Approved
THE COURT OF APPEAL
Civil

Record Number: 2022 207
High Court Record Number: 2020 7625P
Neutral Citation Number: [2024] IECA 37

Noonan J.

Haughton J.

Butler J.

BETWEEN/

DUNNES STORES UNLIMITED COMPANY

CAMGILL PROPERTY A SÉ LIMITED

PLAINTIFFS/RESPONDENTS

-AND-

DAFORA UNLIMITED COMPANY

CORAJIO UNLIMITED COMPANY T/A AS MR. PRICE BRANDED BARGAINS

DEFENDANTS/APPELLANTS

JUDGMENT of Mr. Justice Robert Haughton delivered on the 16th day of February, 2024

1. This is an appeal from the primary judgment of Sanfey J. delivered on 3 June 2022, and his follow up judgment delivered on 15 July 2022 in relation to orders and costs, and his orders made on 15 July 2022 and perfected on 20 July 2022.

2. By the said orders made on 15 July 2022 Sanfey J. ordered as follows:-

*"**IT IS ORDERED** that the Second Named Defendant, its servants, agents, assignees or nominees, in its capacity as successor in title to the leasehold interest in Unit 4, Barrow Valley Retail Park, Sleaty Road, Carlow and as a tenant, sub-tenant, occupier or trader within the shopping centre be prohibited from using or permitting the use of its unit in breach of the provisions of Clause (20) of the Second Schedule of the Indenture of Lease dated 12 July 2007, as between Redhill Properties Limited as Lessor, of the first part, and Stephen Murphy as Lessee, of the second part ('the Unit 4 Lease') and specifically prohibiting it from offering for sale and/or selling food, food products or groceries contrary to the provisions of Clause (20) of the Second Schedule of the Unit 4 Lease and/or the corresponding provisions as agreed and/or covenanted to by the First Named Defendant's predecessor in title in the lease, deed or document pursuant to which the Second Named Defendant occupies its unit in the retail estate.*

AND THE COURT DOTH DECLARE

1. *that the term 'groceries' in the Unit 4 Lease extends beyond food or food products;*
2. *that 'groceries' in the Unit 4 Lease includes 'non-durable consumable household items which are purchased frequently'*
3. *that 'non-durable consumable household items which are purchased frequently' includes healthcare products; household healthcare products; household and cleaning products; pet care and pet food; bathroom toiletries; hair care products; oral care products and other toiletries; detergents; washing powder; cleaning products and materials; shower gels; deodorants;*

shampoos; cosmetics; toothbrushes; toothpaste; kitchen towel and toilet rolls."

Sanfey J. further ordered that the plaintiffs recover their costs of the action, including all reserved costs and the costs of the interlocutory injunction application, from the defendants, and placed a stay on execution only in relation to such costs order pending determination of any appeal.

3. In essence, this appeal concerns the interpretation of the word "*groceries*" in a restrictive covenant in the Indenture of Lease dated 12 July 2007 ("*the Unit 4 Lease*") of a retail unit at Barrow Valley Retail Park ("*Barrow Valley*"), Carlow occupied by the appellants (under the name *"Mr. Price"*) which prevents them from selling "*food, food products or groceries*". The proceedings were heard in the High Court over four days in May 2021 and a fifth day in June 2021, and the primary judgment of Sanfey J. was delivered on 3 June 2022. Following delivery, the matter was adjourned to allow the parties to consider the judgment and the question of the orders to be made, and following a further hearing on 13 July 2022 Sanfey J. made the orders recited above.

4. At the outset it is convenient to state that I agree with the judgment and orders of Sanfey J., and his findings of fact and his reasoning – which I will refer to at some length – and I would dismiss this appeal.

Background

5. The background and context in which the restrictive covenant was created is very fully set out in the judgment of Sanfey J. (which runs to 86 pages) and is germane to the conclusions that he reaches. For present purposes I will refer more summarily to the context and relevant provisions of the Unit 4 Lease, and tothe leases of Units 5 and 6 in Barrow

Valley demised to the first named respondent ("*Dunnes Stores*"), and to relevant evidence given by witnesses, and the trial judge's findings in relation to that evidence.

6. Dunnes Stores, as is well known, carries on supermarket businesses. The second named respondent ("*Camgill*") is a company which has been entitled to the lessor's interest in the leases the subject of these proceedings since 14 December 2017.

7. The first named appellant ("*Dafora*") is a private unlimited company whose principal activity is the buying and leasing of its own property. The appellants together maintain that a sub-tenancy exists between Dafora and the second named appellant ("*Corajio*") which trades as a "*discount variety goods retailer*" under the name of "*Mr. Price Branded Bargains*". Corajio entered into occupation of Unit 4 and commenced trading on 29 October 2020, and according to affidavit evidence employs 26 full time staff.

8. By leases (together "*the Dunnes leases*") dated 19 December 2005 and 14 February 2008 Redhill Properties Limited ("*the Lessor*", which term in the context of the leases includes Camgill from the date of its acquisition of the reversionary interest in both leases in 2017) demised to Dunnes Stores Units 5 and 6 in Barrow Valley for a term of 1,000 years in consideration of payment of a premium and the reservation of a yearly rent of €1.00. Units 5 and 6 comprise 0.797 acres and 0.498 acres respectively, and the said leases are registered in Folios 3073L and 3088L respectively of the Register of Leaseholders County Laois.

9. Clause 3 of each of the Dunnes leases provides that the Lessor covenants to perform and observe the covenant set out in Part III of the third Schedule, including certain restrictive covenants binding on all of the 13.6 acre retail estate comprising Barrow Valley. The restrictive covenants relevant to the present dispute are as follows:-

> *"(1) The Lessor hereby covenants with the Lessee so as to bind the Lessor its successors and assigns and all tenants, sub-tenants, occupiers, users, licensees and*

invitees at any time of the Relevant Property, or any part thereof except the Demised Premises and any Connected Person and so as to bind the Relevant Property and every part of it except the Demised Premises by whomsoever owned as restrictive covenants and for the protection and benefit of the Lessee and of the Demised Premises and every part thereof and to the full extent permitted by law:-

1.1 Not to use or permit or suffer to be used the Relevant Property or any part thereof as a supermarket, hypermarket, grocery, discount foodstore, frozen-food outlet, mini-foodmarket, convenience store or any similar premises or, save as expressly permitted in this clause (1), for the sale of any food, food products or groceries.

1.2 Not otherwise to sell or display or permit or suffer to be sold or displayed any food, food products or groceries except for the sale of food and food products for consumption on the premises only within any restaurants, fast-food restaurants, public houses, cafes, food-courts, cinemas or hotels within the Relevant Property.

1.3 ...

1.4 To include in every lease or other deed or document disposing of any interest in the Retail Estate or any part thereof except the Demised Premises a covenant on the part of each transferee assignee tenant licensee or other disponee and binding their respective successes and assigns not to use the premises so leased or otherwise disposed of in breach of the provisions of this clause (1).

1.5 ...

1.6 To ensure that no third party breaches or otherwise contravenes the provisions of this clause (1); and the Lessee may without prejudice to any

other right or remedy it may have and without being obliged to do so in the name of the Lessor take such action and proceedings as the Lessee may consider necessary or desirable on account of any breach or threatened breach of the provisions of this clause (1) and in respect of any arbitration or Court proceedings actually issued take over the conduct and/or settlement at its cost and expense of any proceeds [sic] which the Lessee would request the Lessor to so initiate."

10. By Deed of Transfer dated 14 December 2017 Camgill acquired the Lessor's interest in the Dunnes Stores leases and also the Unit 4 Lease, in respect of which Dafora acquired the Lessee's interest as hereafter detailed.

Unit 4 Lease

11. By a Lease dated 12 July 2007 the Lessor demised to Stephen Murphy ("*the Lessee*" which term includes its successor and assign Dafora) Unit 4 in Barrow Valley. The Unit 4 Lease describes the assigned property as a plot of ground containing 0.364 acres, and it was demised for a term of 999 years in consideration of the payment of a premium and the reservation of a yearly rent of €1.00. The Unit 4 Lease is now registered in Folio 3087L of the Register of Leaseholders, County Laois.

12. By clause 2 of the Unit 4 Lease the Lessee covenanted to perform and observe the covenants set out in the second Schedule which gave effect to the restrictive covenants in Part III of the third Schedule of the Dunnes leases and included *inter alia* at clause (20) of the second Schedule covenants binding upon the Lessee, its successors, assigns, sub-tenants or licensees:-

"1. Not to use or permit or suffer to be used the Demised Premises or any part thereof as a supermarket, hypermarket, grocery, discount food store, frozen food outlet, mini

food market, convenience store or any similar premises for the sale of any food, food products or groceries;

2. Not to sell or display or permit or suffer to be sold or displayed any food, food products or groceries;

3. Not to sell or permit or suffer to be sold wine, beer or spirits."

It is the interpretation of the first two of these covenants that fell to be determined in the High Court.

13. Dafora acquired the Lessee's interest in the Unit 4 Lease pursuant to a transfer of January 2020 and was registered as owner of Folio 3087L in or about 26 February 2020. Dafora accepts that prior to purchase of the Lessee's interest in Unit 4 it was provided with a copy of the Unit 4 Lease. It was also accepted that it sublet Unit 4 to Corajio prior to 29 October 2020, and that Corajio commenced trading from Unit 4 in or around that date.

14. Unit 4 is next door to Units 5 and 6 and by Dunnes Stores.

<u>The complaints in relation to Unit 4 use</u>

15. Dunnes Stores' local manager Mr. Patrick Browne attended at Unit 4 on 29 October 2020 and 6 November 2020 and found on sale an array of products which Mr. Browne considered to be "*food, food products and groceries*". In a grounding affidavit sworn on behalf of the respondents to support an application for interlocutory relief, Mr. Mark Clifford, a property director of Dunnes Stores, referred to photographs taken by Mr. Browne on 6 November 2020 and stated that:-

"[t]he nature of the food, food products and groceries and grocery products for sale in the Mr. Price Unit include, but are not limited to:

> *(a)* ***Food and food products:*** *biscuits, cakes, condiments, sauces, tinned fruits and vegetables, baking products, crisps, nuts, noodles, sweets, chocolate, water and soft drinks, tea, coffee, coffee pods, hot chocolate and sweetener's, milk, bread, soup, oil, sugar, cereal; and*
>
> *(b)* ***Groceries:*** *wide range of detergents, washing powders, cleaning products and materials, shower gels, deodorants, shampoos, cosmetics, toothbrushes and toothpaste, kitchen towel and toilet roll."*

16. Correspondence ensued, with Dunnes Stores asserting breach of the restrictive covenants, and threatening legal proceedings. By a letter dated 10 November 2020 the appellant's solicitors indicated that the appellants were prepared to give an undertaking to remove all *food or food products* pending resolution of the dispute. That letter indicated that the term "*groceries*" contained in the Unit 4 Lease was ambiguous, given that there was no definition of the term in the Unit 4 Lease, and that it would therefore be inappropriate for a court to consider a prohibition on the sale of "*groceries*" at an interlocutory stage. The respondent's solicitors responded by letter of 10 November 2020 denying that the term "*groceries*" was ambiguous and stating that:-

> *"… the groceries being sold and displayed by your client in breach of the restrictive covenants include, but are not limited to, a wide range of detergents, washing powders, cleaning products and materials, shower gels, deodorants, shampoos, cosmetics, toothbrushes and toothpaste, kitchen towel and toilet roll."*

17. By letter of 11 November 2020 the appellant's solicitors reiterated an offer of an undertaking on the part of the appellants in respect of "*food and food products*", but not groceries.

The proceedings

18. The Plenary Summons was issued herein on 12 November 2020, and equally promptly the respondents issued a notice of motion returnable to 17 November 2020 seeking by way of interlocutory relief orders restraining the appellants from using or permitting the use of Unit 4 in breach of the restrictive covenants. Grounding affidavits were sworn by Mr. Mark Clifford, Dunnes Stores property director, and Mr. Damien Conway, director of Camgill, both of whom subsequently gave evidence at the plenary hearing. Replying affidavits were sworn by Mr. Declan Crinion, managing director of the appellants, and by Mr. Mark Millward, a "*senior retail consultant*", although neither of them subsequently gave evidence at the plenary hearing. Messrs. Clifford and Conway swore further affidavits and in response an affidavit of Anthony Foley, an Emeritus Associate Professor of Economics at Dublin City University was proffered by way of expert evidence.

19. In an *ex tempore* judgment delivered on 3 December 2020 Allen J. declined to grant an interlocutory injunction in the terms sought. Noting the undertaking to remove all food or food products pending resolution of the dispute, and the usual undertaking given on behalf of the respondents in relation to damages, he granted an interlocutory injunction restraining the appellants, their servants or agents from "*… using or permitting or suffering to be used Unit 4… for the sale of any food or food products to include for the avoidance of doubt drinks and confectionery*" and from selling or displaying such products, and he ordered that costs of the interlocutory motion be "*costs in the cause*". A subsequent order of the court made on 18 January 2021 (Reynolds J.) directed that the issue of liability only be considered at the plenary hearing, and that the respondent's claim for an account of profits be tried subsequently in the event that they were successful on liability.

20. In their Statement of Claim the respondents at paragraph 11 pleaded for a meaning of "*food, food products and groceries*" as the "*commonplace and applicable standard meaning of the term within the retail food and grocery sector*" at the time the leases of Units 5, 6 and 4 were entered into, and in particular pleaded:-

> *"The accepted meaning of the terms within the retail sector at that time meant and would have been understood to mean the types or categories of food, food products (including confectionary, cake, water and soft drinks) and groceries as constitute household products which fall within the term and/or terms so described, operated and applied by the then and now leading global market analysts Kantar Worldpanel for the purposes of its analysis of the groceries market. The product types or categories identified by Kantar Worldpanel as food, food products and groceries constituted the parties then understanding, at the date of entry into of the various leases and is as set out in Schedule A, Part I and II to this Statement of Claim. These include the products and items displayed by the Defendants in the within proceedings and incorporate household healthcare products; household and cleaning products; pet care and pet food; bathroom toiletries; hair care products; oral care products and other toiletries. For the avoidance of doubt, the Unit 4 Restrictive Covenants precluded sale of detergents, washing powder, cleaning products and materials, shower gels, deodorants, shampoos, cosmetics, toothbrushes and toothpaste, kitchen towel and toilet rolls."*

21. The first appended list from Kantar, said to be from 2005, includes a list of foods, which is introduced by the words "*this is to confirm that Kantar use the following categorisation to define the Take Home Grocery Market:*" and then includes:-

> *"…*

Total Healthcare

- *Healthcare*

Total Household

- *Household and Cleaning Products*
- *Pet Care*

Total Toiletries

- *Bathroom Toiletries*
- *Haircare*
- *Oral-Care*
- *Other Toiletries"*

22. The second appended list is from Kantar in 2012 and therefore post-dates the leases. It is more detailed and has more headings, including lists of products under the headings of "*Household*" and "*Health & Beauty*".

23. As the trial judge notes at paragraph 34 of his judgment there was debate during the hearing as to the role of Kantar and its relevance to the dispute, but no witness from Kantar gave evidence as to what that entity does and how its methodology might be relevant to the dispute. Sanfey J. observed at paragraph 34:-

> *"… For present purposes, it is sufficient to say that Kantar Worldpanel is a company which operates internationally and, inter alia, conducts market research of which many retailers – and in the current context, supermarkets – currently avail. In Ireland, the company (to which I shall refer as 'Kantar') monitors trends in what it terms the "FMCG market". FMCG is an acronym for "fast-moving consumer*

goods", and Kantar surveys developments in the FMCG market by means of a 5,000-strong "household purchase panel". It is the plaintiffs' position as it emerged in evidence that "groceries" are synonymous with FMCGs. As counsel for the plaintiffs put it in his opening submissions "...whilst we do not say that the Kantar list is the definitive list, it is a list prepared by an industry organisation that periodically and regularly reports on market share, in relation to the grocery markets in Ireland…" [transcript, day 1, p.42, line 27 – p.43, line 2]. Counsel went on [day 1, p.43] to state that the first list is a list compiled in 2005, and that the more elaborate second list is from 2012."

24. In their defence the appellants rejected the use or applicability of the Kantar lists, and denied that Kantar's classification or lists constituted the parties' understanding at the entry into of the leases, noting that the parties "*... were Stephen Murphy, a property developer, and Redhill Properties Limited, the original lessor, and a company controlled by Mr. Murphy, neither of which parties had any particular expertise in retail much less familiarity with Kantar Worldpanel classifications*".

25. The appellants pleaded at paragraphs 17 and 18 of their Defence as follows:-

"17. On the contrary, the meaning of food, food products or groceries must be interpreted in a way in which a reasonable commercial person would, with knowledge of the background circumstances, construe it. Familiarity with the Kantar Worldpanel classification of items, compiled for the entirely different purpose of defining the 'take home grocery market' can be imputed only to those to whom the definition relates, namely, grocery stores and does not fall within the factual matrix of a lease agreement made between Redhill Properties Limited [and] its then director, Stephen Murphy.

