Neutral Citation Number: [2010] IEHC 498

THE HIGH COURT

2009 4644 P

BETWEEN

PAROL LIMITED

AND

CARROLL VILLAGE (RETAIL) MANAGEMENT SERVICES LIMITED

PLAINTIFFS

AND

FRIENDS FIRST PENSION FUNDS LIMITED

DEFENDANT

AND

SUPERQUINN

THIRD PARTY

JUDGMENT of Mr. Justice Clarke delivered the 8th October, 2010

1. Introduction

1.1 The third parties ("Superquinn") have been one of the leading supermarket chains in Ireland for upwards of 50 years. As is widely known, Superquinn was developed by Senator Fergal Quinn. For historical reasons the chain had an association with Dundalk. In more recent times, Superquinn operated a supermarket in Dundalk which is the subject of these proceedings.

1.2 The immediate background to the issues which arise in this case stem from two changes in the Superquinn organisation. First, the shareholding of the Quinn family in Superquinn was sold in 2005. In substance, Superquinn is now beneficially owned by Select Retail Investments Holdings Ltd ("SRH") which is a vehicle for a number of private investors. While that change in ultimate ownership had an obvious affect on the management of Superquinn, it did not affect its legal relations with the third parties.

1.3 The second change came about as a result of a sale and leaseback arrangement entered into, in 2007, by Superquinn with the defendant pension fund ("Friends First") under which Friends First bought a number of Superquinn stores (including the Dundalk store) from Superquinn and immediately leased those stores back to Superquinn. The purpose of that arrangement, from Friends First's point of view, was that the pension fund would have the benefit of owning the stores as investments and would also receive a significant guaranteed rent from Superquinn for a period of time.

1.4 The Dundalk store formed part of what is known as the Carroll Village Shopping Centre. The precise ownership of the units within that shopping centre, both as to the interest of the landlord and the interest of tenants, is a matter which was clarified in the course of the hearing and will be addressed, insofar as relevant to the issues which arise in these proceedings, in due course. However, in general terms, the shopping centre may be described colloquially as being beneficially owned by Mr. Gerard Maguire ("Mr. Maguire") and his wife. Mr. Maguire is the principal behind the first named plaintiff ("Parol"), which own some of the units in the shopping centre. Mr. Maguire and his wife directly own some other units within the shopping centre. The position of the Superquinn store is somewhat different. At the level of commercial substance Superquinn, in fact, purchased its store at the time of the development of the Carroll Village Shopping Centre paying two significant capital sums of IR£450,000 and IR£3.85m in 1998. However, the legal form of that arrangement was that Parol gave Superquinn a long lease on the property at a nominal rent in consideration of IR£450,000 and also entered into a building contract to construct the Superquinn store for IR£3.85m. However, of particular relevance to this case is the fact that the lease concerned contained a keep open clause to which it will be necessary to refer in due course. The second named plaintiff ("Carroll Village"), is the management company which runs the Carroll Village Shopping Centre.

1.5 At one level the issues which arise in these proceedings are very simple. Superquinn stopped operating their store in February, 2009. Parol and Carroll Village assert that this is in clear breach of the keep open clause to which I have referred. Superquinn assert that the manner in which the shopping centre was operated entitled Superquinn, as a matter of law, to be released from complying with the keep open clause. Against that, Parol and Carroll Village say that the undoubted problems which the Carroll Village Shopping Centre suffered from can be placed at the door of Superquinn. Into the mix comes the fact that Friends First are now the lessees under the original long lease given to Superquinn but, in turn, are the landlords in relation to a sub-lease in favour of Superquinn. In addition, questions arose as to whether, if it should transpire that Superquinn were obliged to continue to keep the store open, any obligation lies on Superquinn to use the "Superquinn" name on any store which might operate.

1.6 Against that general description, it is necessary to set out the issues in some greater detail.

2. The Issues

2.1 The backdrop to the factual dispute between the parties is the difficult retail trading circumstances that existed over recent years in the border region in general, and Dundalk in particular. The causes of those difficulties are well known. Differences (unfavourable to traders south of the border) in applicable taxes (such as excise duty and VAT) were coupled with an unfavourable exchange rate so as to make trading conditions in areas close to the border very difficult indeed. Shoppers from south of the border who might otherwise be expected to do their shopping in retail units in places such as Dundalk were travelling North. Likewise, shoppers from the southern part of Northern Ireland, who might otherwise have been enticed to do at least some of their shopping south of the border, found the trading conditions unattractive.

2.2 Against that background it is hardly surprising that many in the retail sector in border areas (not least those in Dundalk) experienced tough trading conditions during most of the period with which I am concerned. On top of those difficulties, a further problem for the Carroll Village Shopping Centre emerged when a rival shopping centre was established which, at least on one view, may have attracted some business away from Carroll Village.

2.3 There can be little doubt but that both Superquinn and many, if not all, of the other units within the Carroll Village Shopping Centre suffered as a result of the difficulties which I have noted. The evidence established that Superquinn, in its Dundalk store, was trading at a loss for a number of years prior to its closure and, in particular, was known to be a loss making store both at the time when the change of ownership occurred in 2005 and when the sale and leaseback arrangement with Friends First was put in place in 2007. Likewise, it is not disputed but that there were significant closures in the retail units operating in the Carroll Village Shopping Centre going back over a number of years prior to the Superquinn closure. Many of the units which closed did not re-open. While both Mr. Maguire and Superquinn gave some acknowledgement to the general difficulty of retailing conditions in Dundalk, the primary factual dispute between them was as to whose fault it was that the Carroll Village Shopping Centre went into decline. That it had gone into decline prior to Superquinn's closure and that it has gone into even greater decline since that time can hardly be doubted.

2.4 On Mr. Maguire's case, Superquinn was at fault. It was said that rumours abounded for some period of time concerning a possible closure of the Superquinn store. It was said that difficulties were encountered by Mr. Maguire in arranging meetings with the new senior management of Superquinn after its takeover by SRH. It is said that changes were introduced within the Superquinn store which made it less attractive to customers with a consequential fall off in footfall in the shopping centre generally with, in turn, it was said, a detriment to other tenants.

2.5 While accepting, therefore, that many units had become vacant in the period leading up to the closure of the Superquinn store, Mr. Maguire's case was that Superquinn, as the anchor tenant, was the principal attraction of the shopping centre and on the basis of Mr. Maguire's assertion that Superquinn had been, to an extent, running down their own store, it was said that the failure of other retail units could be laid at Superquinn's door.

2.6 On the Superquinn side it was said that there had been a significant failure of management and promotion at the shopping centre. Superquinn questioned the efforts made to re-let units which had become vacant. Superquinn made complaint about certain aspects of the management of the shopping centre as a whole including, it was said, the locking of entrances or the failure to open the car park at appropriate times. (Parol and Carroll Village had certain legal obligations in this respect to which it will be necessary to refer in due course). In addition, it was said that Mr. Maguire had facilitated the departure of tenants including, in one case, on the basis of a significant capital payment to himself. Furthermore, it was suggested that Mr. Maguire was, in truth, anxious to obtain vacant possession of the shopping centre with a view to an overall redevelopment in respect of which plans had been developed, at least to some extent, and certain discussions had taken place with the planning authority. On that basis, Superquinn contended that there had been a failure on the part of Parol and Carroll Village to comply with the legal obligations on those parties to be found in the lease such as would, at the level of principle, it was said, have entitled Superquinn to treat the actions of Parol and Carroll Village as a repudiation.

