Neutral Citation: [2015] IEHC 716

THE HIGH COURT

Record No. 2015/49JR

IN THE MATTER OF
AN APPLICATION PURSUANT TO SECTION 50 AND SECTION 50A OF THE PLANNING AND DEVELOPMENT ACT 2000 (AS AMENDED)
AND IN THE MATTER OF
AN APPLICATION

Between:

DUNNES STORES

Applicant

– and –
AN BORD PLEANÁLA

Respondent

– and –
KILKENNY COUNTY COUNCIL

First Notice Party

– and –
DEERLAND CONSTRUCTION LIMITED

Second Notice Party

JUDGMENT of Mr Justice Max Barrett delivered on 13th November, 2015

PART 1: INTRODUCTION

1. Dunnes Stores has brought this application ostensibly for one purpose; in truth the application serves a very different end. On its face, the application is concerned with the legality of a decision of An Bord Pleanála to grant certain retention permission to Deerland Construction. That permission concerns a shopping centre development at Ferrybank, in County Kilkenny. The 'anchor store' at that development is owned by Dunnes. The retention permission authorises five alterations which, individually and collectively, are minor and cosmetic in nature. In a twist worthy of Lewis Carroll, Dunnes in fact has no issue with the alterations that are the subject of the retention permission. So why have these proceedings been commenced? If truth be told, they have nothing to do with planning law and everything to do with Dunnes securing an advantage for itself in a long-running contractual dispute with Deerland and National Asset Loan Management Limited ('NALM'). (This last entity has acquired certain loans of both Deerland and a Deerland subsidiary known as Holtgen). A preliminary issue that therefore arises in this application is whether it comprises an 'abuse of process' that justifies the court in refusing the reliefs sought, declining to consider the purported planning-related issues arising, and dismissing the proceedings.

PART 2: BACKGROUND FACTS

i. Overview

2. The facts of this case can be reduced to a useful chronology. Some of the terms used in the chronology are capitalised because they have a defined meaning for the purpose of the transaction documentation agreed between Dunnes and the Ferrybank developers. It is unnecessary for the court to provide the relevant definitions as the terms employed are largely self-explanatory; their exact meaning is in any event well-known to the parties.

ii. Summary chronology

4 August 2006 Kilkenny County Council grants Deerland planning permission (05/1287) for the Ferrybank Shopping Centre.

March 2007 Work on the Centre commences.

22nd March 2007 Kilkenny County Council grants amending permission (06/2010) to Deerland.

12th June 2007 Dunnes enters into a contract to purchase the site of the anchor store for €2.25m

13th June 2007 Dunnes enters into a Development Agreement and agrees to pay €37.5m for the construction of the anchor store.

1st November 2007 Kilkenny County Council grants amending permission (07/1420) to Deerland.

2008 generally Throughout 2008, Holtglen encounters difficulties in completing the development and Dunnes makes clear that it has no great interest in opening the anchor store. In July, a representative of Dunnes advises a representative of the developer that, absent a €15m discount on the price of the anchor store, Dunnes will not open the store. Relations between the parties deteriorate. Notably, Dunnes at no point expresses concern that the development has not been built in compliance with the applicable planning permission.

28th October 2008 Dunnes serves a 'Cure Notice' under cl.22.1(a) of the Development Agreement. No breach of planning requirements is alleged.

14th May 2009 Joint inspection of anchor store takes place.

20th May 2009 Dunnes issues an Objection Notice specifying various issues and defects.

28th May 2009 Dunnes issues a Step-In Notice to Bank of Ireland.

10th June 2009 Practical completion of the anchor store is claimed to have been achieved. Hereafter, Dunnes has 20 weeks to fit out and open the anchor store. However, Dunnes disputes that practical completion has been achieved.

21st July 2009 Joint inspection for the purpose of certifying Centre Practical Completion takes place. Dunnes gets to look at the entire centre and everything that has been done. Notably, no issue is raised by Dunnes as to compliance with planning permission.

28th August 2009 Practical completion of the Centre is achieved.

4th September 2009 As mentioned above, Dunnes disputed that practical completion of the anchor store had occurred. On 4th September, an Independent Architect determines that practical completion was reached on the previous 10th June; he rejects all

objections advanced by Dunnes as to why practical completion has not been achieved.

Within hours of the Independent Architect's determination, Dunnes commences an arbitration (the so-called 'Monies Arbitration') claiming an entitlement to terminate under the Development Agreement; Holtglen counterclaims for monies owed. Not a single issue about planning compliance is raised in this arbitration.

15th June 2011 Arbitrator issues interim award finding that Dunnes is not entitled to terminate. He finds that Holtglen was guilty of some material breaches of the Development Agreement but that all of these breaches were remedied within the applicable, contractually agreed 'cure period'.

7th October 2011 Arbitrator issues a final award (the 'Award') finding that Holtglen is entitled to succeed on the counterclaim and making an award in favour of Holtglen of in excess of €20m plus interest and costs.

End-Autumn 2011 *Notably, despite practical completion having been reached (and having independently been determined to have been reached), and despite having completely lost in the so-called 'Monies Arbitration', Dunnes does not proceed to honour its standing contractual obligation to fit out and open the anchor store.*

17th November 2011 Dunnes initiates proceedings seeking to set aside the Award.

28th November 2011 Holtglen commences a second arbitration (the so-called 'Fit-Out Arbitration') seeking to enforce Dunnes' obligation to fit out and open the anchor store.

5th December 2011 Holtglen issues proceedings to enforce the Award.

9th January 2012 Dunnes serves notice of its intention to terminate the agreement obliging it to fit out and open the anchor store on the basis of Holtglen's insolvency. This fails because the 'step in' arrangements that pertain under cl.22.2 of the Development Agreement (considered hereafter) are invoked by NALM.

13th February 2012 NALM serves a notice of substitution substituting it as developer under the Development Agreement.

27th March 2012 High Court dismisses Dunnes' challenge to the Award and grants relief to enforce the Award, including a judgment against Dunnes of just under €20.3m.

25th April 2012 Holtglen demands payment of the judgment debt. Dunnes fails to pay.

19th September 2012 Holtglen issues a statutory demand to Dunnes, threatening to petition for the winding-up of Dunnes if it continues to fail to pay the judgment debt.

