

THE HIGH COURT**COMMERCIAL****2007 No. 2211 P****BETWEEN****THE LISTOWEL LIVESTOCK MART LIMITED****PLAINTIFF****AND****WILLIAM BIRD & SONS LIMITED,
WILLIAM BIRD (SALES) LIMITED AND
WILLIAM BIRD (ROLLER COASTER) LIMITED****DEFENDANTS****Judgment of Mr. Justice Clarke delivered 26th October, 2007.****1. Introduction**

1.1 By letters patent issued by James I in 1612 Thomas Fitzmaurice, Baron of Licknawe (as it was then described) was, amongst other things, given the right to hold:

"One free market to be held at Listowell aforesaid in the said County of Kerry on every Saturday weekly forever and one fair yearly forever to be held at Listowell aforesaid in the said County of Kerry on the faist day of the Finding of the Holy Cross and on the next day following the said faist day of the Finding of the Holy Cross provided the said faist day of the Finding of the Holy Cross does not fall on a Saturday or the Lord's Day, in which case we will that the said fair to be held there on Monday and Tuesday next following after the said faist of the finding of the Holy Cross ..."

1.2 Subsequently, in 1688 by a further patent James II added to the entitlements of the Barons of Lixnaw a right to:

"Avail and be able to have and hold one free market in or about the aforesaid Listowel in the aforesaid County of Kerry on any Tuesday of each week forever and also two fairs or marts to be held in or about the aforesaid ville of Listowel annually forever viz. one of the aforesaid fairs or marts to be held in the same place upon the 15th day of July annually forever and lasting the day immediately following annually forever and one other fair or mart to be held in or about the aforesaid ville upon the 18th day of October and lasting the day immediately following annually forever unless the aforesaid days or one of them happen or happens on a Saturday or Sunday when and as so often the same days or one or other of them happen or happens on a Saturday or Sunday, then and so often we by these presents for ourselves, our heirs and successors give and grant a licence to the aforesaid William, Lord Baron of Kerry and Lixnaw, his heirs and assigns that he, his heirs and assigns have and hold and avail and shall be able to have and hold the aforesaid separate fairs and marts in or about the aforesaid ville on the Monday and Tuesday immediately following forever."

1.3 It is accepted that the rights and obligations conferred by those letters patent remain in force today and are held by the plaintiffs ("Listowel Mart"). What is disputed between the parties is as to the precise legal consequences for this dispute which flow from the continued existence of those rights and obligations.

1.4 Listowel Mart acquired certain lands in the 1950s for the purposes of establishing a mart in the town of Listowel. At the same time Listowel Mart acquired the rights and obligations, as the successor of the Baron of Lixnaw, to the market and fair rights set out in those charters. I will describe those rights and obligations as the market rights and obligations save where the distinction between a market and a fair is relevant. Thereafter, until recent times, Listowel Mart conducted regular sales at the site in question, which is in the town of Listowel and is frequently referred to as the Market Place.

1.5 In the latter part of September horse races are run at Listowel which have developed, over the years, into a significant festival. In conjunction with that festival the Bird family have provided amusements and other facilities (the precise extent of which is an issue to which I will have to return) in the Market Place. In more recent times those amusements have been carried on by one or other of the first and second named defendants ("Birds"). It would not appear that the third named defendant has, in reality, any relevance to these proceedings. Since the 1950s a number of leases relevant to these proceedings were entered into. The initial such lease was entered into by Lloyds Bank, as Executor and Trustee of the estate of the Earl of Listowel (the then successor in title to the Baron of Lixnaw), of the one part and William Bird of the other part. Thereafter, Listowel Mart entered into similar leases with Birds. The relevant leases provided for an entitlement to occupy the Market Place (initially as to a part only but laterally the entirety) for a period of just short of two weeks, spanning the Listowel Races festival.

1.6 In recent times Listowel Mart has moved their regular sales to a new location just outside the town of Listowel. The existing Market Place was offered for sale and a contract entered into, in 2004. However, Birds have asserted that the existence of the rights and obligations, flowing from the two 17th century charters to which I have referred, continue to affect the lands in question so that, in the circumstances, the lands, it is said, cannot be sold without either providing another site which is convenient and located within Listowel or in circumstances where the lands in dispute between the parties will remain available for market and fair use.

1.7 This case raises, therefore, the issue of the extent to which two 17th century charters can affect the entitlement of a corporate entity in the 21st century to sell property which it owns with a sufficiently clean title to permit the property to be developed. However, as both counsel properly agreed, if the charters have such a legal effect then this Court must enforce it as appropriate. Within the broad parameters of the general dispute between the parties, a number of specific issues have arisen to which I should now turn.

2. The issues

2.1 It would be fair to say that the position of both parties, but in particular Birds, has evolved since the issues were first addressed in correspondence between the parties in 2006. Until written submissions were filed in these proceedings, the position adopted by Birds, both in that correspondence and in its pleadings, seemed to assert that there was an absolute entitlement to use the Market Place in accordance with the charter. However, in the course of the relevant written submissions it was accepted on behalf of Birds, that their entitlement was subject to a corresponding entitlement on the part of Listowel Mart to move the market and fair provided it was moved to a "suitable location". By suitable location was meant a location which was within the terms of the charters and was convenient for the purposes of a market or fair.

2.2 In addition, and also in the course of written submissions, Listowel Mart raised the question of whether the market rights concerned had been extinguished by virtue of ten years non-user in accordance with the provisions of s. 7(4) of the Casual Trading Act, 1995 ("The 1995 Act"). Likewise this matter had not been pleaded. In the circumstances both counsel, quite sensibly and properly, agreed that, provided pleading points were not taken against them, they would not, themselves, seek to rely on any absence of pleading to exclude their opponent from raising either of the points to which I have referred. Though not pleaded, therefore, both of those issues fall for decision by me.