2.7 In that legal context, it is important to note that a novel legal question arose for debate at the hearing. While pointing to certain authorities (to which I will refer in due course) which suggest that a retailer may be absolved from an obligation to comply with a keep open clause due to significant breaches on the part of a landlord, it was fairly acknowledged by counsel on behalf of Superquinn that no current authority exists for the suggestion that a tenant can retain its leasehold interest but be absolved from its obligations under a keep open clause. Perhaps the reason for any absence of authority stems from the fact that, in the case of most ordinary leases, it would be difficult to envisage circumstances where the retailer/tenant would want to retain a lease in those circumstances. In the case of an ordinary lessee paying open market rent, it is unlikely that a retailer would want to retain the lease (and, thus, the obligation to pay rent) if the lessee was not going to be in a position to make some use of the property by keeping it open. It is only in unusual circumstances such as arise in this case where Superquinn, for all practical commercial purposes, own their store, but hold it under a lease at a nominal rent but subject to a keep open clause, that the commercial imperative to retain the lease (and, thus, retain Superquinn's ownership of the store) while at the same time being absolved from the keep open clause, would be likely to be something that a party in the position in which Superquinn finds itself might wish to achieve. This is a legal issue to which it will be necessary to turn in due course.

2.8 In addition, there might well have been a number of other difficult legal questions which could have arisen in these proceedings were it not for the position adopted by the parties. First, there can be a question as to whether a court faced with a situation where a tenant is found to be in breach of a keep open clause should, on the one hand, make an order requiring that tenant to open the property in accordance with the covenant or should confine itself, on the other hand, to awarding damages to the landlord for any losses attributable to the breach of the relevant clause. However, on the facts of this case Superquinn indicated, through counsel, at the commencement of the hearing, that if, contrary to their case, I was persuaded that Superquinn was not entitled to close the store, then the store would be opened within eight weeks of judgment being delivered. These proceedings finished on the last day of term, being the 30th July. Mindful of the fact that, if I were to come to the view that the store should be opened, it was likely that Superquinn would want to put in place arrangements to be able to take advantage of the Christmas Season, I informed the parties that I would give an indication of the result of the proceedings on the 20th September but that I was unlikely, on that occasion, to give a full reasoned judgment. On the 20th September I indicated to the parties that I did not consider that Superquinn had established a basis in fact or in law for an entitlement to avoid complying with the keep open clause, but that I was also not persuaded that Superquinn was under any obligation, in keeping the store open under the terms of the lease, to operate under the "Superquinn" title. This judgment is, therefore, designed to set out my reasons for having come to that view. On the basis of having given that view, it is my understanding that Superquinn intends to re-open the store with effect from the 1st December next.

2.9 A further set of legal issues which might have, but did not, arise concerns the position of Friends First. It is clear that there is no longer any direct legal relationship between Parol and/or Carroll Village on the one hand and Superquinn on the other. Rather Parol/Carroll Village now has a direct legal relationship with Friends First and Friends First in turn has a direct legal relationship with Superquinn. On the other hand, the real dispute is between Parol/Carroll Village and Superquinn. Each blames the other for the problems which have undoubtedly emerged. In those circumstances Friends First adopted, at least at the beginning of the case, an entirely neutral stance. It does not appear that, at any material time during the currency of the problems which I have briefly set out, either Parol/Carroll Village or Superquinn included Friends First in the loop. Insofar as there were contacts (and indeed part of the case that both sides make concerns the absence of contact) those contacts were direct. Friends First had no evidence of its own to offer on the question of whether Superquinn or Parol/Carroll Village had failed to meet its side of the bargain. While it is true to say that counsel for Friends First did come off the fence at the end of the case, counsel's stated basis for taking that position was that, in the light of the evidence which had been tendered, Friends First had come to the view that Parol/Carroll Village were in the right and Superquinn were, at least in the main, in the wrong.

2.10 However, none of the three parties suggested that it was appropriate to approach the case on the basis of notionally attributing wrongdoing to Friends First (either in its capacity as tenant to Parol or landlord of Superquinn). Rather, it was agreed (subject to one minor technical issue to which it will be necessary to refer in due course) that I should, in practice, indicate whether Superquinn were entitled, on the law and on the facts, to be excused compliance with the keep open clause. If Superquinn were to be so excused, then it was accepted on behalf of both Friends First and Parol/Carroll Village, that that was the end of the matter. Equally if Superquinn were not so excused, then it was accepted by Superquinn and Friends First that the Superquinn store would need to be opened (although they disagreed on whether Superquinn was obliged to use the Superquinn title with Friends First arguing that Superquinn was so obliged, but Superquinn taking the opposite view). None of the legal difficulties which might have arisen in attempting to analyse the precise legal relationships between the three parties against the backdrop of the fact that the two parties which had the real dispute, and who had had dealings with each other directly on the issues in dispute, were the only two parties who had no direct legal relationship one with the other, did in fact, in those circumstances, arise.

2.11 It should also be noted that the parties agreed that any question of the entitlement of Parol/Carroll Village to damages and any consequential issues that might arise as and between Friends First and Superquinn in the event of such damages being awarded, would be left over to a further hearing. What was agreed was, therefore, in substance a modular trial with issues of liability only being determined in the first module. This judgment is directed, therefore, to the reasons why I came to the views which I indicated to the parties on the 20th September in respect of the liability issues which had been canvassed.

2.12 For practical reasons there was a slight break in the hearing before me. Some short period elapsed between the end of the evidence and the making by the parties of their final submissions. With a view to focusing at least some of the argument on certain points that had occurred to me I invited the parties to address, in addition to any points which they themselves might wish to include in their final submissions, the following matters:-

> 1. As a matter of law and having regard to any material terms of the lease can any breaches of the obligations of the landlord under the lease, such as are relied in these proceedings, give rise to a situation where Friends First (and through them, Superquinn) are entitled to resile from the obligation to keep open specified in the lease.
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> 2. If the answer to question 1 is no, then it would appear that an order against Friends First and through them Superquinn must follow. If the answer to question 1 is yes, then it is next necessary to address the question as to the circumstances, having regard to the law and the terms of the lease, in which any breach by the landlord its obligations under the lease might absolve Friends First and through it, Superquinn from its obligations under the keep open clause.
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> 3. As a matter of fact, have any breaches which meet the standard determined as a result of question 2 been established in the evidence?
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> 4. Other than as part of the factual background by which the facts relevant to question 3 need to be viewed, what relevance (if any) has the alleged "running down" by Superquinn of the Dundalk supermarket prior to its closure got to the issues which arise in these proceedings?
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> 5. In the event that an order is to be made which, in substance, would have the effect of requiring Superquinn to re-open its store, is Superquinn, having regard to the law and the terms of the lease, required to trade under the "Superquinn" banner?
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> 6. (For Superquinn only). In the event that the answer to question 5 were to be yes, does Superquinn agree that such an order should be made? If not, then it would appear that potential issues arise concerning the jurisdiction of the court and the circumstances in which it is appropriate to make an order enforcing a keep open clause (which issues do not otherwise arise having regard to the agreement by Superquinn that, in the event that the court finds it to be in breach, it will re-open the store concerned within eight weeks).

2.13 In substance, the answers given in respect of issues 1 and 2 were, on the Superquinn side, and as I have already identified, to the effect that, provided that there were breaches by Parol/Carroll Village of their obligations under the lease such as would, in principle, have entitled Superquinn to repudiate the contract, then, it was said, Superquinn was entitled to be absolved from compliance with the keep open clause. Friends First and Parol/Carroll Village disagreed.

