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(subject to editorial corrections)

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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CHANCERY DIVISON

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2015/2631

IN THE MATTER OF PREMISES KNOWN AS UNIT 45, ABBEY CENTRE, LONGWOOD ROAD, NEWTOWNABBEY, BELFAST

DUNNES STORES (BANGOR) LIMITED

Plaintiff;

-and-

(1) NEW RIVER TRUSTEE 11 LIMITED
(2) NEW RIVER TRUSTEE 12 LIMITED

Defendants.

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DEENY J

[1] The plaintiff company, Dunnes Stores (Bangor) Limited ("Dunnes"), is the owner of Unit 45, a major unit at the Abbey Centre, Newtownabbey, County Antrim. It holds it on a long leasehold title of 1 March 1982, of which 117 years are unexpired, from the predecessor in title of the defendants who became the owners of the centre on 22 August 2014.

[2] On 12 January 2015 the plaintiff caused to have issued a writ of summons in the Chancery Division. They sought an injunction restraining the defendants from altering in any way the premises at the Abbey Centre in such manner as to derogate from the grant to the plaintiff of their leasehold estate of 1 March 1982, or to interfere with the covenant for quiet enjoyment or with their rights of way or to cause nuisance to them. Damages were claimed in the alternative. On the same day Mr Mark Orr QC for Dunnes, with whom Miss Anneliese Day Q.C. and Mr Adrian Colmer appeared, sought an ex parte injunction from the court on the basis that the defendants were already commencing works in breach of his client's rights.

[3] Their concern arises from the express intention of the defendants to make a significant alteration to the centre closely adjacent to the plaintiff's premises. The defendants propose to build a large new unit extending over the existing eastern mall entrance and four adjoining units.

[4] The defendants learnt of this ex parte application and Mr Brett Lockhart Q.C. appeared when the matter came before me seeking to be heard. His own instructions at this stage were limited. It is sufficient for these purposes to say that the court granted an ex parte order restraining certain works at that time. A subsequent application on 14 January led to an amendment of the Order on 15 January effectively allowing the defendants to complete its enabling works in a way that did not prejudice the on-going concerns of the plaintiff. No difficulty has arisen in practice from the implementation of that interim amended Order. The matter was listed for a full interlocutory inter-partes hearing on 4 February 2015 which was completed on 9 February. The court had the assistance of cogent and helpful written and oral arguments from counsel on both sides.

Interlocutory injunctions

[5] The law in relation to interlocutory injunctions was clarified in the landmark judgment of the House of Lords in American Cyanamid Co v Ethicon Limited [1975] AC 396. There is a tendency to over summarise and therefore blur the effect of the judgment of Lord Diplock in that case. For convenience I quote my own analysis of the matter in McLaughlin & Harvey Limited v Department of Finance and Personnel [2008] NIQB 122 at paragraph [6], cited, inter alia, in Lamey v Belfast Health and Social Care Trust [2013] NIQB 91 and Coutts v Collins [2014] NI Ch 24:

> "It can be seen that the test laid down by the House of Lords, is sequential.
>
> (i) Has the plaintiff shown there is at least a serious issue to be tried?
>
> (ii) If it has, has it shown the damages would not be an adequate remedy for the plaintiff and would be an adequate remedy for the defendants if an injunction were granted and it ultimately succeeded?
>
> (iii) If there is doubt about the issue of damages the court will then address the balance of convenience between the parties.
>
> (iv) Where other factors are evenly balanced it is prudent to preserve the status quo.

(v) If the relative strength of one party's case is significantly greater than the other that may legitimately be taken into account.

(vi) There may be special factors in individual cases.

I would add, seventhly, the court has an overall discretion to do what is just and convenient in the circumstances. I would remind parties of the statutory basis for the exercise of the court's power in this regard. Section 91 of the Judicature (NI) Act 1978 empowers the court to grant a mandatory or other injunction 'in any case where it appears to the court to be just and convenient to do so for the purpose of any proceeding before it'. That again makes clear that the court has an overall discretion to exercise this power when it is 'just and convenient to do so'."