September 2012 It is now, three years after practical completion, following joint inspection around that time of the premises, and after doing so much to avoid its standing contractual obligations to fit out and open the anchor store, that Dunnes becomes concerned that the Centre does not appear to have been carried out in accordance with applicable planning permissions. Notably and, the court finds, not un-coincidentally, Dunnes engages a fresh set of architects (not the architects who had been involved throughout the development process, who had attended all the site meetings, and who conducted the joint inspections) to go and inspect the Centre and discover what planning issues presented. The court entertains no doubt, on the evidence before it, that these purported planning concerns are entirely to do with the on-going arbitration and, in particular, the then petition for winding-up of Dunnes. What the evidence shows is a major 'ramping-up' of engagement at this time between Dunnes and its legal team and other professional advisors and – lo and behold – one finds the spectre of planning issues raised as the phantom issue on which, from this point onwards, Dunne seeks to hang its continuing efforts to avoid doing as it is contractually required to do.

October 2012 Planning report of Simon Clear & Associates and Duffy Mitchell O'Donoghue and Associates is compiled.

9th November 2012 Holtglen petitions to wind up Dunnes Stores.

14th December 2012 The winding-up petition is listed for hearing but withdrawn after Dunnes pays the amount due on the eve of the hearing.

May 2013 Dunnes is given leave to amend its points of defence in the 'Fit-Out Arbitration' to plead alleged planning breaches at the Centre as a defence. Notably, there was no mention of same in the initial points of defence filed a year previously.

3rd September 2013 Compliance submission made by Deerland to Kilkenny County Council in a bid to resolve the purported planning issues and get a resolution to matters.

3rd October 2013 Kilkenny County Council issues a compliance confirmation.

22nd November 2013 Deerland applies to Kilkenny County Council (ref. 13/543) for retention permission for six items including four windows that form part of the anchor store and were installed at the request of Dunnes.

10th April 2014 Deerland withdraws the just-mentioned application because Dunnes, as owner of the anchor store, (surprisingly) declines to consent to the inclusion of the four windows in the application made.

6th May 2014 Deerland submits a fresh application for retention permission for five items.

12th June 2014 Dunnes makes the only submission on the retention application.

30th June 2014 Kilkenny County Council grants retention permission subject to certain conditions.

28th July 2014 Dunnes appeals the decision of Kilkenny County Council to An Bord Pleanála.

1st December 2014 An Bord Pleanála grants retention permission subject to certain conditions.

2nd February 2015 Dunnes commences judicial review of the decision of An Bord Pleanála.

20th-23rd and 27th Judicial review application heard by High Court.

October 2015

iii. Standard reliefs, minor alterations and strange proceedings

a. The standard
3. On the face of it, this application aims at securing the following reliefs: (1) an order of *certiorari* quashing the decision of An Bord Pleanála to grant retention permission in respect of the Centre; (2) a declaration that the said grant of planning permission is ultra vires, invalid and/or of no legal effect; and (3) certain other ancillary reliefs.

b. The minor
4. On the face of it, the court is being asked, more particularly, to review a retention permission in respect of: (i) a lift motor room/staircase enclosure over-run on the east elevation of the shopping centre; (ii) an external landscaped area at the northern boundary of the sight, including omission of a permitted bridge; (iii) the placement of red glazing panels, instead of stone panels, at the ground floor main entrance lobby; and (iv) louvred screens on the shopping centre roof.

c. The strange
5. Now for the strange bit: Dunnes has no objection to the just-mentioned adjustments. So this is a judicial review of the granting of retention permission where the party that has brought the application (Dunnes) has no issue with the substance of the adjustments to which that permission relates. That must be something of a first, so far as planning-related judicial review applications are concerned. But whether it is or not, the fact that Dunnes has no issue with the substance of the adjustments to which the retention permission relates offers considerable support for the contention that Dunnes, in coming to court with the within application, has engaged in an 'abuse of process'.

PART 3: DUNNES' INVOLVEMENT IN THE ON-GOING DEVELOPMENT

i. The first affidavit of Mr Sheridan
6. Mr Sheridan is Dunnes' company secretary. In an affidavit of 2nd February, 2015, he avers, inter alia:

> *"7. I say that in or about September 2012, i.e. prior to the relevant application being lodged, the Applicant became concerned that the development of the Centre, which at that stage had already been described by Deerland as completed, did not appear to have been carried out in accordance with the planning permissions upon which Deerland was purporting to rely. As a consequence, the Applicant [Dunnes] instructed Simon Clear & Associates and Duffy Mitchell O'Donoghue Architects, assisted by Precision Surveys Limited, to carry out an inspection of the development and the surrounding site in October 2012 so as to determine the extent to which the development had departed from the plans and particulars lodged with the planning applications for the Centre and the extent to which the development amounted to an unauthorised development. The report produced…following this inspection is contained in the Appeal lodged with the respondent [An Bord Pleanála]…".*

7. The highlighted text creates the impression that the issue of compliance with planning permission cropped up for the first time *"in or about September 2012".* Thereafter professionals were appointed to determine what is afoot and they, in time, reported back to Dunnes. It all seems rather as one would expect any rational corporation to behave. Except that the picture painted by Mr Sheridan seems not to tally fully with the wider truth of matters.

8. Continuing, however, with Mr Sheridan's affidavit, he avers:

> *"8. I say that this inspection revealed a large number of material deviations from*
>
> *the relevant planning permissions….*
>
> *9. I say that this was of great concern to the Applicant because there was, at that time, considerable pressure being put on the Applicant by Holtglen/NALM to enter onto these lands, to carry out works for the purposes of fitting out and opening the Store."*

9. The court rather arches an eyebrow at the reference to *"material deviations"* when it recalls the minor and cosmetic alterations that are the subject of the (impugned) retention permission and which are the focus of this application. However, be that as it may, the above text is perhaps most notable because it involves a clear acceptance by Mr Sheridan that there is a link between the purported planning concerns arising and the fit-out and opening of the store.

10. At para.11 of Mr Sheridan's affidavit, he avers that *"[T]he planning status of the Centre is of fundamental importance to the Applicant"*. He does not say why it is of fundamental importance. But any fair-minded reading of the papers in this case indicates the clearest reason why the planning status of the shopping centre is of such importance: because it will offer Dunnes a defence to the on-going 'Fit-Out Arbitration' which it is determined to win.

ii. The Development Agreement

a. Overview
11. As indicated in the summary chronology above, there were two agreements concluded in June 2007 between Dunnes, Deerland and Holtglen, viz. a contract for the purchase of a site, and a development agreement to construct the anchor store. The Development Agreement of 13th June between these parties contains a number of clauses that are of interest in the context of the within application. Some of the terms used in the clauses considered are capitalised because they have a defined meaning for the purpose of the transaction documentation. However, it seems unnecessary for the court to provide the definitions as all of the terms employed are in truth self-explanatory; their exact meaning is in any event well-known to the parties.

b. Clause 7 ("The Plans")

I. Clause 7.1
12. Clause 7.1 of the Development Agreement provides as follows:

> *"7.1 The Developer may, acting reasonably, without having to obtain the prior approval of the Company make*

alterations to the Centre Plans (but not the Store Plans) provided that:

7.1.1 Such alterations would not adversely affect the intended occupation or use of or the intended trade from the Store or the use, enjoyment, layout or extent of the Common Facilities.