2.14 I have already identified the broad position of the parties concerning the factual issues which arose under issue 3. So far as issue 4 is concerned, it appeared to be accepted by Parol/Carroll Village that the only relevance of the accusations made against Superquinn in relation to the period prior to the closure by Superquinn of its store, was that those accusations formed part of the general factual consideration by reference to which any breach on the part of Parol/Carroll Village might have to be assessed. In other words, it was not asserted that Superquinn were in breach of any legal obligation on their part up to the time when the store was closed. However, it was said that in order to assess the operation of the Carroll Village Shopping Centre as a whole, for the purposes of determining whether Parol/Carroll Village had complied with any obligations on those parties, it was necessary to consider the actions of Superquinn as part of an overall assessment of that factual matrix.

2.15 I have already noted that the parties disagreed as to whether Superquinn was required, in the event that it were not absolved from its obligations under the keep open clause, to use the Superquinn title. Finally, in relation to question 6, it should be noted that Superquinn accepted, as I understand it, that it would open, if directed, and subject to appeal, under the Superquinn title if the court found that it was legally obliged so to do.

2.16 Obviously the primary source of the legal rights and obligations of the parties is to be found in the lease originally entered into between Parol and Superquinn in respect of which Friends First is now the lessee. I, therefore, turn to the terms of the lease. Save for a number of minor matters, some of which it will be necessary to refer to, the sub-lease in which Friends First is now the landlord and Superquinn is the lessee is in the same terms.

3. The Lease

3.1 The lease was entered into on the 11th June, 1998. It is described as being between a company then known as Parolen Limited (which is a former name of Parol) of the first part, Carroll Village of the second part, Anglo Irish Bank Corporation Plc (which bank held a charge over the relevant lands) of the third part and Superquinn of the fourth part. The lease is described as being in respect of what is called the "anchor unit" at Carroll Village Phase II, Dundalk, Co. Louth. The lease was for a term of 999 years from the 1st June, 1998. The lease is described as being in consideration of the sum of IR£450,000, while the rent is described as IR£10 per annum. As noted earlier there was also a building contract for the construction of the Superquinn store for IR£3.85m. The sub-lease was of the 5th September, 2005, for 25 years from that date. As pointed out that the terms of the sub-lease are, in almost all

respects, identical to those of the lease. I will, therefore, concentrate on the terms of the lease save where there is a material distinction.

3.2 So far as they are material to these proceedings some further provisions in the lease are of relevance. First, it should be noted that, in addition to the rent, Superquinn covenanted to pay Carroll Village (in its capacity as the management company) certain sums for insurance premiums and also a service charge.

3.3 Of particular relevance is Clause 3(6) which provides as follows:-

> "Obligation to Trade
>
> To keep the Property open for retail trade during the Minimum Opening Hours unless required by law, industrial dispute, trade union regulation or unless prevented from keeping the same due to circumstances beyond the Lessee's reasonable control PROVIDED ALWAYS the obligations of the Lessee under this sub-clause (6) shall cease and be of no further effect (save in respect of any right of action or remedy of the Lessor in respect of any antecedent breach) 20 years after the date of the opening of the Property to the general public for trade."

3.4 A number of matters need to be noted about that clause. First, it is for a term of twenty years. It thus, in its terms, continues until 2018. Second, it should be noted that "Minimum Opening Hours" is a defined term for the purpose of the lease and is specified as being from 9.00am to 7.00pm on Monday, Tuesday and Saturday of each week, and from 9.00am to 9.00pm on Wednesday, Thursday and Friday. The lease did contain provisions permitting Superquinn to open on other occasions provided that it met an appropriate share of the cost of such additional opening.

3.5 For its part Parol, in addition to the usual covenant for quiet enjoyment and to keep the remainder of the shopping centre and common areas in good repair and condition, gave specific covenants to pay a sum equal to the service charge attributable to any un-let portion of the shopping centre (Clause 4(4)) and also covenanted under Clause 4(5):-

> "To Procure other Lessees to Open
>
> To ensure that the Minimum Opening Hours shall be during the times and on the days from time to time directed by the Lessee and to use its best endeavours to procure that all other lessees sub-lessees and other owners occupiers users and licensees of or in any Units or area in the Centre shall covenant to open for trading during the Minimum Opening Hours and shall enforce performance of this covenant against other Lessees of the Centre."

3.6 It is clear, therefore, that Parol was obliged to do its best to ensure that the shopping centre as a whole remained open for the specified Minimum Opening Hours and was, to that end, required to ensure that all other leases of units in the shopping centre contained an obligation on the part of the lessee to keep open during those times.

3.7 As will be seen, there is a clear obligation on Superquinn to keep open for the Minimum Opening Hours. Indeed, it would appear that the "opening" situation developed somewhat during the course of dealing between Superquinn and Parol. Sunday opening was introduced and an agreement was entered into between the parties as to how the costs of that additional opening would be dealt with. There was, of course, no obligation on Superquinn to open on Sunday, nor was there any obligation on Parol to seek to ensure that any other units opened on that day. Likewise, the precise closing times varied from time to time, more often by an extension of the opening hours over those specified in the definition of the Minimum Opening Hours although, in the latter period, there would appear to have been some occasions when Superquinn (and the rest of the shopping centre), closed before the times specified in the Minimum Opening Hours provision of the lease.

3.8 Before going on to consider the factual dispute between the parties and to set out the views which I formed as to the legal entitlements of the parties in the light of the resolution of that dispute, I should turn briefly to the legal issues which arose.

4. The Law

4.1 As indicated earlier, there is clear authority for the proposition that a lessee who is bound by a keep open clause can nonetheless treat actions on the part of the landlord concerned as amounting to a repudiation of the lease. In *Chartered Trust Plc v. Davies* [1997] 2 EGLR 83, Henry L.J. stated the following:-

> "The trial judge found this to be a repudiation of the lease – a substantial interference with the defendant's business driving her to bankruptcy. This was a judgment he was entitled to come to on the evidence he heard."

4.2 In *Chartered Trust* a passage from the judgment of Denning M.R. in *Moulton Buildings Limited v. Westminster* [1975] 30 P&CR 182 was quoted with approval in the following terms (from p. 186):-

> "If one man agrees to confer a particular benefit on another he must not do anything which substantially deprives the other of the enjoyment of that benefit; because that would be to take away with one hand what is given with the other."

4.3 I did not understand any of the parties to disagree with the general proposition that, in certain circumstances, the actions of a landlord can be such as entitle a tenant to repudiate a lease and, thus, be absolved from all of the tenant's obligations including those which might arise under a keep open clause.

4.4 The next question concerned the level of breach by a landlord of the landlords obligations under the lease in question which might justify such a course of action on the part of a lessee.

4.5 In *British Leyland Exports Limited v. Britain Group Sales Limited* [1981] I.R. 335, O'Hanlon J. held that, in the circumstances of the case in question, "the breaches were of such frequency and such gravity as to entitle Britain's', in all probability, to claim that the breaches had the effect of depriving them (temporarily at least) of the whole benefit which it was the intention of the parties that they should obtain from the contract, so as to enable them to treat the contract as having been repudiated by British Leyland and to regard themselves as discharged from their own unperformed primary obligations".

