnes Stores in respect of its store at Ashleaf Shopping*

Centre between 5 February, 2013 and the time of trial;

(g) All documents evidencing the volume of fresh and frozen foods and produce lost or discarded by Dunnes Stores at its store at Ashleaf Shopping Centre between 5 February, 2013 and the time of trial;

(h) All documents evidencing the costs of waste in respect of discarded fresh and frozen goods and produce incurred by Dunnes Stores at its store at Ashleaf Shopping Centre between 5 February, 2013 and the time of trial;

(i) All documents evidencing any steps taken by the plaintiffs to mitigate any loss resulting from the changes to the Service Hours and Service Yard Access Hours, between the date of notification on 25 May, 2017 and the time of trial."

The arguments on this category

104. The Receiver contends that the documents sought in this category are relevant and that discovery of those documents is necessary. On the question of relevance, the Receiver relies on that part of the amended statement of claim which sets out the plaintiffs' complaints in relation to the threatened restriction of services and access to the service yard proposed by the Receiver in a letter dated 25th May, 2017 (paras. 53 to 62 of the amended statement of claim). The plaintiffs plead (at para. 61 of the amended statement of claim) that the Receiver is precluded from restricting the services and access to the service yard by virtue of certain provisions of the anchor lease. At para. 62 it is pleaded that if restricted services and access to the service yard are imposed by the Receiver, Dunnes Stores will suffer significant loss and damage including but not limited to: loss of trade and custom at the anchor unit, reputational damage, disruption to its supply and distribution network, increased labour costs, loss of fresh and frozen goods and produce and increased costs of waste in respect of discarded fresh and frozen goods and produce. The plaintiffs seek damages for breach of contract and/or breach of covenant and for unlawful interference with their economic interests and/or for intentional causing of economic loss.

105. The Receiver denies these claims in the amended defence and counterclaim (paras. 72 and 73). Further, the Receiver relies on para. 74 which (*inter alia*) pleads that the plaintiffs failed to mitigate any alleged loss and damage. In the circumstances, it is contended on behalf of the Receiver that the nature and extent of any loss and damage allegedly suffered by the plaintiffs are in issue between the parties as is the issue as to whether the plaintiffs have mitigated their alleged loss. The Receiver contends that the documents sought in this category are relevant to these issues.

106. The Receiver further contends that discovery of these documents is necessary as this material is not within the Receiver's possession, power or procurement and if he does not obtain discovery of these documents, he will be deprived of an opportunity to properly assess and defend himself against the plaintiffs' claim. It is further contended on his behalf that in order meaningfully to assess the impact of the changes made to the service hours and service yard access hours, the Receiver will require documents in relation to periods both before and after the date on which the changes were implemented, namely, 1st December, 2017 as this will facilitate the Receiver in comparing the position before and after the changes in order to enable him to assess the impact (if any) which those changes may have had on the plaintiffs.

107. The plaintiffs have objected to making discovery of the documents sought in category 2 as sought by the plaintiffs. They make a series of objections in correspondence, in an affidavit sworn by Domhnall Breathnach and in submissions. It is argued that the category is extremely broad and seeks documents extending from five years back right up to the date of trial, which they contend is unnecessary and disproportionate. They submit that some of the documents sought contain financial information which is highly confidential and commercially sensitive. They also note that the manner in which the documents have been described could capture documents of even the most trivial or banal kind (such as every wage slip of employees at the store during the relevant period). They further argue that since the changes to the service hours and access hours in respect of access to the service yard have only been in place since 1st December, 2017, the full impact of those restrictions on the plaintiffs' business is not yet known or documented and that it is, therefore, not possible for the plaintiffs to identify definitive heads of loss and damage arising from the restrictions at this stage.

