

**THE HIGH COURT**

**[2022] IEHC 342**

**[Record No. 2020/7625 P.]**

**BETWEEN**

**DUNNES STORES UNLIMITED COMPANY**

**AND**

**CAMGILL PROPERTY A SÉ LIMITED**

**PLAINTIFFS**

**-AND-**

**DAFORA UNLIMITED COMPANY**

**FIRST NAMED DEFENDANT**

**AND**

**CORAJIO UNLIMITED COMPANY**

**T/A MR. PRICE BRANDED BARGAINS**

**SECOND NAMED DEFENDANT**

**JUDGMENT of Mr. Justice Mark Sanfey delivered on 3<sup>rd</sup> June, 2022.**

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### **Introduction**

1. The word “groceries” is one with which everybody is familiar. Most people would be comfortable using the word and, if asked, would readily acknowledge its familiarity and consider that they understand its meaning. The most cursory search of websites for supermarkets operating in Ireland shows that almost all of them offer sale and/or delivery of “groceries” or “grocery items”. There can be no doubt as to the widespread use of the term by retailers big and small, and the words “grocery” or “groceries” are in constant use in a variety of contexts: “grocery delivery”, “click and collect groceries”, “online grocery shopping”, and so on.

2. But what does the word “groceries” actually mean? This was the central issue in the present case, in which the plaintiffs seek, *inter alia*, to enforce a restrictive covenant preventing the defendants from selling “food, food products or groceries” from a retail unit at Barrow Valley Retail Park (‘Barrow Valley’), Sleaty Road, Carlow. While the term “food or food products” gave rise to little controversy – an interlocutory injunction was granted on 3<sup>rd</sup> December, 2020 by this Court restraining their sale by the defendants – the issue of what, in the context of the lease in question, constituted “groceries” took up five full days of court time involving eleven

witnesses, including a number of expert witnesses, and the making of complex and lengthy oral and written legal submissions.

3. The first named plaintiff in particular urged that resolution of the issue with regard to the Barrow Valley lease would have major implications for leases in other shopping centres in which it is an anchor tenant, and in respect of which similar wording is used. Indeed, both sides contended fiercely for their respective interpretations of the word “groceries”.

### **The parties**

4. The first named plaintiff (‘Dunnes’ or ‘Dunnes Stores’) is a private unlimited company which carries on the well-known ‘Dunnes Stores’ supermarket business. The second named plaintiff (‘Camgill’) is a company which is and has been entitled to the lessor’s interest in the leases the subject of these proceedings since on or about 14<sup>th</sup> December, 2017.

5. The first named defendant (‘Dafora’) is a private unlimited company which has as its principal activity the buying and leasing of its own property. The defendants together maintain that a sub-tenancy exists between Dafora and the second named defendant (‘Corajio’) which, according to an affidavit of 17<sup>th</sup> November, 2020 sworn by Mr. Declan Crinion, Managing Director of each of the defendants, “...trades as a discount variety goods retailer under the name of ‘*Mr. Price Branded Bargains*’” [emphasis in original]. Mr. Crinion avers at para. 27 of that affidavit that Corajio “entered into occupation of the Mr. Price unit [at issue in these proceedings] and commenced trading on 29 October, 2020 and employs 26 full-time staff”. Where appropriate, I will refer to the defendants collectively as ‘Mr. Price’.

**Background to the dispute: the Dunnes leases**

6. By leases of 19<sup>th</sup> December, 2005 and 14<sup>th</sup> February, 2008 ('the Dunnes leases'), 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), demised to Dunnes Stores units 5 and 6 respectively in Barrow Valley Retail Park. Each premises was demised for a term of one thousand years in consideration of the payment of a premium and the reservation of a yearly rent of €1. The sites, which comprise 0.797 acres and 0.498 acres, are registered respectively in folios 3073L and 3088L of the Register of Leaseholders County Laois.

7. Clause 3 of each of the Dunnes leases provided that the lessor covenanted to perform and observe the covenants set out in part III of the third schedule of the Dunnes leases, including certain restrictive covenants binding upon all of the 13.6 acre retail estate described in the first schedule to the plenary summons and certain adjoining lands as set out in the leases ("the restrictive covenants").

8. The restrictive covenants of particular relevance to the present dispute, and relied upon by the plaintiffs, were set out in the Dunnes leases as follows: -

"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 owed 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.

1.4 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).

1.6 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.”

9. Camgill acquired the lessor's interest in the Dunnes Stores leases and the Unit 4 lease, in respect of which Dafora acquired the lessee's interest as set out below, by deed of transfer dated 14<sup>th</sup> December, 2017.

**The Mr. Price lease**

10. By a lease of 12<sup>th</sup> July, 2007 ('the unit 4 lease') the lessor demised to Stephen Murphy ('the lessee', which term includes its successors and assigns, the first named defendant) the premises known as unit 4, Barrow Valley Retail Park, Sleaty Road, Carlow ('unit 4'). The lease described 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. The lease is now registered in folio 3087L of the Register of Leaseholders, County Laois.

11. By clause 2 of the unit 4 lease the lessee covenanted to perform and observe the covenants set out in the second schedule to the unit 4 lease which gave effect to the restrictive covenants in part III of the third schedule of the Dunnes leases and which covenants include *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.”

12. 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 County Laois in or about

26<sup>th</sup> 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 also accepts that it sub-let the unit 4 premises to Corajio prior to 29<sup>th</sup> October, 2020 and that Corajio commenced trading from unit 4 in or around that date. It is important to note that unit 4 is next door to units 5 and 6, the units owned by Dunnes Stores.

### **Background and correspondence**

13. Dunnes Stores did not waste any time investigating what products Mr. Price was offering for sale. Mr. Patrick Browne, the manager of the Dunnes Stores units, attended at unit 4 on 29<sup>th</sup> October, 2020 and 6<sup>th</sup> November, 2020. After inspecting the Mr. Price unit on the day of its opening, Mr. Browne informed Mr. Mark Clifford, a 'property director' of Dunnes Stores, that there was an array of products which Mr. Browne considered to be "food, food products and groceries". At para. 26 of his grounding affidavit on behalf of the plaintiffs in support of an application before this Court for interlocutory relief – to which I will refer in some detail below – Mr. Clifford referred to photographs taken by Mr. Browne on 6<sup>th</sup> 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."



**14.** The plaintiffs took the view that the sale of such items fell within the prohibition in the leases of the sale and display of food, food products or groceries. Dunnes Stores' solicitors wrote to Camgill on 9<sup>th</sup> November, 2020 pointing out what it regarded as breaches of the restrictive covenants by the defendants. The managing agents – Mason Owen & Lyons – appointed by the management company in respect of the retail park responded immediately, indicating that they had written to the first named defendant on 4<sup>th</sup> November, 2020 requesting that it desist from the sale of food and food products and remove them from the premises.

**15.** Dunnes Stores had in fact written to Dafora by letter of 30<sup>th</sup> October, 2020. This letter referred to the substance of the restrictive covenants, and further set out that the sale of any food, food products or groceries being sold at the premises was in breach of the restrictive covenants and must be removed from sale immediately. The letter stated that all offending items must be removed by close of business on 31<sup>st</sup> October, 2020, failing which Dunnes Stores would be left with no alternative but to institute legal proceedings.

**16.** A further letter of 4<sup>th</sup> November, 2020 from Dunnes Stores to Dafora followed, in which an “immediate” application to court for prohibitory injunctive relief was threatened unless “all food and grocery products” were removed from sale by close of business on that day. Further correspondence ensued and ultimately the respective solicitors entered the fray. By the second of two letters of 10<sup>th</sup> November, 2020, the defendants' solicitor indicated that the defendants were prepared to give an undertaking to remove all food or food products pending resolution of the dispute, and that it would take twenty-four hours to complete this task. The letter further indicated that the term “groceries” contained in the lease was ambiguous, given that there was

no definition of the term in the lease, and that it would therefore be inappropriate for a court to consider a prohibition on the sale of “groceries” at an interlocutory hearing.

17. The plaintiff’s solicitors responded by a further letter of 10<sup>th</sup> 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”.

18. By the second of two letters of 11<sup>th</sup> November, 2020, the defendants’ solicitors reiterated their offer of an undertaking on the part of the defendants in respect of “food and food products”, but not groceries.

19. The plaintiffs then proceeded to issue on 12<sup>th</sup> November, 2020 a plenary summons and a notice of motion seeking interlocutory relief against the defendants, returnable for 17<sup>th</sup> November, 2020.

### **The interlocutory application**

20. The plaintiffs sought interlocutory orders against each of the defendants prohibiting them “from using or permitting the use of [unit 4] in breach of the conditions of Clause (20) of the Second Schedule of [the lease of 12 July, 2007 between Redhill Properties Limited and Stephen Murphy]...and specifically prohibiting [the defendants] from offering for sale and/or selling food, food products or groceries contrary to the provisions of Clause (20)...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 upon which [the defendants occupy unit 4]...”.

**21.** The application was grounded upon the affidavit of Mark Clifford, a “property director” of the first named plaintiff. Mr. Damien Conway, a director of Camgill, swore a short affidavit in support of the application. Both Mr. Clifford and Mr. Conway subsequently gave evidence at the plenary hearing before me. Mr. Declan Crinion, Managing Director of the first and second named defendants, swore a detailed replying affidavit on 17<sup>th</sup> November, 2020, and the defendants also proffered an affidavit of Mark Millward, a “senior retail consultant”, sworn on 20<sup>th</sup> November, 2020. Neither Mr. Crinion nor Mr. Millward subsequently gave evidence at the plenary hearing. Mr. Clifford and Mr. Conway both swore further affidavits, and the plaintiffs also submitted an affidavit of Anthony Foley, an Emeritus Associate Professor of Economics at Dublin City University by way of expert evidence, and also comment on Mr. Millward’s evidence. Mr. Foley subsequently gave oral evidence at the plenary hearing.

**22.** The application was heard by Allen J on 1<sup>st</sup> December, 2020. The court reserved its judgment, which was delivered *ex tempore* on 3<sup>rd</sup> December, 2020, and a transcript of the judgment was made available to this Court. Allen J noted that “...Mr. Price opened for business on 29<sup>th</sup> October in wilful breach of the covenant, at least as to food and food stuffs, which Mr. Crinion acknowledges account for 11% of the offering...” [transcript p.16, lines 7-10]. The court went on to state that “...the central issue between the parties is to what constitutes or comes within the meaning of ‘groceries’” [transcript p. 17, lines 18-20].

**23.** Allen J stated that “...*prima facie*, the use in the covenant of the disjunctive ‘or’ suggests that groceries are a wider category than food and food stuffs...” [p. 19, lines 16-18].