4.6 Likewise, in *Irish Telephone Rentals v. ICS Building Society* [1991] ILRM 880, Costello J. cited with approval an extract from the judgment of Lord Diplock in *Hong Kong Fir Shipping Company v. Kawasaki* [1962] 2 Q.B. 26 in the following terms:-

> "The test whether an event has this effect (to discharge one of the parties from future performance of his undertakings)

> or not has been stated in a number of metaphors all of which I think amount to the same thing: does the occurrence of the event deprive the party who has further undertaking still to perform of substantially the whole benefit which it was the intention of the parties as expressed in the contract that he should obtain as the consideration for performing those undertakings."

4.7 It would seem, therefore, that it is far from sufficient for a lessee to establish some breach of covenant on the part of the landlord in order that the lessee concerned should have an entitlement to repudiate the lease. A lessee may well have other remedies for such breach, whether in damages, injunction, or otherwise. However, in order that the breach be such as would entitle the lessee to treat the contract as repudiated, it seems to me that the actions of the landlord must be such as substantially deprived the tenant of the benefit of the lease. In addressing this issue in *Chartered Trust*, Henry L.J. cited with approval *Aldin v. Latimer Clark, Muirhead & Company* [1894] 2 C.H. 437 at p. 444 where Stirling J. said the following:-

> "The results of these judgments appears to me to be that where a landlord demises part of his property for carrying on a particular business, he is bound to abstain from doing anything on the remaining portion which would render the demise premises unfit for carrying on such a business in the way in which it is ordinarily carried on…"

4.8 Taking the judgment in *Chartered Trust* as a whole it is clear that the actions of the landlord relied on as being a basis for a repudiation on the part of a lessee require to be such as are culpable and sufficiently serious to prevent the lessee from carrying on business in the ordinary way in which it might have been contemplated. A significant issue on the facts of *Chartered Trust* (which does not arise in these proceedings), was the extent to which the landlord was responsible for the actions of another tenant which actions the court held amounted to a nuisance driving the defendant close to bankruptcy.

4.9 It seemed to me that the overall position can be relatively simply stated. A landlord who either fails to comply with the landlord's obligations under a lease or acts otherwise in a manner to a sufficient extent so as to substantially prevent a lessee from using the lessee's premises in the manner contemplated by the lease in question, renders the lease open to being regarded as having been repudiated by the landlord concerned. What amounts to such conduct will depend on the facts of each individual case. Some actions on the part of the landlord may be one off but nonetheless so serious as to meet that test. On the other hand, a persistent failure on the part of the landlord (particularly when called upon to desist) might also amount, in principle, to circumstances justifying the lessee as treating the lease as having been repudiated, even though such action for a brief period of time or on a relatively small number of occasions, might not be sufficient.

4.10 There remains, of course, the question as to whether, even if it be the case that the actions of a landlord in the particular circumstances of a case amount to a repudiation, same entitles the lessee to treat the lease as continuing but to be absolved from any continuing obligations of an onerous variety under the lease such as the keep open clause in question in these proceedings. Given that, for reasons which I propose setting out, I came to the view that Superquinn had not established, on the facts, that it would, in principle, have been entitled to treat the lease as repudiated, it did not seem to me to be necessary to deal with this novel question. Given the importance of the point, it did not seem to me to be appropriate to deal with it in a case where it would not be decisive of the result.

4.11 It follows that it was necessary for me to consider whether, on the facts of this case, it could be said that Parol/Carroll Village had acted in a way which had substantially deprived Superquinn of the benefit of the lease or had placed Superquinn in a position where it could not carry on its business in the way in which the lease contemplated that it would. I, therefore, turn to the factual dispute.

5. The Facts

5.1 Much of the evidence given in relation to the factual dispute between the parties did not seem to me to present a particularly clear picture of the true reasons for the decline in the Carroll Village Shopping Centre. As pointed out earlier Mr. Maguire, in his evidence, placed significant emphasis on the fact that, for a period prior to the closure of the Superquinn store, there had been significant rumours about an impending closure. However, the objective evidence from Superquinn' records does not suggest that any decision concerning closure was taken until quite a late stage in the process.

5.2 In that regard, some mention needs to be made of the way in which Superquinn operated after its takeover by SHL. There would appear to have been so called shareholders meetings running in parallel with the formal meetings of the board of directors. It is, of course, the case that under company law the power to make decisions on behalf of a company rests with the directors or such members of management to whom the directors may delegate defined decision making. However, as a matter of commercial reality, it seems unlikely that a major decision, such as that to close the Dundalk store, would have been taken without the shareholders knowledge and approval. I did not think that, for the purposes of this case, anything turns on the distinction between decisions taken at the level of shareholders meeting or, more formally, by the board of directors. That is not to say that there might not be other issues in respect of which that distinction would be crucial.

5.3 I was satisfied on the evidence that the question of the viability of the Superquinn store in Dundalk was under active consideration for a considerable period of time prior to its closure. However, I was also satisfied that no final decision on closure was taken until the end of 2008 or the beginning of 2009. The fact that rumours (whether well or ill-founded) might well have been around in Dundalk for a considerable period of time prior to that is not really relevant to Superquinn's position as such. Superquinn's only obligation under the lease was to keep the store open and to operate it in accordance with the user clause. There was no evidence, in my view, to suggest that it did other than that. There was not, therefore, in my view, any basis for suggesting that Superquinn was in breach of its obligations under the lease prior to the closure in February, 2009. However, I accepted, as a fact, on the evidence, not only of Mr. Maguire, but also of a number of other continuing tenants in the Carroll Village Shopping Centre, that rumours as to Superquinn's impending closure were around for a considerable period of time before that and that those rumours affected, in a practical way, the operation of the shopping centre. While Superquinn cannot be legally blamed for those rumours, the fact of the existence of those rumours is part of the material which needed to be considered in assessing whether there was any, or perhaps more realistically any sufficient, breach by Parol/Carroll Village of their obligations.

5.4 As to the suggestions made in the course of the evidence led on behalf of Parol/Carroll Village that the Superquinn store was deliberately rundown, I was not satisfied that there was any sufficient evidential basis for that suggestion. Doubtless there were occasions when things went wrong in Superquinn. The evidence, however, seemed to me to fall far short of such as would be required to justify drawing an inference that Superquinn was deliberately running down its store or had taken a conscious decision not to try and trade out of its business difficulties.

5.5 Two further issues arise at this point. There is a slight connection between the two. The first concerns the payment by Superquinn of service charges due under the lease in respect of the management of the shopping centre by Carroll Village. Indeed, a second issue arose under this heading which, while more properly part of an analysis as to whether Parol/Carroll Village complied with its obligations, I propose dealing with at this stage in the judgment for convenience. The second, and slightly connected, issue concerned the use by various lessees in the shopping centre of a compactor owned by Superquinn and located within Superquinn's take.

5.6 Turning first to the service charge question, it was initially contended (prior to the commencement of the hearing) on behalf of Carroll Village, that Superquinn had stopped paying the relevant service charge and that the failure on the part of Superquinn to pay its contracted share of the service charge had impacted adversely on the ability to maintain the shopping centre. However, by the time the case commenced it was accepted that Superquinn was not, in fact, in arrears in respect of its service charge obligations. It is necessary to explain how that situation came about. While strictly speaking the obligation of Superquinn were under the sub-lease and, therefore, to Friends First with identical obligations being owed by Friends First to Carroll Village under the lease, the parties all operated on the basis that Superquinn would deal directly with Carroll Village in relation to service charge matters.

