[2017] IEHC 700

THE HIGH COURT

2017 No. 5675P

Between:

DUNNES STORES and ALMONTE

Plaintiffs

– and –

PAUL McCANN

Defendant

JUDGMENT of Mr Justice Max Barrett on 23rd November, 2017.

I. Background

(i) General.

1. Ashleaf Shopping Centre is a pleasant shopping venue in Crumlin, County Dublin. By lease dated 5th April, 2000 (the 'Anchor Lease'), Primeview Company, as landlord, demised a leasehold interest for 20 years in the anchor unit of the centre to Dunnes Stores, as tenant. Clause 4.1.2 of the Anchor Lease provides for the payment of service charges by Dunnes Stores. Commensurate with the execution of the Anchor Lease, Primeview Company, as landlord, demised the reversionary interest in the Anchor Unit to Almonte, as tenant, for a term of 905 years commencing on the expiration of the Anchor Lease (the 'Anchor Unit Reversionary Lease'). (Dunnes Stores and Almonte are related companies within the Dunnes Stores group of companies).

2. Ashleaf Shopping Centre is served by a car park situate in its basement. By lease dated 30th June, 1998, Primeview Company, as landlord, demised the car park (minus 50 spaces) (the 'Car Park') to Almonte, as tenant, for a term of 925 years (the 'Car Park Long Lease'). By lease dated 27th April, 2000, Almonte, as landlord, demised the Car Park to Messrs John and Frank Smith for 20 years (the 'Car Park Occupational Lease'). On 27th April, 2000, Messrs John and Frank Smith executed an agreement called the 'Car Park Contribution Agreement', the effect of which was that for 13 years thereafter, Dunnes Stores was to pay €100k p.a. to Messrs John and Frank Smith in respect of the Car Park. In practice, that €100k p.a. was set off against the rent owing under the Car Park Occupational Lease.

3. The interests of Messrs John and Frank Smith were transferred in or around 2006 to Mr Gary Smith. Pursuant to the terms of an agreement referred to generally and hereafter as the 'Licence for Assignment' of 24th November, 2006, between Messrs John and Frank Smith, Mr Gary Smith, Primeview Company and Dunnes Stores, Almonte consented to the assignment of the Car Park Occupational Lease to Gary Smith. On 5th February, 2013, AIB Banks plc appointed a receiver over the interest of Mr Gary Smith in the Car Park. Following the appointment of the receiver, it appears that there was no practical change in the manner in which the Car Park was controlled or managed. On 9th December, 2013, Mr Gary Smith was declared bankrupt by the Central London County Court. The Car Park Occupational Lease was disclaimed by Mr Gary Smith's English bankruptcy trustee on 24th April, 2015. Notably, Dunnes Stores has never challenged the validity of the English bankruptcy trustee's disclaimer of 24th April, 2015, before the courts of the neighbouring jurisdiction; and the Irish courts have no jurisdiction to declare invalid an act in an English bankruptcy.

4. Sometime after the appointment of the receiver, a dispute arose between the parties to these proceedings concerning the above-described set-off arrangement that is claimed previously to have applied. The receiver contends that the necessary mutuality for such a set-off arrangement does not exist, and offers the additional rationale that Mr Gary Smith's trustee in bankruptcy, in April 2015, has disclaimed Mr Smith's obligations. Dunnes Stores maintains, *inter alia*, that the necessary mutuality does exist and that it has in any event an express contractual right of set-off. It contends that the receiver is in occupation of the Car Park under the Car Park Occupational Lease and that there has been no valid disclaimer of that lease. These contentions are denied. Mediation has been tried between the parties and appears effectively to have failed.

5. To borrow a colloquialism, the 'long and the short' of the foregoing in purely cash terms, has been that (1) since the appointment of the receiver, no monies have been paid by Dunnes Stores to the receiver in respect of service charges on the anchor unit, (2) no monies have been paid by the receiver to Dunnes Stores, and (3) because the receiver has received no monies from Dunnes (Dunnes says rightly; the receiver says wrongly), he has had to delve into his existing resources to meet circa. €2m of expenses incurred in the provision of extended-hour Services and access to Common Areas since his appointment.