[6] In drawing attention to the overall discretion that remains after addressing the individual elements identified by Lord Diplock I am reflecting the views of Lord Goff of Chievely in R v Secretary of State for Transport ex parte Factortame Limited (No. 2) [1991] 1 AC 643. I also take into account the dicta of Lord Hoffman in National Commercial Bank Jamaica Limited v Olint Corporation Limited [2009] 1 WLR 1405 (PC). I note this at paragraphs [17] and [18]:

"The basic principle is that the court should take whichever course seems likely to cause the least irremediable prejudice to one party or the other. This is an assessment in which, as Lord Diplock said in the American Cyanamid case [1975] AC 396, 408:

'It would be unwise to attempt even to list all the various matters which may need to be taken into consideration in deciding where the balance lies, let alone to suggest the relative weight to be attached to them.'

18. Among the matters which the court may take into account are the prejudice which the plaintiff may suffer if no injunction is granted or the defendants may suffer if it is; the likelihood of such prejudice actually occurring; the extent to which it may be compensated by an award of damages or enforcement of the cross-undertaking; the likelihood of either party being able to satisfy such an award; and the

> likelihood that the injunction will turn out to have been wrongly granted or withheld, that is to say, the court's opinion of the relative strength of the parties' cases."

I observe that this was a decision of the Privy Council and that American Cyanamid is still the binding decision on our courts.

[7] In the particular application before me almost all the aspects of the sequential test arising from American Cyanamid are in dispute. It will be necessary to address them seriatim. Mr Lockhart does not, in effect, deny that the plaintiff has an arguable case but both parties argue that their case is sufficiently stronger for the court to take that into account. Both parties argue that damages would not be an adequate remedy for them. Both parties claim that the balance of convenience favours them. Both parties claim that the status quo is in their favour. In addition, the defendants rely on what might be described as a special factor in this particular case, namely the alleged delay on the part of the plaintiff in bringing the proceedings. I remind myself that the duty of the court is to exercise an overall discretion to do what is just and convenient and, indeed, "likely to cause the least irremediable prejudice to one party or the other".

Nature of proposed development

[8] Each party has submitted in support of its affidavit evidence reports from retail experts to comment on the advantages and disadvantages of the proposal, namely Mr K H Whale for the defendants and Mr Christopher J J Osmond for the plaintiff. I have taken those reports into account.

[9] Both are agreed in the view that the design of the Abbey Centre, dating from the 1970s is not ideal and falls short of the characteristics of the modern out of town shopping centre. Although there is dispute about the figures provided it is acknowledged that the eastern end of the centre, where Dunnes is located, is the quieter part of the shopping centre with a lower footfall. The present Dunnes store is of 1,536 sq. m. (16,533 sq. ft.). The proposed Next store to be built on the existing eastern entrance but also taking in four existing shop units will be much larger, being 4,024 sq. m (43,327 sq. ft.) but this will be arranged over four floors with the trading on the ground and first floors.

[10] Although particularly relevant to the issue of damages it is worth mentioning the point pressed by the plaintiff that this development is actually going to cost the defendants money rather than the reverse. They have agreed to give Next plc (Next) a 24 month rent free period from the opening date of the store or 18 weeks after the access date. In addition Next is to be paid an "inducement" of £445,000. The lease is for 15 years but it will cost the defendants £5.9m. to build the unit. The defendants say this makes sense for them to keep Next, because Next do already have a presence in the centre but of a more modest kind, near Dunnes. The defendants are

also apprehensive that if they do not keep Next they may desert their centre for a competing centre nearby.

[11] The plaintiff finds this proposal objectionable for a number of reasons. Firstly, it will mean that customers to the eastern end of the mall will enter not through a neutral entrance but through the entrance of a competitor. Secondly, Dunnes will have no direct legal right to ensure that Next keep their entrance open at all the hours that Dunnes is open. It is hard to see, at present, how Dunnes would not be entitled to have the entrance kept open but they point out that in the short term it might be closed by Next because they have different opening hours or because they are preparing for a sale and in the long term it may be affected by the trading history of this particular store or of the holding company. The defendants point out that Next is a long established and publicly quoted company. Thirdly, Dunnes object to the proposal being of a sizeable and highly visible kind which will detract from their own attractiveness and visibility to shoppers. Fourthly, they complain that there will be a loss of 79 car spaces in the adjoining car park which their expert believes will be damaging. Thirty-nine of those will be re-located in a car park further away. Fifthly, they complain that there will be a somewhat longer distance, about 12 metres, for shoppers to walk to get to their store from the car park. The new store will be built partly on the existing car park.