24. He noted that "...both sides point to various definition of groceries in various acts, statutory instruments and EU regulations. What these show is that there is no common statutory definition of groceries, but that the classification of goods can vary widely in legislation depending on the object or purpose of the legislation"... [p. 20, lines 5-10]. In terms of fashioning an order, Allen J had this to say:

"It was suggested in argument that Mr. Price, or Mr. Crinion, as an experienced retailer, would be in no doubt as to what are groceries, and that in case of doubt or difficulty, Dunnes might give notice of objection to any particular item before applying to a court to enforce the order. That, in my firm view, would not be a correct way to proceed. In *Aldi Stores v. Dunnes Stores* [2019] IESC 41, Mr. Justice O'Donnell emphasised the long established principle that:

'An order should not be expressed in terms which simply re[s]train a breach of the law but that a person restrained by an order of the court enforceable by committal must know exactly what he has to do or not do'". [p. 21, lines 12-26, emphasis in original]

25. The court went on to state as follows: -

"The real difficulty which I have had with this case is with the form of order sought. The premise of the application is that there is a *bona fide* issue to be tried as to whether the goods identified in Arthur Cox's letter and the grounding affidavit of Mr. Clifford or in the Kantar lists are groceries. I am satisfied that the plaintiffs have established that there is such a fair question to be tried. Some or all of the list of products may ultimately be established to be groceries. Some of them may ultimately be found not to be. Unless and until there is a determination of what products are and are not groceries, Mr. Price

cannot know what the court says the word means...” [p. 24, transcript, lines 8-20].

“...as matters stand, an order in the terms sought would see Mr. Price presented with, on the one hand, an order enjoining it, on pain of sequestration, from selling or displaying for sale groceries. And on the other, a list of items which the court would have said may or may not be groceries. That, it seems to me, ...would be a complete mismatch...” [p. 25, transcript lines 8-14].

“...it would not be right that Mr. Price would ... see its assets sequestered for selling something which had not previously been decided to be groceries and which it had not been unambiguously ordered not to sell...for these reasons I am not satisfied to make an order in the terms sought.” [Transcript p. 25, lines 21-28].

**26.** It should be emphasised that the orders were made in the context of an interlocutory application and strictly in anticipation of more detailed evidence and presentation of the parties’ respective cases at the plenary hearing. A subsequent order of the court on 18<sup>th</sup> January, 2021 (Reynolds J) directed that the issue of liability only be considered at the plenary hearing “...and that the Plaintiffs’ claim for an account of profits be tried subsequently in the event that the Plaintiffs succeed on liability...”.

### **The pleadings**

**27.** In truth, there is little factual dispute between the parties in these proceedings. The making and terms of the various leases are not at issue, although there is a comprehensive dispute as to their meaning. It is necessary therefore to look in some detail at the pleadings in order to be clear as to the respective positions of the parties, and the basis upon which they either seek or resist the reliefs sought.

**28.** In terms of reliefs, the plaintiffs seek permanent injunctions in the terms sought at the interlocutory stage as summarised at para. 20 above. Paragraphs 3 and 4 of the reliefs in the statement of claim seek orders of specific performance which purport to compel compliance with clause (20) of the unit 4 lease. Paragraphs 5 and 6 seek declaratory relief that clause 1 of part III of the second schedule of the unit 5 and 6 leases is binding on each of the defendants. Further declaratory relief is sought at para. 7 to the effect that the restrictive covenants at clause (20) be deemed “for the benefit of good estate management and all other lease holders to include the First Named Plaintiff..”. Paragraph 10 seeks relief relevant to the issue of quantum, should the plaintiffs be successful on liability.

**29.** All of the injunctive or specific performance reliefs are cast in general terms, and rely on the wording of the provisions of the leases. However, paras. 8 and 9 of the reliefs in the statement of claim seek more “bespoke” orders:

“8. A declaration that the term groceries in clause (20) of the Second Schedule of the Unit 4 Lease incorporates, *inter alia*, the product types or categories identified in Schedule A to this Statement of Claim, each and/or all of them.

9. In the alternative, a declaration that the term groceries in Clause (20) of the Second Schedule of the Unit 4 Lease encompasses each and/or all of 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; and toothpaste; kitchen towel and toilet rolls;”

**30.** The gravamen of the plaintiffs' case is set out at para. 11 of the statement of claim which, although lengthy, merits reproduction here: -

“11. The Plaintiffs (their predecessors in title) together with the Defendants and their predecessor in title when entering into the leases of Units 5, 6, and Unit 4 understood the meaning of food, food products and groceries as the then commonplace and applicable standard meaning of the term within the retail food and grocery sector. In that context, the individual restrictive covenants as per the individual leases constituted both terms applicable to that unit and also a clause constituting an estate management clause within the entire development and binding as between lessees and enforceable as such. 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.”

**31.** As this paragraph suggests, there are two appendices at schedule A to the statement of claim. These comprise lists of categories of what the plaintiffs contend are “groceries” within the meaning of the restrictive covenants. The first list is headed “KANTAR”, and beneath the heading is the following statement: “This is to confirm that Kantar used the following the categorisation to define the Take Home Grocery Market...”. There then follows certain headings: “Total Alcohol, Total Ambient Groceries, Total Fresh & Chilled, Total Frozen, Total Healthcare, Total Household and Total Toiletries”. Under each of these headings are various generic descriptions of items: for instance, the “Ambient Groceries” category includes “Ambient Slimming Products”, “Canned Goods”, “Take Home Confectionary” *etc.* The list is undated; no explanation is given on the face of the list as to its provenance – other than the heading “Kantar” – or as to the methodology or criteria involved in its categorisation.

**32.** The second list is a much more elaborate list, with different headings and much more detail in relation to the items set out in the different categories. In addition to food and food products, the list contains categories entitled “Household” and “Health and Beauty”. Each of these contains a lengthy list of qualifying items: examples under “Household” would be “Bin Liners”, “Facial Tissues”, “Household Insecticides” *etc.*

**33.** This list, unlike the first list, has no logo identifying it as a Kantar list. Once again, there are no indications on the list itself of its provenance or the methodology involved in selecting the designated items.

**34.** There was significant discussion during the hearing as to the role of Kantar and its relevance to the dispute. Somewhat unhelpfully, there was no evidence at the



hearing from Kantar, so that a first-hand account of exactly what that entity does and how its methodology is relevant to the present dispute was not available. 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.

**35.** The defendants firmly reject the use or applicability of the Kantar lists, and it is worthwhile to consider their precise pleas in this regard: -

“15. It is denied that the Kantar Worldpanel classification as pleaded at paragraph 11 of the Statement of Claim constituted the accepted meaning of the terms food, food products or groceries within the retail sector at the time that the Dunnes Leases and the Unit 4 Leases were entered into.

16. It is denied that the product types or categories identified by Kantar Worldpanel as food, food products or groceries constituted the parties then understanding, at the date of entry into of the various leases. There is no basis whatsoever for this plea in circumstances where the parties to the leases in

2007 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.

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'..."

31. The Plaintiffs have now modified their claim and have sought additional declaratory relief at paragraphs 8 and 9 of the prayer for relief in the Statement of Claim, which form of relief was not sought in the Plenary Summons. The Defendants object to these reliefs insofar as they necessarily suggest it is appropriate for this Honourable Court to delegate to Kantar Worldpanel the task of construing the Restrictive Covenants in the Leases, which, self-

evidently, it is not. It is clearly impermissible for the Plaintiffs to seek to decant the views of Kantar Worldpanel, which are manifestly irrelevant for the purposes of construing Clause 20 of the Second Schedule of the Unit 4 Lease, into that Clause...”.

**36.** The defendants also reject the categorisation of groceries suggested at para. 9 of the reliefs, quoted at para. 29. They describe this definition as “self-serving, arbitrary and over-broad, constituting a casual expansion of the use of the term ‘groceries’ to encompass many product types sold in a supermarket which go beyond the meaning of the word ‘groceries’ as defined in the Dunnes Leases and the Unit 4 Lease...” [para. 19 defence]. They plead that they will rely on “...the common industry practice applicable to general commercial retail and not specifically the grocery market wherein the terms ‘grocery and food’ are commonly understood to be separate and distinct categories from confectionary, toiletries, cosmetic, perfumes and household accessories...” [defence para. 20].

**37.** The defendants contend at para. 21 of the defence that the overall purpose and object of clause 20 of the second schedule of the unit 4 lease “...was intended to operate so as to prohibit a competing supermarket to operate alongside what are now the Dunnes Stores premises...”. It is pleaded in the alternative that the word “groceries” constitutes a term which is vague and ambiguous “such that it is void and ought to be severed from Clause 20 of the Second Schedule of the Unit 4 Lease”.

**38.** The defendants plead that, further or in the alternative, it can 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 food products. The defendants also plead that the defendants are estopped from “relying on their subjective 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 14<sup>th</sup> 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 hearing**

**39.** After service by the plaintiffs of a reply to the defence and exchanges of particulars, very detailed written submissions were delivered by both sides in advance of the plenary hearing, which took place remotely and concluded on 8<sup>th</sup> June, 2021. Nine witnesses were called on behalf of the plaintiffs, and two by the defendants. 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 gave evidence, and counsel for the plaintiffs 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.

**40.** It is perhaps appropriate to say that I have not, in coming to the conclusions set out in this judgment, had regard to the affidavit evidence in support of the interlocutory application. I have therefore not taken into consideration the affidavit evidence of Mr. Crinion or Mr. Millward, in circumstances where they did not give evidence at the plenary hearing.

41. In this judgment, I summarise the evidence given by witnesses for the parties. This summary is not intended to be exhaustive, and is limited to describing, in a general way, the evidence as it related to the legal arguments concerning the construction of the restrictive covenants. I should say however, that, in preparation of this judgment, I re-read the entire of the transcripts of the hearing, and consulted the digital audio recording where necessary. I have taken all of the evidence proffered at the hearing into account in coming to the conclusions I have reached.

### **The plaintiffs' evidence**

#### **Mr. Irwin Druker**

42. Mr. Irwin Druker was the plaintiffs' first witness. He stated that he was a former partner in Druker Fanning Estate Agents, and had extensive experience in the acquisition of stores in shopping centres, retail parks and standalone developments. He had acted for Dunnes Stores for in excess of 40 years in this regard. 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. He recalled his dealings with Mr. Stephen Murphy of Redhill Properties Limited ("Redhill"), the original lessor of units 5 and 6, as regards the terms of the lease. Mr. Murphy, who was also the original lessee of unit 4, had obtained planning permission for a supermarket in unit 5, and approached Mr. Druker to find out whether Dunnes Stores would be interested in the unit. Dunnes was indeed interested, but, according to Mr. Druker "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..." [day 1, p.76, lines 14-19]. Mr. Druker confirmed that Dunnes had presented the

clauses to Mr. Murphy's solicitor, who accepted them as drafted [day, 1, p.81, lines 9-15].