2.2 Against that background it is clear that the first and most fundamental set of issues concern the precise extent of the continuing obligations which may rest on Listowel Mart as successor in title to the original grantee of the letters patent, and, in particular, whether any such obligations effect the Market Place lands the subject of these proceedings.

2.3 As is clear from the relevant extracts from the two charters to which I have referred, the markets and fairs to be conducted in accordance with the terms of those charters were not described by reference to any specific place within Listowel. It will be necessary, in the context of one of the issues to which I will shortly refer, to deal with the precise locations described in the charter. However, for present purposes it is necessary only to note that the markets and fairs are to take place in Listowel but without any specific location within Listowel being allocated to their conduct. In that context there is an issue between the parties as to the extent to which there remains any obligation to permit markets and fairs to be conducted in the Market Place. The extent to which markets and fairs in accordance with the rights and obligations of the charters have, in fact, been conducted in the Market Place is a question of some dispute. That dispute involves both factual and legal questions.

2.4 Against that general background it is relevant to turn to the actual claims made by the respective parties in the pleadings. It is important to note that the claims brought both by Listowel Mart in its statement of claim and by Birds in its counterclaim seek declarations designed to establish the legal status of the charters insofar as they might affect the lands in question.

2.5 Listowel Mart seeks a declaration that Birds have "no estate, right, title or interest" which would entitle them to "place or conduct rides, stalls or amusements" on the relevant lands. Listowel Marts also seek a declaration that "such fair and market rights created by the 1612 letters patent and the 1683 letters patent do not bind the lands in perpetuity".

2.6 It is, therefore, clear that what Listowel Mart seek to do in these proceedings is to establish that whatever rights, entitlements and obligations may flow from the letters patent, they do not actually bind the lands so that the lands can be sold to a purchaser who would take free from any such obligation.

2.7 Birds, in their counterclaim, seek a declaration that they, "as providers of rides, stalls and amusements are entitled for ever to enter on the lands" provided that they pay a toll and confine themselves to the dates set out in the letters patent. It is clear, therefore, that the case is concerned with the extent to which the obligations which derive from the letters patent affect these lands. If they do, then it is clear that there is at least some limitation on Listowel Mart in relation to the lands. If they do not, then it is clear that Birds cannot succeed on their counterclaim. As I noted earlier, Birds' case, as made at the hearing, involved an acceptance that Listowel Mart was entitled to relocate the market and fair to a new location which was within the terms of the charters and was suitable. Indeed, Listowel Mart had, itself, claimed, in its statement of claim, and as a fall-back position, such an entitlement. However, it is clear that the question of the removal of the fair and market to a different location is a subsidiary issue which only arises in the event that there is an obligation relating to the fair and market which attaches to the land in question. If there is not, then whatever residual obligation Listowel Mart may have to operate a fair and market under the terms of the charters, is not one which arises in these proceedings. The relevant obligations are only material to this case if they can be said to affect the lands in question.

2.8 Therefore, the key initial question is as to whether the fair and market obligations, set out in the charters, do attach to the lands which are the subject of these proceedings in circumstances where the charters do not, of themselves, attach those obligations to any particular part of the lands of Listowel.

2.9 Thereafter, certain subsidiary issues arise in the event that Birds are successful on that principal issue.

2.10 Firstly, the question as to the precise circumstances and manner in which the obligations under the charter can be transferred to another location would, in that eventuality, arise. There are disputes between the parties as to the parameters within which such a relocation can occur. In particular, the status of the new mart operated by Listowel Mart comes into question in that context.

2.11 Secondly, issues arise as to whether Birds are estopped from asserting any entitlement by virtue of a number of factors which it will be necessary to analyse in more detail in due course. Principally, reliance is placed upon the fact that Birds have, for much of the last fifty years, been lessees of the Market Place premises (or at least some of it) in circumstances where, it is asserted on behalf of Listowel Mart, it would be inconsistent to assert that any market or fair has taken place. In addition, reliance is placed by Listowel Mart on the circumstances which surrounded the sale of their premises. It is said that Birds, notwithstanding a knowledge of a possible claim based upon the charters, allowed, to their knowledge, the premises to be offered for sale and the plans for the purchase of alternate premises to which the weekly mart was relocated, to go ahead.

2.12 Finally, the question of whether any market or fair rights have been extinguished by the provisions of the 1995 Act also arises.

2.13 However, for the reasons which I have set out, the key initial issue between the parties is as to the current status of any obligations which may derive from the letters patent. It is to that issue that I now turn.

3. The current status of the letters patent in relation to the lands

3.1 The first question to be addressed is to identify exactly what the current position is in relation to the times at which fairs and markets are to be held under the letters patent. The rights and obligations which arose from the two letters patent are, on their terms, to the effect that there was to be one free market every Saturday, one free market every Tuesday, one fair on the feast day of the Finding of the Holy Cross, one fair on 15th July and one fair on 18th October. Each of the fairs was effectively to be conducted over two days, being the date identified and the date thereafter with supplemental provisions in the event that any of the relevant dates should fall on a Saturday or a Sunday.

3.2 While there was, during the earlier part of the hearing before me, a possible issue as to the precise identification of the date of the feast of the Finding of Holy Cross, it was accepted by the close of the proceedings that the relevant date is 13th May. It is also common case that as a result of the Calendar (New Style) Act, 1750, the references to a fair taking place on or about 15th July and 18th October respectively, now refer to 26th July and 28th October.