108. The plaintiffs initially indicated their agreement to make discovery of the following documents:

> *"All documents evidencing any loss or damage suffered by Dunnes Stores as a consequence of the changes to the Service Hours and Service Yard Access Hours implemented on 1 December, 2017 on which the plaintiffs intend to rely for the purposes of these proceedings."*

These arguments were developed in the affidavits sworn by Ms. Smyth on behalf of the Receiver and by Mr. Breathnach on behalf of the plaintiffs. Mr. Breathnach's affidavit contains an additional offer over and above the discovery offered in the Arthur Cox letter of 20th December, 2017 which responded to the Receiver's voluntary discovery request. As of the date of the hearing of the Receiver's application for discovery, the plaintiffs were offering to make discovery of:

> *"All documents evidencing:*
>
> *(a) Any loss or damage suffered by Dunnes Stores as a consequence of the changes to the Service Hours and Service Yard Access Hours implemented on 1 December, 2017 on which the plaintiffs intend to rely for the purposes of these proceedings; and*
>
> *(b) Any steps taken by the plaintiffs to mitigate any loss resulting from the changes to the Service Hours and Service Yard Access Hours since the date of notification on 25 May, 2017."*

109. The parties developed these points in submissions at the hearing.

My conclusions on this category

110. I am not satisfied that it is appropriate to order the plaintiffs to make discovery in the terms sought by the Receiver in this category. While the alleged loss and damage allegedly sustained by the plaintiffs, or rather Dunnes Stores, by reason of the restrictions to the service hours and access to the service yard imposed by the Receiver with effect from 1st December, 2017 is a matter clearly in dispute between the parties and documents evidencing that loss and damage are clearly relevant, it seems to me that the Receiver's request for documents in this category is excessive in a number of respects.

111. First, the period of time in respect of which documents are sought is excessive. While I fully understand that it is necessary for the Receiver to obtain documents for a period prior to the date of the imposition of the restrictions on 1st December, 2017, I do not believe that a persuasive case has been made by the Receiver that discovery should be ordered in respect of the period from 5th February, 2013. A reasonable period prior to the implementation of the restrictions on 1st December, 2017 to enable the Receiver to compare the position prior to the imposition of those restrictions with the position after their imposition would be a period of two years prior to 1st December, 2017 i.e. from 1st December, 2015.

112. Second, I am not satisfied that it would be appropriate to make an order directing the plaintiffs to make discovery up to the date of trial. This would be impractical. However, I do accept that the Receiver is entitled to see documents falling under the category as ordered which evidence the loss and damage claimed by Dunnes Stores in respect of the imposition of the relevant restrictions. The appropriate way of dealing with this is to order discovery of the documents in respect of the period from 1st December, 2015 up to the date of the order. I do not believe that it would be appropriate to order discovery of documents based on what the plaintiffs intend to rely on at the trial. This would reserve to the plaintiffs the entitlement to rely on helpful documents and to withhold documents which are unhelpful to the case which they seek to make. In my view, this would create a real risk of unfairness and so I do not propose to adopt the terminology put forward by the plaintiffs in respect of this category. However, recognising that the Receiver is entitled to be fully informed as to relevant documents evidencing the alleged loss and damage claimed by the plaintiffs arising from the restrictions, it was helpfully suggested on behalf of the plaintiffs at the hearing that the plaintiffs would provide an updated affidavit of discovery in respect of the documents ordered to be discovered in respect of this category prior to the trial. In those circumstances, I will direct that if there are any further documents falling under this category as ordered, the plaintiffs must swear a supplemental affidavit of discovery in respect of those documents no later than 21 days prior to the trial, or within such other period as may be agreed between the parties. In light of the fact that it is not yet clear what losses the plaintiffs will allege arising from the restrictions, I will amend the category description so as to remove specific categories of loss, it being understood that documents evidencing any loss or damage alleged by the plaintiffs arising from the restrictions for the relevant period must be discovered.