7.1.2 For the avoidance of doubt it is hereby acknowledged by the Company that no consent shall be required for the amalgamation or reconfiguration of any Lettable Areas (other than the Store) provided such amalgamation retains as retail shops the proposed units which front the internal pedestrian malls of the Centre and which under the Planning Permission are permitted to be used for retail purposes and which would not materially adversely affect the use or operation of or flow of customers through the common or public facilities within the Centre or for any works which are internal to any Lettable Areas (other than the Store) forming part of the Centre."

13. Reducing this 'contract-speak' to everyday English, the purport of this clause is that the developer has an unfettered right to change the plans, without Dunnes' consent. If the changes affect Dunnes, if they adversely affect the intended occupation or use of, or the intended trade from, the anchor store or the use and enjoyment of the common facilities, Dunnes' consent is required. Notably, none of the changes at issue in the within proceedings are changes in respect of which the consent of Dunnes was required.

II. Clause 7.3

14. Clause 7.3 of the Development Agreement provides, *inter alia*:

"7.3 The Developer will keep the Company's Architect furnished throughout the construction of the Building Works with a set of plans, drawings and specifications and all material amendments and revisions thereto from time to time in compliance with this Agreement…".

15. The 'Company' is Dunnes. It is clear from the clause that Dunnes is to be kept informed through its architects of how the construction is proceeding. Dunnes appointed a firm of architects, Newenham Mulligan & Associates, as its 'Architect' and they were provided with plans on an on-going basis throughout the construction of the development, and were required to be kept informed of all material amendments and changes to the plans, etc.

c. Clause 9 ("Development")

Clauses 9.13 and 9.14

16. Clause 9.13 of the Development Agreement provides as follows:

"9.13 The Developer will keep the Company's Architect informed of:

9.13.1 material measures taken and stages reached by the Developer in performing his obligation of executing the Building Works (and in this regard a copy of the Building Contractors program (and any drafts and updates) shall be copied promptly to the Company's Architect;

9.13.2 material problems or delays affecting the Development (if any).

9.14 The Developer covenants and undertakes with the Company as follows:-

9.14.1 to procure that the Developer and/or the Building Contractor's Architect shall meet regularly with the Company's Architect and any other representatives of the Company during the course of the construction of the Development;

9.14.2 to procure that regular meetings on the Site are convened and held with the Building Contractor after each of the Developers and/or Building Contractor's Architects regular site meetings with the Building Contractor at which the Building Contractor, a representative of the Building Contractor's Architects and the Company's Architects shall attend and to procure that the Company's Architects receive reasonable notice in writing of each such meeting and to permit any other nominated representative of the Company to attend;

9.14.3 to procure that the Company's Architect promptly receives copies of all relevant sections of the minutes of the meetings together with copies of all relevant documents;

9.14.4 to report without delay to the Company's Architect any material problems or delays relating to the Building Works which become apparent to the Developer and provide the Company's Architect with such papers and explanations as the Company's Architect may reasonably require to satisfy itself that the Developer is complying with its obligations under this Agreement and;

9.14.5 to execute and do all works and things required by all Acts of the Oireachtas and comply with the lawful requirements of all authorities affecting the Site or the Development."

17. The sense one gets from all of the foregoing is that Dunnes' architect was to be, and indeed was, intimately involved in the progress of the works, and could attend site-meetings. Indeed, when one looks to the arbitrator's award in the 'Monies Arbitration', one finds a long history of engagement by Dunnes' architects. This sits uncomfortably with the impression to be gleaned from Mr Sheridan's first affidavit (considered above) that an issue of compliance with planning permission cropped up *"in or about September 2012"* and rather blind-sided Dunnes. The truth is that Dunnes, a savvy commercial enterprise, was entitled to be closely involved in, and throughout, the construction process, and was.

d. Clause 10 ("Inspection of the Store Building Works by the Company")

Clauses 10.1 and 10.3

18. Clause 10.1 of the Development Agreement provides as follows:

"10.1 The Company's Architect and any other person authorised by the Company may at all reasonable times enter upon the Site (including any buildings in course of construction) at all reasonable times, giving 24 hours prior written notice in advance giving the date and time of the visit to the Building Contractor's Architect, in order to:

10.1.1 inspect and view the state and progress of the Building Works;

10.1.2 inspect the materials and workmanship and to take samples;

10.1.3 ascertain generally that the covenants, agreements, conditions and stipulations contained in this Agreement have been and are being duly performed and observed."

19. Reducing this text to ordinary parlance, what it means is that Dunnes had a contractual entitlement whereby its architect could inspect the anchor store building-works, on 24 hours' written notice to ascertain whether the contract was being complied with, and whether planning permission was being complied with.

20. Clause 10.3 addresses the entitlement of Dunnes' architect to make representations to the building contractor.

21. Again one can see that Dunnes had contractual entitlements to be, and it was involved in, the construction of the anchor store. So the idea that Dunnes somehow became aware "in or about September 2012" of some planning issue arising rings hollow. Dunnes was aware, right through the construction process, of what was going on.

e. Clause 9 ("Development") and the 'Fit-Out' Arbitration

Clauses 9.5 and 9.6
22. The court has already touched upon clause 9 above. The above-mentioned provisions are considered slightly out of sequence as they are of importance to the on-going 'Fit-Out Arbitration'. They provide, inter alia, as follows:

"9.5 The Developer will procure that the Development is designed and carried

out:

…9.5.3 as to the part thereof consisting of Store Building Works, that they are carried out in accordance with the Store Plans and the Requisite Consents;

9.5.4 as to the part thereof consisting of the Centre Building Works, that they are carried out in accordance with the Centre Plans and the Requisite Consents.

…9.6 Subject to compliance by the Developer with the provisions of this Agreement and to Force Majeure, the Company shall procure that the Store is fully equipped and stocked and opened for trade within 20 working weeks after the Date of Store Practical Completion provided that the Company shall be entitled, but shall not be obliged, to open the Store prior to the achievement of the Centre Opening Date or during the period from November 14th to 30th inc, the months of December and January and the Fit-Out Works may be programmed accordingly."