5.7 It is correct to state that at or around the time when Superquinn closed its store, Superquinn ceased making any payments in respect of service charge. Thus, on a cash flow basis, there were no service charge receipts coming into Carroll Village from Superquinn from the time of the closure of the Superquinn store until the hearing of the action. However, it transpired that the calculation of the amounts due by Superquinn to Carroll Village on foot of Superquinn's service charge obligation, prior the closure of the Superquinn store, had been wrongly calculated in that, a wrong percentage of the total service charge for the shopping centre as a whole had been applied to Superquinn. It followed that, on a re-examination of Superquinn's service charge obligations, Superquinn had a significant credit built up by reason of overpayments as of the time of the closure of the Superquinn store. That credit was sufficient to cover any sums which might have become due between the time when Superquinn stopped paying any further amounts and the hearing of the action. While there was some minor disagreement between the parties as to the precise position (indeed part of the reason for that disagreement was based on the compactor issue to which I will shortly refer) it was not contended on behalf of Carroll Village that Superquinn was, on a proper analysis, in arrears with service charge.

5.8 As indicated earlier, an issue in relation to the service charge was also raised by Superquinn as part of its allegation against Parol/Carroll Village. As noted in the context of the terms of the lease, Parol had an obligation to make up the share of the overall shopping centre service charge which was attributable to any vacant unit. As a significant number of units became vacant and proved impossible to re-let, it followed that Parol was itself liable for a significant and growing portion of the overall service charge. In that context, Superquinn drew attention to the undoubted fact that the total amount spent on the services encompassed within the service charge obligation had declined in the years leading up to the closure of the Superquinn store. On that basis, Superquinn suggested that a deliberate policy had been adopted on the part of Mr. Maguire to reduce the services provided (and, thus, impact on the overall servicing of the shopping centre) because of his own exposure, in part through Parol, to make up any shortfall attributable to the vacant units.

5.9 That there were reductions in the total service charge budget taken as a whole cannot be doubted. The figures speak for themselves. There were explanations for at least a reasonable proportion of the changes. It needs to be noted that the precise level of services to be provided was not specified in the lease. However, it seems to me that the implied obligation on all concerned was that a level of services reasonable in the context of the shopping centre concerned must necessarily be implied. It also needs to be noted that the remaining lessees were understandably increasingly concerned about all of their outgoings, given the difficult financial circumstances within which they were operating. It those circumstances, it is hardly surprising that most, if not all, of the other lessees were in favour of any measures that might be put in place to minimise their exposure to service charge. It would also appear that certain of the service charge elements were able to be renegotiated in a favourable way such as a reduction in the total insurance bill attributable to the fact that Mr. Maguire had economies of scale arising out of his involvement in a shopping centre at Drogheda.

5.10 I do not doubt that Mr. Maguire was himself anxious to minimise his personal exposure (through Parol and, indeed, personally in respect of those units where he and his wife were the landlord) for the vacant units. However, taking the evidence as a whole, I did not come to the conclusion that there was any improper or inappropriate downgrading of the level of services provided. Arrangements to provide the necessary funding were put in place even if the precise methods used were not always fully transparent.

5.11 In that context, it is worthy of some note that Superquinn do not appear, prior to these proceedings, to have raised any questions concerning either the adequacy of the services provided (save to the extent that some of the issues raised in a memorandum from a Stephen Igo, to which I will shortly refer, relate to questions that might come under this heading) or the cost of same. Indeed, one of the striking features of the case is that Superquinn seemed to be happy to pay the service charge requested over a number of years even though it has now turned out that the amount being demanded was wrongly calculated to Superquinn's disadvantage. The only inference to draw from that fact is that Superquinn were not unduly exercised about the service charge issue at all, whether under the heading of the services being provided and their adequacy or the amount that Superquinn had to pay for them. To the extent, therefore, that it might be said that, to some limited extent, the services provided fell somewhat short of a level that Superquinn could have demanded, it did not seem to me that any such falling short came remotely near meeting the test for repudiation to which I have already referred.

5.12 Finally, I should touch on the compactor issue. Superquinn had a significant compactor which is used for the purposes of compacting packaging and the like to makes its disposal easier. An arrangement was entered into at a relatively early stage that an efficient use of that compactor would involve each of the lessees within the shopping centre having access to the Superquinn compactor for their own packaging on the basis that Superquinn would be paid a sum out of the service charge for that use. It was, at certain stages, suggested that Superquinn had in some way wrongfully interfered with that arrangement. While the evidence suggested the Superquinn had introduced, for purely practical reasons, time slots within which the lessees were entitled to use the compactor, there was no evidence to suggest that that arrangement did not work perfectly well. There was just no evidence, therefore, for the proposition that Superquinn had in any way acted inappropriately, let alone in breach of any legal obligation, under this heading. It would appear that the precise amount to which Superquinn may be entitled for compacting services, in at least the last number of years prior to the closure of the Superquinn store, is an issue that has not been resolved. However, it did not seem to me that that question had any material bearing on the issues of principle to which this judgment is directed.

5.13 However, it must be recalled that the Dundalk store was a loss making store from the time of the acquisition by SRH in 2005. The financial equation changed somewhat when the sale and leaseback arrangement with Friends First was put in place. After that point in time, Superquinn became obliged to pay a rent of €800,000 per annum to Friends First which obligation, of course, continued irrespective of whether the store was open or not. There were some other additional liabilities in respect of the store which would also have arisen whether it was open or not. Rates, at least some level of insurance, and the like would have been payable in any

event. On the basis of the evidence it would seem that a closed store would have cost Superquinn a little over €1m per annum. Its trading position needs to be seen in the light of that fact. It follows that a Dundalk store which was losing (say) €750,000 per annum would nonetheless be an improvement on a closed store, while a loss of upwards of €1.25m per annum would be somewhat worse than closing the store. I was satisfied on the evidence that Superquinn put in place measures during 2008, which sought to improve the trading position of the store. However, those measures do not appear to have been successful. I was satisfied that, in the latter part of 2008, Superquinn's assessment of the likely trading performance of the Dundalk store over the following number of years was such as led Superquinn to conclude that it was likely to make losses which were significantly larger than the cost of keeping the store closed.

5.14 I was not, however, satisfied on the evidence that a significant aspect of the equation, as it appeared to Superquinn at that time, involved the complaints now sought to be placed against Parol/Carroll Village. What is striking in the evidence is the lack of major complaint made by Superquinn either to the management on the ground or to Mr. Maguire. There was evidence of some brief verbal complaints raised a good number of months prior to the closure which do not seem to have been followed up on in any way. There was an exchange of solicitors correspondence in the middle of 2008, where no mention is made of any such complaints. The materials which appear to have been before the shareholders and directors meetings of Superquinn at which decisions as to closure were made, do not appear to have included any documents specifying complaints against the management of the centre. There was, at the relevant time, in existence a memorandum from a Stephen Igo setting out a series of complaints which were relied on at the hearing, but there was no evidence that that memorandum played any significant role in Superquinn's actual decision to close.

5.15 If it were truly the case that Superquinn believed that, as a result of failures on the part of Parol/Carroll Village, it was unable to use its store in the way in which it was contemplated or carry on its business in the way in which it was contemplated, it seemed to me to be inconceivable that a substantial commercial organisation such as Superquinn would not have documented its complaints, made them in a formal way to Parol/Carroll Village, and, almost certainly, followed up by giving deadlines or an ultimatum for compliance. None of that happened. The only possible inference to draw is that while there may have been a certain level of dissatisfaction on the part of Superquinn with aspects of the way in which Carroll Village was operated, that dissatisfaction did not play a significant role in the decision to close the store and that, also, any action or inaction on the part of Parol/Carroll Village fell far short of the threshold for repudiation to which I have referred.