[12] Mr Osmond and Mr Whale agree that it is a subjective issue as to whether shoppers prefer to enter shopping centres via a store or not. Mr Whale is of the opinion that the concerns of the plaintiff are misplaced and that this development will in fact enhance their trade. The Dunnes is not a food store but is there for the sale of clothes and accessories. The nature of such sales are described in planning terms as comparison goods, i.e. the shopper compares the design, price and quality of the goods in different shops before choosing the item. Therefore, the defendants says, this is what will happen here and Dunnes will benefit from the extra customers that Next will draw to the centre and to the eastern end of the centre. Mr Osmond, in effect, replies that this is an imponderable matter as to the effect of the development on his client's store but creates the danger of persons not turning right to go into Dunnes but proceeding through Next to the rest of the mall. One final point is that the effect of the development will be to remove a bus stop proximate to the Dunnes store. The location of any replacement bus stop is unknown at this time.

[13] The existing lease enjoyed by Dunnes does not give them any direct access onto the car park. In the course of the hearing, at the instance of the court rather than the plaintiff, the defendants instructed Mr Lockhart QC to say that they would agree to direct access for Dunnes onto the car park and so bind themselves. However, there is only one point at which that could be achieved on the plans that the defendants have agreed with Next. That would be not only at a corner of the Dunnes store but a corner facing a corner of the car park. Furthermore, the passage between those two points would be right across the vehicle entrance to the service yard of Next, which would obviously be used from time to time by a variety of vehicles, including heavy goods vehicles. The ameliorative effect therefore of such

direct access, certainly on the present layout of the Next service yard, might be very modest.

[14] The defendants propose to maintain an entrance to the centre, including, thus, the plaintiff's premises, through the present Unit 53 of the centre, on the eastern side, while the works of construction are carried out.

Legal Basis of Plaintiff's Claim

[15] The starting point for the consideration of the plaintiff's case here must be the indenture of lease of 1 March 1982 between the defendants' predecessor in title as lessor and the plaintiff as lessee. The opening paragraph of the lease records the demise of Unit 45 to the plaintiff

"together with the easements, rights and privileges mentioned in the said Part One subject as therein EXCEPTING AND RESERVING the interests and rights mentioned in Part Two of the said First Schedule" to hold the same for 150 years.

The relevant rights are then found at the First Schedule, Part One and read as follows:

> "(a) All that part of the shopping centre numbered 45 on the lessors letting plan thereof and together with the service area at the rear shown on the map hereto attached and thereon surrounded by a red line.
>
> (b) Together with the right in common with the lessor its tenants and lessees and all other persons lawfully entitled thereto of access ingress egress and regress for the lessee, its workmen, employees, servants, agents and invitees to and from the demised premises in, over and along such of the roads, entrance halls, staircases and passages of the said shopping centre leading from the public road to the demised premises."

It is agreed that (c) is not relevant. The plaintiff laid stress on this right to it and its invitees of ingress, egress and regress over and along the roads and entrance halls of the shopping centre leading from the public road to their premises. The relevant entrance hall, it is submitted, must be the entrance hall that is currently there and was there in 1982, which the defendants now wish to remove.

[16] However, as stated above the lessor excepted and reserved rights in Part Two of the Schedule, of which (ii) is relevant:

> "The right at any time during the continuance of this demise to execute works upon or to erect, alter, improve, extend, make-safe or rebuild any adjoining or neighbouring premises (including the building, if any, of which the demised premises forms part) in such manner as the person exercising such right may think fit notwithstanding any interference with the access of light and air to the demised premises."