23. The definition of 'requisite consents' includes the planning permissions. So effectively what Dunnes is now claiming in the 'Fit-Out Arbitration' is that the developer (now NALM) cannot force Dunnes to fit out and open the anchor store because there has been non-compliance as regards the requisite consents. That, Deerland asserts – and the court accepts on the facts before it – is what the within application is all about: to enable Dunnes to run that defence in the 'Fit Out Arbitration'.

f. Clause 12 ("Store Practical Completion")
24. Clause 12 is too long to quote in full. Suffice it to note that it establishes a procedure whereby the practical completion of Dunnes' anchor store is determined and reached. Thus there is a procedure whereby the developer serves a notice of practical completion, Dunnes then has an opportunity to raise a notice of objection, and the developer then puts any defects right. If there is any dispute as to whether or not something is a defect, there is provision for that dispute to be resolved by an independent architect acting as an expert.

g. Clause 13 ("Centre Practical Completion")
25. Clause 13 identifies a process, not dissimilar to that in cl.12, as to how the practical completion of the shopping centre is determined and reached. So, for example, cl.13.1.1 provides that:

"The Building Contractor's Architect shall notify the Company's [Dunnes] Architect not less than 10 (ten) Working Days before it is anticipated that the certificate of Centre Practical Completion shall issue and shall arrange for the joint inspection with the Company's Architect of the Centre."

26. So an essential part of both 'Store Practical Completion' and 'Centre Practical Completion' is the carrying out of a joint inspection of the store and then of the Centre with Dunnes' architect, so that the latter can compile in effect a 'flaw-list' that Dunnes requires to be put right. This flaw-list could include any planning issues perceived to arise.

27. Clause 13.2 then provides:

"If the Company's Architect shall object to the issue of the certificate of Centre Practical Completion for the purposes of this Agreement pursuant to clause 13.1.2 (an "Objection Notice") the Certificate of Centre Practical Completion may not be issued until:-

(a) the works specified in the Objection Notice have been completed to the reasonable satisfaction of the Building Contractor's Architect; and

(b) if the Company or the Company's Architect consider that the works specified in the Objection Notice have not been properly completed in accordance with the Developer's obligations herein contained the dispute has been determined by the Independent Architect and in this respect any such dispute arising between the parties may be referred by either party for determination by the Independent Architect."

28. The effect of the foregoing is that if Dunnes had any concern that the developer was guilty of a planning permission contravention, it could have raised that as part of the inspection/objection process. Yet, despite engaging in this process, Dunnes never raised any planning concerns.

h. Clause 22 ("Default and Termination")

Clause 22.1
29. Clause 22.1 of the Development Agreement provides as follows:

> *"22.1 It is hereby agreed that the Company shall have full right liberty and power (without prejudice to any other right or remedy or right and without being obliged so to do) in case:-*
>
> *(a) The Developer or the Surety shall materially fail to perform or observe any covenant or agreement on its part contained in this Agreement and fails to commence to remedy the breach of such covenant or agreement within 30 days after notice in writing specifying the breach and requiring it to be remedied is given by the Company to the Developer or as the case may be the Surety or fails to diligently remedy such breach within a reasonable period of time (but not exceeding 60 days) having regard to the nature of such breach;*
>
> *(b) The Developer or if more than one either of them or the Surety is unable to pay its debts as they fall due within the meaning of Section 214 of the Companies Act, 1963 or shall have a receiver appointed over any of its assets or undertaking or shall enter into liquidation whether compulsory or voluntary (except liquidation for the purposes of reconstruction) or an examiner is appointed or it shall compound or arrange with creditors or shall suffer its goods to be taken in execution; or*
>
> *(c) The Centre Opening Date or the Date of Centre Practical Completion is not achieved within the Development Period."*

30. What the above clause provides in short is: (a) if Dunnes wanted to assert that there had been a material failure to comply with an obligation under the Development Agreement (and thus a ground for termination) it had to serve what was referred to by all involved as a 'cure notice'. Such a notice was required to specify the material breaches perceived to arise and require of the developer that it 'cure', i.e. remedy same within the specified period. It was only if the developer failed to effect the necessary remedies that Dunnes could then seek to terminate the agreement; (b) if there was an insolvency event, a right to terminate arose; and (c) under the Development Agreement, there was (i) a time within which it was anticipated that the development would be completed, and (ii) a long-stop date within which, if the development was not completed, an entitlement to terminate also arose. However, before any termination could be effected, a step-in notice fell to be served pursuant to cl.22.2 of the Development Agreement:

> *"22.2 Notwithstanding the foregoing provisions the Company shall not without first giving the Funder not less than 60 (sixty) days previous notice in writing (the 'Company's Notice') exercise any right it may have (i) to terminate this Agreement or to treat this Agreement as having been repudiated by the Company or (ii) seek to exercise any right it may have against the Surety under this Agreement. The Company's Notice shall specify the grounds upon which the Company claims it is entitled to terminate this Agreement or seek to exercise any right it may have against the Surety (as appropriate). The Company's right to terminate this agreement or seek to exercise any right it may have against the Surety (as appropriate) shall cease if before the expiry of the period stated in the Company's Notice:-*
>
> *(a) The Funder gives notice in writing to the Company substituting the Funder for the Developer as developer under this Agreement (a 'Notice of Substitution'); or*
>
> *(b) The breach or breaches specified in the Company's Notice in so far as they would entitle the Company to terminate this Agreement or seek to exercise any right it may have against the Surety (as appropriate) have been remedied.*
>
> *Upon but not before the giving of a Notice of Substitution the Company shall accept the instructions of the Funder to the exclusion of the Developer and/or the surety as appropriate in respect of the performance of this Agreement upon the terms and conditions of this Agreement."*

31. In early–2012, these step-in provisions were successfully invoked by NALM.

PART 4: VARIOUS CONTENTIONS OF DUNNES
32. A significant portion of the last day of the proceedings was spent on Dunnes' reply to Deerland's contentions as to 'abuse of process'. The court seeks in this Part to identify briefly what Dunnes asserted in this regard and the court's conclusion/s as regards each of those assertions.

33. [1] Dunnes points to the fact that Holtglen may be guilty of breaches of the Development Agreement. The court respectfully notes that while this may or may not be so it is not a matter of relevance to the determination of the within judicial review application.

34. [2] Dunnes points to the fact that it was for the developer in the first instance to ensure that the development proceeded correctly regardless of Dunnes' involvement in the process. The court agrees with this; however, this is no answer to the contention made by Deerland, and accepted by the court, that Dunnes' involvement in the Centre's development, including attendance by its agents at site meetings and the conduct of joint inspections was such that it is inconceivable that, in September 2012 – three years after practical completion – Dunnes had a Damascene moment in which it was struck by the sudden realisation that there were planning issues presenting at Ferrybank.