(ii) Provision of services and access to service-yard.

6. Clause 5.6 of the Anchor Lease provides as follows:

> *"If the Demised Premises are opened for trading to the general public outside the Shop Opening Hours in The Centre and/or if the Tenant requires the Common Areas or any part or parts thereof or the Car Park to be kept open for use of or for access to or egress from the Demised Premises or for any other purpose outside the Shop Opening Hours or the Service Hours, the Landlord will keep the same or procure that the same are kept open and provide such of the services specified in Clause 6 and the Seventh Schedule as shall be necessary or reasonably requested by the Tenant for such purpose or purposes and in the case of the Car Park the Landlord will operate or procure the operation of the Car Park…".*

7. So, if Dunnes Stores (a) wishes to keep its store open outside the Shop Opening Hours or (b) requires usage of the Common Areas outside the Shop Opening Hours or the Service Hours, the landlord (receiver) must, subject to two qualifications, keep the Common Areas open and provide certain Services to the Common Areas*, e.g.*, carrying out repairs, decorating, keeping the Common Areas clean, maintained and adequately lighted, providing refuse facilities, *etc.,* in effect all the kinds of things that one would expect of a shopping centre landlord *vis-à-vis* a shopping centre tenant. The two qualifications are as follows.

> (1) as can be seen from the text of cl.5.6 the Services must be "*necessary*" or "*reasonably requested by the Tenant"* (the receiver will contend at trial that it cannot be reasonable to request Services in circumstances where the 'hard cash' immediately necessary to fund same is being provided by the receiver).

(2) the landlord's (receiver's) obligations are subject to clauses 4.26.1 and 4.26.2 of the Anchor Lease, which each require the payment to the landlord (receiver) of reasonable additional costs incurred for the extra-hours openings, providing as follows under the heading "*Hours of Servicing/Trading*":

"4.26.1 If the Tenant shall use the means of access to or egress from the Demised Premises for the purpose of servicing or making deliveries to the Demised Premises outside the Service Hours to pay to the Landlord all such reasonable additional costs properly incurred by the Landlord on account of the Tenant availing of such access/egress or in the case of such access or egress being availed of at the same time by the Tenants or occupiers of any other Lettable Areas to pay to the Landlord a fair and reasonable portion of the said additional costs.

4.26.2 If the Tenant decides to trade from the Demised Premises outside of the Shop Opening Hours or (save as provided in clause 4.26.1 above) avails of access to or use of the Common Areas or the Car Park outside the Shop Opening Hours (including a period of one hour before and one hour after Shop Opening Hours each day) for any purpose then and in each of those events the Tenant will pay to the Landlord all such reasonable additional costs in respect of The Centre (if any) and the Car Park (if any) properly incurred by the Landlord on account of the Tenant exercising such rights or if the Tenants or occupiers of any other Lettable Areas trade or avail of such access or use outside the Shop Opening Hours then a fair and reasonable portion of the said additional costs shall be payable by the Tenant."

8. Under cl. 5.7. of the Anchor Lease, *inter alia*, the Landlord covenants with the Tenant as follows:

"5.7.2 To use all reasonable endeavours to extend the Shop Opening Hours at the request of the Tenant in accordance with extended trading hours of the Tenant from time to time."

9. The receiver will contend at trial that it cannot be unreasonable to decline such a request services where the 'hard cash' necessary to fund same is being provided by the receiver.

(iii) Events that Have Brought Matters to Their Present Juncture.

10. By e-mail dated 16th May, 2017, Dunnes Stores asked the receiver to extend Sunday-trading hours at the Ashleaf and for the provision of necessary services in that regard. By letter dated 25th May, 2017, the receiver refused that request in the following terms in a letter headed "*SPECIFICASSETS OF GARY SMITH (IN RECEIVERSHIP), Re: Ashleaf Shopping Centre…":*

"I refer to your email of 16 May 2017…which has been passed to me.

I also refer to the lease dated 5 April 2000 between (1) Primeview Company, (2) Snug Taverns Limited, (3) Dunnes Stores, (4) Allied Irish Banks plc and (5) Marivista Limited (the 'Lease') pursuant to which Dunnes Stores hold a lease of the anchor unit of the Centre. Capitalised terms not defined herein shall have the meaning given to them in the Lease.