**Mr. Joseph Stanley**

43. Mr. Joseph Stanley is a partner with the solicitors' firm of Eversheds Sutherland, formerly O'Donnell Sweeney. His core practice relates to commercial property transactions. He stated that he did most of the property work for Dunnes Stores between 1994 and 2009, and 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 "permitted user" definition in the Dunnes leases which he described as "...a standard, very wide user clause that would have applied to any anchor leases that Dunnes would have entered into...in deals I would have acted for them on... [day 1, p.86, lines 5-8]:

"(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".

44. Mr. Stanley said that it was a "Dunnes absolute requirement that its user clause would apply to anchor leases..." [day 1, p.88, lines 11-12]. He also confirmed

that the restrictive covenants at part III of the leases, including the prohibition on “the sale of any food, food products or groceries” “...in a retail park or shopping centre context...would have been standard”. Mr. Stanley gave evidence in relation to the negotiation of the restrictive covenants with Mr. William Fleming, the solicitor who acted for Redhill/Mr. Murphy. Mr. Stanley confirmed that he did not have any involvement in drafting the unit 4 lease, but that he would have expected that “...those restrictions [*i.e.* those in the Dunnes leases] would be replicated in other leases granted by Mr. Murphy to other purchasers or tenants of units in the retail park...” [day 1, p.99, lines 3-6].

**Mr. William Fleming**

**45.** Mr. William Fleming is a solicitor based in Carlow. He was a partner in the firm of AB Jordan Solicitors until 2006, since when he has been principal of William Fleming & Partners. He acted for both Redhill and Mr. Murphy in respect of the Barrow Valley leases. 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].

**Mr. Michael Carrigan**

47. Mr. Michael Carrigan is a solicitor and a former partner in the firm of Eugene F. Collins. Counsel for the plaintiffs intended to call him in order to adduce expert evidence of conveyancing practice. Counsel for the defendants complained that no notice had been given that Mr. Carrigan was to be called, and that no evidence as to conveyancing practice was in any event necessary to resolve the issues before the court. In the event, I permitted Mr. Carrigan to give evidence *de bene esse*, subject to a decision as to whether his evidence should indeed be accepted or disregarded.

48. Mr. Carrigan, whose expertise in the area of conveyancing in respect of commercial property was readily accepted by the defendants, gave evidence as to the way in which an anchor tenant would insist on restrictive covenants and exclusivity, the extent of which would depend on the individual circumstances. He referred to his experience in acting for a major retailer, and in response to a question from counsel, indicated that it was not his experience that the word “groceries” was defined.

49. Under cross-examination, Mr. Carrigan confirmed that the words “grocery” or “groceries” “...have a commonly understood meaning in the industry and are not vague or ambiguous terms...” [day 1, p. 128 lines 8-12]. Significantly, when asked what industry he was referring to in giving this answer he said: -

“...Well, I am referring to retail supermarkets of the kind of, I’m going to call the anchor store here. Insofar as I acted for a major UK retailer in relation to a number of stores in different shopping centres, I would say that their understanding of the word ‘grocery’ was clearly defined, they had a clear understanding of what that word meant. 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 were talking about when they were referring to groceries.” [Day 1, p. 128, lines 15-25].

**50.** Counsel summarised Mr. Carrigan’s evidence as saying that “...clients of yours in the retail industry have a clear understanding of that term and are happy that it would be used...” [day 1, p.129, lines 2-6]. Mr. Carrigan accepted this as a fair summary. He went on to say that “...I would be saying really that as far as the parties are concerned it is very important that they understand what they mean. And I come back to the point I said earlier, that if I get a heads of terms from the parties or the agents with wording of that kind, unless I’m asked specifically by the clients to advise on the wording, I will accept that wording on the basis that they are experienced people and they know what they are talking about...” [day 1, p. 133, line 26 p.134, line 5 – p. 134, line 5].

**Mr. Mark Clifford**

**51.** Mr. Mark Clifford then gave evidence. As he was the only person from Dunnes Stores to give evidence, it will be necessary to dwell on his evidence in some detail. Mr. Clifford, who had been the primary deponent in support of Dunnes’ application for an injunction, told the court that he was a “property director” in Dunnes Stores and was “responsible for property acquisitions and disposals, as well as asset management and property management matters across the estate...” [day 1, p.137, lines 16-19]. He said that he had been with Dunnes Stores for six years and been the property director for two years, having worked for the supermarket chain Lidl for ten and a half years before that. He acknowledged at the outset of his evidence that he was “not in the retail operation side of the business” [day 1, p.138, lines 10-11].

**52.** Mr. Clifford gave evidence of being informed by the Dunnes Stores manager in Barrow Valley, Mr. Browne, of the results of his inspection of the Mr. Price store on the day it opened, and of instructing the company's in-house legal department to write to Mr. Price to convey its concerns. He referred to photographs taken by Mr. Browne and a list of items purchased at Mr. Price, all of which included items such as cleaning products, washing-up liquid, paper towels as well as food. He expressed the view that these items comprised "food, food products and groceries..." [day 1, p.143, lines 8-10].

**53.** The defendants objected to Mr. Clifford expressing a view as to what was comprised in "groceries" without setting out the basis for that view. In response to a question from the court, Mr. Clifford stated that his personal opinion as to what "groceries" were was "the industry held view"; he accepted as correct the court's proposition that this was "the view of the people with whom you have had contact over twenty years who have expertise in retail..." [day 1, p.146, lines 9-22]. He emphasised the importance to Dunnes Stores of exclusivities in relation to the operation of retail parks and tenant mixes.

**54.** Mr. Clifford was asked 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 this had been dealt with by Dunnes. He said the Dunnes policy was to enforce the restrictive covenants and request the removal of the offending products, and that ToGo had complied with these requests when they were made.

**55.** On cross-examination, Mr. Clifford accepted that he was not involved in the negotiation or execution of the leases, and could not assist the court in relation to what might have been the common understanding of the parties as to the terms of the leases

when they were negotiated and executed [day 2, p.18, lines 15-19]. He was asked whether there was a "...list of products that Dunnes has that are groceries and a list of products that Dunnes has that are non-groceries...". Mr. Clifford said that he was unaware whether such a list existed, or if it did, whether its composition had changed over time [day 2, p.22, line 15 – p.23, line 17].

**56.** Counsel for the defendants asked Mr. Clifford what, in the absence of such a list or categorisation by Dunnes Stores, enabled Mr. Clifford to express a view as to what constituted "groceries". Mr. Clifford stated "...It's my opinion having worked directly for retailers for 16 years". Counsel then sought Mr. Clifford's opinion on a range of individual items as to whether they were "groceries" or not: 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. Inter-dental brushes, soothers, coffee filters, paper napkins and nappies were in his opinion grocery items. Flowers were groceries but house plants were not [day 2, pp. 24-26]. 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].

**57.** Counsel then referred to a current sales promotion by Dunnes whereby if a customer spent €25 on groceries, the customer would receive a coupon for €5 off the next grocery shop; if the customer spent €50 on groceries, a coupon for €10 would be received. Mr. Clifford accepted that this promotion applied to "groceries"; it did not apply to categories such as textiles or homeware. Counsel then referred to five items purchased in Dunnes Stores in the Swan Centre in Rathmines in Dublin the previous evening – the parties agreed that there was no need to adduce formal evidence in this regard – and asked Mr. Clifford his opinion as to whether they were groceries or not. Mr. Clifford opined that a packet of highlighters and a packet of coat hangers were

not groceries; compostable rubbish bags, washing machine cleaner and a “Flash Speed Mop” were groceries. A packet of face masks was a grocery item “in the last 12 months”.

**58.** Counsel for the defendants then put it to Mr. Clifford that the promotional discount to customers who purchase groceries was applied to all of these items including the packets of highlighters and coat hangers, and that Mr. Clifford’s position on what constituted groceries did not appear to be consistent with Dunnes Stores categorisation of “groceries” in its dealing with customers. Mr. Clifford replied that this was a promotion which did not necessarily define what Dunnes Stores considered to be groceries [day 2, p.26, line 11 – p.30, line 8]. Counsel then referred to a further purchase by his solicitor that morning of the following items: a water filter jug, a USB cable adaptor, a ream of paper and a razor. All of these items were accepted by Dunnes for the purpose of the discount in a promotion purportedly limited to groceries [day 2, p.30, line 23 – p.33, line 9].

**59.** When asked what his understanding of “grocery store” was, Mr. Clifford said that “A grocery store would be where you can purchase items, non-durable consumable items...” [day 2, p.34, lines 22-23]. He acknowledged his familiarity with “FMCGs” – “Fast Moving Consumer Goods” - as a category in the industry.

**60.** Mr. Clifford was asked about the addition of paras. 8 and 9 – as quoted above at para. 29 – in the statement of claim, but he indicated that the Kantar lists were not matters he would normally engage with in the course of his work, and it was suggested that other witnesses might deal with questions relating to Kantar.

**61.** It was also put to Mr. Clifford that on several occasions between May 2019 and May 2021, infringement of the restrictive covenant on the part of ToGo had been identified by Dunnes Stores, and yet no proceedings had been commenced against that

entity, whereas proceedings had been commenced against Mr. Price within a fortnight of the commencement of trade “despite the fact that they had offered an undertaking two days prior to you commencing the proceedings to withdraw food and food products from sale...” [day 2, p.93, lines 18-23]. It was suggested that “...on any view of the matter there has been a completely inconsistent approach adopted by Dunnes Stores as regards Mr. Price in the Barrow Valley Retail Park and as regards ToGo and that inconsistency of approach undermines the credibility of the case you are making in this Court on what constitutes groceries...”. Mr. Clifford replied that ToGo had not contested that it was in breach of covenant and had removed the offending products on each occasion when Dunnes Stores raised the issue [day 2, p.94, line 26 – p.95, line 20].

**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.

**Mr. Gary Taaffe**

**63.** Mr. Gary Taaffe is a property director at Mason Owen & Lyons property consultants. That firm is the letting agent which manages the retail park. It manages the service charges and is involved in obtaining tenants for Camgill. He gave evidence in relation to his dealings on behalf of Camgill with ToGo, and also in relation to the

letter of 4<sup>th</sup> November, 2020 from Mr. Paul Kelly, the Managing Director of Mason, Owen & Lyons which requested that Mr. Price “immediately desist from the sale of food, food products and remove same from your premises...”. Mr. Taaffe said that the omission of “groceries” had been rectified in subsequent correspondence.