3.3 Other than that, the only other material change in the parameters of the rights and obligations relating to the markets and fairs set out in the charters occurred in February, 1906, when an order was made by the Local Government Board under the provisions of s. 10 of the Local Government Board Act, 1872 which purports to have changed the day for the holding of markets in Listowel from Wednesday to Tuesday. It will have been seen that the original charter appeared to specify Tuesday as the market date, so it is difficult to understand how it came to be believed that the day had transferred to a Wednesday. However, be that as it may, it is absolutely clear that as and from the making of the relevant order by the Local Government Board in 1906, the market days were Tuesdays and Saturdays.

3.4 In the events that have happened it is clear, therefore, that the rights and obligations under the letters patent now refer to a market every Tuesday and Saturday and to a fair of a two-day duration on three occasions in the year, starting on, respectively, 13th May, 26th July and 28th October, with appropriate variations in these latter dates in the event that any of them should fall on a Saturday or a Sunday.

3.5 Subject to the issue raised by Listowel Mart as to whether any such rights have been extinguished by virtue of ten years non-user under the provisions of the 1995 Act, it is accepted by all parties, and I agree, that whatever rights and obligations may be said to derive from the letters patent in respect of fairs and markets still subsist. It is, therefore, necessary to start with a general consideration of the rights and obligations which arise in respect of markets and fairs created by letter patent.

3.6 The existence of markets or fairs held under charter goes back to the Middle Ages. Over the centuries, in these islands, the right to conduct a market or fair was conferred in many locations, most normally, it would appear from the many authorities, on either a local corporation or a local grandee. A market at common law has been defined as a franchise right of having a concourse of buyers and sellers to dispose of commodities in respect of which the franchise is given. See *Downshire v. O'Brien* [1887] 1 L.R. Ir, 380 at 390 per Chatterton V.C. As to the difference between a market and a fair, Coke commented that "Every fair is a market but every market is not a fair". 2 Inst. 406. At common law it would appear that the principal distinction between a market and a fair was as to timing and scale. A market was a regular occurrence on a relatively modest scale. A fair was a much larger event, occurring on one, or perhaps a small number of occasions in the year. The grant of an entitlement to conduct a fair or market frequently carried with it an entitlement to exact a toll from those selling at the market or fair concerned (although certain markets and fairs were "toll-free"). It was, thus, for many centuries, a very valuable entitlement. The right of holding a market or fair is regarded as an incorporeal hereditament which not only authorised the fair to be held but gave the owner of the market rights an entitlement to prevent others from interfering with it. See, for example, *A.G. v. Horner* [1885] 11 App. Cas. 66 at p. 80. While the grant of such rights was seen in English law as being derived from the royal prerogative, it was not suggested in these proceedings that there is anything inconsistent with the constitutional framework of this jurisdiction, in the continued existence of such rights and entitlements derived from pre-independence royal grant.

3.7 The principal public entitlement in respect of a fair or market would appear to be a right of coming into the place of the market and frequenting it for the purposes of buying and selling, subject to the limitation that that right can only be exercised when the market or fair is open and can be confined to a specific category of goods where the market or fair is limited, in its terms, to those goods. It is also clear that persons have, in the course of a fair or market, an entitlement to sell their goods by public auction. See *Nicholls v. Tavistock Urban District Council* [1923] Ch. 18 at p. 27.

3.8 Turning to the obligations of the owner of a market place, it is clear that the grant is made for the benefit of the public as well as for the benefit of the grantee and that certain obligations, therefore, lie on the grantee. It was accepted on behalf of Listowel Mart that amongst the obligations which rest on the owner of market and fair rights is one to hold the market or fair concerned. However, three key issues were raised.

3.9 Firstly, it is said that the obligation does not relate to any specified piece of land unless, perhaps, as is not the case here, the precise boundaries within which the fair or market is to be conducted are themselves specified in the grant (a so-called "metes and bounds" grant).

3.10 Secondly, it is said that the consequences of a failure to hold markets and fairs do not include an entitlement on the part of third parties to require that they be held. Rather, it is said, that the owner of the market and fair rights loses an entitlement to prevent others from holding a competing market or fair (in breach of the monopoly conferred by the patent). In addition, it is said, that a failure to hold might result in a forfeiture of the entitlement. However, it is argued that no remedy lies in the hands of a member of the public who might have wished to attend the fair, either as a buyer or a seller, to enforce its continuance.

3.11 As a combination of both of those points it is argued that, even if there remains some residual entitlement on the part of a member of the public to enforce the obligations of the owner of a market right, any such entitlement cannot extend to one affecting any particular lands owned by that person in the absence of the market rights concerned being defined by charter as being referable to specific identified lands.

3.12 I propose to address each of the issues which I have identified in turn.

4. Attachment of market and fair rights to land

4.1 As pointed out earlier the letters patent in this case do not specify any particular land within Listowel at which the markets and fairs concerned are to be conducted. Taking the letters patent by themselves there is not, therefore, any particular reason to suggest that any market or fair has to be held in the Market Place property which is the subject of these proceedings. However Birds contend that the market and fair obligations under the letters patent have been, as they put it, "appropriated" to the lands in question in the following circumstances.

4.2 As noted earlier, it is common case that, at or about the same time the company was set up and acquired the relevant lands, Listowel Mart acquired, from the successor in title of the Baron of Lixnaw, the market and fair rights granted by the two letters patent. The only lands owned, for virtually all of the period since, by Listowel Mart would appear to have been the lands in question. There is a factual dispute between the parties, to which I will turn, as to the extent to which markets or fairs as contemplated by the charter were, in fact, conducted on the lands in question at any material time. On Birds case it is said that, at least at certain times such markets and fairs did, in fact, occur. In those circumstances, it is said that the obligations in relation to the conduct of markets and fairs now attach to the lands in question. It follows, it is said, that subject to the right of removal to a suitable location within the parameters of the grant, the obligation of Listowel Mart remains one which requires them to make the Market Place available for markets and fairs. It is implicit in the argument put forward on behalf of Birds that the obligation to allow for the holding of markets and fairs at the Market Place would continue, again in the absence of a valid removal, at that location notwithstanding a sale of the property. On that basis, it is said that Listowel Mart is not entitled to the declaration which it seeks for there exists, it is again said, a public right to have markets and fairs which now attaches to the land in question and will continue so to do unless and until a valid

removal takes place.