18. The Plaintiffs' plea that the product types or categories identified by Kantar Worldpanel would have constituted the parties' then understanding of 'food, food products and groceries' at the date of the entry into the Unit 4 Lease seeks to impute an impermissible level of constructive knowledge upon the original parties which is speculative and subjective. It is a specialist or unusual knowledge within the remit and knowledge only of those with an interest in ascertaining the market share of the 'take home grocery market'. …"

26. The appellants also took issue with an alternative list of what constitutes "*groceries*", set out at relief no. 9 in the Statement of Claim, although this alternative list ultimately found favour with the trial judge who includes the same list at paragraph 3 of his declaratory order recited above.

27. The appellants also pleaded that the word "*groceries*" was so vague and ambiguous that it was void, or alternatively that it could be implied that "*food, food products and groceries*" were intended to be limited to the ordinary meaning of food and food products, and that "*groceries*" was intended merely to be a synonym for food and other products.

28. The appellants also pleaded at paragraph 38 (and argued at trial) that the respondents were estopped from relying on their interpretation of the restrictive covenants:-

"…in circumstances where, it is suggested, they have disregarded the breaches of other retailers of equivalent covenants by displaying and offering for sale items which fall within what the plaintiffs now contend are comprised in the term "groceries" in the restrictive covenants. Reference is made in this regard to the "ToGo" store within the retail park, and a pharmacy which it is alleged offered for sale, as of 14th November, 2020, "…a wide range of toiletries, cosmetics, personal

care items, shampoo, deodorants, oral care items and other related products which Dunnes Stores purports to regard as 'groceries'".

The evidence at trial

29. In relation to the plenary hearing the trial judge records the following in his judgment:-

"39. ... Nine witnesses were called on behalf of the [respondents], and two by the [appellants]. Mr. Clifford was the only witness from Dunnes to give evidence; although he clearly had extensive experience in the industry, he accepted that, as a property director, his area of specialisation was in property rather than retail. Nobody from Mr. Price [Corajio] gave evidence, and counsel for the [respondents] commented pointedly on the fact that neither Mr. Crinion nor Mr. Millward had been proffered as witnesses, notwithstanding that they had each submitted detailed affidavits in respect of the interlocutory injunction application."

This prompted the trial judge to state that in coming to his conclusions he did not have regard to the affidavit evidence in support of the interlocutory application, and therefore did not take into consideration the affidavits sworn by Mr. Crinion and Mr. Millward. He then prefaces his summary of the evidence by stating that it is "*not intended to be exhaustive*", and that in preparation of the judgment he had "*re-read the entire of the transcripts of the hearing, and consulted the digital audio recording where necessary*".

30. It is worth noting at this point that no real issue was taken by the parties on appeal as to the accuracy of the summaries of the evidence set out by the trial judge in his judgment.

31. I will now highlight the witness evidence, as it appears from the trial judge's summaries, which was important to his ultimate determination, including evidence given by the appellants' expert which was rejected by the trial judge who preferred the evidence given by the respondents' experts.

Respondent's witnesses

32. **Mr. Irwin Druker** gave evidence on behalf of the respondents. He was a former partner in Druker Fanning Estate Agents and had extensive experience in the acquisition of stores and shopping centres, retail parks and standalone developments and had acted for Dunnes Stores for over 40 years. The trial judge records that:-

> *"He stated that Dunnes Stores would always seek 'exclusivities', in the sense of restrictions on all other users in developments in which they were involved"* (Paragraph 42).

Mr. Druker recalled being approached by Stephen Murphy of Redhill Properties Limited, the original lessor of Units 5 and 6, to see if Dunnes Stores was interested, which it was, but Mr. Druker's evidence was that Dunnes Stores "*had specific requirements as to what restrictions it would require, and those restrictions were given to Stephen Murphy on sort of a take it or leave it basis. He was anxious to get an anchor supermarket, and was quite happy to grant the restrictions …*" [Transcript Day 1, p. 76, lines 14-19].

33. **Mr. Joseph Stanley** gave evidence as the solicitor did most of the property work for Dunnes Stores between 1994 and 2009, and said that:-

> *"It would have been just an absolute requirement that for an anchor store acquisition in a retail park or a shopping centre that Dunnes as the anchor would have exclusivities that would be reflected in their standard restrictive user provisions …"* [Day 1, p. 85, lines 15-19].

He referred to the definition of "*permitted user*" in the leases to Dunnes Stores of Units 5 and 6, which reads:-

> *""(14) '**Permitted User**' shall mean the sale and supply of goods, articles and services of every description, such use to include, without limitation, department store supermarket coffee shop restaurant and garden centre and/or off-licence, and/or all such uses as may be compatible with trends or the future development or setting of new trends in shopping centres or retail developments from time to time taking full account of the changing nature and business and trade of supermarkets/department store chains in Ireland or elsewhere and the Lessee may also use portions of the Demised Premises as offices, stores, staff accommodation and canteen facilities and services and support and plant areas ancillary to such uses".*

34. Mr. Stanley described this as "*... a standard, very wide user clause that would have applied to any anchor leases that Dunnes would have entered into ... and deals I would have acted for them on...*" [D. 1, p. 86, lines 5 - 8]. He said it was a "*Dunnes absolute requirement that its User Clause would apply to anchor leases ...*" [D. 1, p. 88, lines 11-12] and confirmed that the restrictive covenants at Part III of the lease, including the prohibition on "*the sale of any food, food products or groceries*" "*... in a retail park or a shopping centre context ... would have been standard*". He gave evidence of negotiation of the restrictive covenants with Mr. William Fleming, solicitor for Redhill/Mr. Murphy. He confirmed that while he did not have any involvement in the drafting of the Unit 4 Lease he would have expected that the restrictive covenants at issue to be replicated in other leases granted by Mr. Murphy to purchasers or tenants of other units in the retail park.

35. **Mr. William Fleming** was the solicitor based in Carlow who acted for both Redhill and Mr. Murphy in respect of the Leases and gave evidence on behalf of the respondents. The trial judge records his evidence as follows:-

"45. ... He referred to the negotiations with Mr. Stanley, commenting that the extent of the restrictions and conditions required by Dunnes was an "eye-opener". However, Mr. Stanley informed him that "...this was how Dunnes operated, these were their requirements and essentially that they were non-negotiable..." [day 1, p.108, lines 1-5]. Mr. Murphy was aware that Dunnes were "calling the shots" and "that they were vital to the success of the development and whatever they wanted at the end of the day they really were going to get..." [day 1, p.108, lines 19-24].

46. In cross-examination, Mr. Fleming accepted that in none of his correspondence with Mr. Stanley was there any debate about the meaning of the word "groceries". He also accepted that neither he nor Mr. Murphy were specialist retailers with specialist knowledge of the retail market in 2005. He acknowledged that he was not familiar with the "Kantar Worldpanel market research and surveys of the grocery market in 2005", and that he did not discuss any such research with Mr. Murphy before he entered into the 2005 lease [day 1, pp. 114-115]."

36. I note here that at the hearing of the appeal a section of the Transcript[1] of Mr. Fleming's evidence-in-chief (Day 1, pages 107-111), where Mr. Fleming gave evidence of the extent to which there were any negotiations over the content of the restrictive covenants, was handed into court and the subject of submissions by counsel for the appellants, and I will return to that later in this judgment.

37. **Mr. Michael Carrigan**, a solicitor and former partner in Eugene F. Collins was called on behalf of the respondents to give expert evidence of conveyancing practice. He was permitted by the trial judge to give evidence in the face of opposition from the appellants,

[1] While this Court had a Book of Evidence with "Appellant's Extracts" and "Respondent's Extracts", it was not furnished with the full Transcripts. This is not in any way a criticism of the parties who sensibly reduced the transcript extracts to material relevant to the appeal. This court also had a Book of Evidence containing relevant documents.

although the appellants did accept his expertise in the area of conveyancing. The trial judge quotes his evidence as being that – "*an anchor tenant would insist on restrictive covenants and exclusivity, the extent of which would depend on the individual circumstances*", and that in his experience in acting for a major retailer "*it was not his experience that the word 'groceries' was defined*". Under cross-examination his evidence was that the words "*grocery*" or "*groceries*", *"… have a commonly understood meaning in the industry and are not vague or ambiguous terms …*" [Day 1, p. 28, lines 8-12], although "*I don't pretend myself to understand it or to define it. I simply say, it is my understanding that they clearly understood what they are talking about when they were referring to groceries.*" [Day 1, p. 128, lines 15-25].

38. **Mr. Mark Clifford**, property director of Dunnes Stores, then gave evidence. He gave evidence of having been informed by the Dunnes Stores manager in Barrow Valley, Mr. Browne, of the results of his inspection of the appellant's store on the day it opened, and he referred to the photographs taken by Mr. Browne and the list of items purchased which included cleaning products, washing up liquid, paper towels as well as food, and he expressed the view that these were "*food, food products and groceries…*" [Day 1, p. 143, lines 8-10]. When the appellants objected to Mr. Clifford expressing a view as to the meaning of "*groceries*" he stated it was his personal opinion as to "*the industry held view*".

39. Mr. Clifford gave evidence about another entity trading in Barrow Valley under the name '*ToGo*' which he characterised as a "*discount variety retailer*". He gave evidence of a number of breaches by ToGo of the restrictive covenants in its lease and the way that was dealt with by the respondents, and that ToGo had removed the offending products when requested so to do by Dunnes Stores. Under cross-examination Mr. Clifford accepted that he was not involved in the negotiation or execution of the Leases and could not assist in

relation to what might have been the common understanding of the parties as to the terms at that time. Asked whether Dunnes Stores had a list of products that were groceries and a list that were non-groceries, Mr. Clifford said he was unaware that any such list existed, or if it did, whether its composition changed over time [Day 2, p. 22, lines 15 - p. 23, line 17].

40. When asked about specific items, Mr. Clifford opined that a USB charger, a ream of paper, electric razors, water filter refills and a box of matches were *not* grocery items, but that inter-dental brushes, soothers, coffee filters, paper napkins and nappies and flowers (but not houseplants), *were* grocery items. Mr. Clifford explained that in his opinion groceries were "*items that are frequently purchased as part of the weekly shopping trip … non-durable consumer items …*" [Day 2, p. 26, lines 5-10]. He accepted that money spent on groceries could give rise to coupons which could be used to purchase further groceries but would not apply to textiles or homeware. He opined that a packet of highlighters and a packet of coat hangers were *not* groceries, but compostable rubbish bags, washing machine cleaner and a *"Flash Speed Mop" were* groceries, as was a packet of facemasks "*in the last 12 months*". Mr. Clifford accepted that the promotional discount/coupons for customers who purchased groceries did not apply to all of these items, including packets of highlighters and coat hangers, but his response was that the promotion did not necessarily define what Dunnes Stores considered to be groceries [Day 2, p. 26, lines 11 - p. 30, line 8). His understanding of "*grocery store*" was "*a grocery store would be where you can purchase items, non-durable consumer items …*" [Day 2, p. 34, lines 22-23], and he acknowledged his familiarity with "*FMCGs*" *i.e.*, "*Fast Moving Consumer Goods*" as a category in the industry. When it was suggested that Dunnes Stores were treating the appellants differently to ToGo, he replied that ToGo had not contested that it was in breach of covenant, and had removed the offending products.

41. The trial judge then records at paragraph 62:-

> *"Mr. Clifford was then asked about a pharmacy trading in Barrow Valley. He was asked whether, if a customer entered the pharmacy and bought toothpaste and a toothbrush, he would be buying groceries, and could this be called a grocery shopping expedition. Mr. Clifford stated that these were grocery items, but agreed that to say that someone attending a pharmacy was buying groceries "would be unusual". When asked whether the pharmacy, in selling such items, was in breach of the restrictive covenant, Mr. Clifford replied that it was, and accepted that Dunnes Stores had taken no action about this, notwithstanding that it was trying to injunct Mr. Price from selling the same items."*

42. **Mr. Gary Taaffe**, property director at Mason Owen & Lyons property consultants, the letting agent managing Barrow Valley, gave evidence for the respondents in relation to his dealings on behalf of Camgill with ToGo, and also in relation to the letter of 4 November 2020 which his firm issued requesting that the appellants desist from the sale of food and food products, (and in a later letter, "*groceries*") in Unit 4. Mr. Taaffe gave evidence of his involvement with Blanchardstown Shopping Centre and his extensive experience as a letting agent and his evidence was that none of the parties with which he had to engage in relation to restrictive covenants had expressed any confusion in relation to the concept of food, food products or groceries. He said:-

> *"…when Dunnes Stores come to me, it's their restrictive covenant and when they enforce it we would act on it. And I suppose they have never [rung] me about the pharmacy. But when they find ToGo selling products they ring me and I enforce it…the difference with Mr. Price [Unit 4] is it's a 18,000 square foot unit that they*

kitted out, food and grocery in direct competition next door to Dunnes Stores…" [day 2, p.140, lines 12-20]."

43. **Mr. Damien Conway**, a director of the second named respondent gave evidence in relation to the initial complaint made by Dunnes Stores to the appellants, and he considered the position was "*very clear cut … from our point of view*", but he accepted that he was not a "*retail specialist*".

44. **Mr. Malachy O'Connor** was the first expert called to give evidence on behalf of the respondents and had prepared a report for that purpose. He described himself as a "*consultant in the grocery industry*", and adopted his written report as part of his evidence. The "*Profile*" section of his report shows that he obtained a first class honours in BSc Food Science at Queens University Belfast in 1997 and spent 25 years working with business starts with a focus on consumers and their needs. He had some 25 years' experience working in the grocery retail trade, primarily in head office roles, including working with M&S, Dunnes Stores, Superquinn and SPAR as food technologist and buyer. He had been a self-employed food consultant since 2017.

45. The trial judge quotes from key parts of Mr. O'Connor's report as follows:-

*"**4. Opinion***

"My opinion is that the consumer and industry accepted meaning of the term 'Groceries' extends beyond food. It is my opinion that the widely accepted understanding of 'groceries' has not changed since 2005 or during my time in the industry. My opinion is that the term 'Groceries' captures all of the frequently purchased needs of the household. This includes food, drink and non-food household and health & beauty items. The common denominator is that they are non-durable,

consumable items that must be re-purchased frequently. These grocery goods are commonly available in supermarkets and they are distinguished from durable items such as electrical goods, drapery, DIY and hardware items although these are also commonly available in some supermarkets depending on their format.

…

5.1 My experience

Through 25 years of experience, I have understood 'Groceries' to be the non-durable items that are commonly purchased in the shoppers' frequent transactions with a grocery store or supermarket. My opinion is that 'groceries' is an overall classification that can be sub-divided into categories to include fresh foods, frozen foods, ambient extended life foods, drinks, (both alcoholic and non-alcoholic) and non-food items including petfood, household goods and health & beauty. My opinion is that 'groceries' are differentiated from other goods that can be commonly found within the four walls of a supermarket setting e.g. Electrical goods, DIY, Hardware, Drapery, Homewares, sporting equipment or medicines which are distinguished by their durable and relatively higher-priced nature or the requirement of a specialist expertise or authorisation. It is my opinion that shoppers and businesses operating in the grocery sector have this shared understanding of what constitutes groceries. To some extent we are all grocery shoppers and consumers, regardless of our professional expertise. On this basis my opinion is that 'Grocery' is a commonly used term with a common and shared understanding of its definition."

46. The trial judge then records Mr. O'Connor's reference in his report to various statutory provisions referring to the concept of "*groceries*".

47. In paragraphs 5.2 - 5.5 inclusive of his report Mr. O'Connor refers to:-

- Grocery Supplier Code of Practice published in the UK in 2009, defining "*groceries*" to include "*... pet food, drinks ..., cleaning products, toiletries and household goods...*" but excluding *inter alia* clothing, DIY products, pharmaceuticals, newspapers, magazines and cards, flowers, perfumes, cosmetics, electrical appliances and kitchen hardware.
- The Consumer Protection Act, 2007 (Grocery Goods Undertakings) Regulations 2016 (S.I. No. 35 of 2016), which applied only to "*sales of food and drink as defined in Section 63A(a) of the Consumer Protection Act 2007 and do not apply to any other type of grocery goods*", and further recognise that there were other types of grocery goods, additional to food and drink, in stating "*... they do not apply to toiletries, household cleaning products ...*".
- The Restrictive Practices (Groceries) Order (S.I. 142 of 1997), which was abolished in 2006. This included as "*grocery goods*" "*goods for human consumption ... and intoxicating liquors not for consumption on the premises and such household necessaries (other than foodstuff) as are ordinarily sold in grocery shops ...*".
- The Competition (Amendment) Act, 2006, which repealed S.I. 142 of 1987 ("the Groceries Order") which prohibited practices such as selling below net invoice price, boycotting and "*hello*" money. The amendment defined "*groceries*" as "*'grocery goods' means any food or drink for human consumption that is intended to be sold as groceries*", and did not go beyond that. However Mr. O'Connor reported that following the repeal of the Groceries Order and the amendment to the Competition Act, the Competition Authority was authorised by the Minister for Enterprise, Trade and Employment to monitor the grocery sector for the foreseeable future in light of the changes in the legislative and regulatory environment. The result was the

"*Grocery Monitor Project*", and in its second report in March 2008 the Competition Authority sought to clarify the definition of *"groceries"* to include *"food and drink sold for human consumption and household necessaries"*. Paragraph 2.16 of the second report states:-

> *"2.16 The definition of 'grocery goods' contained in the Competition (Amendment) Act, 2006 ('the Amendment Act') was not used either. The Amendment Act defines 'grocery goods' as 'food and drink sold for human consumption that is intended to be sold as groceries'. This definition excludes household necessaries (such as toothbrushes, shampoo and washing up liquid) which are normally considered to be grocery goods by final consumer. The definition in the Amendment Act includes intermediate goods that are used in the production of grocery goods for retail to consumers. The inclusion of intermediate goods in the definition of 'grocery goods' in Report No. 1 would also make that report less meaningful."*

From this Mr. O'Connor opined that the Competition Authority "*clearly regarded 'groceries' as being wider than food and including foods, drink and household necessaries such as personal care and household cleaning products.*"

48. Mr. O'Connor in his Report refers to other evidence to support his contention that "*groceries*" has a wider meaning than just food or drink, and these are covered in paragraphs 5.6 to 5.10 of his Report under the headings 'Kantar Grocery Market Share Data', 'Consumer research', 'Industry Publications', 'Other Retailers', and 'IGBF (Irish Grocers benevolent fund)'.