113. In those circumstances, I will direct the plaintiffs to make discovery of the following documents under this category:

> *"All documents evidencing:*
>
> > *(a) Any loss or damage suffered by Dunnes Stores as a consequence of the changes to the Service Hours and Service Yard Access Hours implemented on 1 December, 2017 in respect of the period from 1 December, 2015 to date; and*
> >
> > *(c) Any steps taken by the plaintiffs to mitigate any loss resulting from the changes to the Service Hours and Service Yard Access Hours since the date of notification on 25 May, 2017."*

114. I will further direct the plaintiffs to swear a supplemental affidavit of discovery in respect of any documents created or arising in the period following the swearing of the affidavit of discovery and that such supplemental affidavit be sworn no later than 21 days prior to the trial or within such other period as maybe agreed between the parties.

(2) Category 3

The discovery sought in this category
115. The Receiver seeks discovery from the plaintiffs of the following documents in this category: -

> *"All documents evidencing any tax advice received by the plaintiffs in relation to the agreements the subject of these proceedings"*

The arguments on this category
116. The basis on which discovery of these documents was initially sought in the Receiver's request for voluntary discovery was that the documents were relevant in light of the claim made by the plaintiffs that the Receiver is liable to Almonte for rent in respect of the car park pursuant to the car park occupational lease on the grounds that in taking the benefit of the car park it is alleged that the Receiver also assumed the obligations under that lease most notably the liability to pay rent to Almonte (para. 38 of the amended statement of claim). The Receiver denies any liability for rent and denies that he derived the benefit of the car park in the manner alleged by the plaintiffs. The documents are also said to be relevant in respect of the alternative claim made by the plaintiffs (at para. 42 of the amended statement of claim) that the Receiver was a trespasser on the car park and is, as a consequence, liable to pay mesne rates or profits to Almonte in respect of his occupation of the car park. It was also noted that the plaintiffs claim damages for trespass to include mesne rates or profits in the prayer for relief in the statement of claim. The plaintiffs' claim mesne rates or profits is also denied by the Receiver (at para. 47 of the amended defence and counterclaim). The Receiver further pleads that even if he were in principle liable for mesne rates or profits something he denies) the quantum of such rates or profits would be nil or nominal. It was, therefore, asserted in the Receiver's request for voluntary discovery that the question as to whether the Receiver was liable for rent in respect of the car park on the basis that he derived a benefit from its use or, in the alternative, whether he is liable for mesne rates and the quantum of any such rent or mesne rates are all issues in the proceedings.

117. The Receiver's request also referred to affidavits sworn in the context of the interlocutory injunction application made by the plaintiffs where it was asserted on behalf of the Receiver that the rental obligation under the car park occupational lease appeared to be an aspect of a "*complex tax-driven title structure for the Centre as a whole*". It is, therefore, asserted that the documents sought in this category are relevant to the question as to whether the alleged rent obligation, was an element of a "*complex tax-driven title structure*" rather than determined on the basis of any economic value or market rent value of the car park. This is asserted on behalf of the Receiver, would damage the plaintiffs' case in relation to the claim for rent or mesne rates. It is also said that discovery of these documents is necessary in light of the "significant *imbalance between the parties' means of accessing relevant documents*" and that the Receiver has no means of ascertaining the tax rationale for the title structure of the Centre in the late 1990's/early 2000's including the rationale for the rent payable under the car park occupational lease other than by way of discovery.

118. The plaintiffs rejected the Receivers' request for voluntary discovery of the documents sought in this category in their response dated 20th December, 2017. In that response, it is asserted on behalf of the plaintiffs that the contention that the rental obligation in question appeared to be an aspect of a "*complex tax driven title structure*" is not part of the pleaded case and is not an issue in the proceedings.

119. These respective contentions were elaborated upon in the affidavits worn by Ms. Smyth and by Mr. Breathnach and in submissions at the hearing of the application. The furthest the Receiver could advance the request for discovery of these documents was that if the plaintiffs had obtained "*significant tax advantages*" from the structuring of the deal, it would be relevant to the calculation of rent or mesne rates. The plaintiffs contended that the documents were directed to an issue which is not pleaded and in any event, even if relevant, (which the plaintiffs contend they are not), would not satisfy the test of necessity.