4.3 Despite the very many authorities referred to in argument and also noted in the passages from the leading authority on the area, Pease & Chitty – *Law of Markets and Fairs*, to which I was referred by both counsel, there does not, it seems to me, appear to be a case dealing directly and solely with this issue. It may well be that, because market rights were, almost always, held by a local corporation or grantee, other lands in the same ownership, or otherwise available for the uses of the market, would be available. The “attachment” of general rights and obligations to a specific site did not, therefore, arise

4.4 Helpfully by the time argument had concluded there was a limited measure of agreement between the parties. It was accepted by counsel on behalf of Listowel Mart that the grant of an entitlement to hold a market or fair by letters patent, such as occurred in this case, entails a form of obligation to hold the markets and fairs concerned. Subject to the question of whether any such obligation had been extinguished by virtue of the provisions of the 1995 Act and to the question of whether the obligation is enforceable by action, the obligation in general terms is accepted. . It was not, however, accepted that the obligation could be said, in principle, to be referable to the lands in question, or, indeed, any lands. As a subsidiary argument it was suggested on behalf of Listowel Mart that even if it was, in theory, possible for market and fair obligations arising under a charter which did not specify “metes and bounds” to attach to a particular plot of land by user or “appropriation”, then, on the facts of this case, it was not accepted that any such appropriation had, in fact, occurred.

4.5 However, it is clear that those factual questions only arise if it is possible for any obligations concerned to attach to the lands in principle and also if it is possible for a private entity, such as Birds, to enforce the rights and obligations concerned by action. It is therefore appropriate to turn to those issues first.

4.6 The only case cited in which a court would appear to have taken action to prevent the use of lands in a manner inconsistent with a fair or market right is *Wyld v. Silver* [1963] 1 Q.B. 169, a decision of the Court of Appeal in the United Kingdom. As part of the enclosure of common lands at the turn of the eighteenth and nineteenth centuries, commissioners, appointed for the purpose of such enclosure, were empowered to designate a piece of waste land near the village of Wraybury for the purposes of holding a fair. The commissioners duly made an award in 1803 allotting certain lands to named recipients “subject to holding the same annual fair”.

4.7 By the time the case came on for hearing in the early 1960’s it was clear that no fair had been held in living memory and the last recorded occasion of such an occurrence was in 1875. The defendant had purchased some of the relevant lands as a development site and was opposed in his proposals by local interests who brought the proceedings on the basis that, it was contended, the development would, in practice, prevent the lands from being used as a fair.

4.8 A number of propositions are clear from the judgments. Firstly the right to hold the fair concerned was determined to be a public right which could not be lost by mere non user. The basis for that determination was that no individual could lose a public right which was held for the benefit of the public generally, or a section of it, and, indeed, no one generation could lose the public right which ought inure to the benefit of future generations. *Wyld v. Silver* is, therefore, authority for the proposition that mere non user will not, as a matter of common law, extinguish a public right to a market or fair. It does not seem to me that the fact that the market or fair in question had a slightly different provenance to that with which I am concerned (being on foot of an award of commissioners established by Act of Parliament rather than by Royal Charter) makes any difference to that proposition. Lynch J. in *Skibereen Urban District Council v. Quill and Others* (1986) ILRM 170 came to a similar view as to the lack of necessity of user to maintain the existence of market rights.

4.9 Secondly the fact that the defendant in *Wyld v. Silver* had no notice of the existence of the right concerned was not considered to be material. It would appear that the purchaser had, in accordance with normal and proper conveyancing practice, researched the title to the property for a sufficient period of time to verify the title. That did not, of course, require him to go back to the original grant of 1803 in which he would have found a reference to the entitlement to hold the fair. Similarly the absence of any active use of the fair within living memory would not have brought the possible existence of a fair entitlement to his attention thus putting him on enquiry. Notwithstanding this the rights concerned were noted as being public rights which applied notwithstanding the absence of any notice. The point to the contrary was dismissed by Lord Denning M.R. in a typically pithy passage from p. 184, which reads as follows:-

“Then it is said to be hard on the defendant because he bought the land in ignorance of the rights of the inhabitants. So be it. It is one of the risks that he must take.”

4.10 Finally the Court was persuaded that it was appropriate to grant an injunction which would prevent the defendant “from erecting any such building or doing any such other act or thing upon the said allotment as would prevent or interfere with the holding of the said fair or wake thereon or any part thereof”.

4.11 A number of propositions, relevant to these proceedings, seem to me to follow. On the basis of that authority it seems to me that, at the level of principle, an obligation to hold a fair or market conferred by Royal Charter subsists as a matter of common law, even if it has not been used. Subject to the 1995 Act question I am, therefore, satisfied that rights still subsist in relation to the markets and fairs granted by the charters in this case.

4.12 However one of the important questions which arises is as to how such rights are to be enforced and by whom. It is true that, in *Wyld v. Silver* the issue was raised as to whether an inhabitant or inhabitants of the relevant area had standing to bring the proceedings. Dealing with that issue, at p. 183, Lord Denning M.R. said the following:-

“Next it was said that a few of the inhabitants could not sue by themselves but that they had to relate the facts to the Attorney-General and persuade him to sue. I do not doubt that the Attorney-General could have sued. He was a competent party. But I do not think he was an essential party. One or more of the inhabitants can sue to enforce the right of all, stating that they do so on behalf of themselves and all others. Even if they are in a minority in the parish they can sue, for the majority cannot overrule the minority in such a matter. The majority cannot excuse the wrong, nor deprive the minority of their remedy by suit: see *Bromley v. Smith* [1826] 1SIM. 8. per Sir John Leach V.-C.”

