**APPROVED** **[2024] IEHC 602**

**THE HIGH COURT**

**Record No.: 2020/1600 P**

**BETWEEN:**

**GRADUAL INVESTMENTS LIMITED**

**Plaintiff**

**-and-**

**DES KENNEDY**

**Defendant**

**JUDGMENT of Mr Justice Rory Mulcahy delivered on 30 October 2024**

## Introduction

**1.** These proceedings concern a dispute between a landlord and tenant regarding the alleged underpayment of rent pursuant to a lease dated 14 October 2008 ("**the Lease**"). The premises the subject of the Lease is a convenience store, including a post office, in Stepaside, a Dublin suburb ("**the Premises**").

**2.** The parties agree that between 1 January 2014 and 13 October 2018 ("**the relevant period**"), the defendant paid the plaintiff less than the rent specified in the Lease. However, it is also agreed that for all but a year of the relevant period, there were two separate abatement agreements in place by which the plaintiff agreed to accept a reduced or abated rent subject to compliance by the defendant with certain conditions. The principal dispute between the parties, therefore, is whether the defendant has failed to comply with those conditions such that the full rent reserved under the Lease was owed by him. The plaintiff

argues that there have been various breaches by the defendant of his contractual obligations during the relevant period. The defendant denies any breach. The defendant also argues that even if there were a breach such that some or all of the abated rent became due, the plaintiff is estopped from relying on any entitlement to claim that abated rent.

## Factual background

**3.** On 14 October 2008, the plaintiff's predecessor in title, Richmond Properties Limited ("**Richmond**"), entered the Lease with the defendant for a 35 year term. The initial rent under the Lease was fixed at €137,000 per annum excluding VAT (all sums referenced in this judgment are exclusive of VAT).

**4.** On 27 April 2012, receivers were appointed to Richmond. On 28 November 2013, Richmond, acting through the receivers, and the defendant entered a side agreement ("**the first abatement agreement**") pursuant to which Richmond agreed to accept a reduced or abated rent of €80,000 per annum for the period from 27 April 2012 until 31 December 2014. They also reached an agreement in relation to arrears which had arisen prior to 27 April 2012.

**5.** On 6 March 2014, the plaintiff acquired Richmond's interest in the Lease as part of its acquisition of the commercial development of nine properties of which the Premises formed part. By the time the plaintiff acquired Richmond's interest, further arrears of €49,800 had accrued and by letter dated 8 September 2014, the plaintiff agreed to accept the sum of €24,000 in discharge of those arrears, payable in 16 monthly instalments of €1,500, the final payment to be made by 31 December 2015.

**6.** Following the expiry of the period covered by the first abatement agreement, the defendant continued to pay rent at the reduced rate which had been set in that agreement.

**7.** By agreement dated 18 December 2015, but signed by the defendant on 15 February 2016, the plaintiff and defendant entered a further abatement agreement ("**the second abatement agreement**") by which the plaintiff agreed to accept reduced rent, in increasing amounts, for the years 2016, 2017 and much of 2018. It is not disputed that the defendant paid rent at the rates provided for in the second abatement agreement, albeit that there is

some complaint that the payments were not made in a timely manner, and that he resumed paying the rent reserved under the Lease when the period covered by the second abatement agreement expired.

**8.** Other than in respect of the amount of abated rent due, the second abatement agreement was in similar terms to the first abatement agreement. In summary, the abatement agreements provided that if there was any delay by the defendant in making payments due under the Lease (other than rent) or the abatement agreements, or if the defendant otherwise breached the terms of the Lease, then the abatement agreements would be rendered void *ab initio* and the full rent due under the Lease would become payable.

**9.** In early 2017, the defendant carried out a significant refurbishment of the Premises owing to a switch from one franchise (Spar) to another (Centra). The plaintiff's position is that it was aware that the defendant was carrying out works but not of the extent of those works. The plaintiff's agent, Mr John Birmingham, visited the premises prior to completion of the works.

**10.** On 15 July 2019, the plaintiff served a forfeiture notice on the defendant. The notice stated that the defendant had failed to pay rent due on 1 June 2019 and:

> *"Accordingly, pursuant to the terms of the Lease and without prejudice to the Landlord's right to pursue the Tenant for such sums as are due in respect of rent required to be paid under the Lease, the sum of* ***€14,042.50*** *has become due and owing by you, the Tenant which said sum has not been discharged.*

**11.** The notice said that the Lease would be forfeited if that sum was not paid within 14 days.

**12.** The defendant's solicitor replied stating that the sum alleged to be due under the notice had already been paid. No further action was taken by the plaintiff on foot of the notice.

**13.** In or about 2019, the defendant engaged with the plaintiff regarding the assignment by him of his interest in the Lease. This resulted in the defendant issuing Circuit Court proceedings on 19 September 2019 against the plaintiff (Circuit Court Record No. 6190/19) seeking a declaration that the plaintiff was unreasonably withholding its consent to the

assignment. Although there was a full exchange of pleadings and discovery in those proceedings, the court was told that they were in abeyance at the time of the hearing of this action.

**14.** By letter dated 31 January 2020, the plaintiff's solicitor wrote to the defendant alleging that there had been unspecified default under the terms of the abatement agreements and demanded all sums due under the Lease. The sum specified as due in the letter was €505,101.09. The defendant's solicitor replied, denying any breach and denying that there was any sum due.

**15.** The plaintiff issued the within proceedings by plenary summons on 27 February 2020. The summons sought declarations that each of the abatement agreements had been rendered void *ab initio* by reason of the defendant's failure to abide by their terms. In addition, the plaintiff sought judgment in the sum of €540,882.35.

**16.** In or about June 2020, that is, subsequent to the commencement of these proceedings, the plaintiff arranged for an inspection of the premises by Pat McGovern (Surveyors) Limited, trading as McGovern Surveyors ("**McGovern Surveyors**"). McGovern Surveyors had prepared a survey report in 2014, prior to the plaintiff's acquisition of the premises. It prepared a further report dated 18 June 2020, which purported to identify various breaches of the terms of the Lease. The plaintiff's agent, Mr Birmingham, wrote to the defendant on 13 July 2020 asking him to remedy the breaches identified in the report. A subsequent report prepared in September 2020 noted that the issues identified in the June report had been substantially addressed.

**17.** On or about 2 July 2020, the plaintiff delivered a statement of claim in which it set out the breaches upon which it relied for the purpose of claiming relief. The breaches alleged reflected the contents of McGovern Surveyors' June 2020 report and included the following:

- The refurbishment carried out in 2017 was carried out without prior written consent in breach of the terms of the Lease;
- The defendant failed to keep the property in good repair in breach of the terms of the Lease;
- The defendant breached a term of the Lease which restricted the amount of the premises which could be used for the sale of wine, beer or spirits;

- The defendant failed to pay service charges due under the Lease in a timely manner;
- The defendant failed to pay arrears due in accordance with the schedule agreed on 8 September 2014.

**18.** The plaintiff claimed that as a consequence of these breaches, the entire reserved rent for the relevant period was due and owing and that, accordingly, there had been an underpayment of rent in the sum of €274,221.29. It also claimed that there was interest due on that sum, pursuant to the Lease, in the sum of €235,770.71. The interest was calculated on the basis that interest accrued from the time that the full reserved rent would have fallen due under the Lease. It also claimed that the agreement to accept reduced rent arrears of €24,000 was void due to the failure to pay the full amount agreed by 31 December 2015 and that the entire amount of arrears was due. It claimed a total sum of just less than €540,000.

**19.** At the hearing of the action, the plaintiff reduced its claim in relation to interest, seeking only interest accruing from the date of its demand letter sent on 31 January 2020. The re-calculated interest claim presented was for €74,848.67.

**20.** In his defence, delivered on 19 March 2021, the defendant denied that there had been any breach of the Lease such as to render the abatement agreements void. Without prejudice to that denial, he pleaded that the plaintiff was estopped from relying on any alleged breach for various reasons. He also alleged that the claims in the proceedings were not made "*bona fide*" but were only raised following the Circuit Court application referred to above. The defendant also argues that the clauses in the abatement agreements which trigger the requirement to pay the full reserved rent are "penalty clauses" and are therefore unenforceable. In addition, he argues that the interest provision in the Lease is a penalty clause and is also unenforceable.

**21.** The parties exchanged discovery and the proceedings were set down for trial by the plaintiff on 17 November 2022. The trial commenced on 10 April 2024 but was not completed within the three days allotted. The oral evidence was concluded on 3 May 2024 and legal submissions were heard on 5 July 2024 following which I reserved judgment.

**Structure of judgment**

**22.** As appears from the foregoing, there are three separate periods in respect of which the plaintiff claims overdue rent. A portion of the first abatement agreement (the plaintiff does not claim any rent foregone prior to 2014), the period between the two abatement agreements, and, therefore, not expressly covered by either agreement, and the period of the second abatement agreement. Different issues arise in respect of each period and the parties make different arguments in respect of each.

**23.** As discussed below, for the plaintiff to succeed in its claim, it must establish that some failure of the defendant entitles it to treat one or both abatement agreements as being void and, therefore, entitled to claim the full rent which was due under the Lease. It must, in addition, be shown that the plaintiff has not waived its entitlement to seek the full rent or is not otherwise estopped from pursuing a claim for the full reserved rent.

**24.** In the circumstances, it is necessary to address, first of all, what were the circumstances in which the abatement agreements would be rendered void. It is then necessary to consider whether those circumstances have arisen in respect of either or both of the abatement agreements. If one or both abatement agreements have been rendered void, it remains to consider whether there is any barrier – by waiver or estoppel – to the plaintiff claiming the full reserved rent for the relevant period. The position in relation to the underpayment of rent in the period between the two abatement agreements, 2015, will also have to be considered.

**25.** As will become apparent, there are very limited facts disputed between the parties. I propose, therefore, to deal with the evidence, where relevant, in the course of addressing each of the questions which requires to be determined in these proceedings. In those circumstances, the judgment will follow the following structure:

a. Brief identification of the witnesses and the material covered by their evidence;
b. Interpretation of the abatement agreements;
c. Identification of issues;
d. Alleged breaches;
e. Estoppel/waiver;

f. Penalty clauses.

**The witnesses**

**26.** The plaintiff called a total of four witnesses: Mr Dualta Moore, principal of the plaintiff; Mr Brian Duffy, a surveyor who carried out a survey of the Premises prior to the plaintiff's acquisition in 2014; Mr Lorcan Daly, a surveyor who carried out two surveys subsequent to the commencement of proceedings, in June and September 2020; and Mr John Birmingham, also a surveyor, but who provided management services to the plaintiff from early March 2017 onwards. It did not call any independent expert evidence.

**27.** The defendant's two factual witnesses were Mr Joe Bingham, the defendant's accountant since 2017, and Mr Kennedy, the defendant. He also called Mr Jerome O'Connor, a surveyor, to give expert evidence.

*Dualta Moore*

**28.** Mr Moore gave evidence of the circumstances in which the plaintiff came to acquire the Premises and of how the plaintiff managed its engagement with the defendant. He explained the background to the dispute from the plaintiff's point of view. He explained the method of calculation of the sums said to be owed by the defendant. Mr Moore was recalled in order to address errors in the plaintiff's initial calculation of the sums due.

*Brian Duffy*

**29.** Mr Duffy confirmed that he had carried out the survey the subject of the report prepared by McGovern Surveyors in 2014. He confirmed the scope of his work and the contents of the report.

*Lorcan Daly*

**30.** Similarly, Mr Daly confirmed that he had prepared the two reports prepared by McGovern Surveyors in 2020. He confirmed the instructions he had been given in preparing those reports.

*John Birmingham*

**31.** Mr Birmingham gave evidence regarding his role in the provision of management services to the plaintiff. He described his dealings with the defendant and addressed the correspondence exchanged between them.

*Mr Kennedy*

**32.** Mr Kennedy gave evidence regarding his ownership of the premises and his history of dealing with the plaintiff, including Mr Moore and Mr Birmingham. Mr Kennedy explained that his mother had operated a shop and post office in Stepaside for many years and he had taken over the running of that shop from her. It had originally been an independent newsagent, but had become a Spar franchise approximately three years before moving premises. He moved premises in 2008 to the premises the subject matter of these proceedings.