The centre owners also rely on Clause 2 of the main lease which commences:

> "PROVIDED ALWAYS AND IT IS HEREBY AGREED AND DECLARED by and between the parties hereto as follows. …
>
> (b) Nothing herein contained shall by implication of law or otherwise operate to confer on the Lessee any easement, right or privilege whatsoever over or against any adjoining or other property belonging to the Lessor which might restrict or prejudicially affect the future rebuilding, alteration or use or development of such adjoining or other property nor shall the lessee be entitled to compensation for any damage or disturbance caused by or suffering through any such rebuilding development or user."

Understandably the defendants rely on this strongly in support of their case.

[17] They also rely on the combined effect of Clause 2(d) and (e) which read as follows:

> "(d) All car parking areas, vehicular areas, entrances and exits thereto and the facilities in or near the shopping centre including without prejudice to the generality of the foregoing the vehicular ways, loading and unloading bays, precincts and ways and ramps and courts, landscaped areas, common areas in all buildings and service and other areas and the other facilities and improvements provided by the lessor for the general use in common at the Shopping Centre (in this Clause called "The Facilities") shall at all times be subject to the exclusive control and management of the lessor and the lessor shall have the right from time to time to establish, modify and enforce reasonable

rules and regulations with regard thereto in the bona fide interest of the shopping centre.

(e) The Lessor shall have the right from time to time to change or reduce the area, level location and arrangement of the facilities referred to in Clause 2(d) hereof and to restrict parking and to close off part or parts of the car park and to construct buildings or other erections thereon or on any part or parts of the shopping centre and at such times as will cause the minimum interference to the Lessees, the Lessor may close all or any portion of the facilities to such an extent as shall be legally sufficient to prevent a dedication thereof or the accrual of any rights to any person or the public thereof and to close temporarily all or any of the facilities for the purpose of preparing, renovating and replacing, cleansing and maintaining the same."

[18] The defendants therefore relies on the words underlined by me above to show that it has an express right to change or reduce the car parking entrances and exits in the shopping centre.

[19] Faced with a reading of the lease that might seem to favour the defendants' contentions Mr Orr Q.C. made two principal submissions. Firstly, he pointed out that the lease must be read contra proferentem in favour of his client as the grantee if there is ambiguity. Secondly, he said that the provision favourable to him at (b) of the First Schedule should prevail over the later provisions in the lease. It is the earlier provision, he submitted and Mr Lockhart did not dispute, as it is referenced in the opening paragraphs of the lease. Mr Orr relied on the following passage from Wylie and Woods, Irish Conveyancing Law, 3rd. Edition, at [17.19]:

> "However, where there is a clear contradiction between two parts of a deed, generally extrinsic evidence is not admissible and instead the rule is that the first statement or description prevails over the second."

[20] This statement requires careful consideration. If one goes to the most recent of the cases cited in support of it, Kenny v La Barte [1902] 2 IR 63, one finds that Andrews J was dealing with the issue of conflicting descriptions of the land being conveyed, rather than the terms on which the contractual relationship between the party was to subsist. Furthermore, the report sets out in extenso an otherwise unreported decision of the Court of Appeal in Ireland, Dennehy v Corrigan [1896] (No: 5719) per Lord Ashbourne C. Again from that judgment and that of the supporting judgments of Fitzgibbon LJ and Walker LJ it is clear their lordships are

dealing again with the description of lands. Walker LJ helpfully cites Lefroy CJ in Roe v Lidwell [1860] 11 Ir. Ch. R 320, one of the other cases cited by Wylie, and one finds again that that case is about the description of the land rather than the terms of the agreement.

[21] The final case cited in Wylie is Bradford v Dublin and Kingstown Railway Company [1858] 7 ICLR 624 but again that decision of the Court of Exchequer Chamber, per Lefroy CJ, does not support the proposition that a "statement" which comes first in a deed prevails over a second statement. See also Boyle v Mulholland [1860] 10 Ir. Ch. R. 150

[22] If one reflects on this for a moment the proposition is a surprising one. The whole thrust of the law of contract here as across the water is to seek to ascertain the intention of the parties from the agreement as a whole. The order in which conflicting statements are found in a lease may be quite accidental. It would seem entirely inappropriate to try and insert such a rule against the prevailing principle of reading the document as a whole. I decline to do so here. The precedents are confined to the description of land.