It seems to me to follow that any person who would have an entitlement to benefit from a public right to a market or fair has an entitlement to maintain appropriate proceedings. Such a right is an incidence of the public entitlement concerned coupled with the absence of an entitlement on the part of others to excuse the wrong. I will turn, in due course, to the question of whether, in the context of the charters with which I am concerned, Birds have a right of enforcement.

4.13 In addition *Wyld v. Silver* also addresses the question of motive. There was significant evidence in that case to the effect that

the true reason why the plaintiffs sought the injunction concerned was not that they wished that the fair take place as such but that they wished to prevent the development under contemplation going ahead. To that Lord Denning M.R. replied, at p. 184:-

"We cannot go into the motives for enforcing a legal right. If it exists, we must enforce it."

Again, on the facts of this case, it is said that what Birds wish to do (and what they have done from, it would seem, the 1930's), is to provide their amusements to the public during race week. It will be recalled that Listowel races take place in the latter part of September and do not, therefore, occur during any of the periods specified as a fair. Furthermore the traditional entitlement of Birds on foot of the various leases and other arrangements under which they were permitted to use the Market Place was for a period just short of two weeks which would only have included a small number of days which would have coincided with the Tuesday and Saturday market obligations arising under the charter. Finally, it is said that what has occurred, even on those days, was not a market as contemplated by the charter. This is an issue to which I will have to return in relation to the non user question. However, for the purposes of the argument now under consideration, I am satisfied, on the authority of *Wild v. Silver*, that the fact that Birds purpose may not, in reality, be directed towards the conduct of markets or fairs in accordance with the Charter, is not a material consideration in considering whether enforceable public rights remain in relation to those lands. If, therefore, it can be said that the market and fair rights concerned now attach to the lands in question, then it seems to me that those rights continue to subsist in the lands irrespective of the following factors.

4.14 Firstly it is not, in that context and in respect of that issue, relevant to consider whether they have in fact been used. If they attach to the lands in question then non user is irrelevant for common law purposes.

4.15 Secondly an issue arises as to who may enforce that entitlement. It is clear that the public right concerned cannot be extinguished or diminished by a majority or the like. In *Wild v. Silver* the right was expressly described in the Commissioners' Award as being for the benefit of "the inhabitants". It was, therefore, clear on the facts of that case that any one of the class of persons for whose benefit the right was created could enforce, even if in a minority. However, the letters patent in this case are not, in express terms, stated to be for the benefit of anyone in particular, though they obviously are, by implication, principally for the benefit of the inhabitants of Listowel and its surrounding areas who might wish to avail of the right to buy and sell in the market. A question does, however, arise as to whether, in such circumstances, where no express class is identified as being the beneficiaries of the entitlement, there are limits on those who might be entitled to enforce by action.

4.16 Subject to what might loosely be termed the estoppel questions, I am satisfied that Birds would have standing to bring such proceedings. It is clear that a market or fair (and in particular a fair) could involve persons travelling from quite some distance for the purposes of marketing their wares. There is, of course, an issue between the parties as to whether the amusements which Birds provide are a legal incidence of a market or fair. However, irrespective of the answer to that question, it seems to me that Birds are entitled to assert that there is a public entitlement, available to any person who wishes to sell any products, to avail of the market and fair rights in the charter. The fact that Birds might also wish to do other things and indeed that their principle interest in these proceedings might be directed towards seeking to procure that they be able to do other things, is not, in my view, relevant to this question.

4.17 Finally it seems clear that if a public right to a fair or market can be said to attach to a particular plot of land, then there is a jurisdiction in the court to enforce by injunction that entitlement. Proceedings would seem to be available even against successors in title who acquired without notice.

4.18 For those reasons it seems to me that the key question comes down to one of whether the rights and obligations in respect of the markets and fairs under consideration in this case can be said to attach to the lands in question. This raises an important distinguishing feature between the present case and *Wyld v. Silver*. The rights in *Wyld v. Silver* were specific and related to a particular piece of land rather than general and related to a district as a whole. That raises squarely the question of whether an entitlement to the type of orders made in *Wyld v. Silver* can be said to arise in relation to any particular piece of land within the general area described in the letters patent. In essence, Birds argue that where a particular piece of land comes to be used for the purposes of a fair or market, then the rights attach to that piece of land in perpetuity (in the absence of a valid removal to another site) even if the market falls out of use. In the phrase used by counsel for Birds it is suggested that the land in question is then "appropriated" to the use of the fair or market concerned and that obligations continue to attach to it at that location unless and until it is legitimately and properly removed to another location.

4.19 Counsel for Birds places reliance on a passage from *Mosley v. Walker* in the following terms:-

"I take it to be implied in the terms in which the market is granted that the grantee, if he confines it to the particular parts within a town, shall fix it in such parts as will from time to time yield to the public accommodation, and that if the place wants a lot it ceases to give reasonable accommodation he is bound, if he had land of his own, to appropriate land on which to hold it; or, if not, to get land from other persons, in order that the market, which was originally granted for the benefit of the public, as well as for the benefit of the grantee, may be effectually held; and that the public may have the benefit which it was originally intended they should derive from it".

4.20 However the authors of Pease and Chitty note, at p. 36, that:-

"A market or fair must be held on land in which the Lord of the market can properly perform his duties of correcting the market and protecting the rights of the public. Such duties can be most readily performed where the Lord owns both the market or fair and the land on which it is held. At no time, however, does it seem to have been thought necessary that the market owner should own the fee of the market place."