*Mr Bingham*

**33.** Mr Bingham gave evidence regarding the defendant's financial position during the period 2017 – 2020.

*Mr O'Connor*

**34.** Mr O'Connor gave evidence concerning the manner in which landlords and tenants typically resolve issues where there is an allegation of breach of covenant.

## The abatement agreements

**35.** Although, as discussed below, the defendant relies on the doctrine of promissory estoppel, it is important to note that the plaintiff has not argued that the abatement agreements are not binding on it. It is trite law that an agreement to accept part payment of a debt in satisfaction of the whole is not binding unless supported by consideration. In *The*

*Barge Inn Limited v Quinn Hospitality Ireland Operations 3 Limited* [2013] IEHC 387 Laffoy J noted that "*it was beyond question*" that this principle, known as the rule in *Pinnel's Case*, represents the law in Ireland. The plaintiff appears to have accepted that the abatement agreements are supported by consideration, or in the alternative, that the principles governing promissory estoppel would prevent it from treating the abatement agreements as having no effect. The defendant's counsel suggested that provisions of the agreements prohibiting assignment went beyond the obligations of the Lease and, therefore, represented consideration for the concessions in those agreements. In any event, the enforceability of the abatement agreements *per se* was and is not in dispute.

**36.** Rather, what is in issue is whether the defendant has breached the terms of the abatement agreements such as to entitle the plaintiff to treat them as void and, if so, whether the plaintiff is estopped from relying on those breaches. Before considering the evidence of alleged breaches, it is first necessary to understand what the abatement agreements required. The parties are agreed as to the principles of interpretation which should apply to a commercial agreement, and are agreed that those principles should apply to the interpretation of both the Lease and the abatement agreements. The defendant's legal submissions refer to the adoption by the Supreme Court in *Analog Devices BV v Zurich Insurance Company* [2005] 1 IR 274 of the set of principles set out by Lord Hoffman in *Investors Compensation Scheme Limited v West Bromwich Building Society* [1998] 1 WLR 896. The approach advocated in those cases was summarised by the Supreme Court (O'Donnell J, as he then was) in *Law Society of Ireland v Motor Insurers Bureau of Ireland* [2017] IESC 31 as follows (at p. 12):

> "*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.*"

**37.** In addition to the principles of interpretation applicable to all commercial contracts, the defendant contends that there is a requirement to interpret the abatement agreements in a particular way in light of the following provision in each agreement:

> *The Tenant hereby acknowledges and agrees, having taken independent legal advice prior to the signing hereof, that the terms of this side letter are fair and reasonable having regard to the concessions granted by the Landlord herein (vis a vis the Landlord's right to enforce the terms of the Lease).*

**38.** The defendant contends that this imports into the contract an obligation to interpret it in a fair and reasonable manner, noting that there was no evidence that the plaintiff (or its predecessor in title, Richmond) had taken steps to ensure that the defendant had, in fact, obtained legal advice. However, the defendant never gave evidence regarding whether he had obtained legal advice. In any event, the clause cannot be interpreted as importing an obligation to interpret any ambiguity in the agreements in a manner which is fairest to the defendant. The clause is no more than an acceptance by him that the agreement by the plaintiff to accept reduced rent was fair and reasonable, an acknowledgement which can hardly be regarded as surprising given the plaintiff's contractual entitlements.

**39.** As noted above, the abatement agreements provide for the payment of reduced rent during specified periods subject to certain provisos. The provisos in the first abatement agreement are as follows:

> *Provided always that:*
> *If:*
> *(i) the Tenant is in default of any payments payable under the Lease (other than in respect of Rent) or in default of the Abated Rent and arrears payable in accordance with clause 1.1 and 1.2 of this side letter for a period of 7 (seven days) or more following receipt of written demand from the Landlord or on his behalf;*
> *(ii) any of the covenants on the part of the Tenant whether set out in the Lease or this side letter shall not be observed or performed;*

*(iii) the Lease is terminated or if the Tenant purports to assign, transfer or surrender the Lease; or*

*(iv) the Tenant breaches the obligations in respect of confidentiality set out at clause 2 of this side letter*

*then and in any of the said cases, the terms of this side letter will immediately become null and void ab initio in which case the Landlord shall be entitled to pursue all monies owed under the Lease without reference to this side letter or the terms of the concession hereby granted.*

**40.** The provisos in the second abatement agreement are in almost identical terms save that there is no reference to the payment of arrears, as they did not form part of the later agreement.

**41.** There are differences between the parties regarding how they interpret the agreements. The first dispute concerns whether a breach of the provisos *at any time* renders the abatement agreements void, or whether it is only a breach during the currency of one of the agreements which could render that agreement void. To be fair to the plaintiff's position, it did not argue with any great force that a breach after the expiry of the term of either abatement agreement could render that agreement void. However, it did not resile from that contention entirely.

**42.** It is clear, in my view, that it was intended that the provisos in each abatement agreement ceased to operate once the term of the agreement expired. There is nothing in either agreement which suggests that any proviso or covenant therein would continue to have effect beyond the term of the agreement. I accept that the provisos in the agreement are silent on the question of whether a failure to make a payment, or a breach of a covenant of the Lease *after* the payment obligations in the abatement agreements have expired could entitle the plaintiff to treat those agreements as void. However, in circumstances where the agreements were, in effect, spent once the payment obligations had been discharged, the clauses would ordinarily be interpreted as ceasing to have effect once the remainder of the agreement ceased to have effect, absent some clear indication to the contrary. There is no such indication.

**43.** When one considers the terms of the provisos, it becomes all the more obvious that they are concerned with a breach of the defendant's obligations during the currency of the

abatement agreements. Notably, the provisos expressly provide for failure to make payments under the Lease other than rent, which remained due during the currency of the agreements, and failure to pay *abated* rent, also due during the currency of the agreements. But no express reference is made to the reserved rent, which would only become due again once the periods covered by the agreements expired. This strongly suggests that the agreements are only concerned with breaches which occur during their currency and not with breaches after the fact.

**44.** Accordingly, I am satisfied that any entitlement of the plaintiff to treat the agreements as void for failure by the defendant to comply with the provisos could only arise where the defendant failed to comply during the currency of each abatement agreement. Put otherwise, the first abatement agreement could only be rendered void by a breach during the currency of that agreement, so too with the second abatement agreement.

**45.** The second dispute concerns the interpretation of the first proviso. That proviso distinguishes between default of payments due under the Lease (other than rent) and default of payments due under the agreements (the abated rent and, in the case of the first abatement agreement, arrears). The proviso also provides that it is only a failure to pay following the receipt of a seven-day demand letter which will result in the agreement being void. The parties disagree about whether the requirement for a prior written demand applies only in relation to a failure to make a payment due under the abated agreements, or whether it also applies in relation to a failure to make a payment due under the Lease. The plaintiff contends that any failure to make a payment under the Lease (other than in respect of rent) rendered the abatement agreements void, without the necessity for a seven-day demand letter, the defendant contends that it was only default following written demand.

**46.** The interpretation is, in the first instance, simply a matter of punctuation. In the absence of any punctuation in the first proviso, the ordinary reading of that proviso is that the sub-clause requiring a written demand before default triggers avoidance of the agreement applies to both clauses preceding it. There is nothing in the way that the clause is phrased to indicate otherwise.

**47.** Nor has the plaintiff identified anything in the substance of the proviso, the balance of the agreements or their context which suggests that the parties intended a different

interpretation. The clause distinguishes between the two types of payment which could trigger default, but the plaintiff did not identify any basis for contending that a written demand is required in relation to one and not the other.

**48.** Therefore, only failure to make a payment following a written demand could render the abatement agreements void.

**49.** The third dispute between the parties arises from the second proviso. The defendant contends that the second proviso only relates to a failure to remedy a breach of covenant upon request, *i.e.* a written demand, and that giving an opportunity to remedy the breach was a prerequisite to reliance on the second proviso. The plaintiff claims that any failure to observe or perform a covenant in the Lease rendered the agreement void without any requirement to provide an opportunity to remedy that breach.

**50.** The defendant's interpretation must be rejected for a number of reasons. The first is that there is nothing in the wording of the second proviso that suggests that it relates to a failure to remedy a breach rather than a breach. The defendant sought to argue that the abatement agreement had to be read in context, as a variation to a Lease. He said further that a court would not permit a landlord to forfeit a lease without having afforded a tenant an opportunity to remedy a breach of covenant. Building from this foundation, the defendant argued that, in fact, there is no breach of covenant – or no failure to observe or perform a covenant, to use the language of the abatement agreements – until there had been a failure to comply with a request to make good an alleged breach.

**51.** This contention is contradicted by the terms of the Lease at issue in this case and, in any event, defies logic. Clause 7 of the Lease entitles the Landlord to treat the Lease as forfeit in the event that the whole or part of the rent or any other sum reserved by the Lease is unpaid for 14 days after becoming payable "*whether formally demanded or not*", or if "*there is a breach of any of the Tenant's covenants*". There is, therefore, no obligation to give notice in the event of any non-payment and afford a reasonable opportunity to remedy even in the Lease. There is no reason, therefore, that such a concept should or must be read into the abatement agreements. Though it may be the case that a landlord is required to afford an opportunity to remedy a breach before seeking forfeiture for any breach other than non-payment of rent (see section 14 of the Conveyancing Act 1881), this does not equate to there being no breach, or to there being no other remedy available to the landlord, e.g.

damages. The defendant's argument by analogy with the principles relating to forfeiture is misplaced.

**52.** It is true that the Lease does provide, at Clause 4.10, a mechanism by which the landlord can give written notice to the tenant to remedy any breach. But the mechanism simply provides that failing compliance by the tenant with such a notice, the tenant is obliged to permit the landlord to enter the premises to carry out the works specified in the notice, and that the tenant will be liable for any costs incurred by the landlord in so doing. It does not *oblige* the landlord to serve a notice in the case of such a breach: it is not an entitlement of the tenant.

**53.** In any event, the express wording of Clause 4.10 is that the written notice is given by the landlord "*of any breach of covenant*", thus confirming the obvious logic that a demand to remedy a breach *must* be preceded by a breach. Absent a breach, a tenant could not be called on to make good that breach.

**54.** In addition, the second proviso can be contrasted with the first proviso which, for the reasons given above, I have concluded *does* expressly provide that there must be a prior written demand for a failure to comply to have any effect. The inclusion of that express requirement in the first proviso, with no equivalent in the second, makes clear that it is a failure to perform a covenant *simpliciter* which triggers the second proviso, not a failure to perform following a written request to comply with the contractual obligations or make good a prior failure so to do.

**55.** It may be that a court would be unwilling to permit a landlord to forfeit a lease where a tenant had not been given an adequate opportunity to remedy a breach of covenant, but that it is not relevant to the question of whether a landlord is entitled to demand the payment of the full reserved rent, having agreed to accept a lesser sum on condition of compliance by the tenant with the leasehold covenant, where the tenant fails to comply with those covenants. Whatever arguments the defendant may have had had the plaintiff sought to forfeit the lease based on alleged breaches of covenant, it is not open to him to argue that the abatement agreements required that the plaintiff give him an opportunity to remedy a breach before they could be rendered void.

**56.** A further issue of dispute arises from the defendant's contention that the abatement agreements required the plaintiff to take immediate steps to avoid them in the event of breach by the defendant, failing which it lost the entitlement to treat them as void. He said that this follows from the use of the term "*will immediately become null and void*" in the clause after the four provisos.

**57.** This interpretation must also be rejected as based on a misconception of how the mechanism in the abatement agreements operated. As explained in the recent High Court judgment in *Gradual Investments v Grant* [2024] IEHC 398, the use of the word "*immediately*" simply means that the relevant clause is self-executing.