49. Commenting on the appellant's suggestion in their Defence that the restrictive covenant in the Unit 4 Lease was intended to operate only to prohibit a competing supermarket operating alongside Dunnes Stores, Mr. O'Connor opines:-

> *"6.2 My opinion is that in 2005, retailers like Dunnes Stores will have been well aware of the emergence of new and competing retail operating models. For instance, supermarket retailers would have been aware of and actively competing with the emerging limited range, German, hard discount formats which are quite different in philosophy and operation but are nonetheless competing with the large supermarket chains. Equally, supermarket retailers would have been aware of emerging models in convenience store formats where traditionally food service offers such as coffee and ready to eat hot and cold foods were being sold alongside take-home groceries. The industry would have been well aware of the emergence of variety discount retail formats such as Poundland in the UK. My opinion is that this awareness will have informed the wording of restrictive covenants such that any retailers' intention will have been to future-proof their position versus new, emerging, competing models. In respect of the user clause, my opinion is that the Mr. Price retail format, as a discount variety retailer, is classified within the text 'any similar premises for the sale of any food, food products or groceries'."*

Mr. O'Connor goes on in his report to comment on views expressed by Mr. Millward, but as the trial judge expressly states at paragraph 40 of the judgment that he did not take into consideration the affidavit evidence of Mr. Millward (who did not appear as a witness) it is not necessary to refer further to Mr. O'Connor's rebuttal of his views.

50. Mr. O'Connor in his Report, and in his oral evidence, rejected the defendant's suggestion that "*groceries*" was a synonym for food and food products. In his Report he states:-

> *"6.3 ... My opinion is that this is incorrect since the entire ecosystem, including legislators, retailers, suppliers, recruiters, research agencies and publishers consistently apply a wider understanding of groceries to include food, drink and non-food consumables such as personal care, health & beauty and household products."*

In his oral evidence the trial judge records him as having expressed the view that "*FMCG is a synonym for grocery*" (paragraph 75 of the judgment). The trial judge records that on cross-examination Mr. O'Connor accepted that "*Mr. Price*" was not a supermarket, hypermarket or frozen food outlet, discount food store or mini food market or convenience store:-

> *"76. He said that Mr. Price would naturally be characterised as a 'variety discount retailer' but that in his opinion it is a grocery in that, even though it no longer sells food in Barrow Valley, 'there are other non-food grocery products on sale' [day 3, pp. 41-44]. He accepted however that Mr. Price would not commonly be regarded as a grocery [day 3 p.42, lines 23-25],"*

51. Mr. O'Connor accepted that from a consumer perspective, a person who bought toothpaste in a pharmacy or detergent in a DIY store would be unlikely to consider themselves as buying groceries or "*going grocery shopping*", and he accepted that a large variety of retailers, including non-grocery stores and non-supermarkets, sell groceries.

52. Mr. O'Connor accepted that his "*basic position*" was that groceries and FMCGs were "*the same thing*", and that FMCG companies such as Unilever and Proctor & Gamble with

products such as Fairy Liquid, Gillette, Head & Shoulders, Crest *etc.* "*clearly operate in the grocery trade*", but he disagreed that either of these was "*a consumer goods company*", or *"not in the grocery business"* (see judgment, paragraph 81).

53. Asked about cosmetics Mr. O'Connor said they were "*a subdivision of health and beauty which is a species of groceries*" [Day 3, p. 93, lines 26-27]. However, he accepted that a ladies cosmetics store would not be regarded as a grocery store, while maintaining that some of the products sold could be regarded as grocery items (see paragraph 82 of the High Court judgment).

54. **Mr. Anthony Foley**, Emeritus Associate Professor of Economics at Dublin City University, was the second expert witness called by the respondents. While retired from full time lecturing, he has consulted extensively for various government departments and representative associations, previously worked as an economist in the Economic and Social Research Institute, and he was economic adviser to the Drinks Industry Group of Ireland. He adopted his report, dated 23 November 2020. His opinion, expressed at paragraph 10 of his Report was that:-

> *"the term 'grocery' includes goods described as non-durable household necessaries such as those at issue, namely a 'wide-range of detergents, washing powders, household cleaning products and materials, shower gels, deodorants, cosmetics, toothbrushes, toothpaste, kitchen towel and toilet paper'."*

He opined that "*The retail industry over many years has operated according to a clear understanding…*" that the items seen on the appellant's shelves fell within the definition of food or groceries. He commented at paragraph 14 of his report:-

"14. Consumers expect that most of their regular weekly grocery shopping can be done on a one stop shop basis. Consumers expect that their basic food, household and toiletries requirements will be available in the one shop. Obviously the range of products and brands is larger in big stores than in small stores…[b]ased on my experience, grocery stores have always provided products in addition to food. For example, cooking foil, greaseproof paper and small cake baking cases would have been expected to be available in the grocery store. Observation shows that what would normally be described as a grocery store with food sales dominant also provides cleaning and toiletries".

55. Mr. Foley also relied on the Competition Authority report. He was of the opinion that the industry view of what constituted groceries had "*not fundamentally*" changed between 2005 and the present day, although "*there have been changes in the types of product and so on but not the category*". He accepted that the 2012 list appended to the Statement of Claim was in Kantar's current definition of groceries. The trial judge records, at paragraph 91 of the judgment:-

"He accepted in cross-examination that '…lots of different types of retailers sell groceries, other than the types of store mentioned in the lease'. He agreed with counsel for the defendant that '…consumers who stop off at Boots and buy a tube of toothpaste and a toothbrush would not commonly say of that retail experience that they had purchased groceries…' and that consumers who bought products '…in many retail settings which are not supermarkets or grocery stores…would never consider themselves to be buying groceries…'. He stated however that such a consumer '…would describe it as buying groceries if they are doing it as part of their grocery shop' [day 3, p.135, lines 3-18]."

Appellant's witnesses

56. **Mr. Aidan Ringrose**, Chartered Surveyor gave evidence. It was accepted that he had 35 years' experience in commercial retail property matters, but that he could not "*be regarded as an expert in retail*", and accordingly his evidence was restricted to certain factual matters arising from his inspection of the various units in Barrow Valley (see paragraph 94 of the High Court judgment). He described Unit 4 as having some 18,000 square feet and displaying a substantial amount of office supplies, educational products for kids, arts supplies, kids' balloons, personal care products and household products - at his inspection on 22 April 2021 there were no food products on display. He inspected the pharmacy in Unit 9 which sold "*cosmetics, oral care products, hair products, shampoos, skin creams, which you would expect to see in a standard pharmacy of that size*" (1,500 - 2,000 square feet) [Day 3, p. 170, lines 10-13]. He inspected the ToGo unit, which was about 26,000 square feet, and his photographs identified items on sale included on the list of items identified by Dunnes Stores as "*groceries*" for the purposes of the case.

57. **Dr. Damien O'Reilly** was the expert called by the appellants. He is a senior lecturer in the School of Retail and Services Management in Technological University Dublin, teaching retail management and other retail related courses over a 20 year period. He was a regular contributor on national radio and television in national print and media and journals as an expert in retail, and grew up above a small convenience store, in the late 1980's opened his own convenience store in Monkstown, and in the early 1990's and operated a petrol station/forecourt in Waterford in the late 1990's.

58. In his Report Dr. O'Reilly explained the origin of the word "*grocer*" as follows:-

> *"7. The history of grocery begins with a dealer who sold by the gross – that is, in large quantities at discounted retail prices. A grocer in medieval England was a*

wholesaler, and the name is derived from an Anglo-French word having the same meaning, groser. Grocer *gained widespread use during the 14th century when a group of wholesale dealers in spices and foreign produce came together to form the Company of Grocers of London, which now exists as the Worshipful Company of Grocers – a charitable and ceremonial organization in London. They used pepper as a payment mechanism and this is the origin of a 'peppercorn rent'.*

8. In time the name grocer *referred to a trader dealing in staple foodstuffs – like tea, coffee, cocoa, sugar, and flour – sold in amounts measured for personal consumption. By the 19th century, the grocer could apply for a licence to sell beer, wine, and spirits. In the 19th century Grocery became a designation for a public bar [pp. 4-5 of report]."*

59. The trial judge notes at paragraph 102 that Dr. O'Reilly was of the view that "*groceries*" was not a term generally used by consumers, and typically we say we are going to the shops, but we do not say "*I'm going to fetch some groceries*" or "*I'm going to the grocery store*". At paragraph 103 of the judgment the trial judge records Dr. O'Reilly's view that "*the distinction made in all of the academic texts in relation to retail sales as between 'food' and 'non-food'*", and he commented thus on the difference or characteristics of a supermarket and a grocery store:-

"…I would be of the opinion that a supermarket is an entity that sells food products and other FMCG products. Regarding grocery is that there are very few outlets that I would consider to be called groceries. To me a grocery is a food product. So that stores that sell food products alone would possibly be called a grocer. But it's a traditional term that's been used…I think the term grocery and grocery store is an

old kind of quaint US term that is used these days [day 4, p.19, line 29 to p.20, lines 1-18]."

60. In paragraph 104 the trial judge records Dr. O'Reilly's view that the concept of "*category management*" is "*at the heart of retailers' performance…*", and that sales are measured by categories, and this focuses on how effectively a group of products meets the needs of the targeted segments of the market, and that supermarkets "*…do not divide themselves on the grocery versus non-grocery.*" [Day 4, p. 30, lines 1-11]. He stated that no FMCG companies, such as Unilever or Proctor & Gamble, describe or advertise their products as groceries [his Report, at p. 9].

61. Dr. O'Reilly accepted that the major data analytic companies operating in Ireland were Kantar, Nielsen and Shopper Intelligence, and the trial judge records at paragraph 105:-

"105. In Dr. O'Reilly's view, Kantar, which produces "ROI grocery market" figures every twelve weeks, '…compares market share of the leading supermarkets…they do not include convenience stores (SPAR, MACE, Londis etc) in their calculations. Ireland has a large number of convenience/symbol groups and they – according to Nielsen – account for 35/37% of the market…' [p.10 report]."

106. Dr. O'Reilly's opinion was that 'Kantar use the nomenclature grocery as a substitute for FMCG as it has a better appeal when promoting their regular press coverage of supermarket shopping…' [report p.13]."

62. The trial judge found that Dr. O'Reilly was *"unswerving"* in his assertion that the word "*grocery*" as used by him applied to food and food ingredients, and the trial judge records – "*109. Fundamentally, Dr. O'Reilly disagreed with the conclusions of Mr. O'Connor and Mr. Foley that 'groceries include more than food or food products"*".

Judgment in the High Court

63. The trial judge found that there was no material dispute between the parties as to the general principles to be applied to the construction of the restrictive covenants, and he considered that a comprehensive consideration of the approach to the construction of a contract was conducted by the Supreme Court in *The Law Society of Ireland v. The Motor Insurers Bureau of Ireland* [2017] IESC 31. As that is the leading judgment in the area and also guides this court, it is convenient here to set out the same passages from the leading judgment of O'Donnell J. (as he then was) as are recited by the trial judge:-

> *"6. "…the [MIBI] Agreement here has a single meaning, even if it is disputed. That is the meaning which both parties are taken to have agreed upon. That meaning is, however, to be determined from a consideration of the Agreement as a whole. What the Court must seek therefore is not an interpretation in which some aspects win out over others. Rather it is a case of providing an interpretation of the Agreement as a whole, which not only relies on those features supportive of the interpretation, but also most plausibly interprets the entire Agreement and in particular those provisions which appear to point to a contrary conclusion. Even if the majority of factors appeared to tend broadly to one side of the argument, that interpretation cannot be accepted if it is wholly and fundamentally irreconcilable with some essential features… An agreement is an exercise in communication and there is a working, though by no means irrebuttable, presumption of coherence. It is important therefore to test any interpretation of a clause against the understanding of the agreement to be gleaned from what is said, and sometimes not said, elsewhere in the Agreement.*
>
> *7. Both parties and all the judges are in agreement that the operative principles are those set out at pages 114 - 115 in the decision in the judgment of Lord Hoffmann*

in Investors Compensation Scheme Limited v West Bromwich Building Society *[1998] 1 All E.R. 98 and they had just been adopted for approval in the Irish Courts:*

> *"(1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.*
>
> *(2) The background was famously referred to by Lord Wilberforce as the 'matrix of fact', but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.*
>
> *(3) The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in ordinary life. The boundaries of this exception are in some respects unclear. But this is not the occasion on which to explore them.*
>
> *(4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The*

background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax…

(5) The 'rule' that words should be given their 'natural and ordinary meaning' reflects the commonsense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had. Lord Diplock made this point more vigorously when he said…:

> *'... if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business common sense, it must be made to yield to business common sense.'*

…

12. Legal agreements are not poetry intended to have nuances and layers of meaning which reveal themselves only on repeated and perhaps contestable readings. Agreements are intended to express in a clear and functional manner what the parties have agreed upon in respect of their relationship, and the agreements often do so in a manner which gives rise to no dispute. But language, and the business of communication is complex, particularly when addressed to the future, which may throw up issues not anticipated or precisely considered at the time when an agreement was made. It is not merely therefore a question of analysing the words used, but rather it is the

function of the court to try and understand from all the available information, including the words used, what it is that the parties agreed, or what it is a reasonable person would consider they had agreed. In that regard, the Court must consider not just the words used, but also the specific context, the broader context, the background law, any prior agreements, the other terms of this Agreement, other provisions drafted at the same time and forming part of the same transaction, and what might be described as the logic, commercial or otherwise, of the agreement. All of these are features which point towards the interpretation of the agreement and in complex cases, a court must consider all of the factors, and the weight to be attributed to each. The reasonable person who is the guide to the interpretation of the agreement is expected not merely to possess linguistic skills but must also have, or acquire, a sympathetic understanding of the commercial or practical context in which the agreement was meant to operate, and perhaps even an understanding of the many ways in which even written, formal and legal communication falls short of the standard clarity and precision set by the early editions of Fowler's Modern English Usage.

13. ...Precision in language is highly valued among lawyers and for good reason. It is an important skill that benefits clients when being advised as to transactions, and when on occasion such transactions give rise to legal disputes and litigation. Inevitably in such disputes and particularly one as extensive and contestable as this, there is an intense focus on the language and in particular the words used. It is important to remind ourselves however, that the process is not the deconstruction of a text, but rather the interpretation of an agreement. ...

> *14. It is also inevitable that when there is a dispute about an issue, that there is a tendency to approach the interpretation of an agreement through that dispute. In this case, it might be said that the question for the Court is whether the MIBI Agreement covers policies issued by insurers which have become insolvent. But it is an error, which can sometimes lead to the wrong result, to approach the interpretation of the Agreement solely through this focus. It is indeed rare that disputes on contractual interpretation address issues which are central to an agreement because, often if the matter is heavily negotiated, the parties will have a clear understanding of what has been agreed, and that will be reflected in the agreement. Much more difficulty arises when the issue, as here, is one which is not specifically addressed, discussed or negotiated. Although the question can be framed as to what the parties agreed about that specific issue, the true question is perhaps subtly different. It is necessary to understand the entirety of an agreement and then to consider what that means for the specific issue now raised. It is necessary therefore to see the agreement and the background context, as the parties saw them at the time the agreement was made, rather than to approach it through the lens of the dispute which has arisen sometimes much later."*

64. In paragraph 117 of his judgment the trial judge then refers to a short excerpt from the dissenting judgment of Clarke J. (as he then was) in *Law Society v. MIBI* cautioning against losing sight of the fact that the document whose interpretation is at issue forms the basis upon which the legal rights and obligations have been established. It is appropriate to quote fully the paragraph in Clarke J.'s judgment in which that appears, because it encapsulates the approach of interpreting "*text in context*":-

> *"10.4 The modern approach has sometimes been described as the 'text in context' method of interpretation. It might be said that the older approach in the common law world placed a very high emphasis indeed on textual analysis without sometimes paying sufficient regard to the context or circumstances in which the document in question came into existence. On the other hand it is important not to lose sight of the fact that the document whose interpretation is at issue forms the basis on which legal rights and obligations have been established. That is so whether the document in question is a statute, a contract, the rules of an organisation, a patent or, indeed, any other form of document which is designed, whether by agreement or unilaterally, to impose legal rights and obligations on either specific parties or more generally. To fail to have sufficient regard to the text of such a document is to give insufficient weight to the fact that it is in the form of the document in question that legal rights and obligations have been determined. However, an over dependence on purely textual analysis runs the risk of ignoring the fact that almost all text requires some degree of context for its proper interpretation. Phrases or terminology rarely exist in the abstract. Rather the understanding which reasonable and informed persons would give to any text will be informed by the context in which the document concerned has come into existence."*

The trial judge referred to the judgment of Clarke C.J. in *Jackie Greene Construction Limited v. Irish Bank Resolution Corporation in Special Liquidation* [2019] IESC 2, where he makes very similar observations at paragraph 5.4 of his judgment.