You have requested the extension of the Services at the Centre for two additional trading hours on Sundays from 9am to 10and and from 8pm to 9pm effective from Sunday, 28 May 2017. At present, Dunnes Stores trades from the Anchor Unit from 10am to 8pm on Sundays.

Dunnes Stores has to date failed to pay any Service Charge since I was appointed as receiver to the Centre on 5 February 2013. As of today's date, the arrears of Service Charge due and owing total €1,969,580.38. I repeat my previous demands for such Service Charge to be paid forthwith.

Furthermore, rather than rehearse arguments made in previous correspondence again in this letter, the Car Park Lease has been disclaimed,

I have considered your request and, having regard to Dunnes Stores' failure to discharge Service Charge to date, I have instructed Bannon not to provide the Services for the additional hours requested.

In addition, in the absence of an acceptable proposal being made to deal with the Service Charge Arrears within 14 days of the date hereof, I have instructed Bannon to provide the Services for the Shop Opening Hours only. To date, the Services have been provided for a number of additional hours outside the core Shop Opening Hours. The Service Charge for these additional hours are invoiced to Dunnes Stores in accordance with the terms of the Anchor Unit Lease. However, as indicated above, Dunnes Stores have failed to discharge any Service Charge. This situation is untenable.

Furthermore, Dunnes Stores has also been permitted access to the service yard which is located within the Common Areas of the Centre for the delivery of supplies to the anchor unit outside the core Shop Opening Hours. I set out further below the revised basis upon which such access will be permitted.

1. the Services will be provided during the Shop Opening Hours only outlined in the table below…

Day Current Trading Hours of Dunnes Stores Grocery Revised Service Hours from Thursday, 8 June 2017 in accordance with the Shop Opening Hours
Monday 9.00-21.00 9.00-19.00
Tuesday 9.00-21.00 9.00-19.00
Wednesday 9.00-21.00 9.00-22.00
Thursday 9.00-22.00 9.00-22.00
Friday 9.00-22.00 9.00-22.00
Saturday 9.00-20.00 9.00-19.00
Sunday 10.00-20.00 (9.00-21.00 proposed extension of hours per email of 16 May 2017) 10.00-19.00

2. Dunnes Stores will be permitted access to the service yard during the Shop Opening Hours only outlined in the table below:

Day Current access to Service Yard Revised Access Hours from Thursday, 8 June 2017 in accordance with the Shop Opening Hours
Monday 6.30-22.00 9.00-19.00
Tuesday 6.30-22.00 9.00-19.00
Wednesday 6.30-22.00 9.00-22.00

Thursday 6.30-23.00 9.00-22.00
Friday 6.30-23.00 9.00-22.00
Saturday 6.30-21.00 9.00-22.00
Sunday 9.00-21.00 10.00-19.00

> *Nothing in this letter constitutes or shall be deemed to constitute, a waiver of any of the Receiver's rights or entitlements, whether under the Lease or otherwise…"*

11. Dunnes Stores has real concerns regarding the revised hours. Thus it contends, for example, that: (1) the restricted service hours and service yard access hours would significantly impact on the ability of Dunnes Stores to maintain its current trading hours at the Ashleaf; (2) as it has, on its version of events, discharged the applicable service charges, the receiver is precluded from restricting the services and access to the service yard; (3) access to the service yard is fundamental to the operations of the anchor unit for the following reasons (as identified in its statement of claim), "[1] *To enable Dunnes Stores open the Anchor Unit for trade and offer a full range of produce to consumers*…[2] [To enable] [t]*he safe and orderly delivery and receipt of deliveries on a staggered basis so as to ensure a safe working environment for both suppliers and Dunnes Stores employees…[*3] [To enable] [t]*he staggered and unimpeded delivery of fresh produce* [so as] *to ensure that refrigerated or frozen produce is not spoiled, which may impact negatively on the health and safety of customers*…[4] [To enable] [s]*taggered and planned deliveries avoid unnecessary queuing of delivery trucks causing nuisance to the local community; and*…[5] *To enable Dunnes Stores plan for deliveries across a number of stores in its network"; and* (4) if the restricted service hours and service yard access come into effect, it will suffer significant loss and damage, including but not limited to (i) loss of trade and custom at the anchor unit, (ii) reputational damage, (iii) disruption to its supply and distribution network, (iv) increased labour costs, (v) loss of fresh and frozen goods and produce, and (vi) increased costs of waste in respect of discarded fresh and frozen goods and produce.