**58.** As suggested by the title to those proceedings, that case involved the same plaintiff as in these proceedings and, in fact, involved the same commercial development which the plaintiff acquired from the receivers in 2014. Judgment in the case was delivered after the evidence was heard in these proceedings but immediately prior to the making of legal submissions. There was in place between the plaintiff and the defendant in the earlier proceedings an abatement agreement in substantially the same terms as the abatement agreement at issue in those proceedings. The court (Heslin J) analysed the agreement in light of the same principles identified above and concluded:

> "*68. Guided by the aforementioned principles, and on the basis that the Lease comprised a key element of the matrix of fact, or context, in which the 2016 AA came into being, I am satisfied that the following can be said in relation to the meaning of the 2016 Abatement Agreement, as opposed to the meaning of specific words, such as "ab initio".*
>
> - *Subject to compliance with the terms of the 2016 AA, the defendant was permitted to pay a lower rent than would otherwise apply and to pay less than the sum for which the plaintiff had agreed judgment;*
> - *In other words, subject to compliance by the defendant with the terms set out in the 2016 AA, her liability was to pay what the agreement described as the "abated rent" rather than what the same agreement called "full rent under the terms of the Lease";*

- *However, if the defendant defaulted in respect of her obligations as set out (under the heading "Provided always that:") the 2016 AA would immediately become void;*
- *This was the 'automatic' consequence of the defendant's breach;*
- *In other words, the agreement was not voidable at the discretion of the plaintiff – rather, the agreement was 'self-executing' in that respect;*
- *In short, failure by the defendant to honour its terms automatically rendered the 2016 AA void, as a consequence of which the defendant ceased to have an entitlement to rely on the concessions in the agreement;*
- *The proper interpretation of the agreement being void ab initio is that the defendant would cease to have the benefit of any concession made to her by the 2016 AA.*"

**Issues**

**59.** In light of the foregoing, the following questions need to be answered in order to resolve these proceedings:

1. Did the defendant fail to comply with the terms of the first abatement agreement such as to render that agreement void?
2. Was there in place any agreement to accept abated rent for the period between the expiry of the first abatement agreement and the commencement of the second abatement agreement, *i.e.* in 2015? If so, did the defendant comply with that agreement?
3. Did the defendant fail to comply with the terms of the second abatement agreement such as to render that agreement void?
4. Is there any reason, whether by reason of estoppel, waiver or otherwise, that would debar the plaintiff from claiming the entire rent reserved on the basis that any agreement to accept a lesser sum was void and of no legal effect?
5. Is the provision of the abatement agreements which renders the full reserved rent recoverable in the event of a breach of covenant in the Lease, or a failure to make a payment following demand, a penalty clause and therefore unenforceable?

6. If any of the rent foregone is recoverable, is the interest clause contained in the Lease applicable to any such amount, or is it a penalty clause and, therefore unenforceable?

**60.** As previously indicated, I will address the parties' evidence as appears relevant to each of these questions.

**Has the first abatement agreement been rendered void?**

**61.** The plaintiff pleads that the first abatement agreement has been rendered void because the defendant failed to comply with the agreement to pay arrears in accordance with its terms, *i.e.* he failed to comply with the first proviso. None of the facts relating to this aspect of the plaintiff's claim are in dispute.

**62.** The first abatement agreement included provisions for the payment of an abated rent and for the staged payment of arrears due at the time that that agreement was concluded. The parties agree that there was a subsequent agreement between them to vary the terms of the first abatement agreement in relation to these payments which was reflected in letters exchanged between the parties in 2014. By letter dated 18 June 2014, the plaintiff's agent wrote to the defendant, setting out that the figure of €49,800 in arrears was due from the defendant at the time that the plaintiff acquired the premises. The letter set out the basis upon which that figure was calculated. It appears to have been made up of a shortfall in payments of abated rent, with a number of monthly payments missed entirely and other payments of a sum less than the agreed abated rent.

**63.** A letter signed on behalf of the plaintiff dated 8 September 2014 confirmed that it had agreed to write down the arrears which had been due to the plaintiff upon purchase of the premises from €49,800 to €24,000, payable in 16 equal instalments of €1,500 from September 2014 to December 2015. The letter expressly stated that any failure to pay the amount due in full by 31 December 2015 would result in the full amount of €49,800 being payable immediately. The parties have, in effect, treated this agreement as a variation of the first abatement agreement.

**64.** The evidence given in relation to payments of these arrears established that by 13 October 2015, the defendant had discharged €18,000 of the €24,000 due and owing as confirmed in an email from the plaintiff to the defendant of that date which stated that the balance of €6,000 was due by 31 December 2015.

**65.** However, the full balance was not discharged by that date. The final payment was made during the course of negotiations on the second abatement agreement. The second abatement agreement had been provided as a letter dated 18 December 2015 but was not signed by the defendant at that time. On 10 February 2016, the plaintiff's agent sent an email to the defendant setting out his understanding of a phone call that they had had. The email noted their agreement that the defendant would sign and return the second abatement agreement by 16 February 2016 and would "*pay the last payment of the arrears*", €1,500, by that date. The defendant returned the signed abatement agreement together with a cheque for €1,500 under cover of a letter dated 15 February 2016. In evidence, Mr Dualta Moore provided a record of all payments received from the defendant between 2014 and 2020 which confirms that there was a payment of €1,500 from the defendant recorded by the plaintiff on 19 February 2016. No evidence was given of when that payment was actually received.

**66.** The plaintiff does not suggest that its agreement to accept €24,000 in discharge of arrears of €49,800 then due was not binding upon it; in this regard, its position is consistent with its treatment of the two abatement agreements. However, it argues that two consequences flow from the delay in discharging the agreed reduced sum. Its *pleaded* claim is that the agreement to accept a reduced amount of rent was conditional on the defendant paying the total sum due by 31 December 2015. His failure to do so renders the full amount of arrears due, and therefore there is an additional sum of €25,800 due from the defendant. I will return to this argument below.

**67.** At the hearing of the action, the plaintiff advanced a further claim which was that the failure by the defendant to pay the arrears on time rendered the first abatement agreement void such that the full reserved rent for the period of the first abatement agreement is also due. Although not expressly pleaded, it contended that this argument came within the parameters of its wider claim that the first abatement agreement had been rendered void by breach, notwithstanding that this was not one of the particularised breaches.

**68.** On the plaintiff's case, the agreement to accept €24,000 in discharge of the €49,800 was a variation of the first abatement agreement. The agreement to accept payment by the end of 31 December 2015 extended the term of the first abatement agreement in respect of the payments agreed in September 2014. Thus, it contends that there was a failure to comply with the first abatement agreement, as varied, within the term of that agreement, rendering the entire agreement void.

**69.** However, as explained above, the abatement agreements would be rendered void for non-payment only if there was a failure to make a payment due within seven days of a written demand. Even if the plaintiff's email of 10 February 2016 could be regarded as a written demand for payment of the €1,500 which was then overdue, the evidence is that the defendant sent that payment within seven days thereof. The plaintiff has not given any evidence that the payment was received outside seven days, such that there had been default.

**70.** The plaintiff, therefore, relies on its email of 13 October 2015 which noted that there was still €6,000 due at that stage and contends that this meets the requirement for a written demand for payment. However, at the time that this email was written, the payment of €1,500 on which the plaintiff relies was not overdue. Indeed, it was not, at that time, due at all. The final payment of arrears was required to be made by 31 December 2015. The plaintiff was not entitled on 13 October 2015 to demand payment of that sum. It cannot, therefore, rely on a letter noting that the payment *would be due* as a written demand for payment within the meaning of the first abatement agreement. It wasn't, and couldn't have been, a demand for payment for the purpose of that agreement.

**71.** I should note that the plaintiff's record of payments, which was dealt with in the evidence of Mr Moore, only shows two payments of €1,500 after the email of 13 October 2015, notwithstanding that it was suggested that there was €6,000 due at that time, and only shows 15 payments altogether, rather than the agreed 16. The record also shows only one payment after 31 December 2015, the date upon which the total amount of arrears was required to be paid. However, the plaintiff has only relied on the failure to pay the €1,500 ultimately paid in February 2016. That is the only 'late' payment about which evidence was given.

**72.** The plaintiff, therefore, has failed to establish any circumstance which rendered the first abatement agreement void. In circumstances where the plaintiff has accepted for the purpose

of these proceedings that the first abatement agreement, and the variation to it, was binding upon it, it is, as a consequence, debarred from making any claim for the difference between the rent actually paid during the period of the first abatement agreement and the reserved rent for that period.

**73.** Different considerations arise in relation to the balance of arrears. The variation to the first abatement agreement evidenced in the plaintiff's agent's letter of 8 September 2014 did not permit the plaintiff to claim all rent foregone in the event of a failure to pay the arrears in time; a written demand for any sum due was a pre-condition to such a claim. However, it did permit the plaintiff to claim the balance of the arrears dealt with by that agreement in the event that the agreed amount was not paid by 31 December 2015 without any requirement for a prior written demand. The plaintiff is, therefore, *prima facie,* entitled to claim that the sum of €25,800 is now due unless the defendant is able to establish some basis for barring such a claim.

**Was there in place any agreement to accept abated rent in 2015?**

**74.** Again, there is no dispute of fact regarding this period. The defendant continued to pay rent at the reduced or abated rate provided for in the first abatement agreement, €80,000 per annum. The plaintiff did not demand the rent reserved under the Lease. Indeed, when negotiating the second abatement agreement, the plaintiff stated, in a letter to the defendant dated 4 January 2016, that, as the offer had not been accepted by the date specified in its letter setting out the proposed terms of the second abatement agreement, the full rent was now due. Given the discussions that had taken place in 2015 regarding arrears and the parties' negotiations regarding a second abatement agreement without any reference to a shortfall in rent for 2015, in truth, it would have taken little to persuade me that there was an agreement in place to continue the first abatement agreement up to 2015. However, neither party gave *any* evidence suggesting that there was an express or even an implied agreement in place that the first abatement agreement would continue through 2015, or of any other agreement by the plaintiff to accept a reduced rental payment for that period. In particular, the defendant has not pleaded, nor given any evidence regarding, the existence of an agreement, whether supported by consideration or otherwise, entitling him to pay a reduced rent during this period.

**75.** The defendant paid €57,000 less than the reserved rent in 2015. These proceedings issued in February 2020, well within the statutory time limit for making a claim for default of payment under the Lease in 2016. Accordingly, as with the claim for €25,800 addressed above, the plaintiff is entitled to claim that the sum of €57,000 is now due unless the defendant can establish that the claim is otherwise barred.

**Has the second abatement agreement been rendered void?**

**76.** The plaintiff alleges various breaches of covenant during the period of the second abatement agreement such as to render it void. In addition, it alleges a failure by the defendant to pay service charges due under the Lease despite demand for payment. It contends that any single breach of covenant, or failure to pay service charge due upon demand is sufficient to render the second abatement agreement void.

**77.** Before dealing with each alleged breach and/or failure in turn, I should address an argument which the defendant belatedly advanced regarding the interpretation of the second abatement agreement in its written submissions delivered after the hearing of the evidence.

**78.** The agreement states "*the company is prepared to agree an abated rent for the period from 1st January 2016 to the next rent review day, being 14 October 2018*" under the following terms. Paragraph 1 then provides that "*the agreed rent for the period is*" €134,260. Paragraph 2 provides that "the abated rent" for each of the three years to which it applies is as follows: €90,000 in 2016, €95,000 in 2017 and €78,356.17 for the period from 1 January 2018 to 13 October 2018 (equivalent to a yearly rent of €100,000).

**79.** The defendant contends that the agreement is capable of being read as an agreement to pay the "agreed" rent of €134,260 for the entire almost three year period of the agreement, that the defendant has overpaid "abated" rent totalling €263,356.17 and that he is, therefore, entitled to a repayment of €129,096.17.

**80.** Unsurprisingly, the defendant never claimed this repayment. Any suggestion that the agreement somehow involved the plaintiff agreeing to accept €134,260, but the defendant at the same time agreeing to pay over almost double that amount simply makes no sense whether in its own terms or in the context of a lease pursuant to which the defendant was

obliged to pay €137,000 *per annum* to the plaintiff or in the context of the existing arrangements between the parties.

**81.** The reference to the "agreed rent for the period" in paragraph 1 can readily be understood as a reference to the rent *per annum* for the period (albeit there is a discrepancy between the reserved rent of €137,000 and the figure of €134,260 quoted in the second abatement agreement). It seems that this was how it was read at all times by the parties until the defendant's eleventh-hour suggestion of an alternative interpretation.