65. There follows a section in the judgment under the heading "*Relevance of factual matrix*", and at paragraph 118 the trial judge states:-

> *"118. It is clear from the approach adopted by the Supreme Court in* Law Society v. MIBI *and* Jackie Greene Construction Limited *that, in order – as O'Donnell J put it – 'to see the agreement and the background context, as the parties saw them at the time the agreement was made…', the court must enter upon a consideration of the factual matrix surrounding the agreement. As the third of Lord Hoffman's principles in* ICS v. West Bromwich *quoted above at para. 113 makes clear '…the law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent'."*

66. The trial judge then quotes from Griffin J. in *Rohan Construction Limited v. Insurance Corporation of Ireland plc.* [1988] ILRM 373 where he approved a statement from Lord Wilberforce in *Reardan Smith Line v. Hansen-Tangen* [1976] 1 WLR 989:-

> *"When one speaks of the intention of the parties to the contract, one is speaking objectively - the parties cannot themselves give direct evidence of what their intention was - and what must be ascertained is what is to be taken as the intention which reasonable people would have had if placed in the situation of the parties. Similarly, when one is speaking of the aim, or object, or commercial purpose, one is speaking objectively of what reasonable persons would have had in mind in the situation of the parties ... what the Court must do must be to place itself in thought in the same factual matrix as that in which the parties were".*

67. As to how the court should regard the respective states of knowledge of the parties, the trial judge quotes with apparent approval a summary adopted by Hildyard J. in *Lehman Bros International (Europe) v. Exotix Partners LLP* [2020] BUS LR 67 at pages 91 to 92 as follows:-

"(1) At least where there is no direct evidence as to what the parties knew and did not know, and as a corollary of the objective approach to the interpretation of contracts, the question is what knowledge a reasonable observer would have expected and believed both contracting parties to have had and each to have assumed the other to have had, at the time of their contract;

(2) that includes specialist or unusual knowledge which only parties entering into a contractual engagement of the sort in question might reasonably be assumed to have; and it also includes knowledge which it is to be inferred, from the nature of the actions they have in fact undertaken, that they had or must have had;

(3) however, it does not include information that a reasonable observer would think that the parties merely might have known: that would open the gate too far to subjective or idiosyncratic speculation;

(4) the fact that material is readily available or notorious may support an inference as to what the parties actually knew;

(5) but - subject to (6) below - where it is demonstrated that one or more of the parties did not in fact have knowledge of the matter in question such knowledge is not to be imputed; nor is the test what reasonable diligence would or might have revealed: in either case that would be inappropriately to introduce impermissible concepts of constructive notice or a duty … to make inquiries or investigations;

(6) the exception is that a reasonable person cannot be assumed to be in ignorance of clear and well known legal principles affecting or incidental to the contractual engagement in question."

This summary was adopted by McDonald J. in *Hyper Trust Limited v. FBD Insurance plc* [2021] IEHC 279.

68. The trial judge noted at paragraph 121 that both sides accepted generally that commercial contracts should be interpreted in a manner which accords with commercial sense or business efficacy, and that if "*there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other*" (*Rainy Sky SA v. Kookmin Bank* [2011] UKSC 50). However, he noted the appellant's submission that the court is not permitted to import into an agreement a meaning which is inconsistent with its language to derive a solution to a given problem under the guise of business efficacy, and that a court should be very slow to reject the natural meaning of a provision as correct simply because it appeared to be imprudent. Thus *Arnold v. Britton* [2015] UKSC 36, Lord Neuberger commented at paragraph 20 that "…*The purpose of interpretation is to identify what the parties have agreed, not what the court thinks they should have agreed.*".

69. At paragraphs 123 - 126 of his judgment the trial judge records in case law/submissions made by the parties in relation to the interpretation of "*long-term contracts*". Thus in *Law Society v. MIBI*, Clarke J. stated:-

> *"10.13 It might well be said that agreements which are designed to last over a long period of time can often give rise to greater questions of construction or difficulty than one-off contracts. The reason for this is that courts are often called on to apply such contracts to developing situations which may not have been contemplated, or at least not contemplated in the same way, at the time when the contract was originally entered into. However, it is an occupational hazard of long-term agreements that they may have unintended consequences when the circumstances to which the contract applies change over time."*

70. The trial judge then refers to *Total Gas Marketing v. Arco British Limited* [1998] 2 Lloyds Rep. 209, in which Lord Steyn suggested:-

> *"…a court may…take into account that, by reason of the changing conditions affecting such a contract, a flexible approach may best match the reasonable expectations of the parties. But, as in the case of all contracts, loyalty to the contractual text viewed against its relevant contextual background is the first principle of construction."*

The trial judge records however that the appellants urged caution in this regard, referring to the decision of Hoffmann J. (as he then was) in *St. Marylebone Property Company Limited v. Tesco Stores Limited* [1988] 2 EGLR 40 concerning a lease granted in the early 1950's with a restriction limiting the use of a shop to "*grocer's, provisions, wine spirit and beer merchants*". A sub-tenant proceeded to sell an extended range of products including newspapers, magazines, books, cards, records, tapes, small electrical articles and later, a video hire business. Hoffmann J. rejected the argument by the sub-tenant that the court should give effect to changes in the trade of grocer since the 1950's by asking what kind of products one would now expect to find in a shop which was the successor of the early 1950's grocer.

71. The trial judge then made the following findings in relation to the circumstances surrounding the negotiation and execution of the leases *i.e.*, the factual context in which the leases were concluded:-

- *"No one from the parties to the leases who was involved in the circumstances surrounding negotiation or conclusion of either the Dunnes leases or the Unit 4 lease gave evidence to this Court;*

- *neither of the witnesses from the plaintiffs – Mr. Clifford from Dunnes or Mr. Conway from Camgill – were involved in the process surrounding negotiation or conclusion of the leases in question;*

- *nobody from the defendants gave evidence at all, and the defendants did not present any evidence in relation to the negotiation or conclusion of the Unit 4 lease;*

- *Mr. Druker, Mr. Stanley and Mr. Fleming were the only witnesses who were involved in the process of negotiating the Dunnes leases;*

- *it is clear from the evidence given by these witnesses that: -*

    - *Dunnes Stores would always seek 'exclusivities' in the sense of restrictions on all other tenants in any development or retail park in which it was to become an anchor tenant;*

    - *Dunnes Stores insisted upon the conclusion of the restrictive covenants set out at part III of the third schedule of the Dunnes leases, thereby imposing on the lessor a duty to bind all lessees of other premises in the Barrow Valley development to the restrictive covenants, and in particular the prohibition on 'the sale of any food, food products or groceries…';*

    - *these restrictive covenants were not actively negotiated with the lessor, or as Mr. Druker put it, the restrictions were presented to the lessor on a 'take it or leave it basis'. Mr. Fleming gave evidence that he was told by Mr. Stanley that these covenants were '…essentially…non-negotiable…'.*

- *Redhill/Mr. Murphy were anxious to secure Dunnes Stores as the anchor tenant in Barrow Valley, and accepted the restrictive covenants as drafted (subject to 'some minor tweaks' [Mr. Stanley, day 1, p.88, lines 27-28] which do not concern us);*

- *as far as Dunnes Stores was concerned, the restrictive covenants 'in a retail park or shopping centre context…would have been standard…'. [Mr. Stanley, day 1, p.88, lines 25-26];*

- *there was no debate between Mr. Stanley and Mr. Fleming as to what the word 'groceries' meant [Mr. Stanley, day 1, p.99, lines 20-24];*

- *… 'there was almost no discussion in relation to the restrictive covenant…' [Mr. Fleming, day 1, p.108, lines 8-10]."*

72. The trial judge went on to state that he found the evidence of Mr. Carrigan "*in truth of little relevance*" but he found it of some assistance and took it to be, in short, "*that as long as the client had a 'clear understanding' of what 'groceries' meant, it would not normally be necessary for its solicitor to advise that client as to the meaning of the word unless expressly requested to do so.*" [paragraph 129].

73. The trial judge then records in brief Mr. Clifford's evidence as property director of the "*exclusivities*" that were important to Dunnes Stores and gave rise to restrictive covenants in 90% of retail parks where Dunnes Stores operated, and that the purpose of exclusivities was "*to prevent competitors*". The importance of this evidence becomes clear later in the judgment.

74. The trial judge then notes the respondents' contention that the two restrictive covenants were distinct but mutually informing each other:-

- *"The restriction on retail use as a 'supermarket, hypermarket, grocery, discount food store, frozen food outlet, mini food market, convenience store or any similar premises*

- *the restriction on sale of specific product classes, namely 'food, food products or groceries'... [written submissions para. 3.37]."*

The trial judge notes the further submission that the inclusion of the clause containing these restrictions in the Unit 4 Lease was due to "*its significance to the long-term commitment of a major grocery retailer/anchor tenant to the retail park. Securing the commitment of our large anchor tenant or major retailer to commit to a new development is frequently a major goal of a developer of a shopping centre or retail park, as it is typically a major driver of footfall to a shopping centre or retail park, and in turn helps attract further tenants [written submissions, para. 3.38].*" The trial judge then notes:-

> *"132. The defendants do not seriously contest these assertions. What they do say, quite simply, is that they do not fall within any of the definitions of retail outlets set out in the restrictive covenants, and that the term 'groceries' does not extend beyond food or food products. It does seem to me however that the purposes for which Dunnes insisted on the inclusion of the restrictive covenants in other leases in Barrow Valley including Unit 4 must be taken into account when assessing the factual context in which the lease is concluded."*

75. The trial judge then notes that the respondents' experts Mr. O'Connor and Mr. Foley did not regard Mr. Price as a "*grocery*". In submissions counsel for the respondents argued that Mr. Price's operation came within the term "*other similar premises*" because 20% of the floor space was devoted to what the respondents considered to be "*groceries*". The appellant's counsel on the other hand argued that in the context in which the phrase "*similar*

premises" was used the term had to signify a premises "*similar to*" the enumerated premises, and all of those named entities were "*predominantly retailers of food*" which Mr. Price was not.

76. As to the meaning of "*groceries*", at paragraph 135 the trial judge notes that - "*No evidence was or indeed could have been adduced by the parties as to the subjective intention behind the inclusion in the Dunnes leases or the Unit 4 lease of the word 'groceries'*", but he went on to note the expert's opinion on what would be understood by the word in the retail industry, and he reprises the views expressed in evidence by the expert witnesses on both sides.

77. In a section headed "*Aids to construction*", the trial judge then considers dictionary definitions, stating the following:-

> *"140. In their submissions, the plaintiffs proffer a number of dictionary definitions which tend to suggest that "groceries" may include household items other than food [para. 3.46 written submissions]. The Oxford Compact English Dictionary, 2nd Edition, revised 2003, which I consulted independently, defines "grocer" as 'a person who sells food and small household goods", but goes on to define "groceries' as 'items of food sold in a grocer's shop or supermarket'. A Chambers English Dictionary (7th Edition, 1990) which I possess defines 'grocer' as 'a dealer in staple foods, general household supplies…', and 'groceries' simply as "articles sold by grocers…".*
>
> *141. All I think one can reasonably infer from these definitions, and those proffered by the plaintiffs, is that there is certainly, at minimum, an argument that the term 'groceries' extended, in 2005 and 2007, beyond 'food and food products'. These dictionary definitions however merely contribute to the overall task of*

interpreting what the words mean in – as O'Donnell J put it in Law Society v. MIBI *– '…the specific context, the broader context, the background law, any prior agreements, the other terms of this Agreement, other provisions drafted at the same time and forming part of the same transaction, and what might be described as the logic, commercial or otherwise, of the agreement…' [para. 12]."*

78. The trial judge then addressed counsel for the respondent's submissions calling in aid the maxims *noscitur a sociis*, and *ejusdem generis*, which were deployed to suggest that the term "*groceries*", in the context of "*food, food products or groceries*" should be regarded as a synonym for "*food and food products*", particularly in the absence of a definition of "*groceries*". He noted that the appellants argued that such rules of construction must yield to the contextual approach mandated by *Law Society v. MIBI* and that "*it is critically important that maxims of construction are not deployed as trump cards to defeat the wider purpose of holistic modern contractual construction…*". That was a proposition that the trial judge considered to be correct. Counsel for the appellants had also relied on the *contra proferentem* rule as applying to the restrictive covenants, but, as the trial judge noted at paragraph 146, that was a point not pressed by counsel in his oral submissions at the hearing.

79. As to whether Mr. Price came within the category of store identified in the first restrictive covenant, the trial judge concluded at paragraph 147:-

"147. It was not seriously contended on the part of the plaintiffs that Mr. Price falls within the categories of store enumerated in the restrictive covenant, and it is notable that no relief was sought in the statement of claim in this regard. I am also satisfied that it is not a 'similar premises' within the meaning of the covenant. All parties are agreed that Mr. Price is a 'variety discount retailer', which is in essence something quite different from the enumerated stores. The real issue is whether Mr. Price is in

breach of the restrictive covenant to the Unit 4 lease by selling non-food 'groceries'."

The finding that Mr. Price is "*a variety discount retailer*", and the consequential conclusion that Unit 4 cannot be regarded as a "*similar premises*" for the purposes of covenant (20)1, are not the subject of any cross-appeal.

80. The trial judge then went on to consider the meaning of "*groceries*", and importantly outlines in paragraph 148 his approach to this task, and in paragraph 149 his findings as to the context in which the Unit 4 Lease was concluded:-

"148. The court must ascertain 'the meaning which [the lease] would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract' [Lord Hoffman in Investor Compensation Scheme*]. The reasonable person must 'have, or acquire, a sympathetic understanding of the commercial or practical context in which the agreement was meant to operate…' [O'Donnell J, para. 12,* Law Society v. MIBI*].*

149. As regards the context in which the Unit 4 lease was concluded in July 2007, the evidence establishes that: -

- *Dunnes Stores insisted on the inclusion of the restrictive covenants in its own leases of Units 5 and 6, and in all leases throughout Barrow Valley, including that of Unit 4;*
- *Redhill/Stephen Murphy accepted the covenants as proffered by Dunnes due to their desire to procure a commitment from Dunnes Stores to take the anchor tenancy;*

- *there were no issues raised or 'any issue in the context of the incorporation of the restrictive covenants' [Mr. William Fleming, day 1, p.111, lines 10 to 13];*
- *there was no engagement between the parties to the Unit 5 and 6 leases as to the meaning of the word 'groceries';*
- *Redhill/Stephen Murphy had no retail experience prior to the Barrow Valley development;*
- *there was no suggestion or discussion between the parties to either the Dunnes leases or the Unit 4 lease of the concept of the Kantar classification being the deciding factor as to what were or were not 'groceries';*
- *the purpose of the inclusion of the restrictive covenants was, from the point of view of Dunnes Stores, to prevent competition with the Dunnes Stores business in the Barrow Valley complex."*

It is important to observe at this point that in my view in paragraph 149 the trial judge makes findings of fact based on the evidence that he records.

81. The trial judge then considers the wording in the restrictive covenant, and importantly states:-

"150. There are a number of pertinent points to be made about the restrictive covenant itself:

- *the restrictive covenant in the Unit 5 lease made it clear that the 'exclusivities' were to apply across the retail park, subject presumably to individual 'carve-outs' in certain cases. It was not in any sense intended to be specific to the Unit 4 lease;*
- *the types of store set out in the covenant ('supermarket, hypermarket' etc) could all be said primarily to be concerned with the sale of food, although a*

supermarket, hypermarket and convenience store at a minimum would certainly sell non-food items;

- *in relation to the phrase 'food, food products or groceries', the plaintiff contends that the word 'or' is disjunctive, clearly implying that 'groceries' may have a 'distinct and wider application', and that it is not just a synonym for 'food, food products';*
- *the defendants contend that 'groceries' coming after a list of stores that primarily sell food, is intended as a synonym for 'food, food products…'.*

151. It could be said that the word 'groceries' was included to correspond to the inclusion in the list of stores of 'grocery', rather than as a means of distinguishing between 'groceries' on the one hand, and 'food or food products' on the other. However, it must be accepted that, even aside from clothing, hardware or electrical goods that might be sold in a supermarket or hypermarket, those stores, together with convenience stores, would typically sell a range of FMCGs which would not be food products, but which might be considered as groceries by consumers due to their being part of 'the weekly shop', or indeed because they are recognised as groceries for the purpose of the Dunnes Stores groceries promotion referred to above."