II. Reliefs Sought

(i) Substantive Proceedings.

12. In its substantive proceedings, Dunnes Stores claims the following reliefs:

(1) a declaration that the receiver is a tenant of the Car Park pursuant to an express and/or implied tenancy and/or a tenancy by estoppel, subject to the covenants and conditions set out in the Car Park Occupational Lease;

(2) in the alternative, a declaration as to the basis upon which the receiver is in occupation and control of the Car Park and, if necessary, a declaration that he is a trespasser thereon;

(3) an order for judgment in the sum of €2m+ as against the receiver for arrears of rent due and owing to Almonte pursuant to the Car Park Occupational Lease and/or any express and/or implied tenancy and/or tenancy by estoppel, subject to the covenants and conditions of the Car Park Occupational Lease;

(4) a declaration that all sums due and owing by the receiver, his successors or assigns, under the Car Park Occupational Lease and/or any express and/or implied tenancy and/or a tenancy by estoppel subject to the covenants and conditions of the Car Park Occupational Lease, by way of damages, mesne rates and/or profits, are to be set off against all sums due and owing by Dunnes Stores under and by virtue of the Anchor Lease;

(5) a declaration that all sums due and owing by Dunnes Stores under and by virtue of the Anchor Lease are and were at all material times (and will be pending the expiration of that lease) charged in favour of the receiver to secure the payment, *inter alia*, of all sums due and owing to Almonte by the receiver, his successors or assigns, under the Car Park Occupational Lease; and/or any express and/or implied tenancy and/or a tenancy by estoppel subject to the covenants and conditions of the Car Park Occupational Lease; by way of damages, mesne rates and/or profits;

(6) a declaration that the receiver, his successors or assigns, is obliged to provide the services specified in cl.6 of, and the Seventh Schedule to, the Anchor Lease (the 'Services'), subject to the terms of the Anchor Lease during prescribed hours, *viz*. Sun: 06:30-21:00; Mon: 06:30-22:00, Tue: 06:30-22:00, Wed: 06:30-22:00, Thu: 06:30-23:00, Fri: 06:30-23:00, Sat: 06:30-23:00;

(7) a declaration that the receiver, his successors or assigns, is obliged to provide access to Dunnes Stores to the Service Areas (as defined in the Anchor Lease), and such part of the Common Areas (as defined in the Anchor Lease) as have been, and may from time to time, be designated by the Landlord (as defined in the Anchor Lease), including the service yard at the Ashleaf, for the purposes of making deliveries to or collections from or otherwise servicing the Demised Premises (as defined in the Anchor Lease), during prescribed hours, viz. Sun: 06:30-21:00, Mon: 06:30-22:00, Tue: 06:30-22:00, Wed: 06:30-22:00, Thu: 06:30-23:00, Fri: 06:30-23:00, Sat: 06:30-21:00;

(8) a declaration that the receiver, his successors or assigns, is obliged to provide the Services, subject to the terms of the Anchor Lease, necessary to facilitate the extended Sunday trading hours of Dunnes Stores, being 09:00-21:00;

(9) a declaration that Almonte is entitled to take possession of the Car Park as against the receiver for, *inter alia*, the failure to pay rent thereon and/or trespass;

(10) an order granting Almonte possession of the Car Park;

(11) if necessary, damages for trespass, to include mesne rates and profits;

(12) damages for breach of contract and/or covenant;

(13) damages for unlawful interference with the economic interests of and/or intentional causing of economic loss to Dunnes Stores;

(14) all necessary accounts and enquiries;

(15) interest; and

(16) costs.

(ii) The Within Application.

a. The Substance of the Motion.

