THE COURT OF APPEAL

Neutral Citation Number: [2019] IECA 138

Record No. 2017/285

Irvine J.
Baker J.
Costello J.

BETWEEN/

CAMIVEO LIMITED

PLAINTIFF/RESPONDENT

- AND–

DUNNES STORES

DEFENDANT/APPELLANT

JUDGMENT of Ms. Justice Costello delivered on the 9th day of May 2019

1. The deceptively simple issue for determination on this appeal is whether the appellant ("Dunnes") is entitled to close and keep closed the main doors of its retail unit situate in Edward Square in the city of Galway. In the High Court, Barrett J. held that it was not, and granted an order restraining Dunnes from disabling the automatic opening mechanism of the doors from its unit in Edward Square shopping centre onto Williams Street ("the Doors") during the opening hours of its department store at the Centre, which is owned by the respondent, and ordering that it keep the Doors open during the opening hours of its department store. In addition, the High Court awarded the respondent damages, including aggravated damages, in respect of the wrongful closure of the Doors in breach of various covenants in the lease of the unit. Dunnes appealed the entire judgment and order.

Background

2. The issues in the case turn on the interpretation of the planning permission for the Edward Square Shopping Centre and the rights and obligations of Dunnes as a tenant of the anchor unit in the Edward Square Shopping Centre. I propose first to deal with the planning permission for the development and then to consider the provisions of the lease under which Dunnes occupies the anchor unit in the Centre.

Application for planning permission

3. In July 1997 Radical Properties Limited ("Radical") applied for planning permission to develop a site in Galway city centre. The site was bounded by William Street to the north-west, Eyre Square to the north-east, Merchants Road to the south-east and Abbeygate Street to the south-west. The site was an in-fill u-shaped site accessible only from William Street via Castle Street (also called Barrack Lane). It adjoined and backed onto the existing developments of Eyre Square Shopping Centre and Corbett Court Shopping Mall.

4. The application was for planning permission for:-

> *"A mixed development on lands between Barrack Lane/Castle Street and Whitehall (formally Corbetts' Yard) and at No 11 Abbeygate Street. The development comprises residential, office use and retail linking into the existing Eyre Square Shopping Centre in Galway City Centre. Permission (1) to construct a building of four storeys above ground floor and lower ground floor to provide 7,499 sq. m. retail floor space (department store and up to 8 no. retail units and extension to existing retail unit), 72 m2 retail kiosks, 343, sq.m. office floor space and 3,749 residential floor space (49 no. residential units),* ***including alterations to existing Eyre Square Shopping Centre to facilitate proposed linkages…****" (emphasis added)*

5. As the application for planning permission included linking into the existing Eyre Square Shopping Centre and alterations to that Centre to facilitate the proposed linkages, the application for planning permission included letters from the owners of properties who were affected by the proposed pedestrian or other linkages acceding to the proposed alterations.

6. Radical submitted revised plans and additional information on the 17th October, 1997 and on the 7th January,1998 Galway Corporation decided to grant Radical planning permission. That decision was appealed to An Bord Pleanála. Further documents were submitted by Radical in response to objections raised by third parties.

7. On the 1st September, 1998 An Bord Pleanála granted Radical planning permission for the development described in the public notice as:-

> *"Residential, office use and retail linking into Eyre Square Shopping Centre in Galway city centre. The above planning application seeks permission (1) to construct a building of four storeys above ground floor and lower ground floor to provide 7,499 square metres retail floor space (department store and up to eight retail units and extension to existing retail unit), 72 square metres retail kiosks, 343 square metres office space and 3,749 residential floor space (49 residential units),* ***including alterations to existing Eyre Square Shopping Centre to facilitate proposed linkages…in accordance with plans and particulars lodged with [Galway] Corporation.****" (emphasis added)*

8. The decision was:-

> *"to grant permission for the said development in accordance with the said plans and particulars, subject to the conditions specified in the Second Schedule hereto, the reasons for the imposition of the said conditions being set out in the said Second Schedule and the said permission is hereby granted subject to the said conditions."*

9. Condition 1 in the second schedule provided:-

> *"The proposed development shall be carried out in accordance with the plans and particulars lodged with the application as supplemented and amended by the plans and particulars received by the planning authority on the 14th day of October, 1997, the 3rd day of November, 1997 and the 18th day of November, 1997 and by An Bord Pleanála on the 6th day of March, 1998 and the 20th day of July, 1998, except as may otherwise be required in order to comply with the following conditions.*
>
> *Reason: to clarify the development permitted."*

10. One of the drawings submitted in March 1998 to An Bord Pleanála showed, *inter alia*, revised entrance doors from the anchor unit into the open U-shaped courtyard around which the other retail units in the development were situate. The entrance comprised a lobby with double automatic doors two abreast the Doors

11. A block plan referred to as L:37 was submitted to An Bord Pleanála on the 6th March, 1998, and is one of the documents referred to in Condition 1 of the grant of planning permission. The block plan shows the site and the proposed development in context. Two existing developments are shown, Corbett Court Shopping Mall marked in green and Eyre Square Shopping Centre marked in yellow. The proposed development is situated adjoining these two parcels of land and is coloured red. The entrance to the proposed development from William Street into Castle Street is shown as a pedestrian entrance and is part of the pedestrian zone in Galway city. A series of black dots are indicated on the block plan. One line comes from William Street up Castle Street and branches into two. One branch passes to the right and continues over the Corbett Court development and the Eyre Square Shopping Centre. This branch shows two proposed exits, one on to Williams Gate Street from Corbett Court and the other on to Eyre Square via the Eyre Square Shopping Centre.

12. The second branch continues straight through the Doors into the anchor unit of the proposed development. The dotted line continues by showing a route into the Eyre Square Shopping Centre over a bridge to be constructed over the Galway City walls as part of the proposed development. A second dotted line continues directly ahead into a different section of the Eyre Square Shopping Centre. Thereafter the dotted lines show that there can be pedestrian access out into Whitehall and thereafter into Abbeygate Street or alternatively through the principal entrance to the Eyre Square Shopping Centre or out onto Williams Gate Street via the Corbett Court shopping mall.

13. The meaning and effect of this block plan submitted to An Bord Pleanála by Radical was the subject of considerable debate at the trial and on appeal.

14. It is worth noting at this point that Messrs. Brady Shipman Martin, the agent's acting for Radical, wrote to An Bord Pleanála on the 17th July, 1998 in relation to an argument raised by a third party objector regarding a directive issued by the Department of the Environment and Local Government limiting the retail floor space of supermarkets to no more than 3,000 square metres. An issue arose as to whether, in assessing the area of this supermarket element of the department store proposed, account should be taken of the existing supermarket space in the Eyre Square Shopping Centre development. In replying to this point, Messrs. Brady Shipman Martin emphasised that the proposed scheme was a standalone development and pointed out that Radical had no interest, direct or indirect, in the owners of the adjacent Eyre Square Shopping Centre "*despite the proposals to create pedestrian linkages between the two developments and to share rationalised shared servicing arrangements*". The letter continued at point 21:-

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

15. It was clear to third parties that the proposed development involved pedestrian linkages between the proposed development and Eyre Square Shopping Centre and Corbett Court Shopping Mall. Ronan Daly Jermyn solicitors acting on behalf of one objector, Decbrooke Limited, the owner of a supermarket in the Eyre Square Shopping Centre, referred to the fact that the proposed development and the existing Eyre Square development were "*irretrievably linked*".

16. The report of the Inspector to An Bord Pleanála of August 1998 clearly noted the proposed links between the proposed development and the Eyre Square Shopping Centre. The report notes that the application is for a development "*linking into the existing Eyre Square Shopping Centre*" and that it includes "*alternations to existing Eyre Square Shopping Centre to facilitate proposes linkages*". In the description of the site location, the inspector states:-

> *"In addition to the pedestrian linkage, there would be access to the existing multi story carpark…another major access point will be from William Street (this forms part of the major shopping street in the city centre connection Shop Street to Eyre Square, via Barrack Lane…)".*

17. The inspector records that on the 11th November, 1997 the owners of Eyre Square Shopping Centre submitted a letter to the planning authority indicating that they had no objection in principle to the proposed development and its linkage with their property. He referred to the provision of linkages between the two centres and the Corbett Court Shopping Mall as representing "*a logical solution that would also improve public access to this historic area and is very much in accordance with the proper planning and development of the area*".

18. The documents submitted to An Bord Pleanála included a report from the City Engineer entitled "*Report on permission from Mixed Development comprising Residential Office Use & Retail linking into existing Eyre Square Shopping Centre in Galway Ccity Centre which was received by An Bord Pleanála on the 2nd March 19*".

19. There was no express condition in the grant of planning permission that there be pedestrian access provided through the Doors of the anchor unit of the Edward Square Shopping Centre accessed from William Street and Castle Street through to the Eyre Square Shopping Centre.

20. A significant issue in the case was whether despite the absence of such express condition the grant of planning permission required that there be access or egress via the Doors through the anchor unit to the Eyre Square Shopping Centre.

The law: principles of construction of planning permissions

21. In order to answer that question, it is necessary to consider the principles by which grants of planning permissions should be construed. The starting point is the decision of the Supreme Court in *Re XJS investments Ltd*. [1986] I.R. 750. At p.756 Mc Carthy J. held that planning permissions are not to be construed in the manner in which statutes or statutory instruments are construed.