**82.** The defendant advanced his alternative interpretation in support of a contention that the plaintiff was seeking to have the agreement interpreted in its favour in this respect and that, in effect, it would be unfair to consistently adopt an interpretation of the agreements most favourable to the plaintiff's position. The interpretation of an agreement is not a matter of "sharing out" the benefit of any ambiguity. Leaving that aside, it seems to me that the interpretation above clearly favours the *defendant* and not the plaintiff. If the reference to the "agreed rent for the period" is not understood – as it must be – as a reference to the agreed rent per annum for the period, the agreement, on its face, would contain a fundamental contradiction, an agreement to pay two entirely different amounts, which could not be resolved. This would, I think, render the agreement unenforceable and of no effect. But it is the *defendant* who seeks to rely on the agreement. The plaintiff accepts that he is entitled to do so, subject to compliance with the provisos in the agreement. Any conclusion that the agreement was unenforceable would automatically render the entire reserved rent due, subject to the question of estoppel and / or waiver.

*i. Breach of repairing covenant*

**83.** The Lease contains a repairing covenant ("**the repairing covenant**") at Clause 4.4.1 in the following terms:

> *To repair the Demised Premises and keep and put them in good repair and condition and as often as may be necessary to rebuild, renew, reinstate or replace the Demised Premises and to keep all Tenant's improvements thereto and all fixtures and fittings therein together with all Conduits and Plant within and exclusively serving the Demised Premises in good and substantial order, repair and condition.*

**84.** The plaintiff alleges that the defendant breached this obligation and in this regard, it relies on the evidence of Lorcan Daly of McGovern Surveyors and the report prepared by him in June 2020. That report details a number of items of disrepair which Mr Daly identified when inspecting the Premises in June 2020. These include cracked stone cladding, a broken window, cracked or broken tiles, damage to plasterboard, damage to a suspended ceiling and an absence of up-to-date testing of the fire alarm system, emergency lighting, and the air conditioning system.

**85.** It was accepted by Mr Daly in evidence that the items of disrepair were "*industry standard*" and "*nothing out of the ordinary*" in terms of severity. He also accepted that they had, in the main, been addressed by the time of his subsequent inspection in September 2020, as set out in his report of that date.

**86.** The plaintiff relied on the decision of the UK Supreme Court in *L Batley Pet Products Limited v North Lanarkshire Council* [2014] UKSC 27 in which the court determined that a covenant to keep in good repair is breached as soon as a state of disrepair arises and contended that this court should take the same approach to interpretation of the repairing covenant here. In a case such as this, where breach of covenant would entitle the plaintiff to demand all the rent which it had agreed to forego, such an interpretation would clearly have a draconian impact; the moment that any aspect of the Demised Premises fell into disrepair, for instance, by a window breaking, the abatement agreements would be voided by the defendant's breach of covenant.

**87.** It is not, however, necessary to consider whether the repairing covenant should be interpreted in this way, or whether such a disproportionate consequence can have been intended by the parties when entering the abatement agreements. Because there is, in fact, no evidence of any disrepair in the Premises during the term of the second abatement agreement, and therefore no evidence of any breach of this covenant. Mr Daly's report relates only to the condition of the Premises on 9 June 2020, the date of his inspection, almost two years after the term of the second abatement agreement ended. It cannot, therefore, be relied on to establish that there had been a breach of covenant during that term. None of the other plaintiff witnesses gave any evidence about the condition of the property between January 2016 and October 2018, other than Mr Birmingham's evidence, discussed

below, regarding the works involved in switching the Premises from a Spar franchise to a Centra franchise in 2017. It was not argued that those works amounted to a breach of the repairing covenant.

**88.** In the circumstances, there is no evidence of a breach of the repairing covenant such as to render the second abatement agreement void.

*ii. Breach of alterations covenant*

**89.** The second covenant alleged to have been breached by the defendant is the covenant requiring that the defendant obtain the landlord's written consent before carrying out any alterations to the Premises ("**the alterations covenant**"). Clause 4.13.2 of the Lease provides that the tenant covenants:

> *Not to install or remove any shop front and not to make any other addition or alteration to the Demised Premises without the prior written consent of the Landlord (which consent shall not be unreasonably withheld or delayed).*

**90.** It is not disputed by the defendant that in 2017 he carried out a significant refurbishment of the Premises when changing franchise from Spar to Centra. It is also accepted that he did not seek, still less obtain, the prior written consent of the Landlord. The question is whether such prior written consent was required for the type of changes which he made, in other words, whether the works he carried out amounted to an alteration of the Demised Premises within the meaning of the Lease.

**91.** The defendant's evidence, not disputed, was that when he took the Lease, the Premises were in a "shell and core" condition, *i.e.* there was no fit out in the Premises, and that it was for the defendant to fit out the Premises as he deemed appropriate. He explained that he fitted out the Premises in their entirety when he first went into occupation. The defendant's contention was that the fittings which he installed, including, for instance, suspended ceilings, floors, etc., did not form part of the Demised Premises but were tenant's fittings and therefore did not require landlord consent to their alteration (or, indeed, to their repair).

**92.** Mr Kennedy described the work carried out in 2017 in his evidence on the third day of hearing. He described moving shelving and refrigeration units, increasing the size of the deli counter and removing a lathed or tiled ceiling which he had installed. In his report of June 2020, Mr Daly described in more detail the changes he observed between McGovern Surveyors' initial inspection in 2014, described in Mr Duffy's report, and what he found on inspection in 2020. As Mr Kennedy indicated, the suspended ceiling in place in 2014 had been removed and replaced with a painted finish applied to the structural floor slab above. A canopy had been added over the deli area and another over the main counter area. There were no structural alterations at ceiling level.

**93.** The report referred to new internal partitions, which he described as "*non-structural stud partitions*", to accommodate delicatessen equipment plus some other decorative changes. The tile floor finish had been replaced by a sheet vinyl finish. The previous lighting installation had been removed in its entirety and replaced with "*tenant-specific track lighting and feature lighting to coincide with the shelving layout of the store.*" Mr Daly acknowledged that he could not determine the extent of changes made to wiring or electrical layouts but he assumed that it was replaced in its entirety. This assumption was not challenged by the defendant, and there is a figure of €18,000 for electrical work included in the project cost report for the refurbishment. A new air conditioning unit had been installed together with all associated electrical, plumbing, supply and waste pipework and ductwork. A new CCTV system had been installed. Mr Daly adopted the contents of his report in his oral evidence. The defendant did not dispute that the works described by Mr Daly in his report had been carried out by him since the 2014 report, although he indicated that he did have air conditioning and CCTV systems prior to 2017.

**94.** Although not expressly confirmed by the defendant, having regard to the absence of a contest on the extent of the works and when they took place and the content of the project cost report, it is more probable than not, in my view, that the changes described in Mr Daly's report were carried out as part of the refurbishment which took place in 2017, *i.e.* within the term of the second abatement agreement, save, possibly, the addition of air conditioning and CCTV systems.

**95.** The Demised Premises is defined in the definitions section of the Lease as meaning "*save as provided in clause 5.3.9*" the premises demised by this Lease more particularly

described in the First Schedule to the Lease. The First Schedule defines the Demised Premises to include, for instance, the doors, door frames and glass in the doors, windows, window frames and all glass in the windows; the internal plaster or other surfaces of all load-bearing walls; the floor finishes, raised floors and floor screeds; the conduits and plant exclusively serving the Demised Premises; and the shop front and fascia board of the Demised Premises.

**96.** The definition also expressly included the following:

> *(9) all Landlord's fixtures and fittings now or hereafter in or upon the Demised Premises;*
>
> *(10) all fixtures, fittings, appurtenances, additions, alterations and improvements made to the Demised Premises.*

**97.** The defendant contends that the insurance provisions, referred to in the definition of the Demised Premises, are also of relevance. Clause 5.3 requires the landlord to insure the Demised Premises. Clause 5.3.9 specifies that "*for the purpose of this clause "Demised Premises" do not include (unless otherwise specified by the Landlord) any additions, alterations, or improvements carried out or being carried out by the Tenant.*"

**98.** The rules of contractual interpretation relied on by both parties, dictate that the definition of "Demised Premises" should be read in the context of the Lease as a whole.

**99.** In this regard, the alterations clause can helpfully be considered together with the provisions of the Lease in relation to tenant's works. Clause 4.45 of the Lease provides that the tenant is responsible for fitting out and furnishing the Demised Premises to enable him to carry on business from the Demised Premises. Clause 4.45.2 requires the tenant to submit all plans, specifications and drawings for the tenant's works to the landlord for its approval. The tenant is required to get approval for the contractor who will carry out the works (4.45.3) and for the insurance cover for the contractor (4.45.4). Upon completion of the works, the tenant is to provide the landlord with certificates of compliance with planning permission and the building regulations (4.45.9). Tenant's works are expressly stated not to be improvements for the purpose of the Landlord and Tenant (Amendment) Act 1980. The landlord is thus granted a close degree of oversight of the tenant's works by the Lease.

**100.** Of further relevance is clause 4.5 of the Lease dealing with decorations. This clause requires the tenant to decorate in a good and workmanlike manner "*all parts of the Demised Premises requiring decoration*" every third year of the Term of the Lease. It expressly requires the landlord's written approval for the decoration of the fascia and shop front.

**101.** These provisions, taken together, make clear that the works carried out by the tenant as part of the 2017 refit were alterations within the meaning of clause 4.13.2, for which the prior written consent of the landlord was required. This conclusion flows, first of all, from the definition of the Demised Premises which includes, at item (10) of the First Schedule, all "*fixtures, fittings, appurtenances, additions, alterations and improvements made to the Demised Premises*". The fixtures and fittings referred to in this provision can be distinguished from the Landlord's fixtures and fittings dealt with at item (9). Thus, the provision, on its face, incorporates the *tenant's* fixtures and fittings into the definition of the Demised Premises. Is there anything in the Lease which establishes that a contrary interpretation should be given to this provision?

**102.** Contrary to the defendant's submission, an interpretation which includes tenant's fixtures and fittings is consistent with the provisions of clause 5.3.9 of the Lease, which is expressed to be an exception from the general definition of Demised Premises. Clause 5.3.9 excludes any additions, alterations or improvements carried out by the tenant from the definition of the Demised Premises for insurance purposes, making clear that they are included in the definition of Demised Premises for all other purposes. In truth, reliance on clause 5.3.9 is of only marginal relevance, since the exclusion of tenant's alterations for insurance purposes only does not assist in determining what should be regarded as an "alteration".

**103.** Even if I accept, as I do, the defendant's evidence that the premises were a "shell and core" premises, which he fitted out when he first went into occupation, it remains clear that the landlord's approval for those tenant works was required. It is not, therefore, the case, as the defendant seems to suggest, that the tenant is free to carry out such works as he pleases to the internal space within the Premises without any requirement for landlord approval. Clause 4.45 is only addressed to, what might be described as, the first fit-out by the tenant. But an interpretation of the Lease which requires landlord consent to a significant alteration

to that fit-out, by reason of clause 4.13.2, is consistent with the requirement that consent was required for the original fit-out.

**104.** It is also consistent with the clause requiring that "*all parts of the Demised Premises*" requiring decoration be kept in good decorative order and with the repairing covenant discussed above. The decorations clause does not require landlord consent (save for the shop front and fascia) but nonetheless makes clear that the tenant's works remain subject to continuing obligations on the part of the tenant. Similarly, the repairs clause does not require prior approval but does require that *all* fixtures and fittings be kept in good and substantial order, repair and condition. Alterations thereto require prior approval, decoration and repair do not.

**105.** Thus, an interpretation of the Lease which results in the substantial works carried out by the defendant in 2017 being treated as works which required prior approval by the Landlord is consistent with the literal wording of the Lease and involves a coherent reading of the contractual provisions as a whole.

**106.** In light of the above, I consider that the defendant breached the covenant in the Lease requiring that he obtain prior written consent to the alteration carried out in 2017. The effect of this breach is to render the second abatement agreement void. Whether, however, the plaintiff is entitled to rely on this breach for the purpose of claiming the balance of rent due for the period of the second abatement agreement which, by my calculation is €117,991.78 (the underpayment of the full year's rent in 2016 and 2017 and for 286 days of 2018), is considered below.