[23] Mr Orr's case on behalf of the plaintiff is not confined to the express terms of the easements in the lease, as set out above; it pleads three alternative courses of action. The first of these is to contend that this development by the defendants taken in its entirety would amount to a derogation from grant by the defendants. A landlord is not entitled to take away with one hand what it has given with the other. Johnston and Sons Ltd v Holland [1988] 1 E.G.L.R 264, CA. See Coutts v Collins op. cit. Both parties referred the court of the judgment of Neuberger J, as he then was, in Platt v London Underground Ltd [2001] 2 E.G.L.R 121 relating to the operator of a kiosk in a London underground station. His Lordship listed 11 relevant principles as follows:

> "(i) A landlord, like any other grantor, cannot derogate from his grant by taking away with one hand what he has given with the other.
>
> (ii) In order to determine whether a specific act or omission constitutes derogation from grant, it is self-evidently necessary to establish the extent of the grant.
>
> (iii) The exercise of determining the extent of the implied obligation not to derogate from grant involves identifying what obligations, if any, on the part of the grantor, can fairly be regarded as necessarily implicit, having regard to the particular purpose of the transaction when considered in the

light of the circumstances subsisting at the time when the transaction was entered into.

(iv) There is a close connection, indeed a very substantial degree of overlap, between the obligation not to derogate from grant, the covenant for quiet enjoyment, and a normal implied term and a contract.

(v) The terms of the lease will inevitably impinge on the extent of the obligation not to derogate. Express terms will obviously play a part, possibly a decisive part, in determining whether a particular act or omission constitutes derogation. An express term should, if possible, be construed as consistent with the "irreducible minimum" implicit in the grant itself. But a covenant relied on by the landlord, if construed as ousting the doctrine in its entirety, is repugnant, and should itself be rejected in its entirety. (Authorial underlining)

(vi) When considering a claim based on derogation from grant, one has to take into account not only the terms of the lease, but also the surrounding circumstances at the date of the grant as known to the parties.

(vii) One test which is often helpful where the act complained of is the landlord's act or omission on adjoining land is whether the act or omission has caused the demised premises to become unfit or substantially less fit than the purpose for which they were let. (Authorial underlining)

(viii) That formulation, though helpful, may in many cases be too generous to the tenant. Permitting a competing business to be run from a next door property is not, of itself, derogation from grant.

(ix) The circumstances as they were at the date of the grant of the lease are very important. A claim will fail if it is based on an alleged defect in the demised premises which was present at the date of the grant of the lease.

(x) But, given that a lease is essentially prospective in operation, the central issue, where the complaint is of activities on the neighbouring premises owned by the landlord, is not merely the use to which the adjoining premises are put at the date of the grant to the tenancy, but also the use to which they may reasonably be expected to be put in the future.

(xi) When assessing what the parties to a contract actually must have contemplated, one should focus on facts known to both parties and statements and communications between them."

[24] I pause at this point to say that an alternative formulation to substantially less fit is that of 'materially less fit', to be found in Gale on Easements pages 142-143. The defendants submit that although Neuberger J found for the kiosk owner in Platt the facts there were very different from the facts here, a submission I accept.

[25] While the plaintiff tenant is indeed entitled to rely on its covenant for quiet enjoyment this is indeed something that is likely to overlap and unlikely to be wider than the heading of derogation from grant. The test is one of "substantial interference with the tenant's possession by the acts or omissions of the landlord. In Southwark London Borough Council v Mills [2001] 1 AC 1, Lord Millett at page 23 spoke of "anything that substantially interferes with the tenant's title to or possession of the demised premises or with his ordinary and lawful enjoyment of the demised premises. The interference need not be direct or physical."

[26] Fourthly, and finally, the plaintiff relied on a head of nuisance but it seems to me that while it is possible that a nuisance might be caused during the rebuilding work, if it was not carried out with the necessary and proper care, that this heading does not add significantly to the plaintiff's case.

[27] The first question I have to ask myself pursuant to the House of Lords judgment in American Cyanamid is whether the plaintiff has shown that there is at least a serious issue to be tried. In the light of the multiple concerns expressed by the plaintiff's expert and Mr Orr's cogent submissions I consider the plaintiff has established that there is a serious issue to be tried; it has an arguable case.