> *"they are to be construed in their ordinary meaning as it would be understood by members of the public, without legal training as well as by developers and their agents, unless such documents, read as a whole, necessarily indicate some other meaning."*

22. In *Kenny v. Dublin City Council & Anor*. [2009] IESC 19, Fennelly J. approved of the following passage from Simons on *Planning and Development Law* (2nd Ed, 2007, paras. 5.06-5.07):-

> *"a planning permission is a public document; it is not personal to the applicant, but rather enures for the benefit of the land. It follows as a consequence that a planning permission is to be interpreted objectively, and not in the light of subjective considerations peculiar to the applicant or those responsible for the grant of planning permission. A planning permission is to be given its ordinary meaning as it would be understood by members of the public without legal training, as well as by developers and their agents, unless such documents, read as a whole, necessarily indicate some other meaning."*

23. Fennelly J. emphasised that planning permission is to be interpreted according to objective criteria but an objective interpretation will not provide the complete answer in every case. It is not a synonym of literal interpretation. Having quoted with approval from the decision in *Re XJS Investment Ltd*. he held:-

> *"A court, in interpreting a planning permission, may need to go no further than the planning document itself, or even the words of a condition in issue within the context of the permission. The words may be clear enough. However, it will very often need to interpret according to context." (para 28)*

24. Fennelly J. held that the principle of objective interpretation excludes purely subjective considerations, but it does not provide a result where a provision is unclear, ambiguous or contradictory. In that situation, the court does not confine itself to a purely literal interpretation of a condition; it will seek to ascertain its true meaning from its context in the planning process. (paras 34-35)

25. Fennelly J. had regard to the decision of the Supreme Court in *Gregory v. Dun Laoghaire-Rathdown County Council* [1996] 7 JIC 1602. That case concerned an application for retention planning permission of what was called a garage/loft. Planning permission was granted and then appealed. An Bord Pleanála imposed a condition:-

> *"the proposed loft shall be omitted. The proposed garage shall be of single storey construction. Revised details shall be agreed with the planning authority…"*

The reason given for the condition was "*in the interests of residential amenity*"

26. The planning authority agreed revised details purportedly in compliance with the condition: the loft was to be omitted but the approved change led to no alteration in the height of the garage. The issue for consideration in the case was whether or not the developer had complied with the condition. On a literal interpretation he had: the loft was omitted and the garage was single story. However, the height had not been altered. Geoghegan J. in the High Court believed that the height of the structure, though not specified, was the main concern. The Supreme Court relied heavily on the reason for the complaint made by the objector which led to the imposition of the condition. The objector's concern was about the height of the structure, and not the internal layout. Murphy J. writing for the Supreme Court held:-

> *"by imposing the condition in question they clearly required the reduction of the height of the structure by the removal of the loft area as shown on the plans before them and the second storey which constituted that loft. The omission or deletion of the loft was the means by which the reduction in height of the structure was to be achieved."*

27. In *Kenny*, Fennelly J. followed this reasoning in construing the condition in that case requiring that the elevation of a building be "*reduced in height by the omission of the first floor…*". The developer omitted a floor other than the first as the condition was interpreted by the planning authority as requiring that the overall height of the building be reduced by one floor. Fennelly J. upheld this construction of the condition and rejected the proposed literal interpretation of the condition in issue.

28. In *Lanigan v. Barry* [2016] 1 I.R. 656, the Supreme Court considered the interpretation of a general clause in a planning permission requiring a development to be carried out in accordance with the drawings and specifications submitted. The issue between the parties in that case was whether on a proper construction the planning permission concerned it could be said that there was a condition relating to the scale and timing of the motor racing circuit operated by Tipperary Raceway. Clarke J. gave the judgment of the court. He said that the starting point had to be the consideration of the grant of planning permission itself. There was no express decision governing the issue in the case and reliance was placed upon Condition 1 which was in the usual form that development be carried out in accordance with the applicant's submitted drawings and other outline specifications unless modified by other conditions. This required the court to look back to the application for outline planning permission approval. The issue in that case did not concern the drawings but "outline specifications" as referred to in condition 1. At paras 26 and 27 of the judgment he held:-

> *"[26] In the context of that issue it is important, in my view, to distinguish between a general description of the scale of operation of a facility which might be anticipated, on the one hand, and a specific condition limiting the maximum scale of the operation concerned, on the other. The distinction may be easy to define in some cases but there may well be grey areas in other cases. For example, a retail unit might be described as being likely to attract a certain level of footfall. That description might, indeed, be relevant for planning purposes for it would undoubtedly affect traffic and potentially the amenity of other property occupiers in the vicinity. But such a description would be unlikely to be taken as imposing an absolute limit on the amount of customers which the retail unit would be permitted to entertain on any given day. Likewise, the documents filed in respect of a planning application might suggest that a retail unit was designed for daytime use. That might indicate the sort of use which might implicitly be approved by the granting of planning permission for the unit concerned. It is well settled that, in considering the use which may be regarded as being permitted, it is possible to look at the development for which permission has been granted together with any documents submitted in the context of the relevant planning application.*
>
> *[27] In such a case the planning authority might choose to impose a specific condition concerning hours of opening. If it did so choose then the matter would be clear and it would be a breach of the relevant condition for the retail unit to open outside the hours as specified. However, even if no such specified opening hours were included as conditions attached to the planning permission, it would always be open to a court to consider whether opening significantly outside the parameters which were contemplated by the planning application itself might amount, in all the circumstances, to a*

sufficient intensification of use (over the use impliedly authorised by the permission) so as to justify a finding of a material change. However, in that latter case it would be necessary to take into account a range of factors, including the degree of difference from the use which it might be inferred had been permitted by the planning permission, so as to assess whether any variation from that contemplated use could be said to involve a material change of use."

29. Following *Re XJS Investments Ltd*. Clarke J. held that the "text in context" approach required the court to consider the text used in the context of the circumstances in which the document concerned was produced including the nature of the document itself. At para 32 of the judgment he held that:-

> *"to interpret a general clause such as condition 1… in a way which imposes very specific obligations in the absence of a specific condition does, in my view, require that what might reasonably considered to be the drawings and specifications be clearly of a nature designed to identify* ***specific and precisely enforceable parameters for the development (including its use)****." (emphasis added)*

In the instant case, he was not satisfied that the application for outline planning permission met this test and at para 35 of the judgment he continued:-

> *"that is not to say that there might not be occasions where the language contained in a document submitted might properly be construed as amounting to a clear commitment that particular limits of one sort or another would be complied with. In such a case, it might be possible to construe a general condition such as condition 1 as importing that commitment into the permission itself by means of a condition. But for that to be the case it seems to me that it would be necessary that it would be appropriate to construe the documents submitted by the applicant for planning permission as giving a clear and specific commitment rather than a general indication concerning the scale and timing of the operation. I am not satisfied that the documents in this case can be so construed."*

In the light of these authorities, I turn to consider the decision of the High Court in relation to the construction of the planning permission.

The decision of the High Court in relation to the construction of the planning permission

30. The High Court considered six authorities relating to the construction of planning permissions. These were *Kenny v. Dublin City Council, Weston Limited v. An Bord Pleanála* [2010] IEHC 255*, Dublin City Council v. Jack Barrett (Builders) Limited* (Unreported, Supreme Court, 28th July, 1983), *Coffey v. Hebron Homes Limited* (Unreported, High Court (O'Hanlon J.), 27th July, 1984) and the decisions of the High Court and Supreme Court in *Lanigan v. Barry* [2008] IEHC 29 and [2016] 1 1.R. 656.

31. Relying on *Kenny*, the trial judge held that the essence of what the Court seeks to do in interpreting a planning permission, or an element of the planning permission, is to *"ascertain true meaning within the context of the applicable planning process"*. He identified as *"perhaps the key lesson to be drawn from Kenny is just how (very) far the Supreme Court was prepared to go in seeking to ascertain the true intent of the planning authority"*. He emphasised that the Supreme Court was prepared not just to look beyond the literal wording of a condition but to allow the doing of something which was entirely contrary to the literal wording of a condition.

32. In relation to *Lanigan*, the trial judge held that it did not represent a departure from previous case law but was a further exposition of applicable principle consistent with past decisions which envisioned the courts inferring obligations into or from a planning permission as part of their ordinary interpretive function. At para. 44 the trial judge identified as the key lesson to be drawn from *Lanigan* as:-

> *"…to contend successfully, in the absence of a specific condition, that a planning permission imposes a specific obligation, one has to identify a clear and specific commitment, and not just a general indication, in the relevant planning application documentation."*

33. At para 47 of the judgment the trial judge identified nine key principles arising from the case law he analysed as follows:-

"(1) When it comes to the interpretation of a planning permission that is a pure question of law;

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

34. When the trial judge came to apply these principles to the facts in the case he cited the grant of planning permission by An Bord Pleanála and the original application by Radical for planning permission. He identified the meaning of linkage which was referred both in the application for planning permission and in the grant of planning permission. He stated that:-

> *"…What seems abundantly clear from the foregoing is that the word "linkage" embraces a facilitation of connection and movement between people and places. It goes without noting but it is worth noting anyway that where an element of*

the linkage (the Edward Square entrance) is permanently closed the desired "relationship or connection between people or things"/"means of contact or transport between two places" is thereby necessarily, and completely, frustrated."

35. At para 51 he highlighted a number of points arising from the description of the application for planning permission:-

> *"…(1) the site is the urban back-land accessed off Castle Street; there is also access from Abbeygate Street; (2**) the link into Eyre Square Centre is given some prominence**; (3) the description relates to permission for physical development, **but not physical development simpliciter; rather it envisions a physical development that facilitates identified uses, including the linkage between the new development and Eyre Square Centre**; (4) the description expressly states that "The development comprises residential, office use and retail linking into Eyre Square Shopping Centre in the Galway City Centre",**so the whole development links into the Eyre Square Centre;** (5) the 'orphaning' of the remaining Edward Square Shopping Centre stores from the Eyre Square Centre, thanks to the closing of the doors through which the anticipated linkage was to be (and for a long time was) facilitated was not only never anticipated but the exact opposite of what was anticipated." (emphasis added)*

36. The trial judge quoted from the decision of Charleton J. in *Weston Limited v. An Bord Pleanála* that:-

> *"Planning controls operate within the community on the basis that the developer will make an honest application for planning permission, stating precisely what is proposed."*

37. He concluded that if there was to be no access onto Edward Square from the Dunnes unit then that would be a misrepresentation of what the developer (honestly) sought. He therefore concluded that this favoured an interpretation which he described as the only "rational" interpretation of the application for planning permission as being that there was intended to be a link from the proposed development/Castle Street to the Eyre Square Shopping Centre.

38. He then considered the detail of Plan L003 and Drawing L37 and the Brady Shipman Martin letter of the 17th July, 1998 which I have quoted above. With regard to Plan L003 he noted that the plan showed a large double door lobby entrance between the anchor unit and the open courtyard of Edward Square Shopping Centre. The trial judge held:

> *"… It is readily apparent from the map that this is to be a major entrance that will be extensively used and which will provide access to the Eyre Square Centre through the relevant access/egress points elsewhere in what is now the Dunnes unit."*

39. In addition to his own objective reading of the plan, he referred to the expert evidence of Mr. McKeon and Mr. Grace to the effect that the plan indicated a double door lobby as is customarily used at a retail entrance. He also referred to the evidence of Ms. Byrne who stated that such an arrangement:-

> *"…would indicate to a planner that the doors thereat would be opening and closing regularly, with it being a reasonable inference to make that they would be used regularly."*

40. He noted that Mr. Grace indicated in his evidence:

> *"…that the plan clearly indicates **to planners, or indeed anybody looking at it**, that were such development to be constructed there would be free movement between Edward Square Shopping Centre and Eyre Square Centre." (emphasis added)*

41. On the basis of his own reading of the plans and on the basis of expert planning evidence as to the meaning a planner would infer from Plan L003, the Court concluded that the permanent closure of the double door lobby would constitute a breach of the planning permission issued on the basis of the plan.