**64.** Mr. Taaffe gave evidence of his involvement with the company that developed Blanchardstown Shopping Centre, and his extensive experience as a letting agent. He said 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. Mr. Taaffe distinguished between “food” and “grocery”. However, when challenged on cross-examination as to whether he was offering a view as to what did or did not constitute “groceries”, Mr. Taaffe confirmed that he would have regard to “my experience of reading the lease and in terms of the lettings that we would do and what they would mean, in terms of the size of the units, the supermarket and what they sell...” [day 2, p. 139, lines 3-6]. He went on to say that “...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 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].

**Mr. Damien Conway**

**65.** Mr. Damien Conway is a director of Camgill and a minority equity shareholder in that company’s business. He gave evidence in relation to Camgill’s involvement in the initial complaint by Dunnes Stores in relation to Mr. Price. He

regarded Dunnes Stores as having exclusivity in relation to food, food products and groceries and stated that the position was “very clear-cut...from our point of view”.

66. On cross-examination, Mr. Conway stated that he did not consider himself a “retail specialist”. He accepted that, as regards what constituted “groceries”, Camgill was in effect deferring to Dunnes Stores’ view; neither Camgill nor Mr. Conway had an independent view, as neither has expertise in the retail business, and Mr. Conway did not have any expertise in respect of what Kantar does.

### **The Plaintiff’s expert evidence**

#### **Mr. Malachy O’Connor**

67. Mr. Malachy O’Connor gave expert evidence on behalf of the plaintiffs, and supplied a report for that purpose. Mr. O’Connor described himself as a “consultant in the grocery industry”, and is involved in a number of consulting businesses dealing with manufacturers and retailers in the food industry generally. He has over the course of twenty-years worked for most of the major supermarkets, “primarily in head office roles”. He writes regular blogs on grocery retail trends, and his articles are featured regularly in trade magazines.

68. Mr. O’Connor adopted his written report to the court as part of his evidence in the case. He stated in his report that the questions on which his assistance had been required by the plaintiffs were: -

“What categories of goods can be covered by the term groceries and how widely accepted is this understanding?

And

would Mr. Price be regarded as a supermarket, hypermarket, grocery, discount food store, frozen food outlet, mini food market, convenience store or any similar premises for the sale of food, food products or groceries?”.

69. Mr. O'Connor concisely summarised in his report his opinion in relation to the first of these questions as follows: -

“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” [para. 4].

70. Mr. O'Connor went on in his report to say the following: -

**“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.”

71. In his report, Mr. O’Connor refers to a number of statutory provisions which refer to the concept of ‘groceries’, noting that the Competitions (Amendment) Act 2006 defined ‘grocery goods’ as “any food or drink for human consumption that is intended to be sold as groceries...”. This provision however must be seen in context; section 4 of that Act was enacted to revoke the Restrictive Practices (Groceries) Order 1987 (SI No. 142 of 1987) which prohibited practices such as selling below net invoice price, boycotting and ‘hello’ money. Mr. O’Connor stated that the Competition Authority, which delivered its second report in respect of the “Grocery Monitor Project” in March 2008, considered that “grocery goods” should be defined as “food and drink sold for human consumption and household necessities” and suggested that the competition authority therefore clearly regarded “grocery goods” as extending beyond food and including “household necessities such as personal care and household cleaning products...” [para. 5.5]. Mr. O’Connor acknowledged that “...the different regulations and legislations that are referenced [in his report] have slightly different views on what is included and not included [in the term ‘groceries’]. But that’s not, as I read it, not to re-define what groceries are, but to reflect the purpose and objective of the different pieces of legislation at that time...” [day 3, p.15, lines 5-11].

72. In his oral evidence, Mr. O'Connor gave his opinion as to what was meant by the terms used by the different types of stores referred to in the restrictive covenants set out at para. 8 above: supermarket, hypermarket, grocery, discount food store, frozen-food outlet, mini-food market and convenience store [day 3, pp. 9-11]. He was asked about the nature of the business that Mr. Price carries on, and stated that "...Mr. Price offers a variety of goods, including grocery and various other non-grocery categories...they have very minimal refrigerated space, so very little temperature controlled products so, therefore, very little fresh foods. Milk perhaps, and nothing much beyond that. They have ambient grocery items which include long life foods like sauces and breakfast cereals, confectionary *etc.* They also have other ambient products like household cleaning, detergents, and they have personal care products like toothpaste, toothbrushes, personal hygiene-type products, and then an array of other categories such as barbeque-type products, party ware et cetera..." [day 3, p.12, lines 2-16].

73. In both his oral and written evidence, Mr. O'Connor addressed the role of Kantar. At para. 5.6 of his report, he stated as follows: -

**"5.6 Kantar Grocery Market Share Data**

Kantar are an industry recognised research agency. They manage a nationally representative panel of households who share their grocery purchase information. Currently, 5,000 Irish households contribute their take-home grocery shopping data with Kantar. Kantar then categorise this data and track trends to extract insights that can help retailers and manufacturers to better satisfy their evolving needs. The information from the 5,000 households is extrapolated to create overall market share and category performance data. Kantar measure the 'total grocery basket', which they distinguished from

products consumed outside the home. Their data set includes short-life foods, long-life foods, drink and non-food items including health & beauty and household goods. Over time, Kantar have added additional levels of detail, but these are in the form of additional grocery sub-categories rather than being considered separate to grocery. It is the case that new sub-categories can emerge over time. For instance, men's grooming, vegan or gluten free foods did not exist as sub-categories in any meaningful sense 20 years ago. Their emergence reflects evolving consumer needs within diet and personal care but it does not make them separate from groceries. Kantar's market insights have included commentaries on trends in areas such as vegan eating, skincare during the summer season, sanitary and cleaning products during the pandemic, personal care product trends linked to the recent lockdowns. Kantar regard all of this as 'grocery' and my opinion is that this is a shared understanding with the industry (retailers and suppliers) that they serve and the shoppers or consumers that they serve."

74. Mr. O'Connor was asked in examination in chief about the two lists in schedule A to the statement of claim, the first list being from 2005, and the second from 2012. Mr. O'Connor noted the difference in the level of detail between the two lists, and stated that his view in this regard "...is that the overall categorisations and understandings of what constitute grocery haven't changed but the level of detail they offer on some of the sub-categories has..." [day 3, p.17, lines 18-21]. Mr. O'Connor accepted that the Kantar lists did not comprise "a conclusive list...of all groceries..." [day 3, p.18, lines 25-26].

75. Mr. O'Connor was asked whether he agreed with the contention of the defendants that "groceries" was a synonym for food and food products. His view was

that it is not. He referred in his report to an “FMCG sector” and expressed the view that FMCG is a synonym for grocery.

76. On cross-examination, Mr. O’Connor was pressed as to how he would classify Mr. Price. He accepted that Mr. Price was not a supermarket, a hypermarket, a frozen food outlet, a discount food store, a mini food market or a convenience store. 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]

77. Counsel for the defendants suggested to Mr. O’Connor that, if non-food items were capable of constituting groceries, many different types of retailers other than the types of stores set out in the restrictive covenant sold groceries. By way of illustrating this principle, counsel referred to a table in a report prepared for the defendants by Mr. Aidan Ringrose of Ringrose Chartered Surveyors. Mr. Ringrose, as we shall see, gave evidence on behalf of the defendants at the hearing. The table set out a list of the products set out in the reliefs in the plenary summons, comprising eighteen categories of what the plaintiffs contend are groceries. The table then indicated whether those products could be bought in a number of different retail outlets. By way of example, the table indicates that the category “healthcare products” can be bought in a chemist, a supermarket, a station forecourt, an office supplier, a discount store, and the ToGo store in Barrow Valley. Pet care and pet food can be bought in a supermarket, DIY store, pet store, discount store and the ToGo unit. Detergents can be bought in a supermarket, a station forecourt, a DIY store, an office supplier, a discount store and

the ToGo unit. Toothbrushes and toothpaste can be bought in a chemist, supermarket, station forecourt, discount store and the ToGo unit.

**78.** Counsel suggested to Mr. O'Connor 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". Mr. O'Connor accepted that this was probably so, and that it was the case that a large variety of retailers, including non-grocery stores and non-supermarkets, sell groceries.

**79.** Mr. O'Connor was questioned in cross-examination about his knowledge of Kantar and its activities with regard to the issues in dispute. He acknowledged that he posts on his website his observations on the grocery market based on releases of new information by Kantar [day 3, p.57, lines 14-19], and that Kantar produces reports estimating share of the grocery market; this information is published every four weeks, and is of particular public interest as it monitors the market share of the major supermarkets, Dunnes, Supervalu and Tesco, which Mr. O'Connor accepted would all tend to have a market share in the low 20%, with Aldi and Lidl having a somewhat lower share at 12 or 11%; the remaining category being "other" with approximately 10% market share.

**80.** Mr. O'Connor accepted that well known entities such as Spar, Mace and Londis are all convenience stores, and all sell groceries. It was put to Mr. O'Connor that Nielsen, a well-known consumer data organisation, estimated that convenience stores had a 35%-37% share of the grocery market, and that Mr. Damien O'Reilly, a retail expert subsequently called by the defendants, would say that Kantar does not take sales in convenience stores into account. Mr. O'Connor disagreed with this proposition, giving the view that the sales of groceries from convenience stores were included by Kantar in the "other" category of 10% [day, 3, pp. 62-64]. He conceded

that, where grocery items were consumed before they could be uploaded by any of the panel of five thousand consumers into the Kantar database – such as might occur with breakfast rolls, confectionary, soft drinks *etc* - such items would not be included in the Kantar data. He accepted therefore that “it might be fair to say that the convenience sector is bigger than the Kantar estimate but it’s not correct to say that they dis-include them” [day 3, p.66, lines 1-3]. Mr. O’Connor did not accept Mr. O’Reilly’s proposition, made in his report to the court, that “the grocery market share [as estimated by Kantar] is quite obviously supermarket share”.

**81.** Mr. O’Connor accepted that his “basic position” was that groceries and FMCGs were “the same thing”. He was then asked by counsel about “very well-known international FMCG companies...like Unilever and Proctor & Gamble”. Taking the latter entity, counsel referenced their products such as Fairy Liquid, Gillette, Head & Shoulders, Crest *etc*. Mr. O’Connor was asked whether Proctor & Gamble are “in the grocery business”. He expressed the view that Proctor & Gamble “clearly operate in the grocery trade”. He disagreed with Mr. O’Reilly’s assertion that Proctor & Gamble is “a consumer goods company and it is not in the grocery business”. He expressed a similar view in relation to Unilever, *i.e.* that Unilever “sell consumer goods in the grocery sector” [day 3, p.76, line 12 – p.77, line 27].