Adequacy of Damages

[28] One must then move on and consider has the plaintiff shown that damages would not be an adequate remedy for the plaintiff and would be an adequate remedy for the defendants if an injunction were granted and they ultimately succeeded? I candidly admit that this is a difficult point to resolve. The least difficult part is that both parties accept that the other is a mark for damages, capable of paying damages if the plaintiff succeeded or honouring an undertaking in

damages if the defendants ultimately succeeded. The plaintiff submits that the assessment of damages in the event of it failing to get an interlocutory injunction but succeeding in the action would be very difficult to calculate. How much of any loss could be attributable to the opening of the Next store with loss of car parking etc? How is that to be reflected with regard to the capital value of the plaintiff's leasehold interest? How would the court form a view of the future impact over many decades of this construction close to the plaintiff's unit?

[29] Against that the defendants say the plaintiff will not suffer any loss at all. This construction, which it is subsidising, will revive the eastern end of the centre where the plaintiff is. The concerns of the plaintiff are misplaced, its expert argues. Even if that is not the case, the deponent avers that all they can suffer is financial loss which can indeed be calculated from loss of footfall and, if it happens, any loss of profits in the operation of the store. That can then be capitalised for the future.

[30] The plaintiff's senior counsel in reply made the valid point that the plaintiff had property rights here and that interference with property rights could not necessarily be compensated for by an award of damages. The plaintiff relied on two judgments of Clarke J in Dublin in Metro International SA v Independent News and Media plc [2005] IEHC 309 and Allied Irish Banks plc et al v Diamond et al [2011] IEHC 505. I readily accept that the court should not approbate a situation where a party with deep financial resources interferes with the property rights of another and then says it is sufficient for them to pay damages. The court will not shrink from granting an injunction to preserve the rights of the property owner in the appropriate case. But I think it fair to say this is a rather more subtle situation than that.

[31] If there is doubt about whether damages would be an adequate remedy for the plaintiff, what of the defendants if an injunction were granted but they ultimately succeed here? The defendants have already entered into a contract in 2014 with Next plc. It is not disputed that this agreement for a lease of 12 September 2014 is binding on the defendants. By virtue of Clauses 3.3 and 19 of the agreement Next is entitled to determine the agreement if they are not given access to the completed building, for fitting out, by 12 October 2016. The defendants express through their affidavits and expert report apprehension that this important retailer may desert them for a competing centre nearby if this work of expansion does not proceed. There is also the risk to the defendants that they construct the building with Next in mind but fail to complete on time, because the interlocutory injunction would be in place for some months until a trial, even an early trial, and Next simply walk away as they would be entitled to do, leaving the defendants with having spent about £6m on a development for which they have to then find a tenant. They will be in a poor bargaining position in such a situation. Against that the plaintiff says that in fact the centre owners are going to make a loss in this situation as briefly outlined above.

[32] I have taken into account the other submissions of counsel in regard to these matters even if not expressly referred to. It seems to me that it might be said that damages will be a partial remedy to both parties but not entirely adequate for either.

Balance of Convenience

[33] Given that there is doubt about the issue of damages the court must then address the balance of convenience between the parties. The inconvenience to the plaintiff of the construction works is obvious but they do not claim that they are entitled to object merely on that ground. The balance of convenience, which has been said to be really more a balance of justice, stems here for the plaintiff from the fact that it may be much more difficult for them to gain an injunction at trial, if they succeed, if the defendants are allowed to go ahead and start constructing this new unit in the way that they wish to in the interval.

[34] On the other hand the defendants point to the fact that they are in contract to complete this building, save for fitting out, within 20 months. Because of the plaintiff's actions they are not yet in contract with a contractor to build the building. They are already under pressure of time through no fault of their own. They submit, persuasively I find, that the balance of convenience leans more in their favour than in that of the plaintiff.

Status Quo

[35] While I have not found the factors so far to be exactly evenly balanced I do think it prudent to consider the status quo. The plaintiff relies on the physical status quo i.e. there is the same entrance here as was there in 1982 and the court should grant an interlocutory injunction until trial before deciding that that can be done away with.