35. [3] Dunnes alleges that Holtglen deliberately slowed its development of the Ferrybank and sought to let units by reference to a planning permission that had not yet been secured. The court respectfully notes that while this may or may not be so it is not a matter of relevance to the determination of the within judicial review application.

36. [4] Dunnes denies that it rushed to bring about the 'All Monies Arbitration'. Again, the court respectfully notes that while this may or may not be so it is not a matter of relevance to the determination of the within judicial review application.

37. [5] Dunnes suggests that if it wanted to drag everything out, it would have appealed every aspect of the 'All Monies Arbitration' award. It seems a curious argument for a party against whom an allegation of 'abuse of process' is made to claim that 'Here is an abuse that we did not commit'. That does not have as its consequence that some other course of action in which that party has engaged (here the bringing of the within application) is not therefore an 'abuse of process'.

38. [6] Dunnes claims that NALM has not always proceeded as fast as it could. The court respectfully notes that while this may or

may not be so it is not a matter of relevance to the determination of the within judicial review application.

39. [7] Dunnes claims that it could have slowed down further the 'Fit-Out Arbitration' had it been so minded. Again, it seems a curious argument for a party against whom an allegation of 'abuse of process' is made to claim that 'Here is an abuse that we did not commit'. That it did not (if it did not) does not have as its consequence that some other course of action in which that party has engaged (here the bringing of the within application) is not therefore an 'abuse of process'.

40. [8] Dunnes asks against what countervailing evidence the affidavit evidence of Mr Sheridan falls to be weighed? Mr Sheridan's affidavit evidence falls to be gauged in the context of all the facts arising. The court has engaged in such an exercise and, in the context of the detailed chronology of facts outlined above, does not find credible the notion which Mr Sheridan's affidavit evidence seeks or appears to seek to convey, viz. that the issue of compliance with planning permission cropped up "in or about September 2012". Given the level of involvement of Dunnes in the development of the Centre, that is a presentation of events which is not even remotely persuasive.

41. [9] Dunnes points to the fact that in autumn 2012, it proceeded like any rational corporation, appointing competent professionals to go and inspect the Centre and report back on any planning issues presented. However, to the court's mind what colours Dunnes' actions at this time, and suggests its true motivation, is that when it commenced this process (three years after practical completion had been attained and without previously flagging planning as an issue of concern) it turned to professionals other than those whom it previously engaged to liaise with the developers as the Centre was developed. This turn of events suggests, when viewed in tandem with all the other facts presenting, and the court finds, that Dunnes was now engaged in what might be called a 'spoiling exercise', aimed at unearthing purported planning concerns that it now commercially suited it to 'discover'.

42. [10] Dunnes maintains that when it subsequently got the expert report on the purported planning issues arising it was concerned. To the court these seem but crocodile concerns. But whether they were or not is beside the point: here the court is concerned solely with a judicial review of a planning decision where the party that has brought the application (Dunnes) has no issue with the substance of the adjustments to which the retention permission that followed that decision relates.

43. [11] Dunnes suggests that for it to have raised planning issues in 2012 as the basis for a judicial review application in 2015 would have required remarkable farsightedness on its part. The court credits Dunnes with much, but not with this level of farsightedness. It is clear from any fair reading of facts that what Dunnes was about in September 2012 was finding any issue that it could lob into its ongoing dispute with Deerland et al. It lobbed the cannonball of purported planning concerns into that dispute. It could not know whether that cannonball would hit home. But having generally failed in defeating Deerland *et al* in the on-going battle between them, Dunnes now finds its purported planning concerns offer it a basis on which to bring a judicial review application ostensibly focused on planning but in truth having a very different objective.

44. [12] Dunnes objects to the suggestion that it ought to have sought or brought an enforcement action in respect of the planning concerns that it considers to present. If such an action would have been legitimate then, Dunnes asks, what is illegitimate about the course of action that it has adopted in bringing the within application? The court has enough to do without judging the merits of proceedings that Dunnes has not commenced. It must confine its attentions to what Dunnes has done, i.e. brought a judicial review application that, as is clear from the court's previous consideration of the applicable facts has nothing to do with planning concerns, and everything to do with 'abuse of process'.

PART 5: THE LAW AS TO 'ABUSE OF PROCESS'

i. Cronin v. Mangan and Others

(Unreported, Supreme Court, 25th July, 1994)

45. Any Irish court embarking upon a consideration of 'abuse of process' will naturally be mindful of the judgment of Finlay C.J. in Cronin, at 2, that:

> *"The remedy of judicial review is one of very considerable importance in our jurisprudence in this country and it must not be used for ulterior motives and it must not be used as an abuse of the processes of the Court."*

46. That is a well-established principle which manifests itself in many of the rules and procedures of court. Leading cases of relevance to the issue of 'abuse of process', and to which the court was referred, include *Grant v. Roche Products (Ireland) Ltd.* [2008] 4 I.R. 679, *Sean Quinn Group Limited v. An Bord Pleanála* [2001] 1 I.R. 505, *State (Toft) v. Dublin Corporation* [1981] I.L.R.M. 439 and *State (Abenglen Properties) v. Dublin Corporation* [1984] I.R. 381. These cases and the relevant principles to be derived from them are considered hereafter.

ii. Grant v. Roche Products (Ireland) Ltd.

47. Grant was a wrongful death action brought by the family of a young man who had been prescribed a particular drug, thereafter become depressed and, tragically, ended up committing suicide. His family hoped via the proceedings to find out the truth of what had precipitated that tragedy, and they made various allegations against a drug company. The drug company sought to restrain prosecution of the proceedings by effectively offering the plaintiff all the monies that could be recovered in an action for wrongful death. When the plaintiff sought to continue with his claim, an application was made to strike out the proceedings as representing an 'abuse of process' in the face of such an offer. This application was unsuccessful in the High Court and, on appeal, in the Supreme Court. Giving judgment for the court, Hardiman J., observed as follows, at 697:

> *"[64] [T]he classic and long established definition of an abuse of process is that of Isaacs J. in Varawa v. Howard Smith Company Limited (1911) 13 C.L.R. 35 at p.91:-*
>
> *'In the sense requisite to sustain an action, the term 'abuse of process' connotes that the process is employed for some purpose other than the attainment of the claim in the action. If the proceedings are merely a stalking horse to coerce the defendant in some way entirely outside the ambit of the legal claim upon which the Court is asked to adjudicate, they are regarded as an abuse of process for this purpose…'".*

48. So *"ulterior motives"*, to use the phraseology of Finlay C.J. in Cronin, are a matter of not truly seeking attainment of the claim in the action (albeit that this may be ostensibly desirable) but the pursuit of some other collateral purpose. Hardiman J. continues, at 697:

"[65] This dictum [i.e. that in Varawa] was adopted by the High Court of Australia in Williams v. Spautz (1992) 174 C.L.R. 509 at p.537. In that case, Brennan J. said:

'…if there be a reasonable relationship between the result intended by the plaintiff and the scope of the remedy available in the proceedings, there is no abuse of process. If there be mixed purposes – some legitimate, some collateral – I would restate his Lordship's test [i.e. Bridge L.J. in Goldsmith] that 'but for his ulterior purpose [the plaintiff] would not have commenced proceedings at all.' So expressed, the test casts on the other party an onus of proving what the plaintiff would not have done if he had formed the intention of obtaining a collateral advantage. That onus may be impossible to discharge.'"