**82.** Mr. O’Connor was also asked about cosmetics. He said that they were “a sub-division of health and beauty which is a species of groceries” [day 3, p.93, lines 26-27]. It was suggested by counsel that, in the absence of a “carve-out” in the lease, Dunnes regards ladies’ cosmetics as groceries which would thus fall foul of the restrictive covenant. Counsel suggested that this interpretation “creates an absurdity”, in that no consumer would regard a ladies’ cosmetics store as a grocery store even if it sold nothing but ladies’ cosmetics, and that if such consumers bought items there,

they would not regard themselves as having bought groceries. Mr. O'Connor accepted that such a store could not be regarded as a grocery store, but that some of the products sold could be regarded as grocery items. Counsel suggested that the reason a consumer would not regard a ladies' cosmetics store as a grocery store was because a consumer would not regard the items sold as groceries. Mr. O'Connor did not accept this [day 3, p.95, line 18 – p.96, line 21].

**Mr. Anthony Foley**

**83.** The next expert witness for the plaintiff was Mr. Anthony Foley, who is an Emeritus Associate Professor of Economics at Dublin City University, and a part-time lecturer at both DCU and the Institute of Public Administration. Mr. Foley retired from his fulltime role at DCU in 2017. He has consulted extensively for various government departments and representative associations, and previously worked as an economist in the Economic and Social Research Unit, among other public bodies. He is currently an economic adviser to the Drinks Industry Group of Ireland.

**84.** Mr. Foley furnished a report of 23<sup>rd</sup> November, 2020, and adopted this report as his evidence at the hearing before me. In the report, he expressed the issue to be considered in his report as “what categories of goods are covered by the term groceries”, and was provided with copies of the pleadings and affidavits in the proceedings up to the date of the interlocutory application.

**85.** Mr. Foley expressed in his report his “opinion” concisely as follows: -

“10. My opinion is that the term ‘grocery’ includes more than food. Grocery is not to be considered as equivalent to food. Food is a component of grocery. My opinion is that the term ‘grocery’ includes goods described as non-durable household necessities 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’.*

Whilst there is no all-encompassing, conclusive definition of ‘groceries’, the retail industry over many years has operated according to a clear understanding that the items on the shelves as seen from the exhibits to the affidavits I have been provided with fall within the definition of food or groceries.” [Emphasis in original]

**86.** This opinion was expressed to be based on: -

- “My own research and consulting experience
- Kantar definition of grocery market in its widely respected and extensively used measurement of the overall grocery market
- Observation and experience of the retail market and expectation of consumers
- Competition and Consumer Protection Commission (CCPC)/Competition Authority coverage of the grocery sector
- 2014 Competition and Consumer Protection Act definition of grocery”.

**87.** Mr. Foley accepted in his oral evidence that Kantar was “not perfect as a source of data” [day 3, p.118, line 15]. It was put to him on cross-examination that “on any reasonable view of the Kantar data, what they are assessing is market share amongst supermarkets and not the grocery market share...”. Mr. Foley acknowledged that “there are huge differences between the grocery market as measured by the three main market organisations, IRI, Nielsen and Kantar, it ranges from a [sic] 97 billion up to 147 billion...” [day 3, p.138, line 20 – p.139, line 4].

**88.** It was suggested by counsel for the defendant that “the Kantar list is not a list of groceries but it’s a list of products that supermarkets sell, some of which are



groceries and some of which are not groceries...” [day 3, p.145 lines 2-6]. Mr. Foley did not accept this proposition: -

“...if that was the case there would be a much wider range of non-food products included to get...what would be described as ancillary lines within the supermarket...” [day 3, p.145, lines 7-10].

**89.** As regards his own, “observation and experience of the retail market and expectations of consumers”, Mr. Foley commented in his report as follows: -

“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”.

**90.** Mr. Foley reviewed the treatment of what was meant by “grocery” in the “grocery monitor” report produced by the Competition Authority in 2008, noting that the term “grocery” is defined to cover various non-food items. He also noted that the Competition and Consumer Protection Act 2014, in using the term “grocery”, “...extends beyond food to include household cleaning products and toiletries. The Act...identifies toiletries and cleaning products as grocery. It does not identify an equivalence of grocery and food” [para. 16].

**91.** Mr. Foley expressed 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 stated that the 2012 list appended to the statement of claim was Kantar’s current definition of groceries”. 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].

**92.** It was accepted by Mr. Foley that there was no distinction between groceries and non-groceries for the purpose of the Consumer Price Index, the NACE classification of activities or the Household Budget Survey, all maintained by the Central Statistics Office.

### **The defendant’s evidence**

#### **Mr. Aidan Ringrose**

**93.** Mr. Aidan Ringrose is principal of Ringrose Chartered Surveyors and is, among other things, a Fellow of the Society of Chartered Surveyors. He has over 35 years’ experience advising on a broad range of commercial retail property matters in both the Irish and UK markets, inclusive of shopping centres and retail parks.

**94.** Mr. Ringrose compiled a report at the request of the defendants for the assistance of the court. However, after some legal argument before me, the defendants accepted that Mr. Ringrose, despite his undoubted expertise in commercial property matters, could not be regarded as an expert in retail, and insofar as his report furnished

opinions in this regard, it should not be adduced in evidence, nor should any reliance be placed on those opinions. Mr. Ringrose's evidence was therefore restricted to certain factual matters arising from his inspection of the various units in Barrow Valley.

**95.** Mr. Ringrose referred to unit 4 as a "standard retail warehouse" of 18,000 square feet, which fronts out on to an extensive carpark of 500 spaces. It is next door to Dunnes Stores and is opposite the ToGo store. Mr. Ringrose referred to his inspection on 22<sup>nd</sup> April, 2021 of unit 4 and what it contained, and to the photographs of this inspection in his report. He said that there was "...a substantial amount of office supplies...plenty of educational products for kids...going back to school stuff...very extensive arts supplies...kids balloons and masks and toys...personal care products,... household products...no food products that I was able to see..." [day 3, p. 169, lines 12-25]. Mr. Ringrose also referred to his inspection of the "Kevin Kelly Pharmacy" at unit 9, in his opinion about 1,500 to 2,000 square feet, which sold items such as "cosmetics, oral care products, hair products, shampoos, skin creams, which you would expect to see in a standard pharmacy of that size..." [day 3, p.170, lines 10-13].

**96.** Mr. Ringrose also gave evidence of his inspection of the ToGo unit. He expressed the view that the unit was "about 26,000 square feet", *i.e.* appreciably larger than the Mr. Price unit. He referred to his photographs taken on 22<sup>nd</sup> April, 2021 of the items on sale in the ToGo unit, noting a long list of items – as counsel put it – "identified by the plaintiff as groceries for the purposes of this case..." [day 3, p.170, line 27 – p.172, line 4].

**97.** Counsel directed Mr. Ringrose to the table in his report to which I have referred at para. 77 above, and Mr. Ringrose explained the basis upon which it was

compiled. He also made reference to the Department of Environment Retail Planning Guidelines 2012, noting that retail goods in these guidelines are divided into convenience goods and comparison goods. He also referred to the “category of uses”, to which reference is made in the Consumer Price Index compiled by the Central Statistics Office, noting that categories 1, 5 and 12 “stratify the retail sector into food, household goods and personal care goods...” [day 3, p.176, lines 11-17].

**98.** In cross-examination, Mr. Ringrose accepted that the term “groceries”, in the context of supermarkets or shopping centres was “a very common term to come across”, although he commented that “it’s a very old word”. He acknowledged that he had never had any experience, in any of the outlets with which he had an involvement, of a dispute in relation to the word “groceries”, nor had he had any difficulty advising clients “in relation to the restrictive covenants that include a reference to groceries or food or food products...” [day 3, p.183, lines 6-20].

**99.** Mr. Ringrose was asked about his own personal shopping experience. He acknowledged that, when doing “the shopping” on behalf of his household, it would not be on a weekly basis, but rather in “intermittent short-term bursts”. He would typically buy items such as food products, detergents, soap and toothpaste as part of “the shopping”. He said that some of these items would be “groceries”, but when asked what items would not be groceries, he said “...in terms of the totality of the retail industry that I work across, I would segregate them into personal care products, cosmetics, shampoo, skin products. There would be household goods. Different food, obviously food, groceries...” [day 3, p.189, lines 10-14].

**Dr. Damian O’Reilly**

**100.** Dr. Damian O’Reilly was the expert witness on whom chief reliance was placed by the defendants. Dr. O’Reilly is a senior lecturer in the School of Retail and

Services Management in Technological University Dublin, and has taught retail management and other retail related courses for over twenty years, during the course of which he has designed a category management module. He was course director for the MBS in retail management. He is a regular contributor on national radio and television as an expert in retail, and writes frequently for the national print media and trade journals. In addition, Dr. O'Reilly grew up in a retail environment, as his mother ran a small convenience store where Dr. O'Reilly helped out as a child. In the late 1980s and early 90s, he operated a convenience store in Monkstown, County Dublin. He also operated a large petrol station/forecourt in Waterford in the late 1990s for three years before taking up his position in TU Dublin.

**101.** 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 14<sup>th</sup> 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 organisation 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 stable foodstuffs – like tea, coffee, cocoa, sugar, and flour – sold in amounts measured for personal consumption. By the 19<sup>th</sup> century, the grocer could apply for licence

to sell beer, wine, and spirits. In the 19<sup>th</sup> century Grocery became a designation for a public bar” [pp. 4-5 of report].

**102.** Dr. O’Reilly was of the view that “groceries” is not a term which is generally used by consumers: -

“2.1 Consumers use many terminologies for food shopping. Typically, in Ireland, we say ‘I’m going to the shops; do you want anything?’ ; or ‘I’m going down to the shops to get some messages’; or ‘I’m going shopping’; or ‘I’m going down to the supermarket (name)’. We **do not** say ‘I’m going to fetch some groceries’ nor ‘I’m going to the grocery store’. When we go to the butchers or the fishmonger we **do not** say we are ‘buying the groceries’;

When buying a jar of Nivea cream in the local pharmacy we **do not** say that we were ‘grocery shopping’” [p.7 of report; emphasis in original].

**103.** In Dr. O’Reilly’s view, the distinction made in all of the academic texts in relation to retail sales is between “food” and “non-food” [day 4, p.17, line 20 – p.18, line 1]. He was asked in examination in chief to comment on “the differences or characteristics of a supermarket and a grocery store”, and said in reply “...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].

**104.** Dr. O’Reilly expressed the view that the concept of “category management” is “at the heart of retailers’ performance...”. By this method, sales are measured by categories as is the gross margin achieved by each category. Category management

“focusses on how effectively that group of products meets the needs of the targeted segments...” [p.8 report]. Dr. O’Reilly said that supermarkets “...do not divide themselves on the grocery versus non-grocery. Supermarkets divide themselves on different categories...none of the supermarkets treat groceries as a single item. There’s no designation within the supermarkets as to what a grocery item is...” [day 4, p.30, lines 1-14]. He stated that no FMCG companies – such as Unilever or Proctor & Gamble – describe or advertise their products as groceries. [Report p.9].