*iii. Breach of restrictive user covenant*

**107.** The third breach alleged is an alleged breach of a covenant ("**the restrictive user covenant**") concerning the sale of alcohol. Clause 4.12 of the Lease deals with the use to which the Premises can be put. By clause 4.12.1 of the Lease, the tenant covenants as follows:

> *Not to use or permit or suffer to be used the Demised Premises or any part thereof for the sale of wine, beer or spirits for consumption off the premises ("the Restricted*

*Uses") **PROVIDED ALWAYS** that the Tenant may use 20 square feet only of the Demised Premises for the Restricted Uses as ancillary to the Permitted User.*

**108.** Mr Daly's report of June 2020 stated that he had measured the area of the Premises "*dedicated to the sale of alcohol and ancillary circulation space*" at 95.8 square feet. His September 2020 Report stated that the area dedicated to alcohol sales had been reduced significantly since the prior report and was now 0.9 square meters or 19.4 square feet. As noted by counsel for the defendant, there is a discrepancy between these figures. 0.9 square meters is approximately 10 square feet. Mr Daly suggested in evidence that the September report contained a typo and it should have read 10.4 square feet.

**109.** The evidence given was that, prior to the works in 2017, there were two shelving units in the premises used for the sale of wine. The two units were side by side along a short section of wall close to the back wall of the shop. Following the refurbishment works, this had increased to seven shelving units. There was now a row of three shelving units along the back wall, and a row of four more, at right angles to those three, along the adjoining wall, where the original two shelving units had stood. There was, as a consequence of this physical arrangement, a small amount of 'blank' floor space in the corner where the rows of four shelving units and three shelving units met. Mr Kennedy was shown photos of the shop in which this was the layout and confirmed that that was the way the shop had been laid out following the 2017 refurbishment. He confirmed that he only ever sold wine in the shop. Subsequent to the 2020 Report and Mr Birmingham's letter, he reduced the number of shelving units used for wine sales back to two.

**110.** Mr Daly explained his method for calculating the floor space being used for the sale of alcohol. In addition to measuring the amount of shelving space, in his June 2020 Report, he made an allowance for circulation space dedicated to the sale of alcohol. In this regard, he identified that the floor space in the corner area of the shop which had rows of wine shelving on two sides, was circulation space dedicated to wine sales and he included this in his calculation of the area used for alcohol sales in his June report. In the report, he identified that the area of shelving was 29.5 square feet, and a further 66.3 square feet was described as circulation space. He said that he had never previously been asked to measure the amount of space dedicated to a specific use within a demise and he confirmed in evidence that it was the client's suggestion to include circulation space in his calculation.

**111.** In his September 2020 report, he took the view that there was no circulation space dedicated to wine sales and, therefore, he only included the measurement of the two shelving units that were being used for wine sales.

**112.** The defendant's questioning of Mr Daly focussed on the appropriateness of including circulation space in the calculation of the area used for alcohol sales. As pointed out by counsel for the defendant, the logic of Mr Daly's position was that only "dedicated" floor space should be included, since no floor space was included in the calculation for the September Report. Mr Daly fairly acknowledged that this was so and did not dispute, as confirmed by Mr Kennedy in his evidence, that customers would cross through the area he had calculated in his June report to be dedicated circulation space to access the tills from the chilled and frozen goods section of the shop. The defendant contends that the circulation space should, accordingly, be discounted.

**113.** It is worth noting that the restrictive user covenant simply refers to an area in the demise being used for alcohol sales, and does not reference "dedicated use" at all. As a matter of common sense, the floor area in front of shelves must be regarded as being necessary for the use of those shelves in a shop and, accordingly, in my view should properly be regarded as being used for the sale of the goods on those shelves within the meaning of the restrictive user covenant. The floor area in front of the wine shelves was, in my view, used for the sale of wine within the meaning of the covenant.

**114.** I accept the argument that the entirety of the space between these shelves and the freezer units contained in the aisles in front of them should not be regarded as being used for wine sales and that, therefore, the figure of 66.3 square feet in the June report is overstated. It is not necessary, however, to precisely determine how much floor space was used for wine sales, because the defendant's argument somewhat misses the more fundamental issue which is that the only evidence available is that the amount of *shelving* space used for the sale of alcohol was, by a significant margin (c. 50%), in excess of the area permitted under the Lease even if, impossibly, no floor space was used for the sale of the goods on those shelves. I reject the defendant's suggestion that this should be disregarded as an immaterial breach because it was such a small amount of the overall shop. First, there is no provision in the abatement agreements relating to the materiality of the breach. But second, and more

importantly, the proper assessment of the materiality of the breach is by reference to what was permitted, not the overall shop size. In that light, the breach was clearly material.

**115.** The plaintiff's evidence in the first report was that 29.6 square feet of shelving space was used for wine sales. This calculation of the area used by seven shelving units is consistent with the calculation of the area used by two shelving units in the September report, even using 0.9 square meters as the correct calculation from that report. The defendant offered no measurement evidence at all regarding the amount of space used. His only basis for challenging the plaintiff's calculation was to point to the 'blank' space in the right angle where two shelving units met. Mr Daly's evidence was that this was an immaterial amount of space, which I accept. In any event, as it was physically necessitated by the shelving arrangement used for wine sales, I would regard it as being used for wine sales within the meaning of clause 4.12.1.

**116.** In the circumstances, it is clear that the defendant was in breach of the restrictive user covenant in 2017 and 2018, *i.e.* during the term of the second abatement agreement. This breach also had the effect of rendering the second abatement agreement void. As with the breach of the alterations covenant, the question of whether the plaintiff is entitled to rely on that breach will be considered below.

*iv. Breach of requirement to pay service charges*

**117.** The final breach of the Lease relied on by the plaintiff relates to the late payment of charges, other than rent, due under the Lease. Clause 3.3 of the Lease required the tenant to pay a portion of the General Common Parts Service Charge ("**the Service Charge**") on demand in accordance with Clause 8 of the Lease. Clause 8 sets out the mechanism by which the Service Charge is calculated and collected.

**118.** Clause 8.2 of the Lease requires that the landlord, at the end of each financial year, prepare an account setting out the calculation of the Service Charge and that, upon certification of that amount by an accountant, the account and certificate would be conclusive evidence for the purpose of the Lease of all matters contained in the account.

**119.** However, clause 8.3 of the Lease requires that the tenant pay *in advance* his proportion of the Service Charge based on an estimate of what the total Service Charge will be for that year. Following the completion of the account required by Clause 8.2, any difference between the amount paid in advance and the amount certified will be credited to the tenant or landlord as appropriate.

**120.** On a proper reading of these clauses, therefore, the Service Charge is payable in advance based on an estimate by the landlord of the tenant's proportion of the overall service charge costs and does not require to be certified by an accountant as the amount actually due. The certification process takes place *after* payment and is used to reconcile the actual costs and the amount paid in advance.

**121.** Since the breach alleged in this case involves a failure to make a payment due under the Lease other than in respect of rent, in order for an alleged breach to have the effect of rendering the second abatement agreement void, it must be shown that there was a failure to pay an amount due under the Lease following a written demand for payment. The plaintiff must, therefore, establish three things: first, that the money was due under the Lease, second, that there was a written demand for payment of the sum due, and third, a failure to pay the sum demanded within seven days.

**122.** Mr Moore explained in his evidence that the Service Charge was paid by Mr Kennedy directly to the management company, Step Village Management Lease Company ("**the Management Company**"), an arrangement which was in place prior to his acquisition of the Premises. The Management Company is provided for in the Lease and the costs of the Management Company are recoverable as part of the Service Charge. Mr Moore gave evidence that the Management Company, or a company to whom it sub-contracted the task, Indigo Property Management ("**Indigo**"), raised invoices with Mr Kennedy and that he paid the Service Charge directly to the Management Company. Mr Moore's evidence was that he was first made aware of delays in discharging the Service Charge in late 2019.

**123.** In his evidence, Mr Kennedy very fairly admitted that there were delays by him in paying what he called 'management charges' and that he had been in arrears, including in the period between 2015 and 2019, which includes the term of the second abatement agreement. He also accepted that he had received written requests for payment.

**124.** In this regard, counsel for the plaintiff put a series of letters to Mr Kennedy which he accepted had been sent to him by the Management Company care of Indigo. These included a letter dated 29 February 2016 headed 'Request for Payment – Reminder'. This stated that a balance had been brought forward from the last statement dated 24 February 2016 of €5246.39 for the financial year January to December 2016. It stated that the account was overdue and requested payment within 14 days "*to avoid legal action*". In addition, it stated that "*if you are experiencing difficulty in paying the outstanding fee, your management agency, Indigo Property Management is more than happy to negotiate an agreeable payment schedule.*"

**125.** This was followed by a letter dated 22 April 2016 headed 'Request for Payment – Final Notice'. It referred to the balance brought forward from the last statement dated 29 February 2016 of €5246.39 for the financial year January to December 2016. The final notice contained the same provisions about payment.

**126.** There was a similar 'Reminder' dated 4 April 2018 and a 'Final Notice' dated 30 April 2018 regarding the sum of €5061.15 stated to be due for the financial year January to December 2018. In addition to these particular letters being put to Mr Kennedy, he was asked whether a statement of account generated on 31 August 2021 setting out the 'Service Charge History' which contained all details regarding payment of Service Charges in the relevant period, including these reminders and final notices, accorded with his "*understanding of claims made for payment and payments made by [him] in respect of management fees*". He replied, "*Yes, that is possible*".

**127.** The statement of account suggests that a portion of the Service Charge for 2016 was paid by cheque on 3 June 2016 with the balance carried forward to 2017. Similarly, a portion of the sum demanded in 2018 was paid by cheque on 23 November 2018 with the balance carried forward to 2019. As at 6 April 2021, the account shows no balance outstanding.

**128.** For completeness, I should record that the plaintiff's counsel also put similar reminder letters and final notices sent in 2015 and 2019 to Mr Kennedy, which were reflected in the statement of account, but as these fall outside the term of the second abatement agreement, they are not relevant to the question of whether the second abatement agreement has been voided.

**129.** In light of the above, I am satisfied that the Service Charge was a payment due under the Lease and that the absence of any certification that the amount claimed accurately reflected the defendant's proportion of the costs incurred does not mean that the defendant was not required to pay the Service Charge demanded. I am further satisfied, on the balance of probabilities, that in 2016 and 2018 payment *was* demanded in writing by, at least, the reminder letters and that, as evidenced by the final notices, there was a failure to make that payment within seven days of the written request for payment. It also appears from the statement of account that there was a failure to pay the sum demanded within seven days of the further demands contained in the final notices. There was, therefore, a failure to make a payment due under the Lease within seven days of a written demand.

**130.** The fact that the letters stated in terms that payment should be made within 14 days might have had a bearing on whether reliance could be placed on these written demands if payment *had* been made within 14 days, but not seven, but the evidence is that payment was not made for some considerable period after the reminder letters and, indeed, after the final notices. The fact that the letters suggest that Indigo was prepared to negotiate a payment schedule does not deprive the letters of their effect as written demands for the purpose of the second abatement agreement.

**131.** The defendant argued that the fact that the letters had not been sent by the plaintiff meant that they could not be relied on for the purpose of satisfying the requirement for a written demand under the second abatement agreement. However, that agreement expressly provides that the demand be "*from the Landlord or on his behalf*". In circumstances where the letters demanded payment of the Service Charge due under the Lease, pursuant to an established arrangement whereby the Management Company collected those payments, the letters clearly satisfy the requirement of being letters sent on behalf of the plaintiff.

**132.** In the circumstances, the defendant's failure to pay the Service Charge demanded in 2016 and 2018 in full within seven days of the reminders of 29 February 2016 and 4 April 2018 respectively, and within seven days of the final notices of 22 April 2016 and 30 April 2018 respectively also renders the second abatement agreement void.

**Inequitable to permit recovery – estoppel/waiver**

**133.** In light of the defendant's breach of the alterations and restrictive user clauses of the Lease, and its failure to pay the Service Charge due within seven days of written demand for such payment, the second abatement agreement has been rendered void. The defendant argues that even if this is so, it would be inequitable to permit the plaintiff to recover any of the rent foregone during the period of this agreement, or any of the other amounts claimed. In so doing, he pleads estoppel and waiver. He also argues that the provision in the abatement agreement which renders due all rent foregone in the event of a breach of the Lease is a penalty clause and therefore unenforceable, and that, furthermore, the interest provision under the Lease, on which the plaintiff relies, is also a penalty clause and unenforceable.

**134.** Before considering the factual grounds on which the defendant makes these arguments, it is helpful to briefly consider the applicable principles regarding estoppel and waiver. I will separately consider the principles applicable to so-called penalty clauses below.