42. In relation to Drawing L37 the trial judge held that it:-

> *"…gives an aerial view of Galway City Centre and by means of large dots gives a sense of how people are expected to move around the Edward Square Shopping Centre and Eyre Square Centre, and into and from some of the streets beyond."*

43. The block plan is in two dimensions and the development was to comprise four floors. Counsel for Dunnes argued that some of the dots appeared to stop at walls and that, in fact, it was not possible to proceed along the line indicated by the dots. In answer to this argument the trial judge held:-

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

44. He concluded that if the Doors to Dunnes are permanently closed the ability of pedestrians to circulate as anticipated is entirely frustrated.

45. Having construed the drawing from the perspective of the reasonable reader, the trial judge then considered the evidence from the expert planners and in particular the evidence of Mr. Grace who stated that the implication of looking at Drawing L37 is that:-

> *"…during normal trading hours, whatever they may be, it would be available for people to use…"*

46. He said that the drawing simply illustrated what was been proposed:-

> *"…which was that there would be access from various places through the proposed Edward Square development into other parts of the development."*

47. In relation to the Brady Shipman Martin letter, he noted that it was clear that the pedestrian linkages are intended *"to ease pedestrian movement through the block"*. Similarly, with regard to the Inspector's Report he noted the reference to the location of the site, and the linkages. The trial judge concluded that the linkage was an important feature of the development and that *"to attain*

that linkage it follows as a matter of simple logic that the doors to the dominant shop unit cannot permanently be closed" in the context of the site as described.

48. The Court then assessed the totality of the evidence and said that *"ultimately it must be approached holistically and not in an atomistic or sequential manner"*. The trial judge identified the key issue to be determined as: what would a reasonable, informed person make of the planning arrangements at issue in the proceedings? He concluded, having made his own objective assessment, that circulation through the Dunnes unit and access and egress via the Doors permitted a through route allowing pedestrians to pass through the Edward Square Shopping Centre and into the Eyre Square Shopping centre. He concluded that the planning permission properly construed required that the Doors should operate as access and egress doors to the unit and not simply as fire doors and that the failure to operate the Doors as such amounted to a breach of the planning permission for the Edward Square Shopping Centre.

Discussion on planning permission

49. Dunnes appealed the conclusions of the trial judge on the construction of Condition 1 of the planning permission on a number of grounds. The first matter to consider is whether the trial judge correctly identified the principles applicable to construing the planning permission at issue in these proceedings before then considering how he applied those principles to the facts. I am satisfied that he did so in a most comprehensive and clear fashion. Critically, for the issues raised in this case, he identified that the construction of a planning permission is a matter of law for the court and that it is to be construed objectively. He identified the important distinction between a purely literal interpretation of a condition and the true meaning of the condition in the context of the particular planning application. Following on from the decision in *XJS*, he identified that the planning permission is to be construed in its ordinary meaning as it would be understood by members of the public without legal training as well as by developers and their agents unless the documents, read as a whole, necessarily indicate some other meaning. He considered the decision in *Lanigan v. Barry* extensively and in particular the fact that, to contend successfully, in the absence of a specific condition that a planning permission imposes a specific obligation, a party must identity a clear and specific commitment, and not just a general indication in the relevant planning documentation. He emphasised that the court must consider the totality of the evidence and approach the planning permission holistically and not in an atomistic or sequential manner.

50. In my opinion there is no error in the judgment in identifying the relevant principles. They accord with principles identified at paras 21-29 of this judgment.

51. The next question to be considered is whether the trial judge correctly applied the principles to the facts in this case. His task was to decide what the planning permission meant to an untrained member of the public, the reasonable reader, looking at it in the context of the planning process and the particular application for planning permission.

52. The application for planning permission said that there were to be linkages between the Edward Square Shopping Centre and the Eyre Square Shopping Centre. The application included a letter from the owner of the Eyre Square Shopping Centre consenting to the creation of the linkages proposed in the planning application. The plans submitted, and in particular Plan L003, showed only one possible linkage between the proposed Edward Square Shopping Centre and the Eyre Square Shopping Centre and this was through the Doors. Block Plan L 37 marked in large black dots pedestrian circulation through Eyre Square Shopping Centre and into Edward Square Shopping Centre and Corbett Court Shopping Mall as I have described above. The letter from Brady Shipman Martin of the 17th July, 1998 was clear that there would be pedestrian linkages between the two developments. The report of the Inspector likewise made clear that linkage was an important feature of the overall proposal. A third party objector represented by Ronan Daly Jermyn Solicitors understood that there were to be pedestrian linkages between the Eyre Square Shopping Centre and the Edward Square Shopping Centre and indeed objected to the grant of planning permission *inter alia* on that basis.

53. In my opinion, there was ample evidence for the trial judge to conclude that the untrained member of the public looking at the grant of planning permission in the context of the planning process and the particular application for planning permission would conclude that the planning permission required the creation and maintenance of pedestrian linkages between the Edward Square Shopping Centre and the Eyre Square Shopping Centre.

54. Further, a consideration of the plans makes it clear that the only possible means by which such linkages could be provided was via the Doors. In order for there to be linkages between the two shopping centres, a pedestrian must be able to travel in a door in one shopping centre and exit through a door in the other shopping centre (or vice versa) and in so doing must be able to travel across the anchor unit and across the Eyre Square Shopping Centre. The trial judge held this to be so and his decision in this regard is unimpeachable.

55. There was no express condition in the planning permission requiring that the pedestrian access and egress was to be via the Doors and the anchor unit. The construction of the planning permission to this effect was based upon the construction of Condition 1 which I have cited above. Whether the general terms of Condition 1 can impose specific obligations or commitment must be considered in light of the decision in *Lanigan*. The test established in Lanigan is whether there was a clear and specific commitment and not just a general indication in the relevant planning application documentation. If the test is not satisfied, then no such condition exists, in the absence of an express condition governing the alleged commitment.

56. I am satisfied that the trial judge was correct in holding that there was such a commitment in the planning documentation read as a whole and in the context of the application for planning permission in this case. The commitment was that there would be linkages and that the linkages would be via the Doors and across the anchor unit. The route was not defined but that does not alter the fact that there were to be linkages in the manner I have indicated. The planning documentation read in context contained a clear and specific commitment that there would be access/egress between the Eyre Square Shopping Centre and the proposed development of Edward Square Shopping Centre and it would be via the Doors indicated on the plans and in particular L003.

57. The appellant argued that Condition 1 of the planning permission was satisfied once the development had been constructed and that it had no relevance to the use of the development, therefore it could have no relevance to the operation of pedestrian linkages between the two centres. This argument is clearly incorrect. Planning permission governs the use as well as the construction of the proposed development. A material change of use could arise if the authorised development was, in fact, used for a use which was not authorised. For example, permission might be granted for a private house and if it were subsequently used for business purposes this could constitute a breach of the planning permission notwithstanding the fact that the building had been constructed in accordance with the plans and specifications. In this case the circulation of pedestrians between the streets and the two shopping centres is as much an aspect of the permission as, for example, continued availability of car parking spaces. If, for example, the developer was required to construct a multi storey car park, it would not be in compliance with its planning permission if it closed the car park a week after it had been built. It follows that not only must the linkages be constructed, they must be capable of use, and closure of the Doors severs the links that were to be provided.

58. The possible use of the Doors as a fire exit did not and could not amount to compliance with the planning permission. The use of the Doors as a means of pedestrian access and egress, thereby facilitating pedestrian linkage and circulation, was integral to the grant of planning permission. The disabling of the automatic opening mechanism of the Doors resulted in the closing of the Doors and meant that they were no longer an entrance, as clearly depicted on the plans which was required by the planning permission. It followed that this constituted a material breach of the planning permission for the development regardless of the fact that it arose after the construction had been completed.

59. It was argued on appeal that plans and drawings could not meet the *Lanigan* test: they did not indicate a specific route through which access was to be facilitated, they did not indicate the times that access was to be provided and the argument of the respondent did not take account of the fact that if the anchor tenant was not open for trade or business (or indeed if the unit was not let) then *de facto* there could be no linkages.

60. I am not persuaded by these arguments. It is clear that units in shopping developments may have different opening hours. The linkages envisaged by the planning permission could only apply when the department store and supermarket to be located in the anchor unit were open for trade. The commitment in the planning permission was that these linkages would exist when that unit was open for trade and business in the normal way as the linkage was via the unit and not through a common area. The linkages did not require the creation of defined routes through the anchor unit into the Eyre Square Shopping Centre, merely that it would be possible to circulate between the linked premises. Therefore, the lack of a defined route is irrelevant to the proper construction of the planning permission. The trial judge held that a reasonable reader of the planning documentation would understand the application to mean that there would be linkages via the Doors and through the anchor unit when it was open for trade. I see no basis for this court to overturn this finding. It was for him to decide whether the planning application and planning permission so construed constituted a clear and specific commitment. He was satisfied that it did and I agree with him. This case is very different to the situation in *Lanigan* where intensification of use was in issue, an amorphous concept almost by definition. Here the closure of the Doors is preventing the very thing the planners intended would occur. The drawings identified specific and precisely enforceable parameters for the use of the development as required by *Lanigan*. Whether there may be a difficulty in the future in relation to the linkages if the occupier of the anchor unit closes for business is not a matter which needs concern this court in this case. At all material times, Dunnes has traded and been open for business throughout the whole of the unit and so this possible difficulty simply does not arise on the facts in this case.

61. It was argued that if the linkages were as integral to the planning permission as the respondent alleged, that the planning authority of an Bord Pleanala could have provided an express condition to that effect and that this was a relevant factor to be taken into consideration when construing Condition 1. The Development Management Guidelines for Planning Authorities (which post the grant of planning permission in this case) at section 7.3.1. state:-

> *"that a condition is not necessary where what is sought by condition is clearly provided for on the plans and particulars by reference to which the permission is being granted."*

These guidelines set out best practice in relation to the imposition of conditions. The practice reduces the number of conditions which must be attached to grants of planning permission, which otherwise could become unduly cumbersome with superfluous conditions. In the circumstances it would have been contrary to good practice and superfluous to provide a condition requiring linkages, as submitted by Dunnes. I do not attach any weight to the absence of an express condition in the circumstances of this case as the application for planning permission expressly sought permission for the linkages in issue.