[36] I have some hesitation about this view. Firstly, the defendants indisputably have a right to alter entrances even if the precise limitations of that right when combined with other steps are still open to determination. Secondly, the plaintiffs themselves do not object to the principal of redevelopment – they only object to this particular redevelopment. Thirdly, it is right to say that I took the opportunity of the adjournment of this matter from 4th to the 9th inst. to visit the location. It seems to me that the defendants' expert is justified in saying that the present situation does look rather outdated and unattractive. Nor was I particularly impressed with the claim that Dunnes Stores had particular visual prominence as one comes into the centre, even from the eastern entrance to the car park proximate to Dunnes. The physical status quo needs to be updated, as Mr Osmond concedes. Furthermore, the defendants have already spent some £200,000 on enabling works for this site development.

[37] In any event the defendants are entitled to say that the status quo also includes the contract which they have entered into with Next and on that basis it

favours them. I find they are in a different situation from somebody who is proposing to start a new venture, which the court may more readily restrain by injunction, because they are already in contract with a reasonably imminent contractual completion date. I conclude therefore that preserving the status quo here favours the defendants.

Stronger case?

[38] If the relative strength of one party's case is significantly greater than the other that may legitimately be taken into account. I consider that the defendants have the better side of the argument in the light of the express clauses in the lease of 1982. Whether the strength of their case is "significantly greater" is something of a moot point.

Special Factors

[39] The special factor that may be applicable in this case is not one that was considered by their Lordships in American Cyanamid. The issue of delay does arise to some degree under the heading of Status Quo, which I have already addressed. See Bean on Injunctions 11th Edition 3-25. If the plaintiff had moved before the defendants were in contact, and carried out enabling works, they would be in a stronger position.

[40] Equally well I acknowledge that injunctions are not "awarded as a prize for the vigilant and automatically withheld from the less vigilant … Each case turns on its own facts" per Rimer J in Law Society v Society of Lawyers [1996] FSR 739. However, delay by the claimant is a factor in the defendant's favour although not a bar. It is relevant to the overall exercise of the courts discretion and in this case, the defendants submit, is a point of particular importance. They rely, inter alia, on Bean – 3.22 to this effect:

> "If, by the time a letter before action is written, the defendant is already substantially committed to the launch of a new project or publication, that is a factor against the grant of an interim injunction: Management Publications Ltd v Blenheim Exhibitions Group plc [1991] FSR 550; cf Belfast Ropeworks Company v Pixdane Ltd [1976] FSR 337."

[41] Bearing these matters in mind I now turn to the facts of the delay by the plaintiff here which the defendants submit was egregious and prejudicial. On 26 June 2013 the previous owner of the centre, Abbey Centre Ltd, applied for planning permission for this scheme. The plaintiff was notified of this by letter of 18 July 2013. On 26 September 2013 the plaintiff wrote a detailed letter to the planning service objecting to the proposal on very similar grounds to those it now puts forward.

[42] Counsel for the defendants point out that Next also wrote to the Planning Service in support of the planning application and that this letter would have been available to the plaintiff on the planning file. The plaintiff wrote on 2 October 2013 stating that it would take all steps to protect its position if the centre proceeded with the development. This is an important part of the plaintiff's case as saying that, in effect, the defendants or their predecessor in title were well aware that the plaintiff would go to law to prevent this development. Pausing there I cannot accept that submission. This letter as drafted, and not from solicitors, does not constitute a letter before action. In any event on 11 October 2013 the defendants' predecessor in title wrote to the plaintiffs offering a meeting to discuss the scheme. There was no response to this nor to a number of other requests on behalf of them for meetings. The various tenants of the centre were kept informed about the scheme e.g. by the minutes of a tenants meeting of 27 January 2014. At that time it was hoped to commence works by Easter 2014. In fact planning permission was only granted on 9 April 2014. On the 14th of that month the Planning Service wrote to the plaintiff to advise it that planning permission had been granted.