*i. Applicable law - estoppel*

**135.** The parties are agreed that the principles which the court should apply in this case are those articulated by the High Court (Laffoy J) in the *Barge Inn* case, cited above. That case also concerned an agreement by a landlord to accept reduced rent, in that instance, as concluded by the court, "*while the business carried on by the plaintiff in the Demised Property was adversely affected by prevailing economic circumstance*."

**136.** The court accepted the defendant's contention that the agreement to accept reduced rent was not supported by consideration and, therefore, did not give rise to an enforceable contract. However, she concluded that, having regard to the principles concerning promissory estoppel, the defendant was not entitled to withdraw the concession made in relation to accepting reduced rent while the plaintiff continued to be adversely affected by prevailing economic circumstances.

**137.** The court considered the relevant legal principles at paragraphs 63 to 74 of the judgment, including an analysis of the leading cases, *Central London Property Trust*

*Limited v High Trees House Limited* [1947] 1 KB 130, *Ajayi v RT Briscoe (Nigeria) Limited* [1964] 1 WLR 1326, and, in this jurisdiction, *Truck and Machinery Sales Limited v Marubeni Komatsu* [1996] 1 IR 12. She also considered the then up-to-date editions of the leading Irish texts, Clark on *Contract Law in Ireland* (6th ed., 2008) and McDermott on *Contract Law* (2001) and observed that "*there is little divergence as to the current state of Irish law on the doctrine between the authors*". She quoted the following list, from McDermott, of the key ingredients of promissory estoppel (at para. 68):

> "*(a) the pre-existing legal relationship between the parties;*
> *(b) an unambiguous representation;*
> *(c) reliance by the promisee (and possible detriment);*
> *(d) some element of unfairness and unconscionability;*
> *(e) that the estoppel is being used not as a cause of action, but as a defence; and*
> *(f) that the remedy is a matter for the Court.*"

**138.** Those key ingredients are also listed in the more recent decision of McDermott (2nd ed., 2017 at 3.126) and are cited in the most recent edition of Clark (9th ed. 2022 at 2.70) as representing Irish law, which Clark suggests "*remains rooted in a rather orthodox view of promissory estoppel*". As is evident from (c), there is some debate about whether mere reliance on a promise is sufficient to ground an estoppel or whether it must be shown that reliance has been to the detriment of the promisee.

*ii. Applicable law – waiver*

**139.** Although distinct concepts, the doctrines of promissory estoppel and waiver share much common ground. Waiver involves forbearance from enforcing a contractual obligation. Even if unsupported by consideration, a representation by one party, whether express or by conduct, that a party will not rely on the strict terms of a contract or enforce a contractual remedy will be binding on that party if the other party has acted in reliance on it. The concept was discussed by Denning LJ in *Charles Rickards Limited v Oppenheim* [1950] 1 KB 616 in the context of a buyer agreeing to postponement of a delivery:

> "*If the defendant, as he did, led the plaintiffs to believe that he would not insist on the stipulation as to time, and that, if they carried out the work, he would accept it, and*

*they did it, he could not afterwards set up the stipulation as to the time against them. Whether it be called waiver or forbearance on his part, or an agreed variation or substituted performance, does not matter. It is a kind of estoppel. By his conduct he evinced an intention to affect their legal relations. He made, in effect, a promise not to insist on his strict legal rights. That promise was intended to be acted on, and was in fact acted on. He cannot afterwards go back on it.*"

**140.** As so formulated, there is little to distinguish waiver from estoppel. The same query arises regarding whether reliance on a representation must also involve detriment. The requirement for a defendant to have acted to its detriment on foot of a representation was the view of the majority in *Peyman v Lanjani* [1985] Ch. 457.

**141.** Waiver cannot occur unless the party said to have waived its contractual entitlement is aware of its entitlement to exercise that contractual entitlement. So in *Peyman v Lanjani*, in a case where the defendant claimed that the plaintiff had affirmed a contract following the defendant's breach, the Court of Appeal of England and Wales determined that a party needed to have knowledge not only of the facts giving rise to the right of election (to continue the contract or treat it as repudiated) but of the right of election itself. The court also stated that a defendant could not rely on a purported affirmation of the contract unless the other party had "*unequivocally demonstrated*" that it intended to continue with the contract (see, in this jurisdiction, *SA Foundries du Lion MV v International Factors (Ireland) Ltd* [1985] ILRM 66).

**142.** In the context of a landlord and tenant relationship, the provisions of Deasy's Act 1860 (the Landlord and Tenant Law Amendment Act 1860) are also relevant. Section 43 of the Act provides that no waiver of a breach of a lease shall be effective unless signed in writing by the landlord. The provision was at issue in *Crofter Properties Limited v Genport*, unreported, High Court, McCracken J, 15 March 1996:

"*The wording of the section is quite clear, and relates to "any breach thereof", which I think can only be reasonably interpreted as meaning that there cannot be a waiver of any specific breach unless that waiver is in writing.*"

**143.** This statutory provision is reinforced by the wording of the Lease in this case. Clause 7.4 provides as follows:

> *Each of the Tenant's covenants shall remain in full force both at law and in equity notwithstanding that the Landlord may have appeared to have waived or released temporarily any such covenant, or waived or released temporarily or permanently, revocably or irrevocably a similar covenant affecting other property belonging to the Landlord.*

**Discussion**

**144.** Before examining whether any issue of estoppel or waiver arises on the facts of this case, it is necessary to consider precisely how such estoppel or waiver is alleged to have operated. The defendant's argument is that the plaintiff is estopped from resiling from the abatement agreements. But as made clear above, the plaintiff does not dispute that the defendant is entitled to rely on the abatement agreements. However, it argues that that reliance was subject to compliance with the terms of the agreements, and that the defendant has failed to comply. The defendant's plea of estoppel is premised on his proposition that there was no "*evidence of substantive breach of any covenants in the Lease*" by the defendant (para. 51 of his written submissions).

**145.** However, for the reasons explained above, I have rejected that conclusion. There is ample evidence of breach and, in respect of the Service Charge, in effect, an admission of a breach. Insofar as the defendant refers to "substantive" breach, there seems to be some implicit suggestion that the breaches were so minimal that the plaintiff was not entitled to rely on them. The defendant did not provide any authority in support of a proposition that a breach of a requirement for strict compliance with an agreement must meet a certain level of severity in order to be operative, but in any event, I do not consider that the breaches in this case could be regarded as anything other than substantive or material.

**146.** In the case of the breach of the alterations covenant, the defendant entirely failed to seek prior consent to, what were, substantial works, which works were required to facilitate a change of franchise. The evidence was that the cost of the works was €147,477.85. Mr Kennedy did not give any evidence regarding his failure to seek consent. He did not, for

instance, suggest that he considered the works to be so minimal that consent wasn't required, or that he had some basis for believing that prior consent was not required. Frankly, it is a little difficult to understand how it could have been considered prudent to commence such substantial works without reference to the plaintiff at all. I fail to see how the breach of the alterations covenant could be regarded as anything other than a material breach of the Lease.

**147.** Similarly, the breach of the restrictive user covenant must be regarded as a substantive or material breach. Although the amount of wine being sold on the premises did not increase significantly in absolute terms beyond that permitted, in relative terms, this was a significant breach, even on the most generous view of how much space was allocated to the sale of alcohol. The premises forms part of a development of nine commercial premises and restrictive user covenants are an essential tool in such developments to enable a landlord to balance the interests of the tenants in the development. As it happens, Mr Moore gave evidence that in 2017, the plaintiff operated one of the units in the development as a coffee and wine shop and that, although the coffee shop element was successful, the wine shop did not prosper and the business ultimately closed. Mr Moore suggested that this may have been contributed to by the defendant's breach of covenant. This proposition didn't come close to being established, and I do not place any significant weight on this evidence. However, it does serve to illustrate the potential importance of such clauses. A breach of the low threshold permitted by 50% must be regarded as a material breach.

**148.** It is difficult to understand on what basis it could be contended that the failure to pay the Service Charge on demand was not a substantive or material breach. True, the sums involved were small when compared to the reserved (or even abated) rent, but there was, in 2016 and 2018, a failure to pay the total sum due in those years at all, and a significant delay in paying any sum.

**149.** There have, therefore, been substantive breaches of the Lease sufficient to render the second abatement agreement void. The defendant argued that even if the court concluded, as I have, that one or both of the abatement agreements was void, the plaintiff was not entitled to any of the amounts claimed. In so doing, it is somewhat unclear whether he is arguing that the plaintiff is estopped from relying on the fact that, *per* its terms, the second abatement agreement has been rendered void, or that the plaintiff has waived the breaches of the second abatement agreement, or has waived its entitlement to claim the full rent under

the Lease. It will, therefore, be necessary to consider whether any of those propositions has been made out.

**150.** In addition to the findings regarding the second abatement agreement, I have concluded – there being no argument to the contrary – that there was no agreement in place for the year 2015. Accordingly, it would appear that the only argument available to the defendant is that the plaintiff has waived its entitlement pursuant to the Lease to the full rent for that period.

**151.** Similarly, with respect to the €25,860 balance of arrears, the defendant appears to be arguing either that the plaintiff is estopped from claiming this balance or that it has waived the balance.

**152.** What then, are the factual circumstances which the defendant claims give rise to the estoppel or waiver such that it would be unconscionable to permit the plaintiff to now recover any of the sums claimed? It has been possible to identify the following matters relied on by the defendant:

i. The plaintiff's acceptance of reduced rent during 2015 without demand for the full reserved rent is relied on in relation to the shortfall in rent in 2015;
ii. Mr Birmingham's attendance at the premises in March 2017 when the alteration works were ongoing is relied on in relation both to the breach of the alterations covenant and the restrictive use covenant;
iv. The various demands for rent at a level consistent with the continuing operation of the second abatement agreement in correspondence from Mr Birmingham (including the forfeiture notice), together with references to the continuing operation of the agreement is relied on in respect of all breaches;

**153.** It also emerged in evidence, as referenced above, that the principal of the plaintiff, Mr Moore, had been aware that the defendant was carrying out the alteration works but did not take any steps to investigate the scope of those works.

**154.** For the reasons set out below, I have concluded that no estoppel or waiver arises. I propose addressing each of the matters alleged to give rise to an estoppel or waiver in turn, but whether considered alone or cumulatively, I cannot identify any basis for concluding

that the plaintiff has lost the right to exercise its contractual rights. In his oral submissions to the court, counsel for the defendant argued as follows (Transcript, Day 5, Page 45, Line 6):

> *"Any promissory estoppel is entirely based on the starting point which is, is it equitable to allow the promisor resile on the promise?*"

**155.** With respect, that is not the starting point. Rather, the consideration of unfairness or unconscionability arises only *after* the other criteria have been established: is it inequitable *in light of those criteria* to permit the promisor to resile from a promise? It is impermissible to simply assert unfairness – judged against what standard one might reasonably query – and claim that contractual entitlements have been lost. That would leave the doctrine of promissory estoppel unmoored from the principles developed in the case law.

**156.** The defendant has no difficulty in establishing that some of the factors necessary to ground an estoppel are present: there clearly was a pre-existing contractual relationship, and he raises the estoppel by way of a defence rather than as a cause of action. But, as will be seen, there is no evidence of any unambiguous representation capable of grounding an estoppel or waiver and little basis for implying such representation from the plaintiff's conduct. Moreover, even if there were such a representation, or it could be implied from the plaintiff's conduct, it is impossible to discern any step which the defendant took in reliance on such representation or conduct, still less a step to his detriment.

i. Acceptance of reduced rent in 2015

**157.** It is not in dispute that in 2015, the defendant paid rent at the same level as provided for in the first abatement agreement. As noted above, there was no evidence given by either party of any discussion regarding the rent payable in that year, nor of any demand for rent made in that year. There were discussions regarding payment of the arrears the subject of the agreement contained in the email of 8 September 2014, as evidenced by the plaintiff's agent's email of 13 October 2015. In addition, it is clear that there were discussions about a second abatement agreement which led to the plaintiff's letter of 18 December 2015 setting out the terms of that agreement. When the defendant failed to sign that agreement by 23

December 2015, as requested, the plaintiff made clear, by letter dated 4 January 2016, that "*the full rent … is the due rent since 1st January 2016*." However, as set out above, I am unable to conclude that there was an agreement in relation to a lower rent for 2015. Is the plaintiff nonetheless estopped from claiming the shortfall in rent for that year? Having regard to the key ingredients for establishing an estoppel, the clear answer to that question is that it is not.