5.16 Rather, it seemed to me that the decision to close the store was based on the trading difficulties which Superquinn faced and which Superquinn had not been able to remedy despite putting in a new manager during 2008.

5.17 The complaints made by Superquinn against Parol/Carroll Village can be conveniently divided into a number of categories. The first set of complaints involved allegations concerning the way in which the day to day management of the shopping centre was conducted. A series of specific complaints were relied on, being those which appeared in the Igo memorandum to which I have referred. I propose dealing with each in turn.

(i) *The main car park not being opened until 9.00am each morning*.

I was not satisfied on the evidence that there was any significant failure on the part of Carroll Village to open the car park on time each morning. The limited evidence given on behalf of Superquinn needs to be counter-balanced with the evidence given by a number of continuing tenants in the shopping centre. It may be that problems were encountered on a very small number of occasions. However, in the overall scheme of things it did not appear to me that this issue has been substantiated to any significant degree.

(ii) *Two out of three entrances to the centre were being locked at 6.00pm each night*.

It seems to be factually correct to state that certainly one, and on occasions, two of the three entrances were closed well before Superquinn's closing time of 9.00pm. In that context, it needs to be noted that, of the three entrances, one was from a car park while the other two opened out directly onto streets. It will be necessary in due course to deal with the question of the vacancy of units within the centre, but by the relevant time many of the units at one end of the centre had closed, such that the entrance from the street at that point would, in any event, have been uninviting. There was also evidence that female employees of tenants had expressed security concerns in the light of the empty units coupled with ease of access, particularly in the evening. It may be that Carroll Village was under an obligation to open those entrances, but in all the circumstances it did not seem to me that there was any substantial breach having regard to the absence of any significant complaint during the relevant period by Superquinn.

(iii) *Customer toilets being locked at 6.00pm and not open at all on Sundays*.

I was satisfied that the toilets were closed for significant periods on Sundays and that the toilets were sometimes closed in advance of Superquinn closing time (but not as early as 6.00pm as alleged). It should also be noted in this context that, after some complaints were made about the standard of cleaning in the toilets a former cleaner was re-employed.

(iv) *The lights in the car park were being turned off early at night at varying times*.

There was evidence of a complaint in this regard being made, although it does appear to have been substantially dealt with by Carroll Village. I was not satisfied on the balance of the evidence that any significant or meaningful complaint has been made out under this heading.

(v) *Car park gates being locked 30 minutes prior to the close of Superquinn*.

I was not satisfied that there was any evidence to support this allegation.

(vi) *Centre Manager rarely on site*.

While it is true that the centre manager was not always on site, I was not satisfied that the evidence establishes that there was any significant failure under this heading.

(vii) *Lights around the building not on at night*.

It does appear to be the case that, as a result of many of the units on the exterior of the shopping centre being vacant, the shopping centre gave a dark appearance at night. Indeed, some of the exterior lights seem to have been directly

connected with the electricity supply to the vacant units and, thus, were themselves not in use when the electricity supply to the vacant units concerned was cut off. Some complaint about this was undoubtedly made on behalf of Superquinn. However, it does need to be noted that a suggestion on the part of the manager of Carroll Village that a joint approach with Superquinn be made to the local authority in respect of certain public lighting outside the centre which was not operating, was not followed up on by Superquinn. If this was a real concern to Superquinn, it is difficult to see how that suggestion would not have been followed up on. I was not satisfied that there is any sufficient evidence of any breach of any obligations on the part of Carroll Village under this heading.

(viii) *Cleaning of car park and green areas being "non existent"*.

The evidence under this heading was, in my view, vague and far from sufficient to establish any breach of obligation on the part of Carroll Village.

5.18 Taking each of those complaints, either individually or collectively, same seemed to me to barely establish any breach by Carroll Village of its obligations in respect of the management of the centre at all and certainly no breach which would go anywhere near satisfying the legal test for repudiation, which I have already set out. In those circumstances, I was not satisfied that any of those complaints could amount to a justification on the part of Superquinn for its decision to close the store.

5.19 There were, however, some other issues which needed to be addressed concerning the way in which Parol operated. I turn to the first of those, which is the question of the letting of the other units in the shopping centre (or more accurately the failure to let same).

6. The Vacant Units

6.1 That many of the units within Carroll Village became vacant in the period between 2005 and the closure of Superquinn (and, indeed, thereafter) is not in dispute. The reasons why those units became vacant was disputed to some extent. The actions taken by Mr. Maguire to prevent or discourage vacancy or to fill vacancies when they arose, was a matter of significant controversy.

6.2 In that context it is important, by way of background, to say a little about the physical structure of Carroll Village Shopping Centre. When originally constructed Superquinn was at the top end of the site. There were a number of units between Superquinn and the Central Mall of the shopping centre as originally constructed. There were two gaps in the row of units adjacent to Superquinn to permit entrance into the Superquinn store from that central mall. On the opposite side of the mall were a further series of units.

6.3 An extension was constructed in early course. The extension involved creating a second mall at right angles to the first and entering the original mall on the side opposite Superquinn. The new mall had a further series of units on either side. In addition, extra units opening onto the street at both the bottom of the site and towards the right hand side of same formed part of the extension concerned. It needs to be noted that the units in the extension were not owned by Parol, but rather by Mr. Maguire and his wife personally. It immediately needs to be noted that this gave rise to some complications in respect of the case. First, and most obviously, the claim for damages which had been maintained in these proceedings involved principally a claim for the loss of rent arising out of vacant units, which vacancy was said to have been caused or contributed to by Superquinn's closure of its store. The plaintiffs are, of course, Parol and Carroll Village. As those companies were not the landlords of the units in the extended part of the shopping centre, it follows that no claim for any damages arising out of the vacancy of any units in that extended area could be maintained by the plaintiffs in these proceedings. Indeed, it may well be open to some doubt as to whether any claim could be maintained by Mr. Maguire and his wife in respect of those units in separate proceedings. The covenants entered into in the original lease were as and between Parol and Superquinn. The covenants that now exist are as and between Parol and Friends First with largely identical covenants arising as and between Friends First and Superquinn under the sub-lease. There are no covenants with Mr. Maguire or his wife in a personal capacity. It must, therefore, be open to doubt as to whether Mr. Maguire and his wife would have any entitlement to rely on a breach by Superquinn of a covenant with Parol or, in the current circumstances, a breach by Superquinn of its covenant with Friends First which in turn led Friends First to be in breach of its covenant with Parol, in circumstances where Mr. Maguire and his wife were not party to any of those covenants.

6.4 Be that as it may, the history of vacancies in the various units within the shopping centre was the subject of a table produced on behalf of Parol/Carroll Village in the course of the hearing. I annex that Table to this judgment. It will be seen from that Table that a number of units became vacant during 2005, and were not re-let. Leaving aside the ATM's, units 17, 18, 23, 24 and 25 have all remained vacant from some point in 2005. Further vacancies arose in 2006. Two points need to be made concerning the vacancies in 2005 and 2006. First, there was controversy between the parties as to the extent to which real efforts were made by Mr. Maguire to seek to have those units re-let. I am satisfied that some sporadic attempts were made. However, the truth is that the overall impression given to me by the evidence was that trading conditions in Dundalk in general and in the Carroll Village Shopping Centre in particular, were very difficult at this stage. That conclusion cuts both ways. First, it may provide an explanation as to why the units were not re-let, but which does not place any significant blame on Mr. Maguire. On the other hand, it follows that the fact that those units are vacant has nothing to do with Superquinn.