49. What does the just-quoted text mean? There are three elements to it:

No 'abuse of process'

If there is a reasonable relationship between (a) the result intended by a plaintiff and (b) the scope of the remedy available in the relevant proceedings, there is no 'abuse of process'.

(2) Test for abuse where there are mixed objectives

If there are mixed (proper and collateral) objectives, discerning abuse involves answering the question 'If it were not for the collateral purpose (so if there was only one or more legitimate purposes), would the plaintiff have commenced the proceedings?' If 'yes', no abuse seems to present. If 'no', abuse seems to present – assuming the collateral purpose is proven.

(3) Onus of proof

As to the last sentence of Brennan J.'s observations, it, arguably, does not flow logically from what he has just stated. Brennan J. posits the example of a case in which mixed purposes present, some legitimate and some collateral. He then states that the correct test for 'abuse of process' is that absent the ulterior (i.e. collateral) purpose which presents, the proceedings would not have commenced. But he then goes on, having spoken of a situation in which mixed purposes do present, to refer to the onus arising "if" the intention of securing a collateral advantage presents (when his immediately previous commentary was about a situation in which it does). It seems to this court to be not inconsistent with Grant and also to chime better with Brennan J.'s various observations, as quoted above, to state that "the test casts on the other party an onus of proving what the plaintiff would not have done if" the other party proves the plaintiff "had formed the intention of obtaining a collateral advantage."

iii. Sean Quinn Group Limited v. An Bord Pleanála

50. This case concerned a proposal by Lagan Cement to build a cement plant outside Kinnegad. The Sean Quinn Group, at that time, was one of the nation's major cement producers. But Lagan, with a new plant, looked likely to be a significant competitor. So Sean Quinn Group engaged in a variety of devices to stymie the development of the Kinnegad plant. This included funding the bringing of judicial review proceedings by local residents. When those proceedings floundered, Sean Quinn Group brought its own set of review proceedings. Faced with these legal shenanigans, Lagan brought a successful application to strike out the proceedings before they were heard in substance.

51. A question arose in the within proceedings as to why a similar such application was not brought. However, counsel for Deerland suggested that the reason was time: such an application would have involved delay if it were brought as a preliminary exercise. And delay, Deerland submitted, has been a constant objective of Dunnes, which seeks to put off the 'evil day' when it will have to fit out and occupy its anchor store at Ferrybank. Better then to address the issue in the course of the within proceedings. The court finds this a convincing rationale.

52. Turning to the judgment of the court in *Quinn, Quirke J.*, at 509, observes as follows:

"I am wholly satisfied from the evidence that in pursuing its claim herein the plaintiff's sole objective is to further its own commercial interest by gaining an advantage over the sixth defendant which it sees as a formidable business competitor. It has not been suggested in argument or otherwise that the purpose for which these proceedings have been commenced is other than to enable the plaintiff to claim a commercial collateral advantage for itself over its competitor. Whilst it has been argued that the plaintiff's motivation in commencing these proceedings is to avoid damage to its interests it is quite clear that the damage which the plaintiff apprehends is a reduction in, or loss of profits. It has not been argued or even suggested on behalf of the plaintiff that the avoidance of damage to the environment within the areas adjacent to the proposed development or the proper planning and development of the County of Meath form any part of what is sought to be achieved by the plaintiff by way of these proceedings."

53. A possibly notable feature of the within proceedings is that there is no suggestion by Dunnes that there is any possibility of damage to the environment or any planning reason as to why the retention application in issue ought to have been refused.

54. Quirke J. continues, at 509 *et seq*:

"The inherent jurisdiction of this court to strike out proceedings as being an abuse of process in appropriate cases has not been questioned in these proceedings. However, in McCauley v. McDermot [1997] 2 I.L.R.M. 486, Keane J… emphasised at p.498 the need to exercise this jurisdiction '…only with great caution'….

The parties were…unanimous in adopting the following extract from the judgment of Scarman L.J. in Goldsmith v. Sperrings Ltd. [1977] 1 W.L.R. 478 at p.498:-

'In the instant proceedings the defendants have to show that the plaintiff has an ulterior motive, seeks a collateral advantage for himself beyond what the law offers, is reaching out 'to effect an object not within the scope of the process'; Grainger v. Hill (1838) 4 Bing (N.C.) 212 at 221 per Tindal C.J. In a phrase, the plaintiff's purpose has to be shown to be not that which the law by granting a remedy offers to fulfil, but one which the law does not recognise as a legitimate use of the remedy sought; see In re Majory [1955] Ch.600 at 623."

Bearing in mind the warning given by Keane J…I take the view that [before striking out for abuse of process] I must be satisfied by way of evidence that the plaintiff, in commencing these proceedings, (1) has an ulterior motive, (2) seeks a collateral advantage for itself beyond what the law offers and (3) has instituted these proceedings for a purpose which the law does not recognise as a legitimate use of the remedy which has been sought….

The remedies offered by the law by way of declaratory and injunctive relief and by way of judicial review of orders and decisions and remedies which may be legitimately used by litigants for a variety of different purposes including, inter alia (a) to vindicate constitutional or statutory rights (b) to restrain unlawful action (c) to quash or restrain the making of orders or decisions of administrative tribunals made or about to be made (i) in excess of jurisdiction, (ii) by way of unfair procedures or (iii) contrary to the principles of natural justice and (d) to ensure compliance with national and international legislative and other obligations imposed by law.