62. It was argued that the trial judge failed to have regard to conflicts in the evidence given by expert planners for the respondent and between those expert witnesses and experts who gave evidence on behalf of Dunnes and that he ignored the agreed position paper of the expert witnesses. It was also submitted that he erred in failing to explain why he rejected the evidence of some of the expert witnesses and accepted the evidence of others. In my opinion, this submission is without merit. Ultimately, the views of the planners on the meaning of the planning permission amounted to opinion evidence on the proper construction and meaning of the planning permission and the planning documents and no more. The planning permission is to be construed objectively by the Court and the Court is to have regard to how it would be understood by a reasonable, untrained member of the public as well as by planners and developers. It was therefore not necessary for the trial judge to resolve any conflicts of opinion evidence given by the planners in this case. Ultimately their evidence did not go to establishing any facts in the case and it was not necessary for the judge to weigh their evidence in his judgment in carrying out his task in construing the planning permission.

63. As I have set out above, the trial judge assessed the evidence first by reference to the reasonable member of the public considering the planning permission in the planning process. Once he carried out this exercise and reached his own objective construction of the planning documents, he then pointed to the fact that his conclusions were, in effect, corroborated by the evidence of some of the planners. It was not necessary for him to do this or for him expressly to reject contrary evidence or to resolve conflicts or inconsistencies in the evidence of the planners. It was implicit in his judgment that he did not find the opinion evidence upon which he did not rely either compelling or convincing.

64. It is important to observe that the planning permission cannot be construed by reference to any rights which Dunnes may have under its lease. The planning permission was granted before ever the lease was entered into. The lease was created subsequent to the issue of the grant of planning permission and it could never alter the terms of the planning permission. The planning permission is a matter of public law which enures to the benefit of the land and gives rise to public rights, including enforcement rights. It follows that the planning permission is to be construed without taking into account any of the provisions of the lease. It further follows that it is the planning permission which may impact upon the lease and the rights of either party under the lease and not the other way round. This was accepted by counsel for Dunnes in submissions to the Court on appeal.

65. In a separate argument on appeal counsel for Dunnes contends that standard conveyancing practice is not consistent with the approach for which the respondent contends in that it would involve a purchaser in an analysis of planning documentation and a consideration of compliance with planning conditions at a level of practical and concrete engagement which would be unnecessarily burdensome.

66. This argument fails to have regard to the fact that the Law Society's standard requisitions on title contain a series of questions regarding the planning status of the property in sale and it is common and good conveyancing practice, absent a special condition precluding this, that a purchaser would require a certificate of a competent person be furnished regarding compliance with planning conditions by a vendor.

67. I am not convinced that this argument, even taken at its height in the context of the board scope of condition one, supports the proposition for which Dunnes contends, that breach of the planning conditions does not give rise to the private law remedy, the

subject matter of this appeal.

68. In my judgment the trial judge was correct to hold that Condition 1 of the planning permission as properly construed gave a clear and specific commitment that pedestrian circulation would be facilitated between the Edward Square Shopping Centre and the Eyre Square Shopping Centre. This would be via the Doors and crossing the anchor unit during the hours that the occupier of the unit was open for business. Any indefinite frustration of this pedestrian access would constitute a breach of condition 1 of the planning permission. The indefinite closure of the Doors, as occurred in this case, constituted a material breach of the grant of planning permission.

The Anchor lease

69. It is now appropriate to turn to the provisions of the lease so as to ascertain the rights and obligations of Dunnes under the lease and to ascertain whether they may provide an answer to the claim that the closure of the Doors amounted to a breach of planning permission and of various covenants of the lease. On the 3rd April, 2000 Radical entered into what is described on its title page as a lease of the anchor unit of the Edwards Square Shopping Centre, Barrack Lane, Galway with Dunnes Stores Ireland Company. It is clear from the terms of the lease and the matters set out at paras 15-17 of the judgment of the trial judge that there is no merit whatsoever in the argument that the Edward Square development was not a shopping centre or that the Demised Premises was not the anchor unit of the Edwards Square Shopping Centre and I have no hesitation in dismissing the grounds of appeal based on the assertion that the lease was not a lease of the anchor unit of the Edward Square Shopping Centre for the reasons set out in the judgment of the High Court.

70. The lease governs the relationship between the lessor and the lessee. By deed of assurance of 7th May, 2013 the respondent became the legal owner of the Edward Square Shopping Centre and is the successor in title to Radical. As such, it is the proper plaintiff in these proceedings and I see no merit in the argument to the contrary based upon the submission it has not beneficial interest in the lease. The respondent sought and obtained relief requiring Dunnes to comply with the covenants in three leases in which Dunnes holds the lessee's interest in the anchor unit of the Edwards Square Shopping Centre: a lease agreement dated the 3rd April 2000 ("the anchor lease") and two further leases of linked properties known as the Bastion Area and unit 107, Eyre Square Centre ("The Bastion lease" and "the unit 107 lease" respectively). The issues in the case almost exclusively turned upon the terms of the covenants in the anchor lease.

71. The following covenants in the lease were the subject of argument in this court and the High Court:-

> *"4. TENANT'S COVENANTS*
>
> *The Tenant to the intent that the obligations may continue throughout the Term HEREBY COVENANTS with the Landlord as follows:*
>
> *4.19 To Open*
>
> *4.19.1 To complete the fitting-out of the Demised Premises in accordance with the Plans and Specifications approved heretofore by the Landlord and once such fitting-out has been completed to open for trade to the general public unless prevented from doing so for some cause outside the Tenant's Control PROVIDED THAT nothing in this Lease or otherwise shall oblige the Tenant to keep the Demised Premises or any part thereof open for trade or business….*
>
> *4.29 Statutory requirements*
>
> *4.29.1 At the tenant's own expense, to comply in all material respects with the provisions of all Acts, statutory Instruments, Bye Laws and other regulations now in force or which may hereafter be in force and any other obligations imposed by law relating to the Demised Premises or the user thereof.*
>
> *4.29.2 To execute all works and provide and maintain all arrangements upon or in respect of the Demised Premises or the user thereof, which are directed or required (whether of the Landlord, Tenant or occupier) by any statute now in force or which may hereafter be in force or by any government department, local or other competent authority or duly authorised officer or court of competent jurisdiction action, under or in pursuance of any statute and to indemnify and keep the Landlord indemnified against all reasonable costs, charges, fees and expenses of or incidental to the execution of any works or the provision or maintenance of any arrangements so directed or required in relation to the Demised Premises;*
>
> *4.29.3 Not to do in or near the Demised Premises, any act or thing by reason of which the Landlord may, under any statute, incur or have imposed upon it or become liable to pay any penalty, damages, compensation, costs, charges or expenses;*
>
> *4.29.4 PROVIDED ALWAYS that the provisions of this clause 4.29 shall not apply to any matters which are the responsibility of the Landlord under this Lease.*
>
> *4.29.5 Not to do anything in the Demised Premises or occupy them in such a way as shall cause any part of the Centre or the Eyre Square Centre not to comply in any material respect with any statute in relation to fire safety. For the avoidance of doubt this clause does not apply to the initial construction of the Demised Premises undertaken by the Landlord and shall not restrict the Tenant from opening for trade.*
>
> *4.30 Planning Acts, Public Health Acts and Building Control Act*
>
> *4.30.1 Not to do anything on or in connection with the Demised Premises the doing or omission of which shall be a contravention of the Planning Acts and the Public Health Acts (if applicable) and the Building Control Act or of any notices, orders, licences, consents, permissions and conditions (if any) served, made, granted or imposed thereunder and to the extent that same is the responsibility of the Tenant hereunder to indemnify (as well after the expiration of the Term by effluxion of time or otherwise as during its continuance) and keep indemnified the Landlord against all actions, proceedings, damages, penalties, costs, charges, claims and demands in respect of such acts and omissions or any of them and against the costs of any application for planning permission, commencement notices, fire safety certificates and the works and things done in pursuance thereof.*
>
> *4.30.2 In the event of the Landlord giving written consent to any of the matters in respect of which the consent of*

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

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

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

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

4.31 Statutory notices

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

4.32 Fire and safety precautions and Equipment

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

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

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

4.39 Insurance becoming void

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

Contractual interpretation

72. The meaning of these covenants must be ascertained by correctly applying the relevant principles of law on the construction of contracts. In paras 18-21 of his judgment the trial judge set out the authorities relevant to the interpretation of the lease. He cited the cases of *Analog Devices BV v. Zurich Insurance Company* [2005] 1 I.R. 274, *BNY Trust Company(Ireland) Ltd. & Anor v.Treasury Holdings* [2007] IEHC 271, *Rainy Sky Sa v. Kookmin Bank* [2011] 1WLR 2900 and *ICDL v. European Computer Driving Licence Foundation Ltd.*[2012] 3 I.R. 327. In *Analog Devices* the Supreme Court approved the statement of five principles by Lord Hoffman in *Investors Compensation Scheme Ltd. v. West Bromwich Building Society* [1998] 1 WLR 896. The principles are too well known to require repetition in full. I draw attention to the fact that at point 1 it is stated that interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time at the contract. The fourth point is also particularly apposite in this case, this distinguishes the meaning which a document would convey to a reasonable man from the meaning of its words. The meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. In relation to the decision in *BNY Trust Company (Ireland) Ltd*, the trial judge noted that the decision of Clarke J. emphasised the need for a commercially sensitive construction of a commercial contract. In this regard the trial judge also had relied upon the decision of the United Kingdom Supreme Court in Rainy Sky where it was held that if there are two possible constructions of a contractual provision, a court is entitled to prefer the construction which is consistent with business common sense.

73. There was no disagreement between the parties as to the principles for the construction of contracts and indeed little time was devoted at the appeal to debating them. There was no allegation that the trial judge misstated the principles or erred in identifying the relevant authorities. The true issue in the appeal was whether the trial judge correctly applied these principles when construing the lease

Dunnes' case of the lease
74. The essence of the case advance by Dunnes was that by virtue of the provisions of clause 4.19.1of the lease it is not obliged to keep open the Doors. The tenant covenants at clause 4.19.1 :-

> *"to complete the fit out of the Demised Premises in accordance with the Plans and Specifications approved heretofore by the Landlord and once such fitting out has been completed to open for trade to the general public unless prevented from doing so for some cause outside the Tenant's Control PROVIDED THAT nothing in this lease or otherwise shall oblige the Tenant to keep the Demised Premises or any part thereof open for trade or business."*

It says the trial judge was in error in in holding that the covenant was irrelevant to the proceedings and in holding that Dunnes is required to keep the Doors open when the unit is open for trade.

75. Dunnes says that under clause 4.19.1 it is obliged to complete the fit out of the premises in accordance with the plans and specifications and then to open for trade. Thereafter, it may cease trading the next day.

76. Dunnes argues that it is not obliged to keep the Demised Premises open. It may close all or part of the unit and not breach the covenant. The Doors are part of the unit and therefore it may close that part of the unit which comprises the Doors.