6.5 The second point follows on from the first. Evidence was given from a number of continuing and former tenants of the shopping centre. Those witnesses, together with Mr. Maguire, all gave evidence as to the time at which rumours about an impending Superquinn closure or alleged failings in the operation of the Superquinn store, began to impact on business. It is hardly surprising that the witnesses differed as to the timing of any such impact. The impact concerned was not a result of a single major event, but rather a gradual process. However, on the balance of the evidence, I was not satisfied that there was any significant impact on the letability of the premises within the Carroll Village Shopping Centre which was in any way influenced by rumours about an impending closure on the part of Superquinn until, at the earliest, the very end of 2007. For reasons which I have already set out, I was not satisfied that there was any significant failure on the part of Superquinn in their management of the Superquinn store, and I was not satisfied that any of the allegations under that heading had been made out. It followed, however, from the conclusion which I have just identified, that the vacancy of the many of the units could not, in any way, be attributed to Superquinn.

6.6 The evidence concerning the efforts made by Mr. Maguire and/or Parol/Carroll Village to seek to re-let those units was, I have indicated, of sporadic attempts. Messrs. Gunne Auctioneers were employed, but only at certain periods of time. Staff within Carroll Village attempted to identify potential tenants, most particularly those who were already tenants of a separate shopping centre development in Drogheda, of which Mr. Maguire was principal. While it may be that greater efforts could have been employed, I was not persuaded on the evidence that there was any significant or substantial failure on the part of Mr. Maguire to attempt to re-let vacant properties. The efforts made need to be seen against the difficult trading circumstances with which the shopping centre was faced in any event.

6.7 However, a further issue arose concerning Mr. Maguire's actions in relation to the departure of tenants. Under this heading a

number of connected but somewhat different points were canvassed. I will leave until last what seemed to me to be the most serious issue which concerned a McDonalds unit (being units 19/20/29) which opened out onto the street towards the bottom right hand corner of the site. However, before dealing with the McDonalds issue, a number of other questions need to be addressed.

6.8 First, attention was drawn on behalf of Superquinn to the provisions of the lease which required Parol to include and attempt to enforce keep open clauses in the leases of other units. Explanations were given by Mr. Maguire as to the circumstances in which various lessees were allowed to close their units. On balance, I came to the view that I should accept Mr. Maguire's explanations. Some degree of commercial reality has to come in to a question such as this. There would be little point in, for example, maintaining legal proceedings to attempt to force a lessee to continue to keep a unit open in the circumstances where it was just not commercially possible for that tenant to trade. There could well be circumstances where legal action might well amount to throwing good money after bad. It did not seem to me that the obligation on Parol to seek to enforce keep open clauses in respect of other units required Parol to do so in circumstances where there was little or no commercial reality to Parol being able to force the relevant units to remain open. So far as the units other than McDonalds are concerned, I was not, therefore, satisfied that Parol was in breach of its obligations under the lease by failing to attempt to force units to remain open in all the circumstances of the case.

6.9 It is also worthy of some note that Superquinn were well aware of their entitlement to require Parol to enforce keep open clauses in relevant leases against other unit occupiers. There was no evidence of any compliant being made at any time on behalf of Superquinn which suggested a breach of the relevant covenant on the part of Parol. Superquinn would, of course, have been well aware of the vacancies as they arose. While Superquinn might not have been aware of the precise circumstances leading to vacancy in each case, it is, perhaps, surprising, given the complaints made at the hearing on behalf of Superquinn, that no attempt was even made at the material time to seek information as to whether the circumstances leading to the closure of any relevant unit might amount to a breach on the part of Parol of its obligations to Superquinn.

6.10 The second issue under this heading concerns the fact that certain complaints were made by most of the continuing tenants in the middle of 2008 which complaints were contained in largely identical correspondence written to Mr. Maguire. It does need to be noted that the relevant correspondence does not make any complaint against Superquinn. However, many of the relevant authors gave evidence to the effect that the letters were designed, for understandable reasons, as part of a campaign to attempt to secure reduced rent and/or service charges. I accepted the explanations given by the witnesses in that regard. All were suffering severe trading circumstances. Their attempt to procure a reduction in their outgoings was undoubtedly understandable. However, it follows that the weight to be attached to the complaints made in that correspondence needs to be tempered by the circumstances in which the relevant letters were written. While the complaints made need to be considered, I was not satisfied that those complaints provided any basis for departing from the conclusion which I have already noted concerning the management of the shopping centre as a whole. However, in response to those complaints it would appear that Mr. Maguire offered each of the complaining tenants the entitlement to walk away from their lease. It seems to me that in so doing Mr. Maguire was undoubtedly acting in breach of his obligations to Friends First and, through them, to Superquinn. However, as it happens none of the tenants took him up on that offer. It follows that there were no practical consequences of his action in that regard and it does not, therefore, seem to me to amount to a matter which could weight very significantly in the assessment of whether Mr. Maguire acted in a way which placed Parol in a position where it had repudiated its obligations to Superquinn.

6.11 That leads to the case of McDonalds. It was accepted in the course of evidence that Mr. Maguire negotiated a significant payment of €500,000 from the franchisee who operated the McDonalds unit in question in order to release that franchisee from the lease. The units in question were some of those which were owned by Mr. Maguire and his wife personally. While there may well be many circumstances in which entering into such an arrangement makes commercial sense, viewed from the perspective of a landlord, it must be pointed out that, at least on one view, Mr. Maguire did not have complete freedom of action by reason of the fact that covenants had been given to Superquinn concerning the enforcement of keep open clauses in other leases. There are many circumstances where a party might, if free to act, adopt a particular course of action without any criticism, but where the course of action concerned cannot be legitimately carried out because the party has bound himself contractually not to act in a particular way. The fact that it might have made commercial sense for Mr. Maguire to enter into the arrangement to which I have referred does not get away from the fact that at least Parol was bound by covenant to attempt to enforce keep open clauses in respect of each of the units.

6.12 However, the covenants to Superquinn were given by Parol and not by Mr. Maguire personally. The precise extent to which Mr. Maguire was liable under the covenants entered into in the lease between Parol and Superquinn is not a matter that was argued before me and the question is one on which, therefore, I express no view. It does not appear to me that any of the parties addressed, either at the time or in the course of the proceedings, the complications for the interlocking set of covenants which arose from the fact that half of the shopping centre did not have Parol as its landlord.

6.13 Be that as it may, it does not seem to me that the circumstances giving rise to the vacancy of the McDonalds premises or, indeed, the fact of that vacancy, was really a significant factor in the Superquinn decision to close. For like reasons to those which I addressed in relation to the issues concerning the management of the shopping centre it was, in those circumstances, impossible to infer that the vacancy of the McDonalds store (however caused) was a factor of any significance in determining whether Parol/Carroll Village had been guilty of actions or inaction which met the repudiation test which I have already analysed. Whether it was or was not a breach of covenant on the part of the Mr. Maguire does not, for those reasons, seem to me to be really central to the issue which I now have to decide. It might, however, be of some relevance in relation to the claim for damages.

6.14 Also when taken in conjunction with the offer made by Mr. Maguire to those tenants who had complained in mid 2008 which would have allowed such tenants to walk away, the actions taken by Mr. Maguire in respect of McDonalds form a basis for what was a further allegation on the part of Superquinn, being that Mr. Maguire wanted vacant possession for development purposes. I now turn to that issue.