82. The trial judge then notes that the respondents' experts "*were firmly of the view*" that the industry meaning of the term "*groceries*" extended beyond food, and that the common denominator of groceries could be described as "*non-durable, consumable items that must be re-purchased frequently*" (Mr. O'Connor) or, as Mr. Foley stated it, "*includes goods described as non-durable household necessaries…*". In paragraph 154 the trial judge comments:-

"154. As we have seen, Dr. O'Reilly, whose perspective – notwithstanding his on the ground commercial experience – is primarily academic, regards groceries as solely food products."

83. At paragraph 155 the trial judge states:-

"155. The difficulty which 'the reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract' would have in interpreting the term 'groceries' in the lease is compounded by a number of propositions put forward by the defendants, which may be summarised as follows: -

(1) If the sale of 'groceries' as Dunnes Stores seeks to define the term is prohibited in the leases of tenants in Barrow Valley, no tenant, 'in the absence of an appropriate carve-out' in the lease, may sell anything coming within Dunnes Stores interpretation of the term. Thus, the pharmacy selling toothpaste or mouth wash, the hardware store selling toilet rolls, the newsagents selling light bulbs or batteries (or perhaps, indeed, newspapers) would all be selling 'groceries' and would be in breach of the restrictive covenant.

(2) A store specialising entirely in ladies' cosmetics might, in the absence of express permission in its lease to do so, be selling nothing but 'groceries' in the sense contended for by Dunnes Stores, and would be in breach of the restrictive covenant.

(3) While one might say that Dunnes Stores can choose whether or not to enforce a restrictive covenant, and would be unlikely to do so in the case, say, of the pharmacy selling toothpaste, counsel for the defendants suggested that the ability of the tenants to sell what Dunnes Stores consider to be 'groceries'

would be solely dependent, not on any contractual right to do so, but on the decision of the plaintiffs whether or not to enforce the restrictive covenant.

(4) The consumers who buy toothpaste in the pharmacy do not tend to consider themselves as buying 'groceries', or to have gone 'grocery shopping'."

84. The trial judge accepts in paragraph 156 that the terms "*grocer*" or "*groceries*" are "*imprecise and somewhat outmoded terms in today's retail environment, and that this comment is applicable to the market is in 2005-2008 as it is today*". He comments in paragraph 157 in relation to the statutory provisions/subordinate legislation to be "*of little or no assistance; each of the provisions must be seen in its own context… Indeed, many of the competition law sources to which I was referred post-dated the conclusion of the Unit 4 lease.*" (paragraph 157).

85. The trial judge then came to the following conclusions in paragraphs. 158-161: -

(1) That Mr. Price is a "*variety discount retailer*" (and hence not in breach of the restrictive covenant by using its stores one of those listed and set out in clause (20)1 of the second Schedule in the Unit 4 Lease).

(2) That the restrictive covenants in the Unit 4 Lease were included in that lease due to the obligation on the lessor pursuant to its obligations under the restrictive covenants in the Dunnes Stores leases of Units 5 and 6.

(3) That Dunnes Stores, in taking on the Unit 5 and ultimately Unit 6 leases was agreeing to become the anchor tenant in Barrow Valley. In paragraph 160 the trial judge states:-

"The evidence of Mr. Druker and Mr. Fleming in particular was to the effect that Mr. Stephen Murphy, principal of Redhill Properties Limited, was

anxious to secure Dunnes Stores as an anchor tenant, and readily agreed to the restrictions sought."

(4) That all the parties to the Dunnes Stores leases, and to the Unit 4 Lease concluded on 12 July 2007, were aware that Dunnes Stores intended by these exclusivities that it would be protected from competition from a supermarket etc. and that no other unit would sell or display or suffer to be sold or displayed any food, food products or groceries. *"These rights were part of what Dunnes Stores paid for when it entered into the Unit 5 and 6 leases; equally Mr. Murphy acquired his interest in the Unit 4 lease knowing full well the general purpose for which the restrictions were intended."* (paragraph 161).

Again I would observe that these were findings of fact made by the trial judge based on the evidence before him.

86. The trial judge then proceeded to hold that "*Groceries*" extended beyond "*food***"** or "*food products*", and was not a synonym for the latter:

"163. Given the motives which caused Dunnes Stores to seek the exclusivities in the Dunnes leases on the Unit 4 lease, which were known to all the contracting parties, it seems to me that the inclusion of 'groceries' must be seen in this context. It seems improbable that Dunnes, in its wish to preclude competition in its core activity, would have insisted on the inclusion of a prohibition on the sale of 'food, food products or groceries', but not intended that wording to cover non-food items in circumstances where shoppers who visit the supermarket section of Dunnes Stores will typically and frequently buy a range of non-food items as part of their regular shopping trip, such as healthcare products, detergents or toiletries. The evidence relating to the background of the matter and the negotiations suggests, and I believe would suggest

> *to a reasonable person having all the reasonably available background knowledge, that the parties to the Dunnes leases and the Unit 4 lease understood and intended 'groceries' to extend beyond 'food' or 'food products', and did not consider the former to be a synonym for the latter."*

The text underlined is emphasised because this formed the basis for an argument made on behalf of the appellants that the trial judge impermissibly had regard to *negotiations* as part of the context relied upon to interpret the meaning of the covenant.

87. The trial judge considered that the foregoing interpretation was consistent with the views of Mr. O'Connor and Mr. Foley as to the widely understood meaning of "*groceries*", and on balance the trial judge preferred their evidence to that of Dr. O'Reilly who "*approaches the question from a somewhat academic standpoint*".

88. The trial judge then looked at the use of the word "*or*" in the covenant. He did not find the maxims *ejusdem generis* or *noscitur a sociis* urged on him by the appellants to be persuasive in interpreting the restrictive covenant as a synonym for "*food*" and/or "*food products*", stating:-

> *"166. ... The disjunctive "or" between "food, food products" and "groceries" is in my view likely to have been intended to differentiate the concept of groceries from food or food products; the inclusion of the word "groceries" is unnecessary if it is to be regarded as a synonym for food or food products, and the notion that it is intended to in some way reinforce the concept of food or food products is in my view fanciful. While it is arguable that "groceries" was deployed solely due to the inclusion of "grocery" in the listed trading entities in the clause, I think that it is nonetheless more likely to have been included to indicate a wider category of goods than simply food or food products; while it might be that all of the enumerated*

entities in the restrictive covenant predominantly sell food, supermarkets, hypermarkets and convenience stores all have a substantial trade in non-food items."

Again I would observe that the trial judge at the end of this paragraph is repeating a finding of fact that first appears in paragraph 151 that "*...supermarkets, hypermarkets and convenience stores all have a substantial trade in non-food items.*"

89. The trial judge then asked the question "*if 'groceries' does not include non-food items, how is one to know what is comprised in the term*", there being no definition in the leases. The trial judge firmly rejected reliance on the Kantar lists (from 2005 and 2012 respectively) as defining the term, particularly as there was no evidence from Kantar proffered to show how those lists came into being or the methodology adopted in compiling the lists. As he notes, at paragraph 173, no regard was had to the 2005 Kantar lists by any of the contracting parties to the Dunnes leases or the Unit 4 Lease. There is no cross-appeal in respect of that conclusion.

90. The trial judge then addressed the appellants' reliance on apparent anomalies that arise from equating "*non-durable consumer items*" or FMCGs as included in "*groceries*", and the contention that that would give a meaning "*so wide as to be incapable of reliable application*" (paragraph 174). The trial judge acknowledged that what is or is not an item of "*grocery*" may be difficult to ascertain and that the definitions suggested by Mr. O'Connor yielded some incongruous results: that buying toothpaste and mouthwash in the pharmacy or detergent in a DIY store constitute "*grocery shopping*" for instance (at paragraph 175). The trial judge resolves the competing positions as follows:-

"176. While there is a superficial attraction to these arguments, one must remember that the court's task is to interpret the '...single meaning [of the agreement] ...which both parties are taken to have agreed upon…' [O'Donnell J, para. 6, Law Society v.

MIBI]. The term 'groceries' is to be interpreted in the context of the agreement as a whole, i.e. the Unit 4 lease. The court is not being asked to determine the meaning of any other agreement; still less is it being asked to determine what 'groceries' means generally, or in the context of other shopping experiences.

177. A decisive factor in determining the meaning of 'groceries' is the circumstances of the agreement of the Unit 4 lease, and in particular Dunnes Stores' insistence on 'exclusivities'. In my view, it is clear that the desire to protect itself against competition in Barrow Valley extended to non-food items of a non-durable consumable nature, and that 'groceries' was intended to include such items. If other retailers in Barrow Valley have a similar restrictive covenant in their leases, it may be that they are selling 'groceries' in contravention of the covenant. However, in interpreting the agreement, one must have regard to the concept of 'tenant mix' addressed by Mr. Clifford in his evidence.

178. In any shopping complex or retail park, it is in the interest of all tenants to have a complementary mix of stores. The consumer who wants to do a 'food shop' in Dunnes or Tesco may also want to fill a prescription in the pharmacy, buy a tin of paint in the DIY store, and buy leisurewear in a sports goods retailer. Ideally, all of these purchases can be made in the same venue, so that only one shopping trip has to be made. Each of the stores benefits from the footfall generated by the other.

179. It may be that, if all of these stores have a restrictive covenant in their leases equivalent to the one in the Unit 4 lease, some or all of these stores may regularly sell items which would be 'groceries' in the sense of being non-durable consumable items. The pharmacy may sell toothpaste; the DIY store may sell toilet rolls; the newsagent may sell batteries. However, there was no suggestion in evidence before

me that Dunnes consider it necessary to take action against any such retailers in Barrow Valley, presumably because such retailers do not offend against the purpose for which Dunnes insisted upon the inclusion of the 'exclusivities': the prevention of competition in its core activities. While it was not expressly stated in evidence, one assumes that the pharmacy in Barrow Valley is seen by Dunnes as complementary to its own trade, rather than competing with it, even if it does sell some items which Dunnes regard as 'groceries'."

91. Having noted that Dunnes Stores took action against ToGo to comply with similar restrictive covenants, the trial judge proceeded:-

"181. While I am satisfied that the prohibition on sale of 'groceries' includes non-durable consumable items, the use of the term 'groceries' gives rise to difficulty in the absence of a definition of the term in the lease, or a schedule setting out what is comprised in the term. As what comprises groceries may change from time to time, in that categories of such goods will emerge or disappear according to consumer taste and demand, it may be that it was considered better not to define the term. However, given the issues which have arisen, and after a five-day hearing and this lengthy judgment, one might ruefully reflect that some attempt at a definition would have been beneficial.

182. The plaintiff's experts readily conceded that – as Mr. Foley put it – there was 'no all-encompassing, conclusive definition of "groceries"'. Mr. Foley went on however to say that the retail industry '...over many years has operated according to a clear understanding that the items on the [Mr. Price] shelves [photos of which were exhibited to the plaintiff's affidavits] ...fall within the definition of food or groceries'. I accept the evidence of Mr. O'Connor and Mr. Foley that 'groceries'

> *includes 'non-durable consumable items that must be repurchased frequently…' [Mr. O'Connor], or 'non-durable household necessaries...' [Mr. Foley], and that many of the items in Mr. Price identified and photographed in the exhibits to the plaintiff's affidavits comprise 'groceries' for the purpose of the restrictive covenants."*

92. In so doing the trial judge rejected the appellants' argument that because there was no definition of "*groceries*", and it might be difficult to ascertain in a given case what was a "*grocery item*" the court should refrain from making any order enforcing the restrictive covenant stating:-

> *"184. There is no doubt that there will be instances in which it is difficult to say whether something is a 'grocery' item. However, the difficulties which may occur in defining individual items must be weighed against the desirability of enforcing the restrictive covenant in circumstances in which its meaning when applied to most items is tolerably clear. Should Dunnes be denied an order enforcing the covenant, which was freely agreed by the contracting parties who each had legal advice available to them, simply because it may on occasion be difficult to say definitively whether an item is or is not 'groceries'?"*

The trial judge therefore concluded that the term "*groceries*" includes "*non-durable consumable household items which are purchased frequently*" and that it covered all of the items in paragraph 9 of the reliefs claimed in the Statement of Claim, and he made his orders accordingly.

<u>The Notice of Appeal</u>

93. The Notice of Appeal set out four principal grounds:

Ground 1 asserts that "*The Court erred in its interpretation of the Unit 4 Lease…*" and then sets out seven sub-grounds and within these some 29 "*particular*" sub-grounds. Because of the length and range of these grounds it would be pointless setting them out here, and instead this judgment will proceed by addressing the core arguments in relation to interpretation that were made in written submissions and more particularly as these were pursued by counsel at the hearing of the appeal.

Ground 2 is that "*The Court erred in interpreting the Unit 4 Lease with reference to the standard to be expected in the practice of conveyancing…*" and sets out six sub-grounds. This ground is directed at the trial judge's admission of the evidence of Mr. Carrigan as a conveyancing expert and any account taken by the trial judge of his evidence as to the meaning that unidentified clients of Mr. Carrigan would give to the term "*groceries*". It was not a ground upon which submissions were made at hearing, and in my view wisely so given the view of the trial judge's statement in paragraph 128 of the judgment that he found Mr. Carrigan's evidence "*in truth of little relevance*".

Ground 3 is that "*The Court erred in preferring the expert evidence proffered on behalf of the Respondents…*" in three particularised respects. This ground was argued and is addressed below.

Ground 4 is that "*The Court erred in granting an injunction expressed in ambiguous and unclear language such that the Appellants are, even now, unable to know with certainty what is prohibited by the Order of the High Court, in particular…*" and sets out six particulars. The arguments pursued under this ground are addressed below.

The Appellants' arguments

(i) "*Groceries*" = "*Food or food products or items akin to that*"

94. Counsel for the appellants (Mr. McGrath S.C.) commenced his oral submissions by arguing that the term "*groceries*" has an "*intrinsically variable meaning depending on the context*" and that there is "*no settled understanding of the term – it is different in different contexts*". He argued that the respondents pleadings and evidence demonstrated this but also demonstrated inconsistencies in the interpretation contended for by them: for example, initially the Plenary Summons had no definition of the term, then the Statement of Claim relied on the differing Kantar lists; Mr. O'Connor's report refers to a different definition ("*non-durable, consumable items that must be re-purchased frequently*") and inconsistently does not include "*office supplies*" and expressly excludes "*medicines*" in his list of "*non-food items*" in paragraph 5.1, yet includes both of them in his list of FMCGs in paragraph 7.1, and Mr. Foley's opinion on what was included as "*non-durable household necessaries*" did not include medicines or office supplies, and he accepted that "*there is no all-encompassing, conclusive definition of 'groceries'…*". This was also demonstrated by differing dictionary definitions referenced by the trial judge which did not necessarily accord with the respondents' expert evidence. Whilst not saying that the term was devoid of meaning, he submitted that it *"means food, food products and items akin to food products"* in the context of the Unit 4 Lease, and he submitted that this particular meaning in context was supported by the evidence of Dr. O'Reilly.

Discussion

95. There are a number of difficulties for the appellants with this line of argument. Firstly, the trial judge expressly recognises in paragraph 156 that "*the terms 'grocer' or 'groceries' are imprecise and somewhat outmoded terms in today's retail environment*". He accepted nevertheless – as a matter of fact, based on the evidence that he heard – that "*'groceries' remains part of the retail lexicon, not just of Dunnes Stores, but of supermarkets*

generally" and that the fact that it was not used internally by Dunnes Stores for classification purposes did not mean the word had no meaning (paragraph 165).

96. Secondly, the trial judge was cognisant of the difficulty that "*what is or is not an item of 'grocery' may, in a given case, be difficult to ascertain*" and that Mr. O'Connor's formulation could yield "*some incongruous results*" (paragraph 175). He rejected, rightly in my view, the suggestion that this meant extending "*groceries*" beyond food and food products was "*an absurdity*", stating:-

> *"176. …The term "groceries" is to be interpreted in the context of the agreement as a whole, i.e. the Unit 4 lease. The court is not being asked to determine the meaning of any other agreement; still less is it being asked to determine what 'groceries' means generally, or in the context of other shopping experiences."*

97. This correctly acknowledges that in a different agreement the same term may fall to be interpreted differently, depending on context.

98. Thirdly, the statement that the court is not being asked to interpret the meaning of "*groceries*" generally is also important. A reading of Dr. O'Reilly's report, which includes very extensive detail on the history and evolution of grocery retailing in Ireland,[2] suggests that his focus was on a general definition, and seeking to demonstrate that the terms "*grocer*" and "*groceries*" evolved over time to mean food products, fresh or packaged, and do not include more broadly FMCGs or the wider products listed by Kantar which has no category called "*Grocery*". A feature of his report is that it does not mention the leases or the context in which the Unit 4 Lease was executed, or the position of Dunnes Stores before executing

[2] Including Dr. O'Reilly's Appendix 1 which is a chapter from O'Callaghan, *Retailing in Ireland: Contemporary Perspectives* (Gill, & Macmillan, 2012) running to some 13 pages.

the Unit 5 and Unit 6 Leases that it required what the trial judge characterises as "*exclusivities*" to prevent competition within Barrow Valley Retail Park.