**158.** Mr Kennedy gave no evidence of reliance on any of the matters which are said to ground an estoppel or waiver. It was suggested on his behalf that the investment in the shop in 2017, when it was converted from Spar to Centra, was done in reliance on there being no additional sums owing from, inter alia, 2015 at that stage and that this was sufficient to ground an estoppel. In this regard, counsel for the defendant sought to equate his position to that of the plaintiff in *Barge Inn*. In that case, the court concluded that the plaintiff had acted in reliance on the defendant's promise (at paragraph 82):

> "*I am satisfied that the plaintiff did act in reliance on that promise. The plaintiff, through its directors and shareholders, expended time, energy and money in maintaining the business carried on in the Demised Property and in improving and upgrading the Demised Property at a time when proprietors of licensed premises were confronting unprecedented difficulties. While there was very little, if any, positive returns for their efforts, the directors and shareholders of the plaintiff acted in the belief that the lessor would abide by its promise.*"

**159.** It is possible that the defendant's efforts in refitting the premises might similarly have provided a basis for claiming an estoppel in relation to matters arising *prior* to that investment, such as the failure to pursue the underpayment from 2015, had Mr Kennedy given any evidence of reliance on that failure. No such evidence was tendered. Moreover, the investment clearly could not give rise to an estoppel from any matters arising *after* Mr Kennedy's decision to switch franchises and to refit the Premises. Mr Kennedy could not have made those decisions in reliance on representations or conduct by the plaintiff which had not yet occurred.

**160.** It was separately suggested that Mr Kennedy could be said to have acted in reliance on the plaintiff's representations, or implied representations, that it would accept a lesser sum

in rent for 2015 simply by paying that lesser sum. This cannot be correct. In order for a defendant to show that it has acted in reliance on a representation for the purpose of grounding an estoppel, they must show that they have done something which they would not otherwise have been obliged by the contract to do. The contractual position in 2015 was that Mr Kennedy was seven years into a 35-year contract pursuant to which he was required to pay €137,000 rent per annum, subject to upward only rent reviews every five years. There is no break clause in the Lease. He was, therefore, required to pay that rent and comply with all other covenants in the Lease. Even had the plaintiff represented to the defendant that it would accept a lesser sum, there is no basis, in equity or otherwise, for suggesting that, simply by paying less than the sum required by the Lease, the defendant acted in reliance on such a representation: it cannot be the case that a defendant simply by paying *less* than a contract requires can contend that a plaintiff is estopped from demanding what the contract requires. That is the clear implication of the rule in *Pinnel's Case*.

**161.** In circumstances where there was no clear representation about the 2015 rent, and, in any event, no step taken in reliance on such a representation, it is unnecessary to consider to what extent it must also be shown that in acting in reliance on a representation, the defendant acted to his detriment.

**162.** Nor, for the same reasons, can it be argued that the plaintiff has waived its right to the balance of rent from 2015, even without reference to the provisions of Deasy's Act and the Lease. Although none of the communications from the plaintiff to the defendant after 2015 suggested that there was rent due from 2015, nor did any unequivocally represent that the failure to pay the full rent from that year was forgiven. The defendant did not give evidence that he believed that the rent from that period had been waived and had acted in reliance on it.

**163.** Even had there been evidence such as to *imply* an otherwise binding waiver, which there was not, this would have involved a purported waiver of the terms of a written lease. The waiver would, therefore, have been defeated by the terms of Deasy's Act and the express terms of the Lease, at Clause 7.4, by reason of not being set out in writing.

ii. John Birmingham site visit March 2017

**164.** In March 2017, shortly after being engaged by the plaintiff to assist with the management of the development of which the premises form part, Mr Birmingham visited the defendant's shop. The alteration works described above were still ongoing but nearing completion. Following the visit, Mr Birmingham wrote to the defendant. The letter, dated 14 March 2017, stated, *inter alia*, as follows:

> "*1) Premises refurbishment*
>
> *I note that your refurbishment is nearing completion. As mentioned, in future can you please let me know of any proposed works in advance, in order that we can document any required Landlords consent. This will serve to safeguard the interests of both parties.*"

**165.** The defendant contends that by a combination of this visit and this letter, the plaintiff is estopped from relying on the breaches of the Lease which were apparent at that time, being the alterations carried out without prior consent, and the increased use of space for the sale of wine. In this regard, Mr Kennedy's evidence was that, at the time of the visit, the space allocated to wine sales had already increased and was as described in Mr Daly's report of June 2020. Mr Birmingham was not in a position to contradict this.

**166.** In his evidence, Mr Birmingham explained that "*the main purpose of [his] visit was to introduce [himself] to Mr Kennedy*". He expressly stated that he didn't inspect the Premises and that he wasn't there to carry out an inspection. He could not recall precisely when he obtained the Lease from the plaintiff, but believed it may have been soon after that visit. Mr Kennedy did not suggest in evidence that he believed that Mr Birmingham was inspecting the Premises, whether to determine compliance with the Lease or otherwise.

**167.** Mr Birmingham had been appointed by the plaintiff and must, I think, be taken to have been acting as the plaintiff's agent, both in and about the visit and in the correspondence he sent to the defendant. On the basis of the evidence, it is clear that Mr Birmingham was aware that the alteration works constituted, at least, a potential breach of the Lease requirement for written consent. He referenced the necessity for such consent during the course of his visit

and reiterated the necessity in the letter of 14 March 2017. There was no evidence, however, that he had any awareness of the breach of the restrictive user clause.

**168.** There can be no question of estoppel, since Mr Kennedy's evidence was that the works and the change of use had already occurred prior to Mr Birmingham's visit; there was, therefore, no question of the works or the change of use being done on the basis of any representation that Mr Birmingham might have made.

**169.** I do, however, consider that the letter of 14 March 2017 could, for certain purposes be considered a waiver of any remedy the plaintiff might seek for breach of the alterations covenant in the Lease. The statement that consent should be sought in future, necessarily suggests that Mr Kennedy did not need to seek to rectify the past breach. Although Mr Kennedy did not give this evidence, in light of that representation, there would have been no basis for Mr Kennedy to try and obtain retrospective consent for the works already done. The letter, in effect, suggested that that was unnecessary. I note that, on one view, a failure to obtain *prior* consent could never be rectified after the fact, but I think that in a different situation, for instance where the failure to obtain prior consent was being relied on to claim damages, a request for consent after the fact would be a relevant factor in mitigating the consequences of that breach. In any event, arguably, Mr Kennedy could be said to have acted in reliance on this letter by not seeking consent after the fact.

**170.** However, the plaintiff is *not* seeking a remedy for breach of the alterations covenant. Rather, it is seeking to rely on that breach to contend that the second abatement agreement is no longer in force. There is nothing in Mr Birmingham's visit or his letter of 14 March 2017 which suggests that *that* claim, which it could have pursued at that time, had been waived. There was no representation that this was so, no evidence that Mr Kennedy believed that rights arising from the breach had been waived, and no evidence that he acted in reliance on the visit or the letter as a waiver of the plaintiff's entitlement to avoid the second abatement agreement. In my view, therefore, the plaintiff cannot be taken to have waived reliance on the breach of the alterations covenant for that purpose.

**171.** Still less could the letter (or visit) be said to give rise to a waiver of the breach of the restrictive user covenant. Neither the breach nor the increased use of the Premises for alcohol sales was referenced during Mr Birmingham's visit or in his subsequent letter. This is unsurprising since Mr Birmingham's evidence was that he was unaware of the change or

of the possibility that there had been a breach. Although it might have been arguable that Mr Kennedy was entitled to assume that Mr Birmingham's visit and subsequent letter should, in effect, be treated as a confirmation that all the changes which he had made were acceptable to the plaintiff, and therefore a waiver, of the breach of the restrictive user clause, this is not a matter which falls to be inferred from the evidence, it is something about which specific evidence was required to be given. However, Mr Kennedy did not give any evidence that he interpreted Mr Birmingham's letter in this way, or that he considered Mr Birmingham's visit to be an inspection for the purpose of confirming compliance with the covenants in the Lease.

**172.** In the circumstances, the defendant cannot rely on Mr Birmingham's visit or his subsequent letter to contend that the plaintiff is estopped from or has waived reliance on the breaches of the alterations or restrictive user clauses for the purpose of avoiding the second abatement agreement.

iii. The subsequent correspondence from Mr Birmingham

**173.** Mr Birmingham frequently wrote to Mr Kennedy during the remaining period of the second abatement agreement regarding the issue of rent, including in the letter of 14 March 2017. That letter set out arrears which had accrued by reason of the defendant's failure to increase rent payments in accordance with the terms of the second abatement agreement. In addition, it was Mr Birmingham who, on Mr Moore's instructions, sent the forfeiture notice quoted above. The defendant relies on these letters as evidence that the plaintiff had waived any entitlement to additional rent from 2015 and to rely on the breaches of the second abatement agreement and claim the rent foregone from 2016 to 2018.

**174.** A letter of 27 March 2017, in reference to the 14 March 2017 letter, set out a schedule showing "*the balance of rent due*" of €7,687.45. In a letter dated 25 April 2017, which confirmed the plaintiff's agreement to accept payment on a weekly rather than monthly basis, Mr Birmingham stated:

> *"Other than those in regard to the frequency of rent payments, the terms of the abatement agreement dated 18th December 2015 still apply and any failure to meet the weekly payment schedule and/or to re-commence monthly rent payments on 1st August 2017 will result in the abatement being revoked."*

**175.** Letters dated 8 August 2017, 6 October 2017, 10 November 2017, 9 January 2018 and 6 March 2018, concerning delays in paying rent due, also referred to a failure to pay rent constituting a breach of the abatement agreements and that, in event of default, the plaintiff would seek payment of the full amount due, said to be in excess of €380,000. A letter dated 20 September 2018 referred to the imminent expiry of the second abatement agreement, and a letter of 8 November 2018 referred to it having expired. A series of letters in 2019 complained about late rent payments for the relevant quarter and demanded payment of interest in respect of those late payments which, it should be acknowledged, Mr Kennedy paid. The forfeiture notice quoted above, from June 2019, referred to the previous month's rent being due and owing.

**176.** The defendant's case in relation to these letters is that by these letters and forfeiture notice, the plaintiff represented that at the time of any given letter, or the forfeiture notice, the only money owing was the money demanded in that letter or notice. Since, on the plaintiff's case, the second abatement agreement had been rendered void when it was breached, this must have constituted a waiver of any entitlement to claim additional arrears of rent. Moreover, the reference to the continuing operation of the abatement agreement, he argues, means that the plaintiff is estopped from *now* relying on events which had already rendered it void.

**177.** I do not accept that the letters or the forfeiture notice can be read as representations that no sum was owing other than the sums specified in those letters. Each letter is concerned with the particular payments the subject of that letter. They were not a representation, implied or otherwise, that no other entitlements had arisen, still less that other entitlements had arisen, but that the plaintiff was waiving those entitlements. The forfeiture notice is expressly stated to be without prejudice to any other sums which may be due under the Lease.

**178.** As noted above, for a waiver to be effective, the party waiving its entitlement must know of the facts giving rise to the entitlement being waived. Although the plaintiff was aware at the time of the correspondence of the breach of the alterations covenant, the only evidence is that it was not aware of the breach of the restrictive user clause until 2020, in fact, after the commencement of the proceedings. Mr Moore indicated that he was made

aware of the delays in paying the Service Charge in late 2019. Mr Birmingham gave evidence that he was aware that Indigo was chasing late payments but did not indicate from what date. In any event, some of the late payments, which constituted a breach of the second abatement agreement, occurred only after most of the correspondence now relied on by the defendant as constituting a waiver.

**179.** The defendant also contends that the plaintiff, or its agents, continued operation of the second abatement agreement disentitles it from now relying on events which would otherwise have entitled it to treat the agreements as void. The defendant interprets the words "immediately" in the agreement as imposing an obligation on the plaintiff to immediately treat the agreement as void in the event of a breach or lose the entitlement so to do. That is a misreading of an obligation which merely concerns when a breach will be deemed to take effect. It did not impose on the plaintiff an obligation of constant vigilance, requiring it to police its entitlements under the agreement lest it lose those entitlements due to a delay in exercising them or, worse, due to a failure to realise that they had arisen. The defendant seeks to criticise the plaintiff, in particular in relation to the restrictive user covenant, for failing to determine that the covenant had been breached and for failing to have acted on foot of that breach. I agree that it was somewhat surprising that Mr Moore, when he noticed works going on in Mr Kennedy's shop, did not show more curiosity about the extent of those works. His explanation that he would generally make himself scarce as he didn't want to put any pressure on his tenants or impose himself on his tenants seems a little implausible. Be that as it may, the obligation was on the defendant to comply with his contractual obligations, not on the plaintiff to confirm whether he remained compliant.