The only requirement would seem to be that the owner of the market rights concerned has sufficient control to regulate the market.

4.21 It seems to me, therefore, that the obligation to hold a market in a general district is an obligation lying upon the owner of the market rights concerned and does not attach any particular piece of land. Such a general market right, not confined by "metes and bounds", cannot, therefore, be said to apply to any specific piece of ground even if the lands in question have happened to be used for the purposes of the market. The fact that it is possible to confer market rights on a person who owns no land within the relevant area makes it clear that the obligations on the owner of the market does not necessarily apply to any particular piece of land. I am strengthened in that view by the decision of Lynch J. in *Skibbereen* where he held in answer to question (c) in the case stated in those proceedings that there was not an obligation on the owner of the market rights to hold markets and fairs in accordance with the terms of the charter but that the State could forfeit the franchise for failure to exercise it. It is important to note that Lynch J. was concerned, in that case, with a general market obligation while *Wyld v. Silver* was concerned with a fair on a specific piece of

land. In that context it is also relevant to note that in all of the English cases cited (for example *Prince v. Lewis* [1826] 5 B. & C. 363), with the exception of *Wyld v. Silver*, the courts appear to have identified that the consequences of a failure to hold (or properly hold) markets or fairs was to the effect that the market or fair entitlement concerned could be forfeit or that the market or fair owner might be deprived of the opportunity to enforce his monopoly.

4.22 It is argued that to allow the owner of market rights to dispose of his last remaining piece of land in circumstances where the market rights are not secured would be to set the entitlements of the public to a market at naught. However it does not seem to me that argument is reconcilable with the proposition, which is clear on the authorities, that an obligation to hold a market can rest upon a person who owns no land. The rights of the public to require Listowel Mart to provide markets and fairs in accordance with the charter, (to whatever extent those rights may exist) even after Listowel Mart have sold their last portion of land within Listowel, would be no different from the rights of the public in a case where market rights were granted to a person who did not own land in the vicinity in the first place. In those circumstances I am not satisfied that any public entitlements that may exist in this case can be said to attach to the lands in question. It seems to me that in cases such as that with which I am concerned the consequence of a failure to conduct a market or fair in accordance with the obligations implied by the letters of patent concerned are not forfeiture and/or an inability to enforce. For those reasons it seems to me that it follows that Listowel Mart is entitled to an appropriate declaration in a form which I will discuss with counsel. It also seems to me to follow that Birds are not entitled to any declaration upon their counterclaim as the whole drift of that claim concerned an entitlement in respect of these lands rather than general obligations.

4.23 However lest I be wrong in relation to that conclusion there are a number of other issues which would arise which I now propose addressing.

5. Were fairs and markets under the charter conducted at the Market Place

5.1 If I am wrong in the view which I have taken, to the effect that a generalised obligation to conduct a fair or market cannot attach to a particular piece of land, then it follows that it would be necessary to consider whether, on the facts of this case, the Market Place had any relevant rights attached to it. As pointed out earlier this question involves both legal and factual issues. I propose addressing the facts first.

5.2 The first reference to the Market Place in the historical records seems to be found in a special meeting of the Magistrates, held at the court house in Listowel on the 6th September, 1854. Up to that time it would appear that fairs and markets were held in the square and on the streets and lanes of Listowel. At the relevant time the owner of the market rights was the Earl of Listowel. I am satisfied that the many resolutions passed on that occasion related not just to the fairs and markets conducted in accordance with the charter rights and obligations (being those derived from the letters patent) but also to other markets which had come to take place in Listowel. Of particular relevance is the fourth resolution which reads as follows:-

"That as the Patent and Fortnightly Fairs of the Town of Listowel, have been held in the principal Square thereof, for a period long previous to the existence of any of the present house property of the Town of Listowel, although we are of opinion that such Fairs ought to be removed therefrom, we hesitate to interfere with them further than by appointing the New Market Place, during such Fairs for the sale of pigs, until authorised by further legislation relative to Fairs, or until sufficient accommodation be provided in a Fair Green. Meanwhile the Proprietor of the Tolls and Customs of those Fairs has engaged to cause all dirt and nuisance created by them to be removed from the public thorough fares of the Town".

It seems to me clear from that resolution that while, many regulations were adopted concerning fairs generally, it was acknowledged that it was not possible to interfere with the market rights held by the Earl of Listowel under the charter. It also seems clear that up to that time no aspect of the fairs or markets concerned would appear to have taken place in the Market Place. As a result of that resolution the sale of pigs would appear to have been the only part of the fair moved to the Market Place at that time. There was also produced in evidence a copy of "*Fairs and Markets of Ireland - A Cultural Geography*" by Patrick J O'Connor which includes a photograph showing both the main square in Listowel on a fair day described as being in the late nineteenth century and also Market Street, Listowel from a roughly similar time. Market Street runs along one side of Market Place. Unfortunately neither of the pictures assist with informing as to activities going on, at that time, in the Market Place itself. It is, however, abundantly clear that the main focus of the market remained in the square at the relevant time. The square, although relatively close to the Market Place, is not directly connected to it.

5.3 Listowel Mart purchased the Market Place in 1959. Also members of the Bird family would appear to have been involved in providing amusements during Listowel race week from the thirties and forties. Some of the witnesses who gave evidence on behalf of the Birds were in a position to deal, for understandable reasons without any great precision, with the position in the Market Place in the immediate run up to the acquisition of those lands by Listowel Mart. I am satisfied, on the evidence, that markets and fairs in their traditional model died out in the late 1950s and early 1960s. While I am satisfied that some of the relevant activities up to that time took place in the Market Place, I am not satisfied that there is any real or sufficient evidence to the effect that the markets or fairs had moved to the Market Place. Rather the Market Place was part of the location at which the market or fair took place and there is no evidence to suggest that the decline in activity within the Market Place was any different to the decline in activity within Listowel generally.