The fact that the legitimate use by a litigant of a lawful remedy will or may result in a collateral benefit to the applicant does not affect the right of the applicant to seek such a remedy in the courts and to be granted such relief as may be appropriate. This applies even to cases where the principal motivation for the application is a collateral benefit for the applicant. Quite clearly a businessman may apply to the courts and if it is appropriate may obtain a remedy restraining a competitor from unlawful activity even if his principal objective is the achievement of a commercial advantage. However, in most such cases it is the unlawful activity sought to be restrained which has resulted or will result in commercial advantage to the party to be restrained and the applicant seeking the remedy has a bona fide grievance and is seeking to right a perceived injustice or to redress a perceived wrong."

55. In a nutshell, Quirke J. is drawing an *'à la Williams'* distinction in the foregoing between (i) legitimate use of the court's processes which yields an incidental benefit, and (ii) the devious deployment of processes aimed at one end to secure another collateral end.

56. Quirke J. continues, at 511:

"The question for determination is whether the applicant, by bringing these proceedings, is using the legal process in a proper fashion or is abusing the process by seeking to use it to achieve an improper objective, In re Majory [1955] Ch. 600 at p.623, Evershed M.R. described the so-called 'rule' in bankruptcy as:-

'…in truth, no more than an application of a more general rule that court proceedings may not be used or threatened for the purpose of obtaining for the person so using or threatening them some collateral advantage to himself, and not for the purpose for which such proceedings are properly designed and exist; and a party so using or threatening proceedings will be liable to be held guilty of abusing the process of the court and therefore be disqualified from invoking the powers of the court by proceedings he has abused.'

In Cavern Systems Dublin Ltd v. Clontarf Residents Association [1984] I.L.R.M. 24, Costello J. held at p.30 that the conduct of a litigant which had consciously failed to serve or disclose the existence of proceedings which it had validly issued had not only flouted the will of parliament but '…the absence of reasonable cause to justify what happened…' comprised conduct which would be regarded as an abuse of the process of the court.

In Lonrho plc v. Fayed (No. 5) [1993] 1 W.L.R. 1489 Stuart-Smith L.J. refused to strike out the plaintiff's claim on grounds that it comprised an abuse of process but was careful to observe at p.1502 that:-

'If an action is not brought bona fide for the purpose of obtaining the relief but for some ulterior or collateral purpose, it may be struck out as an abuse of the process of the court. The time of the court should not be wasted on such matters, and other litigants should not have to wait till they are disposed of. It may be that the trial judge will conclude that this is the case here; in which case he can dismiss the action then. But for the court to strike it out on this basis at this stage it must be clear that this is the case.'

It follows that in considering [strike-out] applications such as that which has been made…herein, the courts may (and perhaps should) take into account the interests of bona fide litigants who, regrettable must often compete for comparatively scarce court time in order to have matters which are often of considerable importance litigated to a conclusion. It is, in my judgment, desirable and consistent with proper public policy that the interests of such bona fide litigants should have precedence over the rights of parties who wish to litigate points of law which sometimes (as in the instant case) are wholly or largely technical in nature and often flimsy in substance for purposes unconnected with public benefit and wholly concerned with private gain.".

57. The decision in Quinn contains a helpful distillation of the principles to be applied when it comes to the issue of 'abuse of process', identifying the high threshold that Deerland needs to satsify – for it is Deerland that comes to court raising the issue of 'abuse of process' – before the court can find such abuse to present.

iv. State (Toft) v. Galway Corporation

58. *Toft* is not so much a case concerned with 'abuse of process', as to factors relevant to the issuance of an order of *certiorari*. This was a case where there had been a technical mis-description of the applicant for planning permission. It had been called 'Spirits Rum Company Limited' in the application whereas, in truth, its name was 'Rum Spirits Limited'. In the course of his judgment, O'Higgins C.J. looked at the question of whether an order of certiorari should be granted by virtue of this mis-description, observing as follows, at 442:

"Certiorari is at all times a discretionary remedy. In exercising a discretion as to whether the remedy should be granted regard should be had not only to the harm which the applicant for the remedy alleges but also to his conduct."

59. The court must admit that having listened at the hearings of the within application and having read the abundant documentation with which it has been provided, it is unable to identify any conceivable harm, let alone any actual harm, that has been done to Dunnes by reason of the grant of the impugned retention permission.

60. O'Higgins C.J. continues, at 442:

"It is said with justification that certiorari issues ex debito justitiae ['by reason of an obligation of justice'; in effect, almost as a matter of right] where an aggrieved or complaining person can point to his legal rights being affected by the order or decision sought to be annulled. In such circumstances a court will be more concerned with dealing with the

irregularity than with the conduct of the prosecutor. In this case, however, the appellant can only point to the inconvenience or disadvantage of him of a similar business to his own being opened in adjoining premises. He can point to no legal right of his being infringed by the order made by the Galway Corporation. In addition it is quite clear, in my view, that his application for certiorari was only one of many attempts which he has made since 1977 to prevent a business competitor opening up nearby."

61. As will be seen hereafter, a like factor presents in the within proceedings which are but the latest in a convoluted effort by Dunnes to delay the fitting-out and occupation of its Ferrybank store.

v. State (Abenglen Properties) v. Dublin Corporation
62. This is a case where a developer sought to quash a decision of Dublin Corporation in a bid to achieve a situation whereby no decision would have been made within a prescribed two-month period, opening the way for it to claim that it had got permission by default. In his judgment in the Supreme Court, O'Higgins C.J. observes, at 393, *et seq*:

"[393] The question immediately arises as to the effect of the existence of a right of appeal or an alternative remedy on the exercise of the court's discretion. It is well established that the existence of such right or remedy ought not to prevent the court from acting. It seems to me to be a question of justice. The court ought to take into account all the circumstances of the case, including the purpose for which certiorari has been sought, the adequacy of the alternative remedy and, of course, the conduct of the applicant….[394] The purpose of their [Abenglen's] application for certiorari was not, primarily, to correct a grievance which they had suffered as a result of a process alleged to have been without legal authority but to avail of the alleged irregularity in order to obtain a benefit not contemplated by the planning code….[395] In my view, having regard to the existence of an adequate appeal procedure, to the conduct and motives of Abenglen and to all the circumstances of this particular case, the High Court should have refused, in the exercise of its discretion, to make absolute the conditional order of certiorari."

63. So Abenglen, like Toft, is a case where the court took into account the motives of the applicant and the collateral benefit that was sought to be achieved, in the exercise of the court's discretion (and the refusal of relief). However, Abenglen is also of interest because it touches upon the issue of alternative remedies. In the within proceedings, insofar as Dunnes is concerned (if indeed it is truly concerned) about the issue of 'unauthorised development' it has open to it the remedy of seeking that the planning authority (Kilkenny County Council) commence enforcement proceedings, or indeed instituting such proceedings itself (under s.160 of the Planning and Development Act 2000). Dunnes has taken neither of these steps, nor has it offered any convincing explanation as to why it has not done so – factors which colour the court's impression as to the true motivation of the within proceedings.