**180.** Accordingly, the defendant's attempted reliance on the letters and the forfeiture notice to ground an estoppel or waiver can be rejected without the necessity to point out that they could not, in any event, give rise to any form of estoppel or waiver in the absence of evidence, of which there was none, of Mr Kennedy's reliance on those letters as a representation that his failure to pay the full rent in 2015 and his breaches of covenant thereafter had been forgiven.

iv. Other issues raised

**181.** Before considering the issue of penalty clauses, it is necessary to address a number of other issues raised by the defendant. First, the defendant sought to argue that it would be unconscionable for the plaintiff to successfully recover the sums claimed having regard to the inability of the defendant to meet the claim, or to have paid any more in rent than he did during the relevant period. In this regard, evidence was given as to the profitability, or lack of it, of the shop with a view, it seems, to suggesting that the rent actually paid was the only rent that the Premises could bear and, therefore, the only rent to which the plaintiff should be entitled.

**182.** It is impossible to identify any principled basis upon which the court should be asked to determine the parties' contractual entitlements by reference to the defendant's alleged lack of profitability. The defendant's contractual obligation was and is (subject to an upward only rent review clause) to pay €137,000 per annum in rent for a 35-year period. He was offered, no doubt due to his financial difficulties, a partial reprieve from that obligation on the basis that he would, to use the defendant's counsel's term, be on his "best behaviour", *i.e.* he would comply strictly with the terms of his Lease. However, contrary to counsel's assertion, this he markedly failed to be. The evidence establishes that he was repeatedly late with his rental payments during the course of both abatement agreements and, indeed, was given further concessions by the plaintiff in respect of arrears under the first abatement agreement and regarding payment terms under both agreements. The plaintiff does not rely on these matters. However, the defendant, in addition, materially breached the alterations covenant and the restrictive user covenant in the Lease. No explanation has been offered for his failure to seek consent to the alteration works. The restrictive user covenant seems to have been simply ignored. In addition, he was repeatedly late with payment of the Service Charge.

**183.** The defendant, accordingly, did not meet his side of the bargain represented by the abatement agreements, and almost throughout the period of the second abatement agreement, he ran the risk of the plaintiff declaring it void and demanding the full rent owing, due to his repeated breach of his contractual obligations. As discussed in the following paragraphs, the fact that the plaintiff only elected to do so when an unrelated

dispute arose between it and the defendant does not render it unconscionable that the plaintiff now claims money which the defendant, by his actions, has caused to fall due. Had the plaintiff claimed the full arrears of rent at the first opportunity it had to do so, the total owed by the defendant to the plaintiff would be unchanged – the contractually agreed reserved rent. One might speculate, as Mr Bingham did in his evidence, as to what would have occurred if the defendant had faced an additional liability at an earlier stage given his limited profits and his apparent indebtedness to financial institutions, but that does not alter the contractual position.

**184.** The other contention made is that the plaintiff was not acting *bona fide* in pursuing this claim. It is apparent from the foregoing that this is not a vexatious claim. Rather the defendant's complaint seems to be that the plaintiff pursued an exaggerated claim as a response to the defendant's proceedings regarding the withholding of consent to assignment of the Lease. Particular reliance is placed on the fact that the plaintiff claimed interest was due notwithstanding that no prior demand had been made for the overdue rent, contrary to the terms of the Lease. I think that it is likely correct that the plaintiff decision to pursue its claims in these proceedings should be seen against the background of the parties' dispute regarding the assignment of the Lease but this is not a barrier to the plaintiff succeeding. There is nothing untoward about a litigant electing to insist on its contractual rights only where a dispute has arisen in another sphere. Indeed, it would have been surprising if the plaintiff, finding itself sued in one set of proceedings, did not immediately consider what contractual options it had to deploy against the defendant. If the claim was exaggerated, as appears to have been the case, at least as regards the interest claim, that will have consequences in costs, but that is not a basis to reject the plaintiff's claim *in limine*.

**185.** The defendant's counsel also argued that the rule in Clayton's Case somehow operated to the defendant's benefit in these proceedings and relies on the plaintiff's failure to keep a "running account" of the defendant's liabilities. The "rule", deriving from the decision in *Devaynes v Noble* (1816) 1 Mer 572, is a presumption that payments made are applied to debts in the order in which they are accrued, *i.e.* to the oldest debts first. The argument seems to be that the plaintiff by not applying rent payments as they were received to the historic underpayments was, somehow, representing that those historic underpayments had been waived. The argument fails for the same reasons that the defendant's other arguments in reliance on estoppel and waiver have been rejected. The failure to apply payments received

to historic underpayments could never amount to an unequivocal representation, especially in circumstances where the rule in Clayton's Case is no more than a presumption. In any event, the defendant gave no indication that he placed any reliance on the manner in which the plaintiff applied payments made by him.

**Penalty clauses**

**186.** The defendant makes two arguments by reference to the well established principle that a clause in a contract which imposes a penalty for a breach may not be enforceable. Firstly, the defendant argues that the clause in the abatement agreements which required the defendant to pay the full sum due under the Lease in the event of a breach of covenant, however minor, is a penalty clause and therefore unenforceable.

**187.** Separately, he argues that the interest provision in the Lease which provides that interest on arrears will be charged at the rate of interest for the time being chargeable under s. 1080 of the Taxes Consolidation Act 1997 ("**TCA**") plus 0.5% is a penalty rate of interest and, therefore, not enforceable.

**188.** Both arguments were addressed in the other proceedings involving the plaintiff cited above, *Gradual Investments v Grant*. In respect of the first argument, at paragraph 111 of his judgment, Heslin J quoted the following passage from the Supreme Court decision in *O'Donnell v Truck and Machinery Sales Limited* [1998] 4 IR 191:

> *"…where an agreement has been reached that an agreed sum may be paid by the instalments or by a lesser amount at different times, failure to abide by what the courts regard as a concession does not make the original sum, though larger than the concessionary sum, a penalty: see Wallingford v Mutual Society (1880) 5 Ap. Cas. 685. This is because it was the sum which was originally payable*." (pp. 217-218)

**189.** He concluded, entirely correctly in my view, that there was "*no question*" of the landlord imposing a penalty by providing that the concession granted would no longer apply in the event of a breach of the lease in that case. Similarly, in my view, all that the plaintiff seeks here is its full contractual entitlement under the Lease on the basis that the defendant

fails to fulfil the conditions on which he was offered a concession. This does not constitute a penalty clause.

**190.** Heslin J did, however, conclude that the provision for interest payments on arrears of rent was a clause which required the defendant to pay more than the contract sum and, therefore, was either a liquidated damages clause or a penalty clause. In accordance with well established principles, therefore, if the clause was a genuine attempt to pre-estimate the loss which a plaintiff might suffer in the event of late payment, it would be enforceable. However, if the sum stipulated was in excess of any damage which a plaintiff might reasonably be expected to suffer, it would be unenforceable as a penalty clause. I note that the UK Supreme Court has recent re-stated the test for when a clause should be deemed unenforceable as a penalty clause in *Cavendish Square Holding BV v El Makdessi* [2016] 2 All ER 519. Rather than focus on whether the clause is a genuine pre-estimate of loss, the court considered that the proper focus should be on whether the clause imposed a proportionate detriment in relation to any legitimate interest of the injured party.

**191.** Heslin J concluded that interest at the s. 1080 TCA rate was equivalent to approximately 14% per annum and this was, in all the circumstances, a penal rate and therefore unenforceable. There is no basis for contending otherwise in this case, whether one applies the test set out in the Irish jurisprudence or the more recent UK Supreme Court formulation. Whether the re-formulation adopted in the UK is warranted here does not, therefore, need to be decided in this case.

**192.** In *Grant*, Heslin J concluded that the consequence of such a finding is for the court to fix a commercially appropriate rate in place of the unenforceable rate. In so doing, he relied on the fact that in *Pat O'Donnell* the Supreme Court remitted the matter to the High Court for the purpose of having the appropriate rate of interest assessed. I am bound to say that it seems to me that simply replacing a penalty rate with a commercially appropriate rate is to let the party who fixed the penalty rate "off the hook". If the consequence of the improper imposition of a penalty rate in a contract is that, in effect, the rate that should have been applied, an appropriate commercial rate, is substituted, there will be no incentive to be careful to avoid imposing a penalty rate.

**193.** The parties had the benefit of the *Grant* judgment, delivered as it was immediately prior to submissions were made in these proceedings, and counsel for the plaintiff suggested that, if I was minded to follow the decision in *Grant*, the court should apply the Commercial Late Payments Act rate (ECB base rate plus 1%) or the Courts Act 1981 rate. The Courts Act rate is currently 2% which is likely to be lower than even the lowest estimate of a commercially realistic rate. In light of my reservations about the plaintiff's entitlement to claim interest at all, I propose acceding to the plaintiff's suggestion of applying the Courts Act rate in the interest of saving time and additional cost. However, in the absence of any evidence of a commercially appropriate rate, I will afford the defendant an opportunity, should it wish, to contend for a different rate.

**194.** As noted above, the plaintiff initially claimed interest on the basis that it accrued from the time that the rent now due as a result of the abatement agreements being rendered void would have originally been due. The defendant argued that the provisions of the Lease provided that interest only became due on any sum "*demanded in writing and payable under this lease*". The plaintiff appeared to accept this proposition and provided an alternative interest calculation based on interest accruing from the date of its demand letter dated 31 January 2020.

**195.** Although I accept the plaintiff's proposition that, in principle, a demand remains a valid demand even if an incorrect amount is claimed in the demand (see, for instance, *Flynn v National Asset Loan Management Ltd* [2014] IEHC 408), it seems to me that the demand for €505,101.09 included in the letter of 31 January 2020 without any indication that the amount was inclusive of interest, despite the absence of a prior demand, could not be a sufficient basis to trigger an entitlement to claim interest. Not until the plaintiff delivered its statement of claim on 2 July 2020 did it make a separate claim for monies due under the Lease and interest on those sums. It appears to me, therefore, that interest should be calculated from that date.

## Conclusion

**196.** In light of the above, I conclude as follows:

i. The plaintiff has not established any basis for treating the first abatement agreement as void. The plaintiff's claim for underpayment of rent during the period of the first abatement agreement is therefore rejected;

ii. The defendant failed to comply with an agreement made on 8 September 2014 regarding the payment of arrears due under the first abatement agreement. As a consequence the sum of €25,800 became due;

iii. There was no agreement in place by which the plaintiff agreed to accept reduced rent for the period between the first and second abatement agreement, *i.e.* 2015. The defendant underpaid rent by €57,000 during that period;

iv. The defendant breached the terms of the Lease during the period of the second abatement agreement. In particular, he breached the alterations covenant and the restrictive user covenant. In addition, he failed to pay the Service Charge due under the Lease within seven days of receipt of a written demand for payment;

v. The second abatement agreement was thereby rendered void. As a consequence of which rent foregone of €117,991.78 became due;

vi. The plaintiff did not waive its entitlement to any of the above sums, nor is it estopped from asserting its entitlement to those sums;

vii. The clause in the second abatement agreement which triggered the plaintiff's entitlement to claim any rent foregone in the event of a breach of the Lease is not a penalty clause;

viii. The interest provision in the Lease is a penalty clause. Subject to further argument, the Courts Act rate of 2% should be substituted for the interest rate set out in the Lease. Interest shall be calculated from the date of delivery of the plaintiff's statement of claim, 2 July 2020.

**197.** Accordingly, the plaintiff is entitled to judgment in the sum of €200,791.78 together with interest on that sum from 2 July at the rate of 2%.

**198.** I will list these proceedings at 10.30 am on 21 November 2024 for the purpose of making final orders and dealing with the issue of costs. I invite the parties to engage in advance of that date for the purpose of seeking agreement on all outstanding issues.

**Rory Mulcahy**