**105.** As regards analysis of the retail sector, Dr. O’Reilly said that the major data analytics companies operating in Ireland were Kantar, Nielsen and Shopper Intelligence. 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].

**107.** In cross-examination, Dr. O’Reilly was asked about “the concept of the weekly shop”. He said that “on average now people are doing 2.1 to 2.2 shops per week. So the concept of a weekly shop is changing because people are shopping more often than they did previously”. On being asked whether this was the case in 2005, he said that “the number of visits to the grocery store...was less than it is now...the frequency of shopping trips to stores has increased over the last number of years...” [day 4, p.48, line 29 – p.49, line 16].

**108.** Dr. O'Reilly was unswerving in his assertion that the word "grocery", as used by him, applied to food and food ingredients, and that a reference by him in television and radio interviews to the grocery sector accounting for "40% of the retail trade", related only to "food and food products". Dr. O'Reilly explained the different methods employed by Kantar and Nielsen for accumulating data; Nielsen collected Epos ("electronic point of sale") data, rather than relying on customers to input the data when the consumer reached home. Items consumed before the buyer returned home would be included in the Nielsen data, but not in the Kantar data. Nielsen do not apparently receive data from Dunnes Stores. Dr. O'Reilly expressed the view that, as long as the method of collection of data is consistent, the data collected can be evaluated by retailers and FMCG suppliers as to how best to approach the market. [Day 4, p.85, lines 6-23].

**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". He understood "groceries" to be "food, food ingredients... and intoxicating liquors", and stated that non-food items considered by Mr. O'Connor and Mr. Foley to be groceries were certainly FMCGs, but not groceries in his opinion [day, 4, p.118, line 18 – p.119, line 19].

#### **General principles of contractual interpretation**

**110.** There was no material dispute between the parties as to the general principles to be applied to the construction of the restrictive covenants which are presently the subject of dispute. There were of course differences of emphasis urged by both sides, which made very detailed submissions in this regard.

**111.** This Court has the benefit of a number of recent decisions of the Superior Courts in which the relevant principles have been the subject of extensive review and



analysis. I do not therefore propose to consider these decisions in any detail; the approach which the court should take to interpretation of the leases in general and the restrictive covenants in particular is clear. I will therefore set out the principles which emerge from the case law and inform the court's approach to the facts of the case.

**112.** A comprehensive consideration of the approach to 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. In the leading judgment of the majority of the court, O'Donnell J (as he then was) stated that: -

“...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 irrefutable, 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”. [at para. 6]

**113.** The court endorsed – at para. 7 of its judgment – the five principles set out by Lord Hoffman in *Investors Compensation Scheme Limited v. West Bromwich Building Society* [1998] 1 AER 98: -

“(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 common sense 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.'

**114.** O'Donnell J went on to state as follows: -

"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*".

**115.** The court considered the approach to be taken with regard to the interpretation of the language of an agreement: -

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...”

116. O’Donnell J summarised at paragraph 14 the approach to be taken by the court in relation to an issue arising from an agreement “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.”

117. While the Supreme Court has emphasised, as quoted above, that “the process is not the deconstruction of a text, but rather the interpretation of an agreement”, Clarke J (as he then was), in a dissenting judgment in *Law Society v. MIBI*, cautioned against losing sight “...of the fact that the document whose interpretation is at issue forms the basis on which the legal rights and obligations have been established”. In referring to the passage which contains these dicta, Clarke CJ stated by way of summary in his judgment in *Jackie Greene Construction Limited v. Irish Bank Resolution Corporation in Special Liquidation* [2019] IESC 2 that: -

“5.4... it is important to give due recognition both to the text of any document creating legal rights and obligations and to the context in which the words used in the measure concerned were chosen. 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 the light of the context in which that language is used.”

### **Relevance of the factual matrix**

**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”.

**119.** In *Rohan Construction Limited v. Insurance Corporation of Ireland plc* [1988] ILRM 373, Griffin J (Finlay CJ and Hederman J concurring) cited with approval the following statement of Lord Wilberforce in *Reardon 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”.

**120.** This in turn begs a question as to how the court should regard the respective states of knowledge of the parties. As part of his consideration of the factual matrix in *Hyper Trust Limited v. FBD Insurance plc* [2021] IEHC 78, McDonald J adopted “a useful summary of the principles which apply in determining what material can be said to be reasonably available to the parties for the purposes of establishing a factual matrix against which a contract is to be construed”. That summary – by Hildyard J in *Lehman Bros International (Europe) v. Exotix Partners LLP* [2020] BUS LR 67 at pp. 91 to 92 – is 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.”

### **Commercial contracts**

**121.** Both sides in the present dispute accept generally that commercial contracts should be interpreted in a manner which accords with commercial sense or business efficacy. In *Rainy Sky SA v. Kookmin Bank* [2011] UKSC 50, the Supreme Court of England and Wales endorsed the proposition 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”.

**122.** However, the defendants urge that, notwithstanding this principle, 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...” [written submissions para. 27]. In *Arnold v. Britton* [2015] UKSC 36, Lord Neuberger commented at para. 20 as follows: -

“...while commercial common sense is a very important factor to take into account when interpreting a contract, a court should be very slow to reject the natural meaning of a provision as correct simply because it appears to be a very imprudent term for one of the parties to have agreed, even ignoring the



benefit of wisdom of hindsight. The purpose of interpretation is to identify what the parties have agreed, not what the court thinks that they should have agreed. Experience shows that it is by no means unknown for people to enter into arrangements which are ill-advised, even ignoring the benefit of wisdom of hindsight, and it is not the function of a court when interpreting an agreement to relieve a party from the consequences of his imprudence or poor advice. Accordingly, when interpreting a contract a judge should avoid re-writing it in an attempt to assist an unwise party or to penalise an astute party.”

### **Long-term contracts**

**123.** The plaintiffs drew attention to the comments of Clarke J in *Law Society v. MIBI* in relation to the effect of changing circumstances on the interpretation of long-term contracts: -

“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”.

**124.** In *Total Gas Marketing v. Arco British Limited* [1998] 2 Lloyds Rep. 209, Lord Steyn stated that there were no special rules of interpretation applicable to long-term contracts that are sometimes called relational contracts, but that in an appropriate case: -

“...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.”

**125.** The defendants however urged caution in this regard, referring to the decision of Hoffman J (as he then was) in *St. Marylebone Property Company Limited v. Tesco Stores Limited* [1988] 2 EGLR 40. In that case, a lease granted in the early 1950s vested in the defendant contained a restriction limiting the use of a shop to “grocer’s provisions wine spirit and beer merchants”. A sub-tenant, faced with the competition of supermarkets, made structural alterations to the premises and proceeded to sell an extended range of products including newspapers, magazines, books, cards, records, tapes, small electrical articles and later incorporated a video-hire business. The landlord brought proceedings against the defendant for forfeiture, which would have the effect of terminating the sub-tenant’s lease.

**126.** It was suggested on behalf of the sub-tenant that one should give effect to the changes in the trade of grocer since the 1950s by asking what kind of products one would now expect to find in a shop which was the successor of the early 1950s grocer. Hoffman J rejected this argument: -

“...If that were so a lease containing a covenant only to carry on the trade of blacksmith granted in the 1870s would have entitled the tenant to take on a substantial trade in bicycle repairs in the 1890s and to become a garage by 1920. Though the commercial progress is perfectly reasonable, that does not in my view entitle one to say that the garage is carrying on the trade of a blacksmith. It does not seem to me that the meaning of the term ‘grocer and

provision merchant’ has changed since the 1950s. What has happened is that there are now very few establishments to which that expression could strictly be applied.”

**Direct evidence regarding creation of the leases**

127. In considering the factual context in which the leases were concluded, it is appropriate firstly to consider what direct evidence was adduced before the court in relation to the circumstances surrounding the negotiation and execution of the leases. The position regarding the evidence was that: -

- 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].

### **Evidence of Mr. Carrigan**

**128.** Although counsel for the defendants objected to Mr. Carrigan giving evidence – see paras. 47-50 above – the objection was not pressed, and I found Mr. Carrigan’s evidence, although in truth of little relevance, to be of some assistance and have taken

it into consideration. I do not consider that the defendants are disadvantaged by its admission.

**129.** Mr. Carrigan, who had experience in acting for major retailers, was of the view that his clients would have understood the meaning of the word “groceries”, and that he would not advise on the meaning of the term unless specifically advised to do so; he would “accept that wording on the basis that [the clients] are experienced people and they know what they are talking about” (see para. 50 above). Mr. Carrigan expressly stated that he did not pretend himself to understand or define the word. 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 so.

**“Exclusivities”**

**130.** Mr. Clifford, in his capacity as property director, gave evidence that “exclusivities” such as the restrictive covenants in the present case were matters of importance for Dunnes Stores. He said that “...ninety percent of our leases would have restrictive covenants and exclusivities” and that exclusivities were a feature of retail parks and tenant mixes. From his time working for Lidl, he was able to say that Lidl also insisted on restrictive covenants in their leases. The purpose of exclusivities was “to prevent competitors...” [day 1, pp. 147-148]. Mr. Druker also emphasised the requirement of anchor stores for “specific restrictions on other units in the developments. We would put very strong emphasis on making sure that Dunnes had rights to exclusivities and that there would be restrictions on all the other users in the developments, in accordance with Dunnes user clause and in accordance with the restrictions that we’re talking about...” [day 1, p.75, lines 5-13].

**131.** The plaintiffs contend that there are “two distinct, but complimentary [sic] restrictions, the interpretation of each mutually informing the 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].

According to the plaintiffs, 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 a 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 plaintiff’s position was summarised as follows: -

“The clause’s purpose is not solely the narrow goal of preventing a rival supermarket from trading alongside it, but the broader object of restricting the wider range of competing traders represented by a *‘supermarket, hypermarket, grocery, discount food store, frozen-food outlet, mini-food market, convenience store or any similar premises’* and restricting the sale of any *‘food, food products or groceries’*. It serves the goal of achieving a mix of viable and complementary uses within the Retail Park”. [Written submissions, para. 3.51, emphasis in original].