13. Pending the determination of the substantive proceedings, Dunnes Stores has issued a notice of motion, to which the within judgment relates, seeking the following reliefs:

> (1) an interim and/or interlocutory *quia timet* injunction prohibiting the receiver from altering (i) the hours during which the services provided pursuant to cl.6 of, and the Seventh Schedule to, the Anchor Lease as provided from the following: Su: 10:00-20:00; Mo: 09.00-21:00; Tu: 09:00-21:00; We: 09:00-21:00; Th: 09:00-22:00; Fr: 09:00-22:00; Sa: 09:00-22:00, and (ii) the hours of access of Dunnes Stores to the Service Areas (as defined in the Anchor Lease) and such part of the Common Areas (as defined in the Anchor Lease) as have been, and may from time to time be, designated by the Landlord (as defined in the Anchor Lease), including the service yard at the Ashleaf Shopping Centre, for the purposes of making deliveries to or collections from or otherwise servicing the Demised Premises (as defined in the Anchor Lease) from the following: Su: 06:30-21:00; Mo: 06:30-22:00; Tu: 06.30-22:00; We: 06:30-22:00; Th: 06:30-23:00; Fr: 06:30-23:00; Sa: 06:30-21:00.
>
> (2) an interim and/or interlocutory injunction prohibiting the receiver from altering (a) the hours during which the services provided pursuant to cl. 6 of, and the Seventh Schedule to, the Anchor Lease are provided from the following: Su: 10:00-20:00; Mo: 09.00-21:00; Tu: 09:00-21:00; We: 09:00-21:00; Th: 09:00-22:00; Fr: 09:00-22:00; Sa: 09:00-22:00, and (b) the hours of access of Dunnes Stores to the Service Areas (as defined in the Anchor Lease), and such part of the Common Areas (as defined in the Anchor Lease) as have been, and may from time to time be, designated by the Landlord (as defined in the Anchor Lease), including the service yard at the Ashleaf Shopping Centre, for the purposes of making deliveries to or collections from or otherwise servicing the Demised Premises (as defined in the Anchor Lease) from the following: Su: 06:30-21:00; Mo: 06:30-22:00; Tu: 06.30-22:00; We: 06:30-22:00; Th: 06:30-23:00; Fr: 06:30-23:00; Sa: 06:30-21:00.

b. Mandatory or Prohibitory Relief?

14. Under the Anchor Lease, the Landlord (now the receiver) entered into positive covenants with Dunnes Stores to provide certain services to the Common Areas of the Centre, e.g., carrying out repairs, decorating, keeping the Common Areas clean, maintained and adequately lighted, providing refuse facilities, *etc*., in effect all the kinds of things that one would expect of a shopping centre landlord *vis-à-vis* a shopping centre tenant. In return Dunnes Stores has covenanted with the landlord to pay service charges to cover its share of the cost of the services aforesaid, with the landlord's obligation to provide the services being conditional on the payment of the said service charges.

15. Notwithstanding the form of the wording used by Dunnes Stores when crafting the form of injunctions sought in its notice of motion, those injunctions in substance and in truth seek to compel the receiver to provide the Services aforesaid on an extended and ongoing basis. Thus Dunnes Stores seeks the performance of positive actions by the receiver, actions that entail expenditure*, e.g.*, in terms of additional staff costs, and which, regardless of the rights and wrongs of the dispute that is ongoing between the parties, will immediately require of the receiver that he pay the 'hard cash' necessary, *e.g.*, in respect of additional staff costs. Dunnes Stores effectively concedes in its written submissions that it is seeking to mandate certain actions of the receiver, stating "*It does not seek to mandate the Receiver to do anything that it has not been doing prior to the issue of the within proceedings*"…but that is still seeking to mandate the receiver positively to do something; the injunctions sought in the within proceedings would require the receiver on an ongoing basis positively to provide Services to Common Areas and to provide access to the Service Areas; such injunctions are clearly mandatory in nature. Moreover, while Geoghegan J. refers in *Noel Ó'Murchú t/a Talknology v. Eircell Limited* [2001] IESC 15, to there being