99. Fourthly, this submission ultimately places reliance on the expert evidence of Dr. O'Reilly for a narrow definition of "*groceries*" as including only food and food products. It follows that *if* the trial judge was entitled to prefer the evidence of Mr. O'Connor and Mr. Foley to that of Dr. Reilly then he was entitled to come to the conclusions that he did in respect of the meaning of *"groceries".* Whether he was so entitled is addressed later in this judgment.

100. Fifthly, and this brings us to the next argument, the trial judge fundamentally accepted that the term *"groceries"* in the Unit 4 Lease fell to be interpreted in context.

(ii) *'Text in context'*

101. Counsel for the appellant accepted that the term "*groceries*" fell to be interpreted under the principle of construing 'text in context'. He quoted from the passage of the judgment of O'Donnell J. in *MIBI* at paragraphs 6-14 recited earlier, and accepted that the court must consider not just the words used by also the specific context, including "*…the broader context, the background law, any prior agreements, the other terms of this Agreement, other provisions drafted at the same time and forming part of the same transaction, and what might be described as the logic, commercial or otherwise, of the agreement*". (*per* O'Donnell J. at paragraph 12).

102. Counsel however emphasised the requirement that the test was how "*it would be interpreted by a reasonable and informed member of the public who understands the context of the document in question*" (*per* Clarke J. in *MIBI,* at paragraph 10.5), and the warning given by Clarke C.J. that due recognition must be given both to the text creating legal rights and to the context:-

> *"5.4…To fail to give adequate weight to the words is to ignore, or downplay, the fact that those were the words that were chosen to define the relevant legal arrangement. To fail to give adequate weight to context is to ignore the fact that all language is inevitably interpreted by reasonable persons in light of the context in which that language is used."*

103. Counsel also referred to a similar warning given by Clarke C.J. in his judgment in *Jackie Greene Construction* and submitted that in the present case the trial judge had erred in giving "*overwhelming*" weight to the context/contextual analysis, and not enough weight to textual analysis.

Discussion

104. It is trite to observe at this point that in his judgment the trial judge refers to the relevant extracts from *MIBI*, including the views of Clarke J. in his dissenting judgment and in his judgment in *Jackie Greene Construction.* It is also clear that the trial judge proceeded to address the meaning of the word "*groceries*" both within the text of the Unit 4 Lease, and in the broader context of the Unit 5 and Unit 6 Leases, and also the wider factual context in which the lessor committed to the restrictive covenants in the Unit 5 and Unit 6 leases. Thus, it cannot be said that he erred in his approach to the interpretive task.

105. While undoubtedly the trial judge did place, in the words of counsel "*very considerable reliance*" on contextual analysis, in my view this was wholly justified. In the absence of any definition of "*groceries*" in the Unit 4 Lease, it was essential that the trial judge consider the covenants restricting "*permitted user*" imposed by the lessor Redhill Properties Limited on the original tenant Stephen Murphy in the context of Unit 4 being part of a larger "*Retail Estate*". It will be recalled that "*permitted user*" is defined in the Unit 4

Lease to mean "*in accordance with Planning Permission where such user does not conflict with the Lessee's covenants set out in the Second Schedule and in particular covenant 20*" – where covenant 20 sets out covenants "*for the protection and benefit of the Lessor*", and where covenant 2 reads:-

> *"2. Not to sell or display or permit or suffer to be sold or displayed any food, food products or groceries."*

106. In order to ascertain what this meant in the context of "*the protection and benefit of the lessor*" it was entirely appropriate – indeed necessary – that the trial judge consider the terms of the Unit 5 and Unit 6 Leases, the definition of "*Permitted User*" in those leases, the covenants entered into by the lessor in Part III of the Third Schedule (essentially to bind all tenants in Barrow Valley, other than Dunnes Stores, by the restrictive covenants), and the context in which those terms were entered into. In this regard counsel accepted that the lessor's covenants in the Unit 5 and Unit 6 Leases "*ran with the land*" and were binding on the successors in title of Redhill Properties Limited, now Camgill the second named respondent. In that sense the context in which the Unit 5 and Unit 6 Leases used the term "*groceries*" was directly and centrally relevant to the interpretive task.

107. So, considering the restrictive covenants in context is precisely the exercise undertaken by the trial judge in aid of his interpretation of "*groceries*". In fact, he relies on context in two ways: firstly to assist him in his initial conclusion that "*groceries*" is not confined to food or food products; and secondly in interpreting what "*groceries*" does mean.

108. But the trial judge certainly did not ignore the textual analysis. In particular he places reliance on the disjunctive word "*or*" in covenant 20(2) between "*food and food products*" and "*groceries*" in a passage that bears repeating:-

> *"166. In this regard, I do not find the maxims of* ejusdem generis *or* noscitur a sociis *to be persuasive in interpreting the restrictive covenant. The disjunctive 'or' between 'food, food products' and 'groceries' is in my view likely to have been intended to differentiate the concept of groceries from food or food products; the inclusion of the word 'groceries' is unnecessary if it is to be regarded as a synonym for food or food products, and the notion that it is intended to in some way reinforce the concept of food or food products is in my view fanciful. While it is arguable that 'groceries' was deployed solely due to the inclusion of 'grocery' in the listed trading entities in the clause, I think that it is nonetheless more likely to have been included to indicate a wider category of goods than simply food or food products; while it might be that all of the enumerated entities in the restrictive covenant predominantly sell food, supermarkets, hypermarkets and convenience stores all have a substantial trade in non-food items."*

109. This is an important part of the trial judge's reasoning for coming to his first key conclusion, namely that "*groceries*" is to be interpreted in the Unit 4 Lease as including non-food items. It is also notable that his rejection of the appellant's reliance on the maxims is emphatic based on his finding, which is not contested, that supermarkets, hypermarkets and convenience stores all have a substantial trade in non-foods.

(iii) *Maxims of interpretation:* "noscitur a sociis*", and* "ejusdem generis"

110. Counsel argued however that in the passage just recited the trial judge erred in not applying the principles of *noscitur a sociis* and *ejusdem generis*. *Noscitur a sociis* ("a word is known by its companions") is the principle that the meaning of words may be determined by reference to the context in which they are used, and in particular the words around them; and *ejusdem generis* is the principle that where a list of specific words is followed by a

general word the court may infer that the general word was intended to be of the same nature as the specific words. The argument was that "*groceries*", a general word, fell to be construed by reference to the more specific "*food, food products*" that immediately preceded it.

Objection that argument was not part of the appeal

111. Objection was taken by counsel for the respondents that this argument was not specifically included in any ground of appeal, or in the appellants' written submissions, and was based on supplemental authorities provided on the morning of the appeal hearing.

112. This objection was properly taken. I do not think that any ambush was intended, but that was the effect of introducing these arguments into the appeal, particularly in light of the length and detailed nature of the Notice of Appeal, and the fact that the new oral submissions were based on caselaw not seen or considered by the High Court, or the respondents (or this court) in advance of the appeal hearing. It meant that counsel for the respondent was obliged to respond 'on the hoof'. While it must be acknowledged that an argument based on these maxims was raised in oral and written submissions in the High Court, and ultimately rejected by the trial judge (see paragraphs 142-144 of the judgment), it does not appear to have been central to the defence in that court; yet that is how it was positioned in the appeal. For these reasons in my view the appellants' oral submissions on this are mid-way up the "*spectrum*" of new argument referred to by O'Donnell J. in *Lough Swilly Shellfish Growers Co-operative Society Ltd. & Anor v. Bradley & Anor* [2013] IESC 16 at paragraph 27 when considering whether an appellant should be permitted to introduce new argument on appeal. On this basis alone I consider that this argument should be rejected. Notwithstanding this view I have considered the argument and the caselaw presented, and in my view it does not avail the appellants.

ICDL and other caselaw

113. Counsel for the appellants relied principally on the judgment of O'Donnell J. (as he then was) in *ICDL v. European Computer Driving Licence Foundation Limited* [2012] 3 IR 327. There a licence agreement signed between the first plaintiff and defendant in relation to the Gulf region provided for the appointment of the second plaintiff as licensee for the Kingdom of Saudi Arabia. The defendant sought to terminate the agreement so far as it related to Saudi Arabia on the grounds that it was no longer lawful for the second plaintiff to operate the programme there as it did not have a licence from TVTC, the government body charged with responsibility for vocational and educational training in the Kingdom. The defendant purported to terminate under clause 14.1 which provided:-

> *"The licensee understands and agrees that the exercise of the licence granted to the licensee under this contract is subject to all applicable laws, enactments, regulations and other similar instruments in the designated territory (including, without limitation, all applicable local laws relating to advertising, broadcasting, health and safety and telecommunications), and that the licensee shall at all times be solely liable and responsible for such due observance and performance. The licensee shall obtain at its own expense all licences, permits and consents necessary for it to carry on its business in the designated territory."*

114. In the High Court Clarke J. held that the phrase "*licences, permits and consents as are required to make it lawful to carry on business*" was "*concerned with matters which are required in order that the operation be lawful, rather than commercially successful*", and rejected the defendant's contention for a broader contextual construction of the clause having regard to the nature of the business contemplated by the agreement. Fennelly J. (with whom Hardiman, McKechnie and MacMenamin JJ. concurred) agreed, finding that the clause 14

referred to legal requirements; he accepted the plaintiff's submission that the as the document emanated from and was prepared by the defendant it should be construed against it, applying the *contra proferentem* rule.

115. O'Donnell J. dissented on other grounds, but agreed with the majority that clause 14.1 referred to legal requirements, although not on the basis of an application of the principle of *contra proferentem* which he considered should be applied only "*as a last resort*". He noted that the defendant's argument focussed on the last sentence of clause 14.1, that this covered agreements required to conduct the business "*as a matter of commercial and practical, rather than legal, necessity*", on the basis that TVTC controlled 68% of the market and had its own training centres and licensed training centres – so in effect its consent was needed to conduct business. He also noted the argument based on the use of the words in the first sentence that made the licence granted subject to "*applicable laws, enactments, regulations and other similar instruments*"; the defendants argued that as the first sentence covered what was required to make the business lawful, the second sentence should be construed more broadly, to refer to commercial consents, so as not to become an unnecessary redundancy. O'Donnell J. came to the same conclusion on this issue as the majority, but by a different route, stating:-

> *"Skilfully put though this argument was, it seems to me, with respect, to be an example of the approach criticised by Lord Hoffman in his judgment in* I.C.S. Ltd. v. West Bromwich B.S. [1998] 1 W.L.R. 896. *That is, it focuses too closely on the words and their possible dictionary definitions to the exclusion of their meaning to be gleaned from the context in which they were expressed. First it appears to me that the words; "licences", "permits" and "consents" are to be read together. The principle* noscitur a sociis *is, I think, applicable. Therefore "consent" is intended, in this context, to be akin to a permit or licence, both of which connote a legal rather*

than a commercial or practical requirement. The fact that "consent" has a somewhat broader connotation than "licence" or "permit" makes sense in this context since, as pointed out by Clarke J., this form of contract was applicable in a number of very different territories and it would not be possible to predict in advance the precise format of the necessary legal authorisation in any given state. Furthermore, the sentence must be read as part of clause 14.1 as a whole. The clause undoubtedly deals with legal requirements and I see no reason to read the second sentence as shifting the context to commercial or practical matters."

116. Counsel also relied on the judgment of Hogan J. in *Knockacummer Wind Farm Limited v. Daniel Cremins and Sheila Cremins* [2018] IECA 252 in which this court (Peart J., Hogan J. concurring; Whelan J. dissenting) applied the maxim *noscitur a sociis* in construing the terms of a settlement. In the passages opened to the court Hogan J. stated:-

*"**32**. The argument of Knockacummer is to urge the application of the principle of* noscitur a sociiis *('a word is known by its companions') to the construction of the contract. It contends that what are the general words of clause 2.4 dealing with the purchase option must be read in the light of the context of the rest of the agreement. Specifically, it maintains that the specific provisions contained in clause 6 negative what might otherwise be regarded as the natural meaning of these general words. The argument here, in effect, is that the provisions of clause 6 serve to create an implied prohibition in relation to the date on which the purchase option might be exercised where none is expressly found in clause 2 or, indeed, elsewhere in the agreement.*

33. *The principle of* noscitur a sociis *is, of course, a well recognised method of construction of any document, whether it be a statute or a contract. It really is no*

more than an application in the context of a written contract of the general principle that the document must be read as whole. This approach was well expressed by Black J. in The People (Attorney General) v. Kennedy *[1946] I.R. 517, 536, albeit admittedly in the context of a statute:*

> *'A small section of a picture, if looked at close-up, may indicate something quite clearly; but when one stands back and views the whole canvas, the close-up view of the small section is often found to have given a wholly wrong view of what it really represented.*
>
> *If one could pick out a single word or phrase and, finding it perfectly clear in itself, refuse to check its apparent meaning in the light thrown upon it by the context or by other provisions, the result would be to render the principle of ejusdem generis and noscitur a sociis utterly meaningless: for this principle requires frequently that a word or phrase or even a whole provision which, standing alone, has a clear meaning, must be given a quite different meaning when viewed in the light of its context.'*

34. *While the underlying legal issues presented in Kennedy - involving as they did the jurisdiction of the Supreme Court to hear a criminal appeal – are quite remote from the facts of the present case, the principles of interpretation illustrated by that decision are not. In fact, Kennedy illustrates perfectly the contention urged by the plaintiff in the present appeal in that it provides an apt example of where the general - and 'perfectly clear' - words of one part of a document (i.e., in this instance, the general words of clause 2) are cut down by what Black J. described as the process of checking those words with reference to the context of other parts of the document."*

117. To similar effect counsel referred us to *Lend Lease Real Estate Investments Ltd & Anor v. GPT RE Ltd* [2006] NSWCA 207, in which the New South Wales Court of Appeal applied the maxims to interpret a Put and Call Option which contained a definition of "*deal*" to mean "*any sale, assignment, transfer, disposition, declaration of trust assumption of obligation or other alienation…or granting other like rights*". Spigelman CJ stated:-

> *"32. …Unless the expression "assumption of obligations" is confined to "alienation", most of the adjoining words would be otiose. The reading down of general words is one of the most common mechanisms applied in the course of legal interpretation. The Court should not give one word in an interrelated, overlapping list of expressions a meaning that is so broad as to be inconsistent with adjoining words or that renders those words irrelevant."*

118. Counsel argued that these two maxims are not at variance with the *text in context* approach to interpretation, but rather are an early illustration of the principle that you look at the context of the words used within the document. He submitted that the trial judge erred in his disjunctive interpretation of "*or*" and in not applying the maxims to the word "*groceries*" so that it "*takes colour from the words that surround it*". He submitted that you identify the "*genus*" of the words, which he submitted was food/food products, which "*groceries*" would include; then, as "*groceries*" is capable of having a wider application, you must give it a narrower interpretation that is cognate with food/food products, and not something "*completely different*". In making this argument Counsel was not saying that "*groceries*" was a synonym for "*food, food products*" – he accepted that groceries went beyond this, accepting that it could refer to drinks or ingredients that might not be encompassed by "*food, food products*".

Discussion

119. There are a number of reasons why these arguments do not find favour with me. While these maxims may still aid interpretation, it seems to me that they are largely subsumed by the broader modern principles of interpretation set out by Lord Hoffman in *Investors Compensation* and confirmed most recently by the Supreme Court in *MIBI* to be the correct approach of Irish courts, and as developed and applied in particular in the judgment of O'Donnell J.

120. The specific context in which words are used is certainly part of this, but "*the broader context, the background law, any prior agreements…and what might be described as the logic, commercial or otherwise, of the agreement*" (*per* O'Donnell J. at paragraph 12) must also be considered. O'Donnell J. emphasises this several times in his judgment, including quoting in paragraph 10 from a paper by Lord Hoffman on "*Patent construction*" (2006) CIPA *Journal 727*, where he refers to language as the code by which we communicate and having two elements, semantics, the meaning of words, and syntax, the order in which words are arranged, and says:-

> *"But when we try to understand what someone is saying, the code is only part of what we rely on. Enormously important is the background, the context, the knowledge already assumed to be shared between the speaker and the listener, [and] the purpose for [which] the communication is made. What we are trying to understand is not just the meaning of the words. That in itself is inadequate."*

121. The trial judge accepted the submission by counsel for Dunnes Stores that the "*rules of construction … must yield to the unitary, holistic contextual approach mandated by* Law Society v. MIBI…*it is critically important that the maxims of construction are not deployed as trump cards to defeat the wider purpose of holistic modern contractual construction*". I

agree, and while they still have their place in interpretation it is secondary and yields to the broader approach recently enunciated in *MIBI* which represents the law in this jurisdiction.