**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.

### **Construction of the restrictive covenants**

**“Supermarket, hypermarket...” etc**

**133.** No evidence was given by anyone involved in the negotiation or conclusion of the Unit 4 lease as to the circumstances in which the enumerated categories of store were considered for inclusion in the restrictive covenant in the Unit 4 lease. It was left to the expert witnesses to express an opinion as to whether or not what Mr. Price is doing constitutes the operation of its premises as a “grocery”. In this regard: -

- Mr. O’Connor and Mr. Foley both accept that Mr. Price is a “variety discount retailer”. [Mr. O’Connor, day, 3, p.42, lines 1-3; Mr. Foley agrees with this assertion at day 3, p.130, lines 8-19].
- Mr. O’Connor accepts that Mr. Price is not a supermarket, hypermarket, discount food store, frozen food outlet, mini-food market or a convenience store;
- Mr. O’Connor, as we have seen, stated that, in as far as Mr. Price sells groceries, it could be regarded as a “grocery”; but he accepted that it would not commonly be regarded as a “grocery”: see para. 76 above.
- Mr. Foley agreed that Mr. Price is not a supermarket, hypermarket, discount food store, a frozen food outlet, a mini food market or a convenience store. He specifically accepted that Mr. Price was not a “grocery”: [see day, 3, p.130, line 29 – p.131, line 10].

**134.** Counsel for the plaintiffs and the defendants, at my invitation at the end of the final day of the hearing, addressed the question of whether Mr. Price could come within the term “other similar premises”: [see day 5, p.187, line 10 to p.189, line 10]. Counsel for the plaintiff expressed the view that, if the store sold groceries, it did not avoid being a grocery because it sold products which were not groceries; in circumstances where the evidence was that twenty percent of the floor space of Mr. Price was devoted to what Dunnes considered to be “groceries”, Mr. Price must be considered a “similar premises” for the purpose of the restrictive covenant. Counsel for the defendants on the other hand stated that, in the context in which the phrase “similar premises” was used, the term had to signify a premises “similar to” the enumerated premises. All of those named entities were “predominantly retailers of food”, which Mr. Price was not. Counsel also drew attention to Mr. O’Connor’s characterisation of Mr. Price as a “variety discount retailer”, which was not similar to the other entities named in the clause.

### **Groceries**

**135.** 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”. As we have seen however, the experts did opine on what would be understood by the word in the retail industry. These opinions are set out above in the case of Mr. O’Connor at para. 69, and in the case of Mr. Foley at para. 85. As is apparent from the summary above of Dr. O’Reilly’s evidence, he considered that “groceries” applies exclusively to “food, food ingredients and intoxicating liquor”, to the extent that it is a useful or applicable term at all.

**136.** Mr. O’Connor, as set out at para. 69 above, was of the view that the consumer and industry accepted meaning of the term “groceries” extended beyond food, and



that this “widely accepted understanding...has not changed since 2005 or during my time in the industry”. Mr. Foley commented that what the industry view was 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...” [see para. 91 above]. Dr. O’Reilly did not accept that “groceries” was a valid category used in the retail industry – see para. 104 above – and expressed the view also that academic texts distinguished between “food” and “non-food items”.

**137.** Dr. O’Reilly was firmly of the view that consumers do not by and large use the term “groceries”. Mr. O’Connor accepted that persons buying toothpaste in a pharmacy would be unlikely to consider themselves as buying groceries or “going grocery shopping”. Mr. Foley also accepted this proposition, although he pointed out that such consumers would describe it as buying groceries if they bought the toothpaste “as part of their grocery shop”.

**138.** In cross-examination of the witnesses of the plaintiff – Mr. Clifford, Mr. O’Connor and Mr. Foley in particular – a number of themes emerged: -

- If “groceries” extend beyond food or food products, how does one establish in a given instance what constitutes a “grocery” item?
- does Dunnes Stores itself have any internal classification or “list” of what constitutes “groceries”? (Mr. Clifford, the sole Dunnes Stores witness, was unaware of any such list);
- the discount promotion in Dunnes Stores in respect of “groceries” appeared to encompass a number of items – highlighters, coat hangers - which Mr. Clifford did not consider to be “groceries” in that they were not “non-durable consumer items”...;

- although no legal action had been taken against ToGo, the evidence of Mr. Clifford and Mr. Taaffe was that ToGo had on several occasions been requested to remove items regarded by Dunnes Stores as groceries, and had done so;
- “groceries” as defined by Dunnes Stores were sold in other units in Barrow Valley, such as the pharmacy. Mr. Clifford accepted that, to the extent that the pharmacy was selling what Dunnes Stores regarded as being “grocery” items, it was in breach of the restrictive covenant in its lease.

#### **Aids to construction**

**139.** In my view, while one can have regard to reputable dictionaries as contributing to a general understanding of what might be considered as “groceries”, one must be aware of the limitations of such research when applied to terminology employed in a particular context in a commercial agreement.

**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, 2<sup>nd</sup> 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 (7<sup>th</sup> 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].

**142.** At para. 17 to 20 of their written submissions, the defendants call in aid the interpretational maxims *noscitur a sociis* and *ejusdem generis*. The principle of *noscitur a sociis* provides that the meaning of words may be determined by reference to the context in which they are used, and in particular the words used around them. The principle of *ejusdem generis* provides that where a contract contains a list of specific words followed by a general word, the court may infer that the general word was intended by the parties to be *ejusdem generis* – of the same nature – as the specific words.

**143.** These maxims are deployed by the defendants 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”. At paras. 3.29 to 3.35 of their written submissions, the plaintiffs argue that such “rules of construction...must yield to the unitary, holistic contextual approach mandated by *Law Society v. MIBI*...it is critically important that maxims of construction are not deployed as trump cards to defeat the wider purpose of holistic modern contractual construction...”

**144.** It seems to me that this position is correct. That is not to say that the maxims cannot assist the court towards an accurate interpretation of the true meaning of the

agreement; just that they are not rigid rules which automatically apply in any case where the meaning of a word is not readily apparent.

145. The plaintiffs also deprecate the suggestion in the defendants' submissions at para. 42 that the principle of *contra proferentem* should apply. The defendants rely on the dicta of Clarke J in *Law Society v. MIBI* at para.10.6, where he said: -

“...The reasonable and informed person would be likely to assume that an individual who wished to insert a clause into a contract specifically for their own protection or benefit would ensure that the clause was expressed in clear terms. It would follow that, provided that the terms were clear and that there was no ambiguity, the clause should stand and provide whatever protection its terms permitted. However, if the clause were unclear and an ambiguity existed, then the clause should be construed against the profferer for 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 clearly specified”.

146. While that may be so, it was certainly not intended by Clarke J to suggest that the *contra proferentem* rule applies automatically when there may be some uncertainty – usually promoted by the “profferee”, as it were – in relation to the meaning of a contractual term. The task of the court is the discerning of the meaning of the agreement as a whole in accordance with the approach set out by the Supreme Court in *Law Society v. MIBI*. In fairness, the *contra proferentem* point was not pressed by counsel for the defendants in his oral submissions at the hearing.

#### **Conclusions of the court in relation to the evidence**

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”.

**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.

#### **The restrictive covenant considered**

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.

**152.** The restrictive covenant contains no definition of “groceries”, nor is any list appended to the Dunnes leases or the Unit 4 lease which would make clear what the term meant. When the defendants’ solicitors stated, in their letter of 10<sup>th</sup> November, 2020, that they considered the meaning of the term, in the absence of a definition in the lease, to be ambiguous, the plaintiff’s solicitors responded with the letter of the same date with an “including but not limited to” list – see para. 17 above – which fell some way short of providing a definition of “groceries” or even a definitive list of the allegedly offending items in Mr. Price’s store. As we have seen, Allen J, on hearing the interlocutory application, was unwilling, in view of the lack of definition of non-food “groceries”, to extend the interlocutory injunction to such products.

**153.** The plaintiff’s experts were firmly of the view that, as Mr. O’Connor put it, “the consumer and industry accepted meaning of the term “groceries” extends beyond food”. He described the “common denominator” of groceries as “non-durable,

consumable items that must be re-purchased frequently”. Mr. Foley stated that the term “‘grocery’ ...includes goods described as non-durable household necessities...”. He accepted that there was no “all-encompassing, conclusive definition of “groceries”, but was of the view that the items photographed on the shelves of Mr. Price as exhibited to the affidavit of Mr. Clifford fell within the definition.

**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. He makes the point that supermarkets do not distinguish between “grocery and non-grocery”, and that none of them treats groceries as a single item. On the other hand, he acknowledged that Kantar surveys the “ROI grocery market”, although he was of the view that Kantar uses the term “as a substitute for FMCG”. The evidence of Dr. O’Reilly of the approach of supermarkets to “grocery” as a classification was consistent with the evidence of Mr. Clifford, the sole Dunnes Stores witness, who was unable to say whether Dunnes had any internal classification or “list” as to what were groceries or non-groceries.

**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”.

**156.** It does seem from all the evidence 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 in 2005-2008 as it is today. The Irish consumer does not, as Dr. O’Reilly pointed out, generally speak of buying “groceries” or going “grocery shopping” at all. However, that is not to say that the term has no meaning or common currency. As I point out in the opening paragraph of this judgment, it is in fact a term in constant use by retailers; whether these retailers are clear as to the precise meaning and ambit of the term is another matter altogether.

**157.** I was urged to take into account, in interpreting the term “groceries”, the various statutory provisions in both primary and subordinate legislation. I have referred above to some of these. However, I found them to be of little or no assistance; each of the provisions must be seen in its own context, and to the extent that such provisions relate at all to the question of what constitutes “groceries”, they did not inform the drafting of the restrictive covenants. Indeed, many of the competition law sources to which I was referred post-dated the conclusion of the Unit 4 lease.

### **Analysis and conclusions**

**Mr. Price is not a “supermarket” *etc.***

**158.** As I have mentioned above, I am satisfied that Mr. Price is a “variety discount retailer”, and that it is not in breach of the restrictive covenant by using its store as one of the list of stores set out at Clause (20) of the Second Schedule in the Unit 4 lease.

**“Groceries extends beyond food, food products...”**

**159.** In considering “all of 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”, it is undoubtedly the case that the restrictive covenants in the Unit 4 lease – set out at para. 11 above – to Mr. Price’s predecessor 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 as set out at para. 8 above.

**160.** Dunnes Stores, in taking on the Unit 5 and ultimately Unit 6 leases, was agreeing to become the anchor tenant in Barrow Valley. The evidence of Mr. Druker, Mr. Stanley and Mr. Fleming made it clear that it was only prepared to do so on the basis that it would have “exclusivities”, *i.e.* restrictive user provisions which would

ensure that it would not have to compete in respect of its core trading activities with other tenants in the retail park. This was standard practice for Dunnes, who presented the restrictions to the lessor on a “take it or leave it” basis. 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.

**161.** In the circumstances, all parties to the Dunnes Stores leases, and to the Unit 4 lease concluded on 12<sup>th</sup> July, 2007 between Redhill and Stephen Murphy, were aware that Dunnes Stores intended by these exclusivities that it would be protected from competition from a supermarket, hypermarket, grocery, discount food store, frozen food outlet, mini-food market, convenience store or any similar premises, 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.