> *"different kinds of mandatory injunctions" and that "[a]lthough the injunctions sought in this case may arguably be classified as 'mandatory'….[t]hey are directed simply towards retaining the status quo pending the outcome of the action, which is the normal purpose of a prohibitive injunction",*

the court does not understand this to mean that a mandatory injunction which seeks to preserve the status quo falls necessarily and in all instances to be treated as a prohibitory (or prohibitory-type) injunction. As is clear from the judgment of Clarke J. in *Glenkerrin Homes v. Dun Laoghaire Rathdown County Council* [2006] IEHC 413, in assessing whether an injunction is mandatory or prohibitory in nature, a court must examine the substance, not just the form, of the order sought. So, for example, Clarke J. states in his judgment that:

> *"The crucial question, it seems to me, stems from the fact that the Order sought in this case is, in* **substance***, a mandatory order. It was, I think, properly accepted by counsel for the Plaintiff that while the Order sought at paragraph 1 of the Notice of Motion is expressed in negative terms, it is, in* **substance***, a mandatory order involving a double negative and it seems clear that the* **substance** *of the Order sought is a mandatory order."* [Emphasis added].

16. The substance of the injunctive relief sought in the within application is mandatory. Support for this last conclusion is to be found in the relatively recent decision in *Thomas Thompson Holdings & ors. v. Musgrave Group* [2016] IEHC 28, para.8, in which Hedigan J. refused an application for an interlocutory injunction enforcing a 'keep open' covenant in a supermarket lease, observing that:

> *"Although…the plaintiff characterises the order sought as prohibitory, its effects in substantive terms would be to force the defendant to continue operating their Supervalu store until September 2018, against their wishes and contrary to their interest because they are operating it…* [at] *a substantial loss".*

17. The court does not know in this case whether or not the receiver would be operating at a true loss: that cannot be known until the outcome of the substantive proceedings. However, it is certainly the case that at this time the only party that would, to borrow a colloquialism, 'take an immediate hit' in cash terms is the receiver.

18. That a distinction still falls to be made between mandatory and prohibitory injunctions in Ireland was reaffirmed by the Supreme

Court in *Okunade v. Minister for Justice* [2012] 3 I.R. 152, para. 76. That that distinction has a consequence is clear from the decision of the Supreme Court in *Maha Lingham v. HSE* [2006] E.L.R. 137, 140: "it is necessary", per Fennelly J., "*for the applicant*" (here Dunnes Stores) "*to show at least that he has a strong case that he is likely to succeed at the hearing of the action*", as opposed to establishing that "*fair bona fide question*" referenced by O'Higgins C.J. in *Campus Oil v. Minister for Industry (No. 2)* [1983] I.R. 88, 107. In truth, matters seem to have become terribly complicated since Jessel MR's simple but sensible observation in *Smith v. Smith* (1875) LR 20 Eq 500, 504, that:

> *"As to mandatory injunctions, their history is a curious one, and may account for some of the expressions used by the Judges in some of the cases cited. At one time it was supposed that the Court would not issue mandatory injunctions at all. At a more recent period, in cases of nuisance, a mandatory injunction was granted under the form of restraining the Defendant from continuing the nuisance. The Court seems to have thought that there was some wonderful virtue in that form, and that extra caution was to be exercised in granting it. To that proposition I can by no means assent. Every injunction requires to be granted with care and caution, and I do not know what is meant by extraordinary caution. Every Judge ought to exercise care, and it is not more needed in one case than in another."*

19. One can see further traces of this sensible simplicity in Lord Hoffmann's more recent observations in *National Commercial Bank Jamaica Ltd v. Olint Corporation Ltd* [2009] 1 WLR 1405, 1410, which saw him formulate a unified test, applicable regardless of the form of the injunction (mandatory or prohibitory) which focuses on avoiding "irremediable *prejudice"*. Per Lord Hoffmann at 1409-10:

> *"There is…no reason to suppose that, in stating these principles, Lord Diplock was intending to confine them to injunctions which could be described as prohibitory rather than mandatory. In both cases, the underlying principle is the same, namely, that the court should take whichever course seems likely to cause the least irremediable prejudice to one party or the other….What is true is that the features which ordinarily justify describing an injunction as mandatory are often more likely to cause irremediable prejudice than in cases in which a defendant is merely prevented from taking or continuing with some course of action….But this is no more than a generalisation. What is required in each case is to examine what on the particular facts of the case the consequences of granting or withholding of the injunction is likely to be. If it appears that the injunction is likely to cause irremediable prejudice to the defendant, a court may be reluctant to grant it unless satisfied that the chances that it will turn out to have been wrongly granted are low; that is to say, that the court will feel, as Megarry J said in Shepherd Homes Ltd v Sandham [1971] Ch 340 , 351, 'a high degree of assurance that at the trial it will appear that the injunction was rightly granted'….*
>
> *For these reasons, arguments over whether the injunction should be classified as prohibitive or mandatory are barren….What matters is what the practical consequences of the actual injunction are likely to be."*

20. To the foregoing might be added that it is not always the case that a mandatory injunction imposes an additional degree of hardship or expense on a defendant, nor that in practical terms the making of a mandatory order will always lead to additional difficulties in enforcement and supervision. In truth, as lawyers well know, it is perfectly simple to cast a positive relief in negative terms and vice versa. A common "*irremediable prejudice*" test of the type contemplated by Lord Hoffmann in *National Commercial Bank Jamaica,* and which applies regardless of the form of injunction sought (mandatory or prohibitory), seems more persuasive in logic and more desirable in practice than the application of different standards to forms of injunction that can easily be re-cast in whatever form might seem preferable to a particular party. But while the court can accept that logic and might wish for such practical advantage, it is bound by precedent. That a distinction still falls to be made between mandatory and prohibitory injunctions in Ireland was reaffirmed by the Supreme Court in *Okunade*. That that distinction has a consequence is clear from the decision of the Supreme Court in *Maha Lingham*. And that the "*strong case*" test has not been restricted to service or employment contracts but, rather, has been and continues to be applied in a variety of contexts, is evident from case-law, *e.g., Bank of Ireland v. O'Donnell* [2015] IECA 73 (mandatory injunction requiring yielding up possession of premises), *E.S.B. v. Roddy* [2010] IEHC 158 (mandatory injunction restraining defendants from preventing plaintiffs from accessing lands) and *Tola Capital Management LLC v. Linders and anor (No. 1)* [2014] IEHC 316 (mandatory injunction restraining defendant from purchasing loans other than in accordance with terms of agreement with plaintiff). Finally, and notably, as Denham J. observed in *Boyhan v. Tribunal of Inquiry into the Beef Industry* [1992] I.L.R.M. 545, 556, echoing observations of O'Higgins C.J. in *Campus Oil*, a mandatory injunction is an "*exceptional form of relief*".

III. Strong Case?

21. Has Dunnes Stores established a strong case that it is likely to succeed at trial? Respectfully, the court considers that Dunnes has failed entirely in this regard. Why so?

22. First, the Car Park Occupational Lease was disclaimed by Mr Gary Smith's English bankruptcy trustee on 24th April, 2015. The court has affidavit evidence before it from Mr Parker, an English-qualified solicitor, that "*under the English Insolvency Rules, a disclaimer is presumed valid and effective unless a party can prove the contrary*". Dunnes Stores has never challenged the validity of that disclaimer in England and the Irish courts have no jurisdiction to declare invalid an act in an English bankruptcy. It follows that Dunnes Stores is not possessed in this regard of the requisite "*strong case*".

23. Second, as regards the set-off clause in the Licence for Assignment, it seems to the court that two possible scenarios present. In the first scenario that set-off clause (i) is an obligation under a pre-receivership contract entered into by Mr Gary Smith and thus does not bind the receiver (*Ardmore Studios (Ireland) Ltd v. Lynch and ors* [1965] I.R. 1), and (ii) was disclaimed and ceased to have effect in April 2015. In the second scenario, even if the court is completely wrong as to (i) and (ii) and the contrary applies, i.e. that the Licence for Assignment falls to be construed as establishing a more expansive right of set-off than statutory insolvency set-off, that presents an equally great difficulty for Dunnes Stores because the situation that would then present would violate the *pari passu* rule in bankruptcy, yielding a serious difficulty under the so-called *'British Eagle principle'*, with the result that the set-off clause would fall to be treated as void or ineffective. Either way, it follows that Dunnes Stores is not possessed in this regard of the requisite "*strong case*".