5.4 Save for the fact of the acquisition by Listowel Mart of the Market Place and the contemporaneous acquisition of the market rights, there is not, in my view, any basis for suggesting that any fair or market operated in accordance with the charter became allocated or attached to the Market Place in preference to any other area within Listowel over which the Earl of Listowel or his agent had control. I am not, therefore, satisfied that there is any factual basis for the suggestion that the fair and market rights and obligations had attached to the Market Place up to 1959.

5.5 In relation to the period thereafter it would appear that Listowel Mart charged tolls for a brief period after its acquisition of the market rights, with the last recorded instance being 1959. However, the company constructed a significant building covering quite a portion of what had been the Market Place for the purposes of conducting sale by auction in what is, in modern parlance, described as a mart. It would seem, on the evidence, that a small number of additional operators had, from time to time, stalls or other locations at the mart, at which they sold products to those attending the mart. In addition it would appear, as already pointed out, that there were various lease arrangements in favour of William Bird, and subsequently Birds, in which the Market Place was taken for a period spanning the Listowel Races week from, initially, the executors of the Earl of Listowel and subsequently from Listowel Mart. Those lease arrangements provide that Birds had exclusive possession of the Market Place (or initially part of it) for the relevant period. It seems to me that it is not possible to describe what occurred during races week as a market or fair conducted in accordance with the patent. Notwithstanding the evidence given on behalf of Birds to the effect that it was their understanding that they were taking over the collection of tolls from the Earl of Listowel (and subsequently on behalf of Listowel Mart), the terms of the written agreements entered into between the parties are clear and cannot, in my view, now be reneged on. On that basis Birds paid a

rent and received exclusive possession. If anyone else was trading in the Market Place on foot of paying something in the nature of a license fee to Birds, then such persons were not exercising any rights which flow from the charter to engage in the sale of merchandise on payment of a toll to the charter owner. It cannot be said that Birds were collecting toll on behalf of the owner of the market rights. Birds were collecting a license fee on foot of their entitlement to exclusive possession of the property. While it was said that the rent was increased to reflect the fact that Birds could collect tolls, there was no provision in the lease providing for, nor did it in fact happen, that the amounts paid by Birds to Listowel Mart depended on the sums actually paid to Birds by any independent operators.

5.6 In those circumstances it does not seem to me that what occurred during the period of when William Bird and, subsequently, Birds were in exclusive occupation can be described as a fair or market as contemplated by the charter at all. While it is true to state that Birds had not, from the beginning, a letting of the entire Market Place it does seem that the parts not let to Birds during races week were let to other parties so that nothing turns on that point.

5.7 The next question to be considered is as to whether the fact that a small number of traders appear to the have attended at at least some of the general marts, could lead to a conclusion that markets, in accordance with the charter did, in fact, occur in the period since 1959 at the Market Place. It is clear from the judgment of Lynch J. in *Skibbereen* that scale is not a relevant consideration in determining whether it can properly be said that a market is conducted in accordance with a charter. At p. 173 Lynch J. noted:-

"If an owner should neglect to hold a market, it seems to me that he can have no cause of complaint if traders and customers continue to assemble at an appropriate place on the appropriate date. If they do so assemble then they would form a concourse of buyers and sellers to dispose of commodities within the meaning of the definition of 'market right' which I have already quoted above. Such a concourse might be big or small and might even be constituted by one trader and such potential customers as might assemble or pass by to see his wares: see s. 11(a) of the Interpretation Act, 1937 whereby the plural includes the singular".

However, I am not satisfied that there is any acceptable evidence which suggests that there were ever any additional traders present at the mart other than on a Thursday. On the evidence the principal mart conducted by Listowel Marts was on Thursday. There were additional traders there on that occasion. No mart took place on Tuesdays or Saturdays. A smaller or subsidiary mart took place on a Wednesday but the evidence suggests that additional traders did not attend on that day, presumably because the significantly smaller scale of the mart on that occasion did not justify their presence.

5.8 The question arises as to whether the marts conducted could, in theory, be considered markets as contemplated by the letters patent. On balance I have come to the view that such a mart could, in principle, be so regarded. It is clear, for the reasons which I have earlier set out, that a sale by auction is nonetheless a sale for the purposes of a market conducted in accordance with the letters patent. While the cattle concerned were offered for sale through the auspices of Listowel Mart, in effect the sale was by the owners of such cattle to whatever purchasers happened to be interested. The mart was, therefore, in the words of Lynch J. in *Skibbereen*, a concourse of buyers and sellers who happened to use the medium of an auction for their buying and selling.

5.9 I am, therefore, satisfied that what occurred on Wednesday and Thursdays in the mart was, in principle, a market as contemplated by the charter. If, therefore, I had been satisfied that it was possible, in principle, for market obligations to attach to a particular location by user, and if Wednesdays and Thursdays had been market days for charter purposes, then I would have been satisfied that, those rights would have attached to the Market Place. I should also note that it seems to me that each of the market rights and obligations and the fair rights and obligations needs, in this context, to be considered separately.

6. Estoppel

6.1 Again lest I be wrong in my overall conclusion, it is necessary to consider whether Birds would have lost any entitlement which they might otherwise have had by virtue of their actions. Firstly it is said that by entering into the leases to which I have referred, Birds are now, in effect, prevented from asserting any entitlement. For the reasons which I have already set out, I am satisfied that the existence and terms of those leases has prevented any market or fair from taking place during the period spanning Listowel Race Week since the time when Birds have been involved. I came to that view not on the basis of an estoppel, but on the basis that no market could, in fact, have taken place in the manner contemplated by the charter, having regard to the leases. I do not believe that the leases are, therefore, truly an issue which raises an estoppel but rather have the effect which I have sought to analyse.