PART 6: SOME PRINCIPLES APPLICABLE TO 'ABUSE OF PROCESS'
64. The court considers the principles itemised below to arise from the above consideration of case-law as to the identification and consequences of an 'abuse of process'.

I. Importance of Judicial Review
65. [1] Judicial review is of very considerable importance in Irish jurisprudence. It must not be used for ulterior motives or as an abuse of court processes. *(Cronin).*

II. What is 'Abuse of Process'?
66. [2] The term 'abuse of process' connotes that the process is employed for a purpose other than the attainment of the claim in the action. If proceedings are merely a 'stalking horse' to coerce the defendant in some way entirely outside the ambit of the legal claim brought, they involve an 'abuse of process'. *(Grant, Varawa).*

III. How to identify 'Abuse of Process'
67. [3] Where 'abuse of process' is alleged, the question for determination is whether the party who has brought the impugned proceedings is using the legal process in a proper fashion or is abusing the process by seeking to use it to achieve an improper objective. *(Quinn, Cavern Systems).*

68. [4] If there is a reasonable relationship between (a) a plaintiff's intended result, and (b) the scope of the remedy available in the proceedings brought, there is no 'abuse of process'. *(Grant, Williams).*

69. [5] If there are mixed (proper and collateral) objectives, discerning whether there is abuse involves answering the question 'If it were not for the collateral purpose (so if there was only the legitimate purpose), would the plaintiff have commenced the proceedings?' If 'yes', no abuse seems to present. If 'no', abuse seems to present, assuming the collateral purpose is proven. *(Grant, Williams).*

70. [6] The test at [5] casts on 'the other party' an onus of proving what the plaintiff would not have done, if the other party proves the plaintiff formed the intention of obtaining a collateral advantage.

IV. Legitimate and Non-Legitimate Use of Administrative Law Remedies
71. [7] Administrative law remedies may legitimately be used by litigants for various purposes, e.g., vindication of constitutional/statutory rights, restraint of unlawful action, quashing/ restraint of certain orders or decisions of administrative tribunals made or to be made, and ensuring compliance with legal obligations. *(Quinn).*

72. [8] That legitimate use of a lawful remedy will or may result in a collateral benefit to the applicant does not affect the applicant's right to seek and be granted such remedy. This applies even to cases where the principal motivation for the application is a collateral benefit for the applicant. In most such cases it is the unlawful activity sought to be restrained which has resulted or will result in commercial advantage; and the applicant seeking the remedy has a bona fide grievance and is seeking to right a perceived injustice or wrong. *(Quinn).*

V. Threatening and Abusing Court Proceedings
73. [9] Court proceedings may not be used or threatened for the purpose of obtaining for the person so using or threatening them some collateral advantage, and not for the purpose for which such proceedings are properly designed and exist. A party so using or threatening proceedings is liable to be held guilty of abusing the process of the court and therefore be disqualified from invoking the powers of the court by proceedings he has abused. *(Quinn, Majory).*

VI. Need for Caution before 'Striking Out'
74. [10] The High Court has an inherent jurisdiction to strike out proceedings as an 'abuse of process'; this jurisdiction must be exercised with caution. *(Quinn, McCauley, Lonrho).*

VII. Relevant Factors in an 'Abuse of Process' Application
75. [11] The court, before striking out for 'abuse of process', must: (A) be satisfied by way of evidence that the plaintiff, in commencing these proceedings, (i) has an ulterior motive, (ii) seeks a collateral advantage beyond what the law offers, and (iii) has instituted the proceedings for a purpose which the law does not recognise as a legitimate use of the remedy sought; and (B) ought always to recall the cautionary note of Keane J. in *McCauley* (as referred to at VI). *(Quinn, Goldsmith).*

VIII. Interests of Other Litigants
76. [12] If an action is not brought *bona fide* for the purpose of obtaining the relief but for some ulterior or collateral purpose, it may be struck out as an abuse of court process. The time of the court should not be wasted on such matters. Other litigants should not have to wait till they are disposed of. But for the court to strike out on this basis, it must be clear that this is the case. *(Quinn, Lonrho).*

77. [13] In considering 'abuse of process' applications, the courts may (perhaps should) take into account the interests of bona fide litigants who must often compete for court time. It is desirable and consistent with proper public policy that the interests of such litigants have precedence over the rights of those who wish to litigate points of law which (a) are wholly or largely technical in nature, (b) flimsy in substance, and (c) for purposes unconnected with public benefit and wholly concerned with private gain. (Quinn).

IX. Remedy of Certiorari
78. [14] *Certiorari* is a discretionary remedy. In exercising the discretion as to whether *certiorari* should be granted, regard should be had to the harm which the applicant for the remedy alleges and also his conduct. *(Toft).*

79. [15] *Certiorari* issues *ex debito justitiae* where an aggrieved or complaining person can point to his legal rights being affected by the order or decision sought to be annulled. In such circumstances a court will be more concerned with dealing with the irregularity than with the conduct of the prosecutor. *[i] (Toft).*

[i] Presumably the court in *Toft* meant to refer to rights being, for want of a better term, 'wrongly' affected. There seems also to be something of a divergence between [14] and [15] as to the emphasis to be placed on a party's conduct.

80. [16] As to the effect of the existence of a right of appeal or an alternative remedy on the exercise of the court's discretion, such right or remedy ought not to prevent the court from acting. It is a question of justice. The court ought to take into account all the circumstances of the case, including (a) the purpose for which *certiorari* is sought, (b) the adequacy of the alternative remedy, and (c) the applicant's conduct. *(Abenglen).*

PART 7: CONCLUSIONS
81. For the reasons stated above, the court finds that the true object of this judicial review application is to enable Dunnes to delay or avoid compliance with its contractual obligations to fit-out and occupy the anchor store and/or to facilitate the creation of a contrived legal justification for Dunnes' long-time failure to comply with those obligations. These purposes are entirely collateral to the remedies being sought in the within application and have no connection to the objects which the public law procedures now being invoked by Dunnes were designed to achieve. That this is the true purpose of Dunnes is not a matter of conjecture or surmise. It is the irresistible and logical conclusion to be drawn from the detailed consideration of the facts in which the court has engaged above. The court refuses the reliefs sought, declines to enter into any consideration of the purported planning-related issues raised by Dunnes, and dismisses the proceedings as involving an 'abuse of process'.