122. Further it seems to me that the three decisions relied on by the appellants must be read in the light of their own facts and the particular instruments that fell to be interpreted, because in each of them the appellate court did not see the need to go outside the context of the instrument itself. In *ICDL* Fennelly J. writing for the majority applied the principle of *contra proferentem* to conclude that clause 14.1 should be narrowly construed against the defendant. Only O'Donnell J. in his dissent applied the maxims now relied on by the appellant.

123. In *Knockacummer* the construction of a Settlement Agreement contended for by the defendants was that in the absence of an express prohibition on the exercise by them of a Purchase Option prior to 2042 they could exercise it at once (as they had purported to do), whereas the plaintiffs contended that it could not be exercised until certain dates in 2042. Hogan J. as appears from the extract of his judgment quoted earlier considered that *noscitur a sociis* was "*no more than an application in the context of a written contract of the general principle that the document must be read as a whole*". He held against the defendants because the construction they contended for would have rendered other provisions of the Settlement Agreement inoperable or inconsistent with the rest of the agreement. It was a decision that depended on consideration of the agreement as a whole rather than consideration of the broader context in which that agreement was created. It is distinguishable from the present appeal in that it is not contended by the appellants that the trial judge's interpretation of the covenant renders any other provision of the Unit 4 Lease inoperable; it is further distinguishable in that the terms of the Unit 5 and 6 Leases are clearly and directly relevant to the interpretation of the Unit 4 Lease.

124. I also do not consider that the New South Wales Supreme Court decision in *Lend Lease* to be of assistance. It undoubtedly is an example of the application of the maxims relied on by the appellants. The court did not look outside the confines of the terms of the Joint Ownership Agreement that regulated the ownership of the Sunshine Plaza Shopping Centre in order to construe the definition of "*deal*", and nothing in the report suggests that the court at first instance or the appellate court addressed evidence of context or was invited to take a broader 'text in context' approach. Whether an approach to construction such as that confirmed in *MIBI* is part of New South Wales jurisprudence is simply not addressed.

125. Fundamentally the appellants' submissions based on the maxims ignore the prior agreements between the lessor and Dunnes Stores in respect of Units 5 and 6, and the overarching purpose of the covenants which are expressly stated to be for the benefit and protection of Dunnes Stores. They fail to take into account the broader context that in 2005 the lessor required an anchor tenant supermarket, and that the anchor tenant would require "*exclusivities*" – in order to prevent potentially damaging competition in respect of its core business from those who later took tenancies of other units in Barrow Valley. That was the commercial logic that gave rise to the covenants. These were the background, the broader context, and the agreements, along with the disjunctive use of the word "*or*" in the covenant, along with the expert evidence, that led to the trial judge's interpretation of "*groceries*" in the Unit 4 Lease.

126. Further, in response to questioning from the court, while accepting that "*groceries*" was not the same as "*food, food products*", counsel for the appellants struggled to identify what "*groceries*" could refer to at all if it was to be read as cognate with "*food, food products*". He suggested soft drinks or bottled water, a coffee pod, ice cubes and garnishes as examples. When the court suggested these were foods or food products, his response was

that that would require an expansive definition of "*food products*", which might, he accepted, mean that that phrase was ambiguous. When it was put to counsel that "*food*" is something that a human being can consume, something they can eat or drink, he agreed that it was something a person can ingest. He resorted to arguing that where there is a list of products or items the draftsperson will describe them in different ways to ensure they don't leave something out, using overlapping or overarching/inclusive terms, and in such circumstances such overlapping or overarching terms should be interpreted in a cognate manner, not something completely different, such as, he suggested, the cleaning products etc. suggested by the respondents that have no connection with food.

127. I found these answers and line of argument unpersuasive. In particular, they entirely ignore the trial judge's findings that the purpose of imposing the restrictive covenants was to protect the anchor tenant from competition within Barrow Valley, and that FMCGs or frequently purchased non-durable goods such as cleaning products are frequently sold in hypermarkets, supermarkets, convenience stores and similar premises. In that sense it could not be said that the restrictive covenants were directed only at food outlets, and the inclusion of "*convenience store*" also demonstrates that they were not just directed to large supermarkets or hypermarkets seeking to set up in competition.

128. The submission also fails to recognise the carve out of "*food and food products*" in clause 1.2 of Part III of the Second Schedule to the Unit 5 Lease. This requires the lessor to include, as the second restrictive covenant in the lease of other units, a covenant:-

> *"1.2 Not otherwise to sell or display or permit or suffer to be sold or displayed any food, food products or groceries <u>except for the sale of food and food products</u> for consumption on the premises only within any restaurants, fast-food restaurants, public houses, cafes, food-courts, cinemas or hotels within the Relevant Property and*

except for one pizza take-away outlet and one drive-thru restaurant within the Relevant Property." [Emphasis added]

129. The second limb of this clause clearly treats "*food and food products*" as distinct from "*groceries*", and provides for certain exceptions in respect of the former, but not the latter. It can only be inferred from this that the drafters intended "*groceries*" to mean something different to "*food food products*". It is also implicit that "*food and food products*" are items "*for consumption*", and the ensuing list of outlets make it clear that this refers to consumption *i.e.* eating or drinking, by human beings. This is part of the context in which the covenant in the Unit 4 Lease must be interpreted, and in my view it fatally undermines the appellants' argument for a narrow interpretation of "*groceries*", and the examples that counsel suggested such as soft drinks, bottled water, coffee pods or ice-cubes as not being covered by "*food, food products*".

130. Ultimately if counsel's submissions based on these maxims were accepted it would render the use of word "*groceries*" in the covenant surplusage and unnecessary, and it would limit the benefit of the covenant only to the display and sale food or food products. Such a result would fail to give meaning to wording that the lessor and Dunnes Stores as original anchor tenant deliberately inserted in the Unit 5 and Unit 6 leases, and which thereafter had to be (and was) inserted in lessee covenants in leases of other units, and would fail to achieve their purpose which was the prevention of competition within Barrow Valley in relation to "*groceries*" in addition to "*food, food products*".

(iv) *Contra proferentem*

131. While not specifically pleaded as a ground of appeal the appellant's written submissions (paragraphs 37 - 53) contended that this principle of construction should be

applied to the interpretation of the covenant. Counsel submitted that the Supreme Court (Fennelly J., speaking for the majority) in *ICDL* affirmed and applied the principle of *contra proferentem* to a commercial contract. The application of the principle was again confirmed by Clarke J. in his dissenting judgment in *MIBI* where at paragraph 10.6 he stated that a clause which is ambiguous should be construed against the profferor on the grounds that:-

> *"the reasonable and informed observer would be likely to take the view that, if greater protection or benefit had truly been agreed, the profferer would have ensured that it was truly specified."*

Counsel also referred the court to an older example of its application in a shopping centre setting by Pringle J. in *L.S.D. v. Quinnsworth (Rathfarnham) Ltd.* (unreported, High Court, 21 December 1970) where he stated:-

> *"I accept the principle that a restrictive covenant as to the letting or use of property such as this must be strictly construed: See the judgment of James L.J. in Kemp v. Bird 5ch Div. at page 976 where he said "Persons who are men of business, as they were here, are able to get protection and advice and they must make their covenants express, so as to state what the really mean, and they cannot get a Court of Law or of Equity to supply something which they have not stipulated for in order to get a benefit which is supposed to be intended". It is also clear that, if a doubt arises on the construction of a grant and the doubt can be removed by construing it adversely to the grantor, this will be done."*

132. Counsel therefore submitted that as Dunnes Stores *proffered* the restrictive covenants on a 'take it or leave it' basis by requiring the lessor to include them in unit leases (other than Units 5 and 6). He argued that in so far as there was any ambiguity it should be construed against Dunnes Stores. He argued that the trial judge in paragraph 156 of the judgment, where he refers to the terms "*grocer*" and "*groceries*" as being "*imprecise and*

somewhat outmoded terms in today's retail environment" was acknowledging uncertainty in the meaning of "*groceries*". The culmination of this was his submission that where two interpretations of "*groceries*" are reasonably open, a narrow one which means food/food products or something akin to food/food products, and a broad one that is non-durable household necessaries (Mr. Foley's formulation), then the *contra proferentem* principle means that the court should give effect to the narrower construction.

Discussion

133. The principle was applied by Fennelly J. in his judgment in ICDL. In his dissenting judgment in ICDL O'Donnell J. referred to the principle of *contra proferentem* as "a last resort in the case of ambiguity and not as a general approach" (paragraph [166]). Both O'Donnell J. and Fennelly J. restate that it is only applicable where there is ambiguity.

134. In my view the premise for the appellant's argument is incorrect. While the trial judge did make the "*imprecise*" and "*outmoded*" comment in paragraph 156 he went on to say "*However, that is not to say that the term has no meaning or common currency*". There was of course competing evidence and argument in the High Court as to whether "*groceries*" had any meaning beyond "*food, food products*" or something akin, the narrow meaning advanced by Dr. O'Reilly. The trial judge found that the restrictive covenants were intended to protect Dunnes Stores from certain competition, and proceeded, on the basis of the respondents' expert evidence which he accepted, to hold that "*groceries*" went beyond the narrow meaning suggested by the appellants and had the meaning "*inside and outside the retail industry, as of 2005*" advanced by Messrs. O'Connor and Foley.

135. The trial judge was entitled to make these findings, and the net effect is that he did not consider the term "*groceries*" ambiguous. On an evidential basis he concluded that it had

the broader meaning contended for by the respondents. In the light of this it could not be said that there was such ambiguity as would permit the court to adopt a *contra proferentem* construction, whether as a primary tool or as a matter of last resort.

(v) *Subjective intentions – regard had to negotiations*

136. This is raised in the Notice of Appeal, at ground 1 sub-ground 4. Counsel submitted that, contrary to the principles enunciated in *Investor Compensation Scheme*, the trial judge had regard to "*the circumstances surrounding the negotiation and execution of the leases*" (paragraph 127 of the judgment) including the evidence in that regard given by Mr. Druker (the former partner in Druker Fanning Estate Agents who acted for Dunnes Stores in 2005), Mr. Stanley (the solicitor acting for Dunnes Stores in 2005), and Mr. Fleming (the solicitor acting for the lessor Redhill Properties in 2005) and summarised in the judgment. Counsel argued that the evidence of these parties in relation to the fact that Dunnes Stores always sought "*exclusivities*" was evidence of subjective intention, of what it wanted in the leases.

137. Counsel argued that the approach of the judge was influenced by his perception and the evidence of what Dunnes Stores wanted to achieve. In support of this submission he referred to paragraphs 130-132 of the judgment where the trial judge recounts and relies on the evidence of Mr. Clifford as to the importance of "*exclusivities*" to Dunnes Stores, that restrictive covenants feature in 90% of their leases in retail parks, that the purpose of "*exclusivities*" is "*to prevent competitors…*", and the judge's concluding remark in paragraph 132:-

> *"132. … It does seem to me however that the purposes for which Dunnes insisted on the inclusion of the restrictive covenants in other leases in Barrow Valley including*

Unit 4 must be taken into account when assessing the factual context in which the lease is concluded."

This, counsel submitted, was reliance on what Dunnes Stores wanted. In a similar vein counsel referred to paragraph 149 where the trial judge sets out in bullet point format the context in which the Unit 4 Lease was concluded, the first and last of which read:-

- *"Dunnes Stores insisted on the inclusion of the restrictive covenants in its own leases of Units 5 and 6, and in all leases throughout Barrow Valley, including that of Unit 4;"*
- *"the purpose of the inclusion of the restrictive covenants was, from the point of view of Dunnes Stores, to prevent competition with the Dunnes Stores business in the Barrow Valley complex."*

138. Counsel then refers to the "*Analysis and conclusions*" section of the judgment where at paragraph 160 the trial judge refers to the fact that Dunnes Stores agreed to become anchor tenant in Barrow Valley and again relies on the evidence in relation to "*exclusivities*", leading him to conclude at paragraph 163 that:-

"163. Given the motives which caused Dunnes Stores to seek the exclusivities in the Dunnes leases on the Unit 4 lease, which were known to all the contracting parties, it seems to me that the inclusion of 'groceries' must be seen in this context. ..."

And at paragraph 177 that:-

"177. A decisive factor in determining the meaning of 'groceries' is the circumstances of the agreement of the Unit 4 lease, and in particular Dunnes Stores' insistence on 'exclusivities'. In my view, it is clear that the desire to protect itself against competition in Barrow Valley extended to non-food items of a non-durable consumable nature, and that 'groceries' was intended to include such items. ..."

139. In written and oral submissions counsel for the respondents responded that the meaning that the trial judge determined was not predicated upon adopting Dunnes Stores understanding of the covenant, and that the evidence leading to the conclusions in paragraph 149 was properly considered as evidence of context and background, and related to "*the most rudimentary understanding of the dynamic between a developer and an anchor retail tenant*" (Submission, paragraph 4.21). It was submitted that:-

> *"4.26 A reasonable person would readily understand that the clear objective of incorporating these covenants was to safeguard against a rival retailer setting up in the supermarket's 'back yard' and offering competing products for sale…"*

140. Counsel for the respondent further argued that there was in fact no negotiation over the restrictive covenants when they were introduced into the terms of the Unit 5 and 6 Leases in 2005. He referred the court to the transcript of the evidence of Mr. Fleming, solicitor for the lessor, to the effect that the covenants were presented by Dunnes Stores on a 'take it or leave it' basis, although he did secure a carve out for one pizza take-away and one drive-thru restaurant.

Discussion

141. In addressing this issue it is helpful to recall the three most relevant principles enunciated by Lord Hoffman in *Investors Compensation Scheme*:

> *"(1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.*
>
> *(2) The background was famously referred to by Lord Wilberforce as the 'matrix of fact', but this phrase is, if anything, an understated description of what the*

background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.

(3) The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in ordinary life. The boundaries of this exception are in some respects unclear. But this is not the occasion on which to explore them."

142. Before commenting on the competing views of the evidence that the trial judge took into account, an important and in my view decisive point should be made. It seems to me that in 2005 the reasonable person having background knowledge of how retail shopping centres are set up would know that they typically have a large anchor tenant supermarket or hypermarket, and other smaller units. Indeed, counsel for the appellants readily accepted the importance of securing an anchor tenant. A reading of the Unit 5 and 6 Leases would plainly convey to the reasonable person that Dunnes Stores is to be the anchor tenant of Barrow Valley, and that it has placed a binding legal obligation on the lessor to impose restrictive covenants on the incoming tenants of other units in Barrow Valley in respect of "*food, food products and groceries*". If asked 'why are these restrictive covenants to be imposed on tenants of other units?' the reasonable person would know from the text of the Unit 5 and 6 Leases in Part III that they are "*restrictive covenants for the protection and benefit*" of Dunnes Stores, and such person would without difficulty deduce from this, and the content of the covenants read as a whole, that their purpose was to prevent or limit competition in "*food, food products and groceries*". On any objective basis there could be

no other commercial purpose. There is no mystery about any of this, and it is not dependent on evidence of background facts or negotiations arising prior to entry into the Unit 5 and 6 Leases.

143. Ultimately therefore whether the trial judge impermissibly took into account any negotiations or declarations of subjective intent does not make any difference to what in my view was the correct and only conclusion, namely that the purpose of the restrictive covenants was to establish certain "*exclusivities*" for the benefit of Dunnes Stores and to prevent competition in certain spheres of sales from rival retailers within Barrow Valley. The trial judge therefore correctly approached the interpretation of "*groceries*" in that context.

144. As counsel for the appellants points out the trial judge in the passages which counsel has highlighted does refer to "*negotiations*". However closer analysis of the evidence shows that so far as the restrictive covenants were concerned, they were presented on a 'take it or leave it' basis, and there was in reality no relevant negotiation. The only negotiation referred to resulted in Mr. Fleming (solicitor for the lessor) obtaining a carve out for one pizza take-away and one drive-thru restaurant, but in truth this had no material bearing on the main issue of interpreting "*groceries*". The finding that "*Dunnes Stores insisted on the inclusion of the restrictive covenants in its own leases of Units 5 and 6*" in its own terms was not a reference to negotiation.

145. Moreover, the finding that "*the purpose of the inclusion of the restrictive covenants was, … to prevent competition with Dunnes Stores business in the Barrow Valley complex*", even though expressed as being "*from the point of view of Dunnes Stores*" was not necessarily a reference to Dunnes Stores' declaration of subjective intent. It was based in evidence including that of Mr. Clifford that other supermarkets such as Lidl (for whom he

worked for ten and a half years before moving to Dunnes Stores) routinely insisted on imposing restrictive covenants for the same purpose, and the evidence of Mr. Fleming that both lessor (Redhill/Mr. Murphy) and lessee (Dunnes Stores) "*knew that [the restrictive covenants] were vital to the success of the development*" (Transcript Day 1, p. 108). As I have indicated earlier it could also be deduced from a consideration of the terms of the Dunnes Leases under they were about to and did become the anchor tenant of Barrow Valley.

146. The trial judge refers in various parts of his judgment, including paragraph 177, to "*exclusivities*" but it is clear that in so doing he is simply using a shorthand for the restrictive covenants insisted upon by Dunnes Stores and which do have the effect of giving Dunnes Stores exclusive rights in respect of display and sale of "*food, food products and groceries*". For the reasons already given this does not transgress the principle that the court should not have regard to declarations of intent.