77. The covenant expressly provides that "nothing in this lease or otherwise shall oblige [Dunnes] to keep the Demised Premises or any part thereof open for trade or business". It argues that this means that the lessor may not rely upon any other covenant in the lease to contradict this covenant and to require it to open the Doors. It says this is so, even if the closing of the Doors amounts to a breach of another covenant in the lease.

78. Dunnes goes further and says that the words "or otherwise" means that the lessor may not rely upon a condition of the planning permission to require it to keep the Doors open even if a closure of the Doors would constitute a breach of the planning permission (which it denies). It submits that if it is correct then the lessor may not sue Dunnes to enforce any alleged breach of covenant or to compel it to cease to breach any provision of the planning permission. Dunnes' case is that it is entitled by virtue of the provisions of the proviso in covenant 4.19.1 to close a part of the Demised Premises which includes the Doors even if this amounts to either a breach of another covenant or a breach of planning permission. So, if for example, there is a breach of the fire safety covenants arising from the closure of part or all of the Demised Premises, including the Doors, the lessor may not enforce the covenant relating to fire safety directly but must rely upon the fire safety authorities to take enforcement proceedings against Dunnes if they see fit. Similarly, with regard to any alleged breaches of planning permission. Is this correct?

Discussion of clause of 4.19.1
79. The starting point of the analysis by counsel for Dunnes was this clause of the lease. It was argued that this trumped all other obligations of the tenant. But, in my judgment this was to start at the end. Prior to the lease there was the grant of planning permission. The planning permission governed use as well as construction of the development, including the Demised Premises. The trial judge held, and I agree with him, that on a true construction of the grant of planning permission, pedestrian access linking the Edward Square Shopping Centre with the Eyre Square Shopping Centre *via* the Doors through the anchor unit of the Edward Square Shopping Centre was a condition of the grant of planning permission. It was accepted by counsel for Dunnes that this is a public law right and that the terms of the lease between Radical and Dunnes could not alter or in other way abbreviate that right (though he denied that the grant of planning permission created such a right). It follows, as I have said in para. 63 above, that the lease cannot govern the planning permission. It is the planning permission which may impact upon the rights and obligations of the parties to the lease. In this case, there was a clear and specific commitment in the application for planning permission and in the grant of planning permission as properly construed that this access and egress would be provided via the Doors while the anchor unit was open for trade and to the public.

80. It follows that clause 4.19.1 cannot authorise Dunnes indefinitely to close the Doors as this amounts to a frustration of the condition of the planning permission and therefore a material breach of the planning permission.

81. Further, clause 4.19.1 relieves Dunnes of the obligation to keep the premises open for trade or business, but it does not authorise Dunnes to close the Doors when the Demised Premises are actually open for business. Such a construction ignores the last four works of the clause and therefore is simply not a permissible construction of the clause, applying the principles in *Analog Devices*. As the trial judge said at para. 100 of his judgment, the court is required to look at the clause as a whole and give effect to its commercial purpose, which he identifies as to fit out the Demised Premises and to open "for trade" subject to the proviso that, once open, the unit need not be kept open for trade or business.

82. This court therefore does not have to assess whether the grant of the injunction in this case amounts to a mandatory injunction requiring Dunnes to keep open for trade. The order does not require Dunnes to stay open for trade in circumstances where it would otherwise close all or part of the unit for business. This is quite clear from the terms of the order of the 16th May 2017. It follows that the submissions of counsel for Dunnes insofar as they relied upon the absence of a "keep open" clause in the lease are not actually relevant to determining the rights and obligations engaged in this case. The "commercially sensible construction" of clause 4.19.1 cannot be advanced as a justification for the closure of the Doors.

83. The respondent never made the case that Dunnes was required to keep the Demised Premises open for trade or business. Its case was that when Dunnes was open for trade it was required to keep the Doors of the anchor unit of the Edward Square Shopping Centre open.

Was there a breach of clause 4.30 in relation to planning?
84. Dunnes covenanted in clause 4.30.1 not to do anything on or in connection with the Demised Premises, the doing or omission of which shall be a contravention of any notice, consent, commission or condition served, made or granted under the PlanningActs. It also covenanted to keep the landlord indemnified against all actions, claims and demands in respect of such acts or omissions. I have concluded that condition 1 of the grant of planning permission includes an obligation to keep the Doors open to facilitate pedestrian circulation between the two shopping centres while the anchor unit is open for trade. It follows that the closing of the Doors indefinitely by disabling the automatic opening mechanism from the anchor unit into the courtyard at Edward Square Shopping Centre during its opening hours amounts to a material breach of planning permission. A material breach of planning permission by the tenant constitutes a breach of clause 4.30.1.

85. On the14th July 2015, Galway City Council sent a warning letter issued pursuant to s.152(1) of the Planning and Development Act, 2000 to both Dunnes and the respondent. The letter provided:-

"Dear Sir/Madam,

It has come to the attention of the Galway City Council, the Council for the City of Galway that unauthorised development is being carried out by you in contravention of section 34 of the Planning and Development [sic]2000 at Edwards Square/Castle Street, Galway in the townland of Townparks in the City of Galway.

Namely:-

*"**Unauthorised works, namely closure of pedestrian access point between Edward Square, Castle Street and Eyre Square Shopping Centre via Dunnes Stores**"*

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

You are hereby warned pursuant to s.152(1) of the Planning and Development Act, 2000, to discontinue the said unauthorised development forthwith." (emphasis in original)

86. Dunnes argued that the trial judge erred in law in holding that it was required to accept the warning letter as conclusive that there was a breach of planning permission and further that it was required immediately to rectify that breach. Dunnes argued that the planning authority was wrong in concluding that there was a breach of the planning permission as there were no unauthorised works and that it was entitled to respond to the planning authority disputing this allegation and specifically it committed no wrong by not complying with a warning letter issued under s.152 of the Planning and Development Act, 2000.

87. As a matter of planning law a warning letter issued pursuant to s.152 of the Act of 2000, is the start of a process to ensure compliance with the terms of grants of planning permission which can culminate in enforcement proceedings. A planning authority is required to issue a warning letter where it is in receipt of a complaint from a third party that a developer or occupier of land is in breach of the planning permission or the Planning Acts, save where the alleged breach is of a trivial or minor nature or the allegation is considered to be frivolous, vexatious or without substance. The recipient of a warning letter is not obliged by law to comply with the direction of the planning authority after it has issued the warning letter. The planning authority is then required to investigate the issue and it may well conclude that there is no substance to the complaint which gave rise to the issuing of the warning letter or the issue may otherwise be resolved by the parties concerned. A critical difference between a warning letter and an enforcement notice is that the warning letter issues before the planning authority has had the opportunity of investigating the merits of the issue, whereas the enforcement notice represents the considered opinion of the planning authority after due investigation.

88. This statement of the law does not lead to the conclusion that Dunnes was correct in its submission that it did not have to comply with the warning letter and that the trial judge erred in holding to the contrary. The respondent argued, and the trial judge agreed, that in so acting Dunnes breached the provisions of covenants 4.29.2, 4.29.3, 4.30.4 and 4.31 of the lease. By clause 4.30.4 Dunnes covenanted to comply with any notice or order served on it under the provisions of the Planning Acts in relation to the Demised Premises. By clause 4.31 it covenanted without delay to take all necessary steps to comply with any notice or order relevant to the Demised Premises by a local authority. A warning letter issued pursuant to s.152 of the Planning and Development Act, 2000 is a notice within the meaning of these two covenants and indeed Dunnes did not seek to argue to the contrary. It follows that Dunnes had covenanted to comply with any such notice served upon it and to take all necessary steps without delay to comply with any such notice. The fact that under the Act of 2000 a recipient of a warning letter is not required as a matter of law to comply with the direction of the planning authority does not assist Dunnes in the proper construction of these covenants. They are unqualified, the tenant is not given a discretion whether or not to comply with any such notice. Dunnes advanced no reason why an alternative construction of these clauses should apply. I agree with the submissions of counsel for the respondent that the commercially sensible construction of the covenant is that the tenant should be given no discretion in the matter. The covenants are for the benefit of the landlord. If there is a material breach of the planning permission by a tenant, the landlord wants to have protection against possible prosecution or fines or simply to avoid the time and expense of dealing with breaches occasioned by its tenant. In my opinion the trial judge was correct in concluding that Dunnes had breached clause 4.30.1 of the lease in the circumstances as set out in para. 65 of his judgment and I reject this ground of appeal.

Was there a breach of the covenants relating to fire safety?

89. The trial judge dealt with this issue in paras. 68-84 of his judgment. He first set out the relevant contractual obligations, being clauses 4.29.2, 4.29.5,4.32.1 and 4.32.3. He then described the events which unfolded after Dunnes closed the Doors on the 16th June 2015. On the 19th June, 2015, the respondent's solicitors wrote to the fire officers of Galway County Council stating their concerns that if the Doors were kept shut indefinitely this might constitute a breach of fire safety regulations. They specifically asked the fire officers to confirm if

"from your point [of]view, the closure of this point of access and egress from the Centre would be considered to be a potential fire hazard and/or if Dunnes are in breach of fire safety regulations."

Assistant Chief Fire Officer Cunningham attended the premises that day and he was reassured (incorrectly) by the security manager of Dunnes that the Doors were connected to the fire alarm system (when in fact they were not) and they would open on activation of the fire alarm. The Doors were not locked and would slide open by hand. The Doors were connected to the fire alarm system the next day. Mr. Cunningham attended on the 20th June and sought a demonstration that the Doors were connected to the alarm system and he confirmed that the Doors were not locked and there was a notice informing the public that the Doors were not locked Mr Cunningham was satisfied with the arrangement.

90. The trial judge considered the expert evidence of Mr. Michael Slattery, a chartered fire safety engineering consultant, who gave evidence regarding compliance and the need for compliance with provisions of the building regulations insofar as they related to fire safety. Mr Slattery emphasised the need for automatic doors that would open up when the fire alarm was triggered. He accepted that:-

"in the context of the auto sensor being disabled then the doors would have to be physically slid open and then become sliding doors, and unless you had very strong management protocols in place to open the door it would be an issue …"

He later said that:-

"there was a clear… conflict with the fire cert as granted [where the doors were not connected to the fire alarm

system and it was a designated exit]"

The trial judge concluded that when the Doors were closed permanently there was a breach of fire safety requirements because the escape strategy on which the applicable fire certificate was granted was not operable as envisaged and, this being so, once the Doors were closed, they were closed in breach of the provisions of the lease.

91. This finding of fact was not challenged by Dunnes on appeal, and indeed, it is difficult to see how it could be, in view of the principles in *Hay v O'Grady* [1992] 1 I.R. 210.