7. The Development Plan?

7.1 In addition to the actions taken by Mr. Maguire, to which I have referred, Superquinn also placed in evidence the fact that plans had been developed to some extent for a larger development of the area in which Carroll Village was situated, which development would necessarily have included other properties not owned by Mr. Maguire. There can be little doubt that such a development was at least the subject of some consideration. There would appear to have been some discussions with the planning authority.

7.2 Superquinn's contention is that all of the evidence points to Mr. Maguire being happy to have Carroll Village run down so that he could avail of vacant possession of same to enable him to engage in his part of a larger development. On balance, I came to the view that that allegation was not well founded. There were many tentative plans under consideration at the height of the Celtic Tiger property bubble. I do not consider that the plans which had been developed in respect of Carroll Village and other properties were any more than that – tentative plans. While Mr. Maguire's actions in respect of the McDonalds outlet do not reflect any great credit on

him, I was not satisfied that he was engaged in a plan to secure vacant possession of the entire shopping centre.

8. Conclusions on Keep Open Clause
8.1 For the reasons which I have sought to analyse I was not, therefore, satisfied that Parol/Carroll Village (including, if necessary, Mr. Maguire in his personal capacity) were guilty of any sufficient action such as would have justified Superquinn as repudiating its lease. In those circumstances, even if it is legally possible for a lessee who is entitled to treat a lease as repudiated, to continue the lease in existence but be absolved from compliance with a keep open clause, the factual basis for Superquinn's contentions under this heading were not, in my view, made out.

8.2 In those circumstances, it seemed to me that Superquinn were still subject to the keep open clause and obliged to comply with same. There remained only the question of whether Superquinn were obliged to use Superquinn title.

9. Open under What Name
9.1 The starting point for a consideration of this issue had to be the terms of the lease itself. It is striking that neither the original lease as between Parol and Superquinn (in respect of which Friends First is now the lessee) or the sub-lease created for the purposes of the sale and leaseback operation in which Friends First is now the landlord and Superquinn is now the tenant, make any express reference to the keep open obligation requiring Superquinn to trade under the Superquinn name.

9.2 Accepting that fact, it was argued on behalf of both Friends First and Parol/Carroll Village that it was implicit in the arrangements that trading would take place as Superquinn, rather than under any other name. It is common case that the user clause in the original lease requires that the unit operate as a "supermarket and/or superstore (including the sale of intoxicating liquor for consumption off the demised Unit) and the for the sale of goods and/or services which may from time to time be sold or provided in supermarkets and/or superstores". It will be recalled that the keep open clause requires Superquinn "to keep the property open for retail trade during the Minimum Opening Hours".

9.3 The case made by both Parol/Carroll Village and by Friends First was that at the time the original lease was entered into there was only one brand under which Superquinn operated. It was also suggested that the deal under which Superquinn originally entered into its arrangements with Parol was financially favourable to Superquinn because of the advantages that were perceived as flowing to the shopping centre from having Superquinn as an anchor tenant.

9.4 However, it does not seem to me that any of those matters were significantly material. It would have been very simple for Parol to have included a clause in the lease which required Superquinn to trade under that name. While it is, of course, true to say that the factual matrix, in which any contract (including a lease) is entered into, is relevant to its construction, it is also important to note that each of the authorities make it clear that significant regard has to be given to the language which the parties choose to use in their arrangements. The language which the parties chose to use in this case did not involve any specification as to the name under which Superquinn would operate.

9.5 It should be noted that Superquinn did not have any obligation to obtain the consent of Parol to an assignment of the original lease. Indeed, it was in that context that Superquinn was able to make the sale and leaseback arrangements with Friends First without Parol being, at the time, aware of them. It is true to say that the form of sub-lease under which Superquinn now holds the property from Friends First does require landlords consent to assignment. It is also true that that sub-lease requires use as a "high end supermarket" and that that obligation, insofar as it exists between Superquinn and Friends First, continues until 2030 as opposed to the 2018 time limit in the lease as and between Parol and now, Friends First. However, it would have been very easy for the language of either the original lease or the new sub-lease to have included a specification as to the name under which Superquinn was to keep open. The absence of any such language seems to me to imply that the respective landlords were content to have the security that a firm of the substance of Superquinn would keep open a supermarket or, in the case of Friends First a high end supermarket, without requiring that any particular trading name be used.

9.6 To imply a term (and it would necessarily be an implied term) into the lease so as to require Superquinn to trade under the Superquinn title would be, in my view, to rewrite the lease. It would not be a matter of interpretation in the context of facts. Rather, it would be a matter of ignoring the language of the lease. For those reasons, I was not satisfied that the lease contained any implied obligation on Superquinn to trade under any particular name provided that it met the user clause. Given that Superquinn's direct obligations are now to Friends First that necessarily implies that Superquinn must operate a high end supermarket under whatever name it considers appropriate.

10. Conclusions
10.1 For the reasons already analysed, I was satisfied that Superquinn were obliged to comply with the keep open clause.

10.2 For the reasons set out in the previous section I was not, however, satisfied that Superquinn was obliged, in compliance with that clause, to do other than keep open as a high end supermarket under whatever title might be appropriate.

10.3 It remains to discuss with counsel the precise orders which will be required. In addition, it will be necessary to discuss with counsel what steps need to be taken at this stage to consider the remaining claim for damages.

TABLE

UNIT		**Open – Close**	**Comment**
1	Bus Stop Charlies	July 1999 – Aug 2004 Aug 2004 – Oct 2007	Liquidation
2	Paco	Dec 1999 – June 2009	Liquidation
3/15/16	Superquinn / Tusa Wise Owl	Nov 1999 – Apr 2005 June 2006	Still trading

4	Sasha	July 1999 – June 2009	Liquidation
5	Café Anne Fallons take over Village Café	Aug 1999 – July 2002 Jul 2002 – Oct 2005 Dec 2005 -	Still trading
6	CD World	Aug 1999 –June 2009	
6A	Watch it Isabee	Sept 1999 – Feb 2004 Oct 2006 – Mar 2008	T& G Byrne Discussions
7	Formative Fun House of Shoes	Sept 1999 – Oct 2003 Oct 2003 – Apr 2007	
8	Cellcom Des Lynch	Dec 1999 – Nov 2001 Nov 2001 – Apr 2008	
9	Eirsat Needful Things	Aug 1999 – Dec 2002 Dec 2002 – Oct 2006	
10	Brag Destiny Kidz	Aug 1999 – Oct 2002 Oct 2002 – Apr 2006	Des Lynch Temp unit
11	Budget Travel	Aug 1999 – Oct 2009	Liquidation
12	Absolutely Textiles	Apr 1999 – Dec 1999	Unit 12 no longer exists
13	Absolutely Text Bride 2 Be	Dec 1999 – Nov 2002 Nov 2003 -	Still there
14	McCabes	Sept 1999 -	Still there
15/16	ATMs	Sept 1999- Apr 2005	
17/18	Fotofast/Dryfast	Dec 1999 – Sept 2005	
19/20/29	McDonalds	May 2000 – Sept 2006	5 year penalty
21	DC Beauty	Aug 2004 – May 2007	Paid €30k fit out
22	Amer Destiny	Dec 1999 – Jul 2008	
23/24	Satellite Sports	May 2001 – Sept 2005	Liquidation
25	Super Specs	Dec 2002 – Mar 2005	Principle died
26	DC Hair	Mar 2001 – Jan 2009	
27	Wise Owl *Frawley takes unit	Jun 2001 – Mar 2006 Mar 2006 – Oct 2009	Moved to unit 3
28	Frawley	Mar 2003 -	Still there