(vi) *Commercially sensible construction*

147. This submission was based on paragraph 22 of the appellants written submission which states:-

> "*Commercial contracts should be interpreted in a manner which accords with business common sense. In* Rainy Sky v Kookmin Bank [[2011] UKSC 51], *Clarke LJ stated that, where two or more constructions are possible,* 'the court is entitled to prefer the construction which is consistent with business common sense' [[21]]. *In* L Schuler AG v Wickman Machine Tools Sales Limited [[1974] AC 235], *Lord Reid stated that* 'the more unreasonable the result the more unlikely it is that parties can have intended it' [At 251]. *This approach was adopted by Finlay Geoghegan J in O'Rourke v Considine* [[2011] IEHC 191].

The written submission proceeds in paragraph 23 to state that "*The Court is not permitted to import a meaning into a contract inconsistent with its language to derive a solution to a problem under the guise of adopting a commercially sensible construction.*"

148. Counsel advanced an argument under this heading based on the permitted user definition in the Unit 5 and 6 Leases that permits:-

> *"the sale and supply of goods, articles and services of every description, such use to include, without limitation, department store supermarket coffee shop, restaurant and garden centre and/or off-licence, and/or all such uses as may be compatible with trends or the future development or setting of new trends in shopping centres or retail developments from time to time taking full account of the changing nature and business and trade of supermarkets/department store chains in Ireland..."*

149. Thus, Dunnes Stores would be permitted to open a department store selling clothing, yet there was no restrictive covenant preventing other retailers opening, for instance, a drapery business.

150. Counsel's first submission was that the trial judge erred in his approach by starting his analysis on the basis that Dunnes Stores wanted to ensure that there was no competition in relation to any form of retail, and by protecting them from any competitor, even though the duration of the Unit 5 and 6 leases is for a term of 1000 years.

Discussion

151. This in my view must be rejected. The trial judge did not commence his analysis on that premise. Undoubtedly it is the case that hypothetically Dunnes Stores could expand or evolve its business in Barrow Valley into permitted uses that are not protected by the restrictive covenants, but its core business in the context of becoming anchor tenant was

"*food, food products or groceries*". It is abundantly clear that the trial judge addressed the meaning of "*groceries*" in the context of Dunnes Stores protecting that core business, and was cognisant that the restrictive covenants did not cover all potential businesses, and that Dunnes Stores was not seeking to close off other types of business.

(vii) ***Breadth of trial judge's interpretation of "groceries", and uncertainty in the declarations***

152. It is convenient to take these together as the arguments proved to be overlapping. Counsel submitted that his argument on 'commercially sensible interpretation' also went to the breadth of the interpretation that the respondents wanted to give to the concept of "*groceries*", by extending it to FMCGs and including household cleaning products and health products, or "*non-durable household necessaries*" (*per* Mr. Foley). His submission, as I understood it, was that interpreting the restrictive covenants this way went beyond what was, objectively, commercially sensible because it undermined the flip side of the objective of securing an anchor tenant, which was the letting of other retail units in Barrow Valley for complementary purposes – such as a pharmacy. Thus he submitted that it was not commercially sensible to have a pharmacy selling a significant amount of its products (such as cosmetics) acting in breach of restrictive covenants in its lease, or to have a pet store selling pet food or a hair salon selling hair care products both of which are included in the High Court order as a "*non-durable consumable household items which are purchased frequently*".

153. Counsel was quick to emphasise that he was not arguing a *jus tertii*, on behalf of the pharmacy or tenants of other units who may currently be in breach of covenant. Under questioning from the court it emerged that the real thrust of this argument was that the list

of specific products adopted by the trial judge was unduly wide. It is helpful to record what he said:-

> *"Well, I don't think I would object to things like detergents, washing powder, shower gels, deodorants, shampoos. I mean, if an order was being made, those are specific. But the wider categories of things like healthcare products – I don't know what the distinction is supposed to be between healthcare products and household healthcare products, that indicates a very wide ambit – pet care, cleaning products generally, even toothbrushes – I mean, even on the logic of the judgment and the ruling, that includes, you know, electric toothbrushes as well as ordinary toothbrushes etc., which I understood from the evidence everybody would've accepted were not groceries. So it's obviously too wide. And if there is to be an order, it would have to be in much more confined and detailed terms so that there is clarity as to what the order covers and what it doesn't cover."*

154. In support of this counsel relied on *Aldi Stores Ireland Limited v. Dunnes Stores* [2019] 3 IR 201 in which O'Donnell J. (as he then was) stated that:-

> *"if a person is to be restrained by an injunction which can be enforced by processes of committal, then the person must know what they are bound to do or not to do".*

155. He also referred the court to *Basildon Development Corporation v. Mactro Limited* [1986] 1 EGLR 137. There the plaintiff commenced proceedings seeking an order compelling the defendants to carry on business in compliance with the terms of the restrictive covenants of their lease. Whitford J granted an order "*that the defendants be restrained from selling…any items not as of November 21 1981 usually sold in supermarkets for the sale of groceries and provisions.*" Balcombe LJ in the Court of Appeal of England and Wales recognised that the injunction was something to which the plaintiffs were entitled but stated

that "*it was not a particularly helpful kind of injunction, because on any question of enforcement (committal for contempt or something of that nature) it would leave wide open the question what goods were sold in supermarkets on that date.*" The Court of Appeal substituted the order made by the trial judge for an injunction restraining the defendants from selling a list of identified items.

156. Counsel noted that in paragraph 186 of his judgment the trial judge, while accepting Mr. Foley's formulation of "*non-durable consumable household items which are purchased frequently*", said:-

> *"It may well be possible to pick holes in this formulation, or to suggest that it does not cover every item which might or might not be '*groceries*'."*

Counsel submitted that it was too difficult to know what might come within the scope of the order, and that it ran counter to the well-established principle that a court must interpret an agreement as of the date it is entered into.[3]

Discussion

157. As to the first point I do not accept the contention that the breadth of the declarations undermines the commercially sensible purpose of the restrictive covenants, which is to have an anchor tenant with exclusivities but also allow for other units conducting businesses that do not involve the sale of "*food, food products and groceries*". No evidence supported this contention – for instance no witness from ToGo or the Kevin Kelly pharmacy, or indeed Mr. Price, gave evidence to say that enforcement of the covenant against them would so damage their trade that they would have to cease business in Barrow Valley. It seems to me that this submission was based on conjecture.

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[3] Counsel cited for this proposition *St Marylebone Property Company Ltd. v. Tesco Stores Ltd* [1988] 2 EGLR 40, and *Calabar (Woolwich) Limited v. Tesco Stores Ltd*. [1978] 1 EGLR 113.

158. As to the last point, the trial judge was very conscious that the covenants fell to be interpreted by reference to the meaning that they would have attracted in the industry in 2005. The focus of his judgment is the evidence as of 2005. See for example paragraph 171 – when discussing the evidence of Mr. Fleming he observes that neither he nor his client Mr. Murphy were familiar with Kantar (whose first list was produced in 2005) or its work when the Dunnes Leases were being negotiated. He accepted Mr. O'Connor's evidence which included his opinion that "*the widely accepted understanding of 'groceries' has not changed since 2005 or during my time in the industry*" (paragraph 4 of his Report). I would therefore reject this point as being of no substance.

159. As to the injunction and the wording of the declarations, the trial judge was live to the possibility that in the absence of a definition of the term "*groceries*" or a schedule listing what was comprised in the term, there was potential for further difficulty, and as he notes in paragraph 181 "*what comprises groceries may change from time to time, in that categories of such goods will emerge or disappear according to consumer taste and demand*".

160. Following delivery of his judgment the parties were given an opportunity to try and agree the terms of an order, but were unable to do so, and returned before him. This resulted in his Ruling delivered on 15 July 2022 where he notes that he was presented with competing draft orders, the appellants draft being based on his conclusions in paragraph 188 of the main judgment that:-

- *"the term '*groceries*' in the Unit 4 lease extends beyond food or food products;*
- *'*groceries*' includes '*non-durable consumable household items which are purchased frequently*';*
- *such items include the items set out at para. 9 of the reliefs in the statement of claim."*

161. In his Ruling the trial judge says, at paragraph 7:-

> *"7. As the reader of the substantive judgment will appreciate, it is not possible to compose a comprehensive all-embracing definition of what constitutes 'groceries'. Perceptions of what is comprised in the term have changed over the years. Items which have yet to be invented or which are not yet on the market may give rise to difficulty as to whether they are 'groceries' for the purpose of the lease between the parties. There is therefore a risk that if I make a general order enforcing the restrictive covenants – which I have found the defendants have breached – any future bona fide dispute between the plaintiffs and Mr. Price as to whether an item constitutes 'groceries' could result in an application by the plaintiffs for attachment and sequestration of the defendants' assets on the basis that the defendants have disobeyed an order enforcing the restrictive covenants, when in fact the defendants accept that they are bound by those covenants, but do not accept that they have breached them. It might well be doubtful in such a scenario as to whether an application for attachment and sequestration, as opposed to an application more akin to the present proceedings, would be warranted."*

For these reasons he preferred to grant an injunction by reference to the terms of the second restrictive covenant in clause (20) "*prohibiting it from offering for sale and/or selling food, food products or groceries*" with accompanying declarations as to the meaning of "*groceries*" in that covenant, in line with the appellants' draft and based on his conclusions at paragraph 188 of the judgment.

162. I am of the view that these declarations, with one reservation which I shall address shortly, set out a clear primary definition and then set out a list of "*included*" items of sufficient specificity to justify the injunction granted and the need for clarity bearing in mind that breach of the order could lead to processes of attachment or sequestration.

163. The declarations are generally consistent with the trial judge's conclusions on the meaning of "*groceries*" and his rationale for reaching those conclusions. The second declaration that "*'groceries' in the Unit 4 Lease includes 'non-durable consumable household items which are purchased frequently'* " has a clear basis in the evidence. So too does the list of included items or categories of items that follows in the third declaration – see the report of Mr. Foley – although I would make one small observation as to where I believe the third declaration should be modified.

164. The inclusive list in the third declaration extends to some items that are not "*non-durable*". For instance, pet care products could include a dog leash, dog clothing or dog basket; hair care products could include a hair dryer, brushes, combs; oral care products could include electric toothbrushes. I do not believe that this was intended by the trial judge, but in any event as it stands the list potentially includes durable items that would not be encompassed by the primary second declaration. This can be simply rectified by inserting at the end of the third declaration the words "*provided that such items are non-durable*".

(viii) ***The expert evidence***

165. The appellants relied on their written submissions to support a number of points under this heading. At paragraphs 54 - 62 they set out relevant caselaw establishing a number of propositions:-

1) That expert witnesses are only entitled to give opinion evidence where it is reasonably required to enable the court to determine proceedings.[4]
2) That the evidence must be relevant to an issue and of assistance to the court.[5]

[4] Order 39 Rule 58(1) of the Rules of the Superior Courts, and Kelly P. in *O'Brien v. Clerk of Dáil Éireann* [2016] 3 IR 384, at para. [36].
[5] *O'Brien v. Chief Constable of South Wales Police* [2005] UKHL 26; and McDonald J. in *Hyper Trust Limited v. FBD* [2021] IEHC 279, at para. 26 approving dicta of Warren J. in *British Airways v. Spencer* [2015] EWHC 2477 (Ch) at para. [68].

3) That each witness has to be evaluated on the basis of sound reasoning and examination of the factors and reasons for their opinions.[6]
4) That where the opinion is based on fact the facts must be proved.
5) That where there is a conflict between experts the court is required to determine which view to accept, and consider the relevance and weight to be attributed to the evidence of both experts.[7]

166. The first point was that the trial judge erred in admitting the evidence of conveyancing expert of Mr. Carrigan in the face of objection. His evidence was admitted by the trial judge *de bene esse*. His evidence as recounted by the trial judge at paragraphs 48 - 49 was that an anchor tenant would insist on restrictive covenants and exclusivity, the extent of which would depend on the individual circumstances, and that in his experience "groceries" was not defined. He said that acting for a major UK retailer their understanding of the word grocery "*was clearly defined*" but he didn't pretend to understand it or define it.

167. As I have stated earlier the trial judge at paragraph 128 observed that "*I found Mr. Carrigan's evidence, although in truth of little relevance, to be of some assistance and have taken it into consideration.*" Then in paragraph 129 he summarises the evidence and says:-

> *"I took his evidence to be, in short, that as long as the client had a 'clear understanding' of what 'groceries' meant, it would not normally be necessary for its solicitor to advise that client as to the meaning of the word unless expressly requested to do."*

168. Mr. Carrigan's expertise as a conveyancer was not challenged. It seems to me he carefully confined his evidence to his experience of acting for anchor tenants and that in so

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[6] *James Elliott Construction Limited v. Irish Asphalt Limited* [2011] IEHC 269 (Charleton J.).
[7] *Donegal Investment Group plc v. Danbywiske* [2017] IESC 14 (O'Donnell J. as he then was).

far as this was limited to one "*major UK retailer*" and another unidentified entity he was readily admitting to such limitations. The height of his evidence was that his client anchor tenants usually required exclusivities which might involve "*groceries*", the meaning of which he did not pretend to know but his anchor tenant client in the retail trade would understand.

169. It doesn't seem to me that this added materially to the sum of the evidence, expert of otherwise, and that the trial judge placed little if any weight on Mr. Carrigan's evidence when coming to his conclusions. Rather he relied on the factual evidence given by the Dunnes Stores witnesses who gave contextual evidence concerned with the Unit 5 and 6 Leases, and he gave real weight to the opinions of retail expert Mr. O'Connor and economist Mr. Foley whose evidence he preferred to that of Dr. O'Reilly. Mr. O'Connor gave his expert opinion "*of the widely accepted understanding of 'groceries' …in the industry*", and Mr. Foley's similar opinion was based on "*the clear understanding*" of the "*retail industry over many years*".

170. I would not in any way criticise the trial judge for hearing Mr. Carrigan's evidence *de bene esse* – that is often the most efficient and sensible way of proceeding at trial and avoiding protracted argument on relevance and admissibility before it is clear what the witness might have to contribute to the issues.

171. The second point made in the submissions relates to the trial judge preferring the evidence of the Messrs. O'Connor and Foley to that of Dr. O'Reilly:-

> *"While the High Court enjoys considerable deference in preferring the evidence of competing experts, there was no credible basis to suggest that the robust and reviewable method of assessment conducted by Mr. O'Reilly in addition to his practical retail experience was not to be preferred over the opinion of a retail*

consultant and an economist. This is particularly the case where the qualifications of Mr O'Reilly surpassed those of Messrs O'Connor and Foley. The High Court should have been guided by the greatest expertise available. In preferring the evidence of Messrs O'Connor and Foley, the High Court did not consider the fact that the theory advanced by those witnesses gave rise to illogical results. Messrs O'Connor and Foley both accepted that their opinion conflicted with the ordinary experience of consumers."

172. I agree that the High Court enjoys considerable deference in preferring the evidence of one expert over another, and this is because the trial judge has the advantage of hearing the witnesses first hand and assessing their answers, particularly under cross-examination. I cannot agree that there was no credible basis for preferring the evidence of the respondent's witnesses. The academic qualifications of Dr. O'Reilly, a senior lecturer, may have "*surpassed*" those of the respondents' experts, but that is not the test; indeed, the stronger expertise in a given field may be a combination of academic learning and research together with greater practical knowledge and experience of that field. Indeed, it was what the trial judge described as Dr. O'Reilly's "*somewhat academic standpoint*", compared to the experience inside and outside the retail industry that informed the respondents' experts, that led him to prefer their evidence. A reading of Dr. O'Reilly's report which contains extensive text and materials relating to the history of the grocery trade supports this view. While Dr. O'Reilly had "*hands on*" experience in convenience stores and a large petrol station/forecourt in Waterford up to 2000 he does not seem to have had the same direct experience of supermarket business as the respondent's experts. What is clear is that the trial judge considered his evidence, which he recounts in some detail in paragraph 100 – 109, and in the course of his judgment he gives cogent reasons for rejecting Dr. O'Reilly's opinion that "*grocery*" applies only to food and food ingredients.

173. I would therefore allow this appeal only to the extent that I would vary the High Court Order by inserting at the end of the third declaration the words "*provided that such items are non-durable*" in order to bring greater clarity and make it wholly consistent with the second declaration. In all other respects I would dismiss this appeal and affirm the orders of the High Court.

Costs

174. While the respondents have not been "*entirely successful*" in this appeal within the meaning of that term in s. 169(1) of the Legal Services Regulation Act, 2015, they have been very substantially successful, and I would propose that the appellants should pay to the respondents ninety per cent of their costs of the appeal, to be adjudicated by a legal costs adjudicator in default of agreement. A short costs hearing will be arranged on a date to be notified to the parties, unless the parties notify the Court of Appeal office before the date fixed that the proposed costs order (or some other costs order) is agreed.

As this judgment is being delivered electronically Noonan and Butler JJ. have read it and have indicated their agreement with the judgment and the orders proposed to be made.