92. Four weeks later on the 16th July 2015, Senior Assistant Chief Fire Officer Kelly, attended at the premises and he took a much more serious view of the closure of the Doors. He was of the view that the fact that the Doors were connected to the fire alarm was irrelevant. He said that if Dunnes intended to keep the Doors closed, they must be converted to push bar doors (swing doors). He said that sliding doors were not acceptable as fire doors. He said that any changes made to the entrances/exits of the store necessitated a new fire safety application. In the absence of a new fire safety certificate there is a breach of building regulations. He stated that the fire safety application process can take up to two months during which the Doors "must be operational". He said he would return the following morning "to ensure that the Doors are open". He indicated that if the Doors were not open that the Council will start litigation procedures which could include a closure order.

93. At para. 77 of his judgment the trial judge held as a fact that :-

> *"there was the clearest of directions that at the present time they [the Doors]be reopened-which direction went unobserved in breach of the above-quoted provisions".*

He also noted the evidence on behalf of Dunnes that no consideration was given by Dunnes to reopening the Doors.

94. On the 22nd July 2015, five days after Senior Assistant Chief Fire Officer Kelly's inspection, the Chief Fire Officer of Galway County Council, Mr Raftery, wrote to solicitors acting for Dunnes stating:-

> *"we strongly recommend **in the interim** that the presence sensing devices to the main entrance/exit doors from Dunnes Stores directly to open air to be reactivated" (emphasis added)*

Mr. Raftery emphasised that they were concerned that the safety of the occupants of the Dunnes Stores Unit in Edward Square "*may be compromised due to current means of escape arrangements*".

95. The trial judge described this as a strong recommendation that Dunnes open the Doors "*in the interim*" in the interests of the fire safety of occupants of the store. The evidence was that despite receipt of this letter, Dunnes did not consider reopening the Doors.

96. The trial judge notes that, as he says, eventually, following a meeting on the 31st August 2015 Dunnes agreed that it would install panic bolts on the Doors but this agreement was subject to the approval of the board of directors of Dunnes. The trial judge does not record when or whether this approval was forth coming. It would appear that no steps have been taken to install panic bolts prior to the grant of an injunction by the High Court on the 9th September 2015 requiring Dunnes to keep open the Doors in compliance with the status quo ante. It further appears that there would be a delay of a number of weeks before the doors could have been installed.

97. The trial judge agreed with the respondents that the failure to comply with the recommendation of the Chief Fire Officer constituted a breach of the provisions of clause 4.32.1 of the lease to comply with the lawful requirements and reasonable recommendations of the Chief Fire Officer. He held that on the evidence before him Dunnes had breached clauses 4.29.2, 4.29.5, 4.32.1 and 4.32.3 of the lease.

98. On appeal Dunnes argued that there were no safety issues as Dunnes had agreed after the meeting on the 31st August 215 that it would install push bars on the Doors. The only reason, it was submitted, that this had not occurred was that it had been overtaken by the injunction of the 9th September, 2015. It argued that the letter of the 22nd July, 2015 did not amount to a requirement but accepted that it was a recommendation within the meaning of the clause. It also argued, as it had in the High Court, that it had a right to assess the recommendations of the Chief Fire Officer and to determine whether Dunnes agreed with those recommendations. It argued that it was entitled to take advice as to how to proceed when there was a division of opinion in the fire Department of Galway County Council in relation to the closure of the Doors and what was required to comply with fire safety regulations and the fire certificate for the unit.

99. In my opinion, the argument of Dunnes is without merit. Clause 4.32 requires Dunnes to comply with the reasonable recommendation of the appropriate local authority in relation to fire and safety precautions effecting the Demised Premises. It cannot be contested that the letter of the 22nd July 2015 constituted a recommendation within the meaning of the clauses. There was no evidence adduced to suggest that the recommendation of the 22nd July 2015 was anything other than reasonable. The recommendation was that the Doors should remain open "in the interim" until the push bar doors were installed. Thus, it is no answer to state that Dunnes agreed (conditionally) to implement the recommendation after the 31stAugust, 2105 (some six weeks later). It cannot be emphasised enough that there was absolutely no technical difficulty in complying with the requirements of the Chief Fire Officer which were in the interest of the safety of the users of the shopping centres. As the trial judge said, it was a matter of seconds to reactivate the disabled mechanism closing the Doors.

100. In addition, I would hold that the refusal to comply with the direction of Senior Assistant Chief Fire Officer Kelly of the 16th July 2015 likewise amounted to a failure to comply with the lawful requirements and reasonable recommendations of the appropriate local authority in relation to fire and safety proportions affecting the unit.

101. Dunnes argued that, just as with the covenants relating to planning, it was entitled to assess whether the recommendation was reasonable, and it was not obliged without question to comply with the measurable recommendation of the fire safety authorities. It is of course true that the obligation is to comply with the reasonable recommendations only. Insofar as an unreasonable recommendation might be made it would be open to Dunnes to challenge the reasonableness of the recommendation ultimately by judicial review proceedings if required. But that does not arise as the facts in this case where it was not suggested that there was no recommendation or that it was unreasonable, or indeed that there was any difficulty in complying forthwith with the recommendation.

102. Dunnes argued that the reasonable recommendation must be lawfully required. This construction ignores the fact that the obligation is to comply with the lawful requirements and reasonable recommendations. The construction contended for simply involves

deleting the words "and reasonable recommendations". Those words must be given a meaning and they mean something different from and in addition to lawful requirements.

103. Even more than in the case of a breach of planning permission, the landlord has a very real interest in the immediate compliance by the tenant with the lawful requirements and reasonable recommendations of the fire safety authorities without equivocation or disputation. As with clause 4.30, clause 4.32, properly construed does not entitle the tenant, Dunnes, to decide whether or not to comply with a recommendation within the terms of clause 4.32. For these reasons, I reject the argument that the trial judge erred in holding that Dunnes was in breach of clauses 4.29.2, 4.29.5, 4.32.1 and 4.32.

Was Dunnes in breach of clause 4.39 in relation to insurance?
104. By Clause 4.39 of the lease, Dunnes covenanted not to do or omit to do anything that could cause any policy of insurance in respect of or covering either the Demised Premises or the Centre to become void or voidable. The trial judge held that the clause meant that the landlord is not to bear the risk arising from any act or omission of Dunnes as tenant which could have, as its consequence, that an insurer would refuse to indemnify upon a claim being made. The trial judge emphasised that the question was whether the tenant had done anything that "could cause" any policy of insurance in respect of or covering the Centre to become void or voidable. He noted that this chimes with commercial and common sense.

105. Dunnes disagreed, appealed and argued that the evidence in the High Court was that an insurer would not be entitled to refuse cover and that the closure of the Doors would not have an impact on the respondent's insurance. It followed, according to Dunnes, that the trial judge simply had no basis for holding that there had been a breach of Clause 4.39 by Dunnes.

106. The argument ignored the response of the respondent's insurers to the situation. General Condition 2 of the respondent's policy of insurance provides that the policy shall be terminated in "any other circumstances, whereby any risk under the policy is increased". The trial judge notes that following the closure of the Doors the respondent "touched base" with its insurer with regards to the situation. On the 10th July, the insurers wrote to the agent for the respondent as follows:-

> *"As you know the situation regarding the doors that open out onto Edward Square; whether they are locked, alarmed or otherwise; whether people can use them to enter or exit Dunnes Stores is still very much an issue for us as insurers for the premises.*
>
> *Based on the information currently available to us, and notwithstanding the fact that there are still some unanswered questions, there is now a serious concern over whether the Insured have failed to follow the "Reasonable Precautions Condition" on their policy.*
>
> *On that basis we must now advise you that if an accident happens or if a claim is* ***made as a result of the doors being closed it is very likely that our claims department will refuse to indemnify our Insured*** *on the basis that they have failed to follow the "Reasonable Precautions Condition" on their policy.*
>
> *We should also mention that the failure to reopen the doors at this stage could result in claims being brought against other parties, including but not limited to Dunnes Stores, if there is an incident or injuries as a result of the doors remaining closed." (emphasis added)*

107. This letter satisfied the proof required to show that the actions of Dunnes "could cause" the policy of insurance to become void or voidable. It was not necessary, as is pointed out by the trial judge, to determine whether an insurer had properly indicated a perception of heightened risk. That being so, it is immaterial whether the respondent could have successfully challenged a refusal of cover. A commercial construction of the clause leads to the conclusion that the lessor did not bear any risk of declension of cover by reason of any act or omission on the part of a tenant. Accordingly, I would dismiss this ground of appeal also.

Was there a breach of Clause 4.23.3 by Dunnes?
108. By this clause, Dunnes covenanted not to make any alterations of a non-structural nature to the premises without obtaining the prior written consent of the landlord. The trial judge concluded that the indefinite closure of the Doors and their conversion into emergency doors constituted an alteration of a non-structural nature for which the prior written consent of the respondent was required to be sought. It was neither sought nor obtained and accordingly this clause was breached by Dunnes.

109. On appeal, Dunnes argued that the trial judge failed to provide adequate reasons to support his conclusion and argued that there was no evidence to support a claim that this clause had been breached. Dunnes argued that an alteration must be material in nature otherwise the clause would be unworkable. It argued that the clause only applied to alterations to the physical unit itself and not to the manner of use and accordingly there was no breach of Clause 4.23.3.

110. In my opinion an alternation of a non-structural nature to the premises includes the change of use of what were previously the main doors to the anchor unit of the shopping centre into emergency doors. It could not be described as a *de-minimis* alternation or that the clause would be unworkable if Dunnes were required to obtain the prior consent in writing from the respondent in advance of effecting such alternation. It should also be pointed out that the alternation is not simply as to use of the Demised Premises, it involves de-activating the automatic sensor system on the Doors which *inter alia* interferes with the pedestrian linkages between the two shopping centres.

111. In my judgment there was ample evidence for the trial judge to conclude that a breach of this clause had been made out and I reject this ground of appeal.

Was there a breach of Clause 4.16 in relation to common areas?
112. By Clause 4.16 Dunnes covenanted not to do anything whereby the fair use of the common areas by others may be obstructed in any manner. The respondent argued that by closing the Doors Dunnes prevented customers and prospective customers from accessing the Common Areas and thus the fair use of same. Previously such customers and/or prospective customers had become accustomed to entering Dunnes via the Edward Square entrance and continuing on into the Eyre Square Shopping Centre or vice versa. In paras 94 and 95, the trial judge set out the evidence which led him to conclude that the alternative access available via the Corbett Court Shopping Mall is both inadequate and an inconvenience. He referred to the decision of Laffoy J. in *Conneran v. Corbett & Sons* [2004] IEHC 389 where the Court was satisfied that there had been "*a real and substantial interference with the express and implied rights acquired by the plaintiffs under the leases*" and that it was no answer to say that there were other routes available in circumstances where the plaintiffs had been deprived of "*not only of the most convenient route but of the only suitable route for efficient bulk deliveries of merchandise*". The trial judge applied this reasoning by analogy to the circumstances in this case and held that the cutting off of direct access to the common areas by closing the Doors constituted a breach of Clause 4.16 and it was

irrelevant that indirect access might otherwise be gained to the common areas via the separately owned and entirely inconvenient Corbett Court means of access. He therefore concluded that there had been a breach of Clause 4.16 of the lease.