**162.** It is clear that the lessee of Unit 4, be it Mr. Murphy or any subsequent lessee, could not sell “food, food products or groceries”. As we have seen, Mr. O’Connor and Mr. Foley, the experts for the plaintiff, are both of the view that “groceries” extended beyond “food” or “food products”. Both were clear in their evidence that the consumer and industry meaning of “groceries” extends beyond food, and that this was the position in 2005 and since then. Dr. O’Reilly, the expert for the defendant, takes the view that “groceries” has never extended beyond “food, food ingredients and intoxicating liquors”.

**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.

**164.** This interpretation is consistent with the views of Mr. O’Connor and Mr. Foley as to the widely understood meaning of “groceries”, inside and outside the retail industry, as of 2005. On balance, I prefer this evidence to that of Dr. O’Reilly, who in my view, notwithstanding that he does have some “hands-on” retail experience, approaches the question from a somewhat academic standpoint. It is true to say that “grocery” as a classification term is somewhat outmoded, and it may well be, as Dr. O’Reilly suggests, that supermarkets concentrate their internal analysis on categories of goods rather than “grocery” or “non-grocery”. Certainly, Mr. Clifford, the only Dunnes Stores witness, was unaware of any internal list kept by Dunnes which differentiated between groceries and non-groceries: see para. 55 above.

**165.** However, it is clear that “groceries” remains part of the retail lexicon, not just of Dunnes Stores, but of supermarkets generally. To say that the term is not used internally by Dunnes for classification purposes is not to say that the word has no meaning; the issue is whether or not it must, in the present context, be regarded as a synonym for “food, food products”, or whether its meaning extends beyond these terms.

**166.** In this regard, I do not find the maximums 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.

**Definition of “groceries”**

**167.** However, if “groceries” does include non-food items, how is one to know what is comprised in the term? There is no definition in the leases, nor is there - as one might have expected – some sort of list of items or even general categories appended to the unit 4 lease which might comprise “groceries”.

**168.** As we have seen, Dunnes Stores took steps to challenge Mr. Price on its sale of what Dunnes considered to be “groceries” from the first day of trading by Mr. Price, and within a fortnight had initiated the present proceedings and an application for an interlocutory injunction. An affidavit of Mr. Foley was advanced in support of this application after it became apparent from the affidavit of Mr. Declan Crinion that Mr. Price was contending that groceries did not include anything other than food or food products. However, Allen J declined to grant interlocutory relief in respect of items other than food or food products, and his judgment made clear the difficulty in fashioning an order which defined or set the limits of the term “groceries”.

**169.** The first mention of Kantar as either an indicator or an arbiter of what constituted “groceries” came in the second affidavit of Mr. Clifford in support of the interlocutory application, sworn on 23<sup>rd</sup> November, 2020 in response to Mr. Crinion’s affidavit. In that affidavit, Mr. Clifford exhibited the Kantar lists which were subsequently included in a schedule to the statement of claim. It seems clear that the reliance on the Kantar lists was directly in response to the assertion on behalf of Mr. Price in Mr. Crinion’s affidavit that groceries did not extend beyond food or food products. I am told that the two lists are from 2005 and 2012 respectively and, as we have seen, para. 8 of the reliefs in the statement of claim seeks “a declaration that the term groceries in Clause (20) of the Second Schedule of the Unit 4 lease incorporates, *inter alia*, the product types as categories identified in Schedule A to this statement of claim, each and/or all of them”.

**170.** It is a matter of some surprise to the court that it is invited to grant this relief in circumstances where no evidence whatsoever from Kantar was proffered as to how these lists came into being, or what methodology was involved in their compilation. The plaintiff’s experts were strongly pressed in cross-examination about how Kantar

operates; a significant point of contention was whether or not Kantar accounts sufficiently for groceries sold by entities which are not supermarkets, which it was suggested according to Nielsen could comprise 35-37% of the market. Mr. O'Connor accepted in cross-examination that "it might be fair to say that the convenience sector is bigger than the Kantar estimate..." [see para. 80 above].

**171.** It is clear from the evidence of Mr. Fleming that neither he nor Mr. Murphy were familiar with Kantar or its work when the Dunnes leases were being negotiated in 2005, nor that they discussed any market research in relation to what constituted "groceries" at that time. There is no evidence on behalf of the plaintiffs that Dunnes considered the applicability or relevance of Kantar data in 2005.

**172.** All of the experts gave their view as to what the Kantar lists do or do not represent. Mr. O'Connor set out the role of Kantar in the industry at para. 5.6 of his report, quoted at para. 73 above. To the extent that the court can infer from second-hand evidence, Kantar is a research agency which produces market information for the retail trade, and more specifically in the current instance "...grocery market share data". Mr. O'Connor acknowledged the difference in detail between the 2005 and 2012 lists, and that "new categories can emerge over time. For instance, men's grooming, vegan or gluten free foods did not exist as sub-categories in any meaningful sense twenty years ago. Their emergence reflects evolving consumer needs within diet and personal care but it does not make them separate from groceries..." [report para. 5.6 – see para. 73 above].

**173.** The fact that no regard was had to the 2005 Kantar lists by any of the contracting parties to the Dunnes leases or the Unit 4 lease, and the complete absence of cogent first-hand evidence as to the basis upon which the lists have been compiled in my view render them entirely unsuitable as a means of defining groceries, or using

them as a basis for an order enforcing the restrictive covenants. The declaration sought by the plaintiffs at para. 8 of the reliefs is in my view inappropriate.

**174.** Heavy emphasis was placed by the defendants on the apparent anomalies that arise from the insistence that “non-durable consumer items” or FMCGs – which Mr. O’Connor said was “the same thing” as groceries – “are groceries”. These are summarised above at para. 155 and in the paragraphs above dealing with the evidence of the Dunnes Stores witnesses. The defendants sought to demonstrate that the meaning of the word “groceries” as contended for by the plaintiffs, was so wide as to be incapable of reliable application, and that it did not accord with practical reality or the average shopper’s experience. The fact that Dunnes’ own grocery promotion extended to items such as highlighters and coat hangers, which Mr. Clifford accepted were not “groceries”, was advanced as demonstrating Dunnes’ own inability to categorise “groceries” correctly.

**175.** These positions were advanced very effectively in cross-examination, and certainly demonstrated that what is or is not an item of “grocery” may, in a given case, be difficult to ascertain. It was also made clear that the insistence of Dunnes that “groceries” comprised “all of the frequently purchased needs of the household...non-durable consumable items that must be repurchased frequently...” [para. 4, Mr. O’Connor’s report] yielded some incongruous results: that buying toothpaste and mouthwash in the pharmacy or detergent in a DIY store constituted “grocery shopping”; that ladies’ cosmetics were “groceries”; and so on. It was suggested that these instances which were logical consequences of Dunnes’ definition were so far removed from the common experience and perception of what “groceries” and “grocery shopping” were as to suggest that the extension of “groceries” beyond food or food products was an absurdity.



**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”.

**180.** Dunnes has taken action against the defendants by means of the present proceedings. It has also insisted on the removal from ToGo of what it considers “groceries” on several occasions. ToGo has complied with the demands of Dunnes on each occasion. It is clear from the evidence of Mr. Clifford and Mr. Taaffe in particular that the sale by Mr. Price and ToGo of “groceries” is significant, both in terms of the breadth of goods offered for sale and the floor space devoted to such items. These are the factors which have motivated Dunnes Stores to take action in these cases, and to insist on an adherence to the terms of the restrictive covenants.

**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 necessities...” [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.

**183.** The defendants argue that, as there is no definition of “groceries”, and as it may be difficult in a given case to determine whether, according to Dunnes' understanding of the term, an item is a “grocery item” or not, the court should refrain from making any order enforcing the restrictive covenant. They point to the apparent absence of any internal list or definition of Dunnes which defines or categorises “groceries”, and the fact that its grocery promotion clearly encompasses items which are not “groceries” in the sense in which Dunnes purports to comprehend that term. It is said that Mr. Price must have clarity as to the terms of any order made against it; it must know with precision exactly what is likely to be in breach of the order. If such clarity is not possible, it is argued that an order should not be made.

**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”?

**185.** The remedies of injunction and/or specific performance which the plaintiffs seek are equitable in nature, and exercisable at the discretion of the court. It seems to me that the justice of the case requires that I grant relief which will have the effect of enforcing the restrictive covenant, while ensuring that the terms of any order are clear and allow the defendants to understand what they may or may not do. It should be noted that paras. 1 to 7 of the reliefs sought in the statement of claim address matters which are not in truth controversial. The defendants accept that the restrictive covenants apply to Unit 4, and therefore orders simply enforcing the covenants would hardly seem necessary. Counsel for the defendants also all but accepted that Mr. Price could not sell “food or food products”; I consider these items to be sufficiently clear to be enforced, although one could perhaps conceive of a dispute as to whether an item fell within these terms.

**186.** In respect of what constitutes non-food “groceries” within the meaning of the lease, I think that a wording which draws on the evidence of Mr. O’Connor and Mr. Foley is appropriate: I consider that the term “groceries” includes “non-durable consumable household items which are purchased frequently”. 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”. However, it does seem to me that it covers all of the items in para. 9 of the reliefs in the statement of claim, and if Mr. Price removes all “food, food products and groceries” in compliance with this categorisation, it will

in my view be in compliance with the restrictive covenant. This course of action will effectively remove the threat of competition in Barrow Valley which the restrictive covenant was intended to address. I am sure that, in relation to any remaining items in respect of which there is doubt as to whether or not they are “groceries”, Dunnes and Mr. Price as substantial and responsible traders will be able to come to a business-like accommodation, rather than resorting to further legal action.

**187.** For completeness, I should say that I do not consider that it was appropriate to construe the restrictive covenant *contra proferentem* in circumstances where it was possible to discern the true meaning of the term in the manner envisaged in *Law Society v. MIBI*. The written submissions of the defendants also raised the possibility of an estoppel argument; however, no estoppel was established by the evidence, and in fairness neither the estoppel nor *contra proferentem* arguments were relied upon by the defendants in their oral submissions at the hearing.

### **Orders**

**188.** I am satisfied, on the basis of the evidence before me, 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.

**189.** It may be that the findings in this judgment preclude the need for extensive orders; however, I will allow the parties a period of fourteen days from delivery of this judgment to either agree the appropriate orders, including orders as to the costs of

the proceedings so far, or deliver written submissions as to what the orders should be.

Such submissions should be limited to 2,000 words.

**190.** As the hearing before me addressed issues of liability only, the parties should indicate what, if any, orders are necessary in order to progress issues of quantum which may arise.

**191.** I will give the parties liberty to apply in the event of any unforeseen difficulty.