[43] Mr Gerard Hughes, for the defendants' predecessor in title, finally did have a meeting with the plaintiff's representatives on 19 June 2014. There is a difference of recollection about what passed at the meeting of 19 June 2014. The defendants were represented by one of the Project Managers, Mr Hughes, and the plaintiff seems to have had four representatives there, led by their new property director, Mr Dominic Deeny. In a rejoinder affidavit of 3 February 2015 the plaintiff's company secretary, Thomas Sheridan, avers that he is advised that Mr Hughes' recollection of that meeting is not accurate but he does not say by whom he is so advised, as he should when quoting hearsay. In any event what is clear is that he is maintaining on behalf of those who were at the meeting that they were told that the then owner of the centre was in agreement with Next to come in as the tenant on the scheme. The plaintiff's representatives claim that Mr Hughes was committed to sending excerpts from the landlord's agreement with Next and proposals to deal with the plaintiff's concern. "In fact he never did so."

[44] However, as Mr Hughes points out he could not have sent excerpts as no agreement was then in place with Next, as we now know. He says that Mr Deeny was to write expressing their concerns rather than the reverse. It is not appropriate to resolve this dispute at this interlocutory stage. The key point is that the plaintiff's representatives were being told that the owner of the centre was proceeding with the scheme and that they were either in negotiations with, as Mr Hughes says, or they were actually already in contract with Next. Despite that it is common case that the plaintiff did not write after that meeting objecting in any way, let alone instructing solicitors to write a letter before action seeking assurances about the plaintiff's position. In the event the present defendants contracted to purchase the centre on 22 August 2014. On 12 September 2014 they entered into the Agreement for a Lease with Next. Subsequent to that there was correspondence from London solicitors about the scheme showing that the plaintiff was indeed concerned. There were

requests for information but not so as to relieve the plaintiff of a duty to act promptly. There was some suggestion from counsel that the plaintiff was not aware of what was happening but the defendants put in at the hearing of this matter a number of press statements that had been issued regarding these proposals at Abbey Centre. One of those was dated 11 August 2014 which announced that the group of which the defendants are part exchanged contracts on three shopping centres including this one. (They were a little early in saying that.) There was also an entry on the Estate Gazettes website to the same effect and a third disclosure in a trade website. These were matters for the trade but then Dunnes Stores Ltd clearly has an interest in such retail and property developments.

[45] As the defendants complain this correspondence took place but it was only after their workmen came on to the site to commence the enabling works, on foot of a second contract they had entered into with a contractor, preparatory to the implementation of the agreement to build the unit for Next, that the plaintiff's solicitors in Northern Ireland moved to take steps.

[47] I make it clear that it seems that the plaintiff's solicitors and counsel appearing before me acted with ability and alacrity in bringing this matter before the court once instructed. But the same cannot be said of their clients over an extended period of time before that. I find that the plaintiff was on notice that the former and present owners of the scheme were likely to proceed with it and yet did nothing

Conclusion

[48] The court has an overall discretion in this matter at common law. Furthermore, the court seeks an outcome which is just and convenient pursuant to s.91 of the Judicature Act 1978. The exercise of that discretion here is informed by all the matters referred to above; this judgment should be read in its entirety. However it seems to me that a number of factors in particular tell in favour of the defendants. Firstly, on the wording of the lease they appear to me more likely to succeed at trial, albeit it is far from being a certain outcome. Secondly, if the plaintiff were to win it could, at least, recover damages which would be a partial remedy. Thirdly, the balance of convenience somewhat favours the defendants. Fourthly, the plaintiff delayed from April 2014 until last month, January 2015 in taking decisive action. During that time the defendants entered into a binding legal contract with a third party to build out the development for which planning permission had been largely granted on 9 April 2014, so that the preservation of the status quo in all the relevant circumstances favours the refusal of an interlocutory injunction. Parties seeking the exercise of the court's discretion are ill advised to sit on their hands. Finally, and of lesser importance, any unquantifiable loss to the plaintiff is mitigated by their newly acquired right to have direct access from and egress to the car-park. Not all these factors are required for the defendants to succeed, as I am satisfied they should. The interim injunction granted by the court will not, therefore be continued, extended or enlarged. I find for the defendants.