113. On appeal, Dunnes argued that in closing the doors Dunnes did not prevent customers of the Edwards Square Shopping Centre from accessing the common areas of Edwards Square. It argued that customers of Eyre Square Shopping Centre were not customers of the Edwards Square Shopping Centre and vice versa. It argued that it had not blocked customers from accessing the common areas of Edwards Square.

114. It is true that the closure of the Doors did not block customers who walked up Castle Street from accessing the common areas of Edwards Square but it did obstruct the fair use of those common areas by others who formerly traversed them by passing to or from the Eyre Square Shopping Centre, as they were entitled to do under the terms of the planning permission. Further, customers of the Edwards Square Shopping Centre for more than fifteen years used a pedestrian route from the common areas into the anchor unit as well as out of the anchor unit into the common areas. The closure of the Doors obstructed this access in both directions. The High Court in my judgment was correct to conclude that indirect access to the common areas via the separately owned and entirely inconvenient Corbett Court means of access was irrelevant in the circumstances. In my opinion there was ample evidence to support the finding of the trial judge that Dunnes breached this clause also and I would dismiss this ground of appeal.

115. In my judgment the trial judge was correct to hold that by closing and refusing to reopen the Doors while the unit was open for trade, Dunnes thereby breached clauses 4.16; 4.23.3; 4.29.2; 4.29.3; 4.29.5; 4.30.4; 4.31; 4.32.1 and 4.32.3 of the lease.

Appeal against the awards of damages

116. The trial judge awarded the respondent €53,860.50 in compensatory damages arising from the failure of a tenant of the Edward Square Shopping Centre, HMV, to pay the rent due under its lease to the respondent. He concluded that the respondent had suffered loss and damage as a result of a breakdown of commercial relationships with other tenants of the centre and a loss of use of associated rent roll and awarded general damages in the sum of €10,000. In addition, he awarded aggravated damages in the sum of €45,000 to the respondent. Dunnes appealed in respect of each of these awards.

117. First, Dunnes said that the trial judge erred in making the awards of damages in favour of the respondent as it merely holds the legal title to Edward Square and has no beneficial interest in the rent roll from the shopping centre. It was argued that therefore it had not suffered any loss or damage in respect of the matters complained. Therefore, according to Dunnes, there could be no question of compensating the respondent for a loss it did not suffer.

118. This point may be shortly disposed of. As the holder of the legal title, the respondent was the appropriate party to sue for breaches of covenant and for any losses arising out of the alleged wrongful acts of Dunnes. The fact that it must account for the rent or for awards of damages to another party who was beneficially entitled to same does not alter this fact. It certainly does not mean that the beneficial owner is required to sue or that Dunnes is not obliged to pay damages to the respondent.

119. The trial judge held that the evidence established that the respondent had suffered loss and damage including loss of rent from HMV, a breakdown of commercial relationships with other tenants, loss of use of associate rent roll and various legal costs. He accepted that the withholding of rent by tenants (actual in the case of HMV and threatened by others) would have irreparable and knock on consequences for the viability of the Edward Square shopping centre as a whole. He also accepted that this would have implications for the respondent's loan facility from NALM.

120. Having regard to the principles in *Hay v O'Grady*, this Court may not interfere with the findings of fact of the High Court where there is credible evidence to support those findings. While inferences of fact derived from oral evidence may be reconsidered, this court will be slow to disturb those inferences.

121. Mr. Hynes gave evidence on behalf of the respondent that HMV stopped paying rent following the closure by Dunnes of the Doors. HMV justified their action in refusing to pay rent on the basis that the Doors were closed and suggested that their footfall and turnover had been adversely affected.

122. However, there was no evidence before the Court that this in fact was the reason HMV withheld its rent. Furthermore, as a matter of law, even if it was the basis for its action, it was not entitled so to act. The respondent itself did not accept that HMV was entitled to withhold its rent, as it issued summary summons proceedings against HMV suing it for the arrears of rent. The respondent subsequently voluntarily decided to discontinue the proceedings "on a commercial basis", not on the basis that HMV was entitled to withhold its rent. The agreed evidence of the experts was that it was well known at the time that HMV was in financial difficulty throughout the country and John Moran, on behalf of the respondent, acknowledged the fact that it was not unusual at that time for HMV to fail to pay rent in respect of other units. Ultimately HMV went into examinership a number of months later. It cannot be said therefore that the failure of HMV to pay the rent due constituted a loss of rent roll suffered by the respondent as a result of the wrongful actions of Dunnes. In this circumstance it seems to me that there was no evidence upon which the trial judge could properly hold that the actions of Dunnes in closing the Doors was the cause of HMV withholding its rent from the respondents. Even if it were the case, it is another question entirely whether, in the circumstances, Dunnes would be liable in law to compensate the respondent for such losses.

123. Similarly, there was no or no sufficient evidence adduced to ground an award of €10,000 in "unquantified compensatory damages" in relation to "the strain in the commercial relationships" between the respondent and its other tenants or the "corruption of commercial relationships". The tenants did not withhold their rent and therefore there was no loss of rent roll in respect of these tenants. The height of the evidence in relation to tenants, other than HMV, is at para. 107 of the judgment that *if* the rents were withheld it would have irreparable and knock-on consequences for the viability of the Edward Square Shopping Centre as a whole. But they were not.

124. I would allow the appeals in respect of each of these awards of damages.

The tort of Causing Loss by Unfawful Means

The trial judge found that Dunnes was guilty of the tort of causing loss to the respondent by unlawful means. He held that the three essential ingredients of the tort were met: (i) intention, (ii) unlawful means and (iii) harm. At para 145 he held:

> *"The court finds that Dunnes has interfered with the economic interests of [the respondent], that it has intentionally caused loss to [the respondent] by unlawful means [the closure of the doors in breach of covenant] and as a retaliatory measure, that [the respondent] has suffered loss and damage that includes loss of rent from other tenants (whom it had to sue for same), corruption of commercial relationships, loss of use of rent-roll, and legal costs, and thus that the*

tort of causing loss by unlawful means has been committed by Dunnes."

For the reasons I have set out above, in my judgment the trial judge was in error in holding that the actions of Dunnes causes the losses identified in this passage. It fails to appreciate the essential distinction between the fact that the respondent suffered loss (in this case the rent due by HMV but nothing more) and the issue whether Dunnes caused it to suffer that loss. It is essential to the tort that the wrongful act complained of must cause the harm allegedly sustained. There is no evidence in this case which would entitle a court to concluded that the actions of Dunnes caused the losses complained of by the respondent. It follows that it is not open to a court to conclude that Dunnes was guilty of the tort.

In light of this conclusion, I do not find it necessary to consider whether the trial judge was correct to conclude that Dunnes' breach of contract satisfies the unlawful means limb of the tort and I expressly reserve my position on this point for decision in proceedings where it is necessary for the determination of the case.

The award of aggravated damages

125. The leading authority on aggravated and exemplary damages is the decision of the Supreme Court in *Conway v. INTO* [1991] 2 I.R. 305. The Supreme Court held that compensatory damages may be increased under the heading 'Aggravated Damages' by reason of:-

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

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

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

126. Exemplary damages arise either from the nature of the wrong itself or the manner of its commission and are intended to mark the Court's particular disapproval of the defendant's conduct in all the circumstances of the case. They are distinct from compensatory damages and are intended to be seen as a punishment of the defendant for such conduct.

127. In this case, the trial judge found as a fact that Dunnes had engaged in egregious deliberate behaviour both prior to the institution of the proceedings and in the conduct of the proceedings once commenced. The following facts were found by the High Court:-

(1) Following the purchase of the Edward Square Shopping Centre by the respondent, Dunnes stopped paying rent and service charges in respect of the Anchor Unit.

(2) The respondent was required to bring summary proceedings to secure payment of sums due and owning. On 14th July, 2014, the High Court gave judgment in favour of the respondent in the sum of €1,134,392.32. Dunnes appealed the decision to the Supreme Court. Dunnes paid a sum of €750,000 to the respondent and gave an undertaking to pay service charges as they fell due on an ongoing basis pending the appeal. The Supreme Court dismissed the appeal on the 15th May, 2015. The balance due pursuant to the summary judgment came to €384,392.32 together with accrued interest of €29,499.19. In spite of the decision of the Supreme Court, Dunnes did not discharge this sum.

(3) Dunnes did not pay any rent arising while the summary proceedings were before the Court. As a result, when the Supreme Court delivered judgment, substantial arrears of rent had accrued. On 15th May, 2015, the respondent demanded €748,979.75, being the outstanding rent and interest accrued from 1st July, 2014. Dunnes made no payment in respect of this demand.

(4) On 16th June, 2015 the respondent's solicitors served copies of the High Court and Supreme Court orders with penal endorsements on Dunnes registered office at 12.10. At 12.49 an in-house solicitor notified Ms. Margaret Heffernan by e-mail of the service of the orders with the penal endorsements. Eleven minutes later at 13.00 Ms. Heffernan e-mailed Mr. John McNiffe, in the following terms:

> *"John…can you arrange for the Door from Shop Street to be closed ASAP. Discuss with Paul they should put a fixture of Ladies wear in front of it and out (sic) notice entrance from main to (sic) store.*
>
> *Can you get this done ASAP*
>
> *It only needs to have foo (sic) closed and a fixture that I can move if we change to closing another door.*
>
> *Let me know when it can be done"*

Mr. McNiffe replied that the Doors could be closed from the following morning and he would have to double check if Dunnes were required to use the Doors as a fire exit.

Early in the morning of the 17th June, Ms. Heffernan replied:-

> *"Why should we have as a fire exit? You can check anyway!*
>
> *What I mean is just put Rails across the door so people know it is closed and use as part of dept display,*
>
> *We need to look at what we are paying for this area in service charge.*
>
> *Liz needs to really get involved with this lease now and get our rights and service charges clear. Can you discuss with you and ask her to get involved ASAP..*
>
> *We need to look at other things we can do like is car park a Walk through?*

(5) The plenary summons issued on the 16th July, 2015. Dunnes took the following steps in relation to the dispute and in the conduct of the proceedings:-

(i) It refused to comply with the recommendations of the Senior Assistant Chief Fire Officer of 16th July, 2015 to re-open the Doors.