24. Third, there is, with respect, not even a stateable case for a general or equitable right of set-off because there is no mutuality between debts allegedly owed by Mr Gary Smith to Almonte, and Service Charges payable by Dunnes Stores to the receiver. It is a fundamental principle that for set-off to be exercisable, the relevant debts must be owed between the same parties in the same right, even in cases of equitable set-off. *Thus, as Laffoy J. observes in O'Meara v. Bank of Scotland [2011] IEHC 402, para. 12.1, "The fundamental principle which underlies the entitlement of a bank to set off under the general law is mutuality, which requires that the debts be between the same parties in the same right"*, and, at para. 13.1, *"As regards the principle of equitable set-off in the context of bank accounts, the requirement of mutuality in relation to the beneficial interests in the cross-debts pervades its application*." Though stated in the context of banking law, these are well-established principles of general application. There is also the additional difficulty for Dunnes that it appears to be seeking a right of set-off in respect of a liability (rent) that arose *after* the receiver was appointed; however, where a debt owed by A to B becomes due *after* a receiver is appointed to A, A's secured creditor

takes the assignment of any debt owed by B to A free from B's right to set-off when it comes to debts that did not yet exist at the time of assignment. (See NW *Robbie v. Witney Warehouse* [1963] 3 All ER 613; and *Business Computers v. Anglo-African Leasing* [1977] 1 WLR 578; contrast *Rother Iron Works Ltd v. Canterbury Precision Engineers Ltd* [1974] 1 Q.B. 1 and *Murphy v. The Revenue Commissioners* [1976] I.R. 15). It follows that Dunnes Stores is not possessed in this regard of the requisite "*strong case*".

25. Fourth, as to the notion that the receiver is a trespasser, two scenarios present. The first is that the receiver cannot be a trespasser as he has an express legal right to enter the Car Park as landlord under the Car Park Long Lease. The second is that he is a trespasser, in which case, (i) the court does not see, having regard to *Edward Lee v. N1 Property Developments* [2013] IEHC 162 and the evidence at hand, how any mesne rates could be greater than nil/nominal, and (ii) more importantly, indeed crucially, any such mesne rates could not in any event be set-off under cl.11 of the Licence for Assignment because that provision only applies to "*any rent or sum of money*" falling due under "*the Lease*", *i.e*. the Car Park Occupational Lease, not any new arrangement. Either way, it follows that Dunnes Stores is not possessed in this regard of the requisite "*strong case*".

26. Fifth, even if it could be inferred that the receiver has agreed to enter into a new tenancy over the Car Park, indeed even if such a tenancy exists, any rent payable would not be capable of being set-off against Service Charges. This again is because the contractual right of set-off in cl.11 of the Licence for Assignment only applies to "any rent or sum of money" falling due under "*the Lease", i.e.* the Car Park Occupational Lease, not any new arrangement. It follows that Dunnes Stores is not possessed in this regard of the requisite "*strong case*".

IV. Conclusion

27. As Dunnes Stores has failed entirely to show that it has the requisite "*strong case*" for the mandatory injunction that it seeks, it is not necessary for the court to proceed to consider the adequacy of damages and the balance of convenience.

28. For the reasons aforesaid, Dunnes Stores' application for the injunctive relief that it seeks at this time must fail and is respectfully refused.

29. Finally, and on a separate note, the court notes that there was suggestion by counsel for the receiver at the hearing of the within application that Dunnes Stores, *inter alia*, has been "*bellicose*" in its dealings. There is nothing wrong with being robust in the *bona fide* advancement or defence of what one perceives to be one's legal entitlements, regardless of whether one is proved right or wrong at the end of the day. As the court noted in *Camiveo Ltd v. Dunnes Stores* [2017] IEHC 147, para. 8, when not dissimilar complaints were raised concerning the actions of Dunnes Stores in the circumstances of those proceedings:

> *"Dunnes enjoys the same right of access to the courts as any other person and is entitled to commence as many proceedings as it considers appropriate to vindicate what it considers are its legal entitlements and rights. It may win such cases, it may lose such cases; it will always get a fair hearing."*