My conclusions on this category
120. I am satisfied that there is no basis whatsoever on which the Receiver could obtain discovery of the documents sought in this category. Documents evidencing any tax advice received by the plaintiffs in relation to the agreements the subject of the proceedings do not appear to me to be relevant to any issue raised in the pleadings. Nowhere is it asserted by the Receiver that the plaintiffs sought such tax advice in relation to the agreements or that they obtained significant (or any) tax advantages by virtue of the manner in which the transactions were structured which the court should take into account in calculating for any alleged obligations which may be owed by the Receiver to either of the plaintiffs by way of rent or mesne rates or profits. The issue does not arise at all on the pleadings. Since relevance is determined by reference to the pleadings, in my view, the documents sought in this category are not relevant. It will be a matter for the plaintiffs to give evidence (presumably including expert evidence, although that is obviously a matter for the plaintiffs) on what the appropriate level of mesne rates or profits would be, if that issue ever comes to be determined in the proceedings. Even if I were satisfied that the documents sought in this category were relevant (and I am not), I do not believe that discovery of the documents is necessary for the fair disposal of the case or for saving costs. Therefore, I refuse to order any discovery in respect of this category.

Conclusions in relation to discovery

(a) Conclusions in relation to the plaintiffs' application
121. As noted earlier, the Receiver has agreed to make discovery of the documents contained in Categories 4, 7, 8 and 10 (as those categories were amended by agreement). The Receiver has also agreed to make discovery in part of the document sought in category 5. As regards the categories in dispute, for the reasons outlined earlier in this judgment, I have reached the following conclusions in relation to those categories.

Category 1
122. The discovery sought in this category is refused.

Category 2
123. I will make an order directing the Receiver to make discovery of the following documents:

> *"All documents evidencing the manner in which the set off clause (also defined as Clause 11 in the amended defence and counterclaim) was applied and/or given effect to by Gary Smith and/or by the plaintiffs following the execution of the licence for assignment on 24 November, 2006 and prior to the appointment of the Receiver on 5 February, 2013."*

Category 3
124. I will direct the Receiver to make discovery of the following documents in respect of this category:

> *"All documents evidencing the basis of the Receiver's occupation, management and/or control of the car park including, but not limited to, all documents evidencing the alleged exercise by the Receiver of the rights reserved to the landlord under the car park long lease and/or the manner in which the Receiver allegedly invoked the landlord's right of entry under that lease."*

Category 5
125. Noting that some discovery has been agreed between the parties in respect of this category, I refuse to direct the Receiver to make discovery of any further documents under category 5.

Category 6
126. I will direct the Receiver to make discovery of the following documents under this category:

> *"The email dated 30th April, 2015 from DLA Piper UK LLP to AIB enclosing the notice of disclaimer."*

Category 9
127. I refuse the plaintiffs' request for discovery in respect of the documents sought in this category.

(b) Conclusions in relation to Receiver's application against plaintiffs:
128. The plaintiffs have agreed to make discovery of the documents sought in Category 1 of the Receiver's request for voluntary discovery. As regards the disputed categories, Categories 2 and 3, I have reached the following conclusions for the reasons outlined earlier in this judgment:

Category 2
129. I will direct the plaintiffs to make discovery of the following documents under this category.

> *"All documents evidencing:*
>
> > *(a) Any loss or damage suffered by Dunnes Stores as a consequence of the changes to the Service Hours and Service Yard Access Hours implemented on 1 December, 2017 in respect of the period from 1 December, 2015 to date; and*
> >
> > *(b) Any steps taken by the plaintiffs to mitigate any loss resulting form the changes to the Service Hours and Service Yard Access Hours since the date of notification on 25 May, 2017."*

130. I will also direct the plaintiffs to swear supplemental affidavit of discovery in respect of any documents created or arising in the period following the swearing of the affidavit of discovery and that such supplemental affidavit be sworn no later than 21 days prior to

the trial or within such other period as may be agreed between the parties.

Category 3
131. I refuse the Receiver's request for discovery in respect of the documents sought in this category.

132. I will hear counsel in relation to the terms of the orders to be made on foot of this judgment.