(ii) It refused to comply with the recommendation of the Chief Fire Officer of the 22nd July, 2016 that the Doors be re-opened in the interest of safety of users of the Edward Square Shopping Centre and Eyre Square Shopping Centre.

(iii) The evidence was that Dunnes never contemplated re-opening the doors in the interim prior to fitting push bars to the Doors.

(iv) Mr. McNiffe, on behalf of Dunnes, said that the Doors were closed for operational reasons. This was directly contradicted by the e-mails quoted above. Under cross-examination Mr. McNiffe continued to assert that the Doors were closed for operational reasons but was unable to identify any such reason.

(6) On the morning of the hearing of the respondent's motion to have the action admitted into the Commercial List of the High Court, Dunnes discharged the sums due to the respondent on foot of the orders of the High and Supreme Court and the outstanding arrears of rent and interest so that it could argue that the case did not satisfy the Rules of Court to be entered into the Commercial List. The trial judge was of the view that this was a cynical ploy by Dunnes.

(7) The affidavit of Tom Sheridan, Dunnes' company secretary, opposing the application for an injunction restraining Dunnes from closing the Doors, averred that the closure of the Doors was not in response to service upon Dunnes of the orders of the High Court and Supreme Court with penal endorsements. Ms. Margaret Heffernan, who gave the order in question, did not swear an affidavit in response to the application for an injunction.

(8) It delivered a defence and counter-claim on the 9th October, 2005 expressly pleading at para 54:-

> *"The Defendant expressly denies that the closure of the doors was a retaliatory measure in response to steps taking by the plaintiff to recover judgment which it had obtained against the defendant."*

(9) Dunnes opposed the request for discovery of all documents establishing evidencing and/or concerning the dissemination within [Dunnes] of the letter of demand dated the 16th June, 2015 from the respondent or information as to its content, the dissemination within Dunnes of the letters of the 15th June, 2015 enclosing copies of the High Court and Supreme Court orders with penal endorsements as served on Dunnes and on its director on the 16th June, 2015, or information as to their contents and the decision by Dunnes to disable the automatic opening mechanism of the Doors and/or to close the Doors and the timing of the giving of instructions and/or the taking of action on foot of that decision. Discovery was only made following an order of the High Court of the 7th December, 2015 which revealed the e-mails set out above.

(10) Dunnes was obliged to amend its defence in light of the discovery of the e-mails on the 29th April, 2016 by deleting the sentence quoted above and substituting the following:-

> *"It has admitted that the closure of the Doors was in response to the service on the defendant, and not its directors, of the penally endorsed orders of the High Court and the Supreme Court received on 16th June, 2015 in so doing the defendant denies any wrongdoing. It has denied that the closure of the doors was in response to the service of the letter of demand dated 16th June, 2016 which was not received until 17th June, 2016."*

Dunnes thus admitted that it did close the Doors in response to service of the penally endorsed orders. This was contrary to the position maintained on affidavit in opposing the application for an injunction and in the defence delivered on the 19th October, 2015.

128. On appeal, Dunnes argued that the test as to whether aggravated damages ought to be awarded was not, whether it was in fact entitled to act as it did but, whether it *bona fide* believed at the time that it was so entitled to act. It argued that in his witness statement Mr. McNiffe had so stated and that therefore the trial judge erred in his application of the law and the facts.

129. I am wholly satisfied that there was ample evidence before the trial judge for him to conclude that Dunnes did not have a *bona fide* belief that it was entitled under the terms of its lease to close the Doors on the 17th July, 2015. He was entitled to conclude that there was a long and substantial history of Dunnes failing to pay rent and service charges and interest due to the respondent. He was entitled to conclude from the extraordinarily swift response that this was a retaliatory measure. If there were any doubt in this regard, the fact that Ms. Heffernan was considering whether there were other possible options open to Dunnes tended to under-score this conclusion. It is remarkable that in none of the exchanges between the parties prior to the application for an interlocutory injunction, did Dunnes or any of its representatives refer to Clause 4.19.1 as the basis for its entitlement to act as it did. Given that this was the central basis of its defence, the judge was entitled to take the view that the failure to rely upon this at an earlier period shows that it was not, in fact, relied upon at the time. He was entitled to take the view that Dunnes *ex post facto* was seeking to assert that it actually relied upon the provisions of Clause 4.9.1 in June, July and August 2015 when in fact it played no role at all in Dunnes' decision making and actions.

130. He was entitled to draw inferences adverse to Dunnes from the fact that it stated that the Doors were closed for operational reasons (and continued so to maintain up and until the trial of the action) when it was never in a position to identify those operational reasons and when this was flatly contradicted by the e-mails of the 16th June, 2015. He was also entitled to draw inferences from the failure to call Ms. Margaret Heffernan as a witness. It was her decision to close the Doors. The position maintained by Dunnes from June 2015 until April 2016 was that the Doors were not closed in response to the service of the penally endorsed orders of the High Court and the Supreme Court. Dunnes was obliged to amend its defence in what amounted to a *volte face*. He was entitled to infer that she could not give evidence that at the time she gave the instruction to close the Doors Dunnes believed that they were entitled to do what they did.

131. In those circumstances, I am satisfied that the trial judge was entitled to hold that the respondent ought to be compensated for the wrongs inflicted by Dunnes by an award of aggravated damages based on the manner in which the wrong was committed, the conduct of Dunnes after the commission of the wrong, and the conduct of Dunnes in the defence of the claim up to and including the trial of the action. It would equally have been open to the trial judge to conclude that it was appropriate to award exemplary damages to mark the Court's disapproval of the conduct of Dunnes. Therefore, I see no merit in the argument that the trial judge erred in awarding aggravated rather than exemplary damages, particularly as the respondent had sought both aggravated and exemplary damages. The rights of the respondent were deliberately flouted by Dunnes without regard to its obligations under the lease or indeed to other occupants of the Edward Square shopping centre.

132. Insofar as Dunnes has alleged that as a company as opposed to a natural person, the respondent is not capable of suffering "added hurt or insult" so as to attract aggravated damages, in my opinion, this submission is without merit and is contrary to principle. There is nothing in the decision in *Conway* which would justify such a distinction.

133. The trial judge awarded aggravated damages both for breach of contract and for the tort of unlawful or wrongful interference with economic interests in the aggregate sum of €45,000. I have already concluded that there is no basis for an award of damages for the tort as it was not made out in evidence. The issue is whether nonetheless this court ought to interfere with the award. I can see no basis upon which it can be said that the sum of €45,000 was an excessive award of aggravated damages in the circumstances of this case. It could well have been higher. I would not interfere with the award. I therefore would dismiss the appeal against this award.

Non-derogation from grant
134. Dunnes counterclaimed for damages against the respondent. It argued that if the proper construction and interpretation of Clause 4.19.1 of the lease is to permit Dunnes to close the unit or any part of it, in particular the Doors, but the Court finds that Dunnes is obliged to keep the Doors open during trading hours pursuant to the grant of planning permission, then the respondent ought to be liable to Dunnes for impermissible derogation from grant and/or breach of covenant. It submitted that such a result set at nought the contract agreed between Radical and Dunnes. Further, it argued that based on the representations of Radical, the respondent ought to be estopped from seeking to compel Dunnes to keep the Doors open and thirdly that the requirement to keep the doors open amounted to a breach of its right to quiet enjoyment pursuant to Clause 5.1 of the lease.

135. In my opinion, the submissions of the respondent, that this argument was predicated on the incorrect proposition that there had been a derogation from grant are correct. The trial judge correctly found that the doctrine of non-derogation of grant did not apply to the proceedings in circumstances where the respondent was not derogating from a grant but rather was seeking to compel Dunnes to comply with the terms and conditions of the grant. Further, no question of estoppel arises as this is likewise based upon the flawed reasoning of Dunnes that Clause 4.19.1 is engaged. As set out above, in my judgment, it is not. It follows therefore likewise that there cannot be a breach of the covenant for quiet enjoyment in the circumstances. I dismiss this ground of appeal also.

Balance of the appeal
136. Dunnes appealed against orders compelling it to comply with its obligations under the leases into the future on the basis that they amounted to mandatory injunctions which ought not to have been granted and/or amounted to orders for specific performance. These grounds of appeal were not pursued as they had become moot due to the fact that Dunnes had acquired the reversionary interest in the Demised Premises between the date of the decision of the High Court and the hearing of the appeal.

Conclusion
137. The planning permission for the Edward Square Shopping Centre, properly construed, required that the Doors be open during the hours that the anchor unit was open for trade to facilitate linkages between the Edward Square Shopping Centre and the Eyre Square Shopping Centre. The closure of the Doors on a permanent basis breached the planning permission.

138. The closure of the Doors breached the covenants on the part of Dunnes in clauses 4.16; 4.23.3; 4.29.2; 4.29.3; 4.29.5; 4.30.4;4.31; 4.32.1 and 4.32.3 of the lease. Dunnes had no intention of reopening the Doors in the absence of a court order. The respondent was entitled to an injunction to restrain Dunnes from closing the Doors while the Demised Premises were open for trade.

139. The provisions of clause 4.19.1 of the lease did not entitle Dunnes to close the Doors indefinitely and did not entitle it to breach the other clauses in the lease.

140. The trial judge erred in holding that the facts established that the closure of the Doors by Dunnes caused HMV to cease paying rent due under its lease and that Dunnes was liable to compensate the respondent for this failure by HMV to pay the rent due by it to the respondent. There was no evidence to support the finding that the actions of Dunnes had caused any other financial loss to the respondent arising from the withholding by other tenants of rent due to the respondent and a consequent loss of rent-roll or any other loss sounding in damages. Therefore, the awards of quantified and unquantified compensatory damages must be set aside.

141. The trial judge erred in holding that the facts established that Dunnes had committed the tort of causing loss by unlawful means as there was no evidence to support the conclusion that the harm asserted had been caused by Dunnes.

142. There was ample evidence upon which the trial judge was entitled to conclude that it was appropriate to award aggravated damages against Dunnes. The award of €45,000 was not excessive in the circumstances.

143. The respondent had not derogated from its grant but rather was seeking to enforce the grant of the three leases. There was no misrepresentation by Radical in agreeing to clause 4.19.1 of the lease and the respondent was not estopped from enforcing the clauses in the lease by reason of the provisions of clause 4.9.1. The trial judge was correct to dismiss Dunnes' counterclaim.

144. For these reasons I dismiss the appeal save that the award of damages will be reduced to €45,000.