6.2 The other matters relied upon as creating an estoppel concern the conduct of Birds since the possibility of a move by Listowel Mart to their new location just outside Listowel was first mooted. There certainly was early correspondence from Birds which seemed to acknowledge an entitlement on the part of Listowel Mart to make such a move. In addition it would appear, and I am satisfied, that Birds in effect permitted Listowel Mart to act to its detriment in circumstances where Birds were already aware, at least in general terms, of the possibility that they might be able to assert rights under the letters patent. It, of course, follows from the rational of *Wyld v. Silver*, that a public right cannot be extinguished by an estoppel on the part of one individual for just the same reason that a public right cannot be extinguished by non user. The market and fair rights, such as they are, must, therefore, subsist notwithstanding any estoppel. The issue is as to whether Birds have lost any entitlement to assert those public rights by virtue of the estoppel contended for.

6.3 Firstly, I should state that I am satisfied that if these were ordinary proceedings involving private rights, an estoppel would arise such as would debar Birds from maintaining these proceedings. However the proceedings do not involve private rights. It would be futile to decline to declare the existence of public rights on the basis of an estoppel which operates against only one individual. In those circumstances the public rights concerned could be asserted by any other individual and, if so asserted, there would be no reason why Birds could not avail of those public rights in just the same manner as anyone else. If, therefore, I had been satisfied that there were public rights attaching to the lands in question, I would not have taken the view that it would have been appropriate to decline to declare those rights on the basis of the contended for estoppel. The rights would, in those circumstances, subsist and there would have been no barrier to Birds enjoying whatever rights might be declared to exist in common with everyone else.

7. Non user under the 1995 Act

7.1 I have already analysed the extent of the use of the market and fair rights and obligations over the last number of years. I am, therefore, satisfied that none of the fair rights nor the Tuesday or Saturday market rights have, in fact, been exercised for much longer than a ten year period. In those circumstances I would, in any event, have been satisfied that those rights have been extinguished under the provisions of the 1995 Act.

7.2 I am satisfied that, where separate markets and/or fairs are created by a charter or charters, the non user provision applies separately to each of them.

8. Removal

8.1 The final issue upon which I should also express my views, lest I be wrong in my main conclusion, concerns the entitlement of Listowel Mart to remove the market from one location to another. It is abundantly clear, on all authority, that the entitlement to remove must be exercised within the confines of the area described in the letters patent creating the market or fair in the first place. See *Pease & Chitty* p. 34.

8.2 The 1612 Charter, as quoted at para. 1.1 above, refers to the Saturday market and the Feast day of the Finding of the Holy Cross Fair being held "at Listowel aforesaid." It is accepted by both parties, and I agree, that, from the text of the letters patent, the reference to "aforesaid" is a reference to a description of Listowel by means of a series of townlands earlier set out in the charter. The very considerable diligence of Listowel Mart's solicitor has allowed maps to be put in evidence which show those locations. It does seem clear that the new mart premises, while close to the area defined by the sequence of townlands, is not, in fact, within it. It is, perhaps, of the order of less than half a mile from the nearest point. It does not seem to me, therefore, that a relocation to that location could come within the terms of the 1612 Charter.

8.3 The 1688 Charter, as quoted at para. 1.2 above, is in slightly different terms and requires the Tuesday mart and the July and October fairs to be held "in or about the aforesaid Listowel." In those letters patent the description of Listowel is as "The Ville of Listowel" rather than by reference to any particular townlands. I am not satisfied that the new location for the mart could come within the confines of the term "in or about the Ville of Listowel." It is quite some distance from the historic original town of Listowel and is at least eight hundred metres from the now boundary of the town.

8.4 For these reasons I am not satisfied that any obligation on Listowel Mart could be said to have been met by a valid removal of the market to its new location.

8.5 However it does seem to me to be clear and, indeed, agreed by the parties, that any subsisting obligations (whatever they may be) can be validly removed to a suitable location. With that in mind it is important to define the parameters within which such a removal can validly take place. It is clear that, in addition to the removal being to a location within the parameters defined in the relevant charters (which would, at a minimum, require that the removal be to a location within the specified townlands and, in all probability, relatively close to Listowel town so as to satisfy the requirements of the 1688 charter), such removal must also be to a "convenient" location. However "convenience" must, in my view, be judged by reference to the needs of those who have an entitlement to use the market whether as buyers or sellers, rather than by reference to those who may carry on ancillary activities in conjunction with the market. In that context it is important to indicate I am satisfied that the carrying on of amusements in the fashion conducted by Birds is not one of the legal incidents of either a market or of a fair. Vol. 29 (2) of Hallsbury Laws of England (4th Ed.) at para. 1,003 states that:

"It seems that the legal incidents of a fair do not include the amusements which often accompany the holding of fairs, although their presence has been recognised by statute."

The Court of Appeal in *Walker v. Murphy* [1914] (2) Ch. 293 seems to have taken that view by adopting the dissenting judgment of Gainsford Bruce J. in *Collins v. Cooper* [1893] (68) LT 450 to the effect that a fair could not be devoted solely to amusements. The fact that amusements may commonly be found at a fair or even a market does not, it seems to me, mean that amusements are one of the legal incidents of such a market or fair. The definition of a market or fair is "a concourse of buyers and sellers". Very many other persons may, in one way or another, benefit by the existence of such a concourse. That fact does not, however, make the business of those persons a part of the market or fair concerned.

8.6 In those circumstances it does not seem to me that any removal would require, for its validity, to make provision for Birds amusements as such. It is only the concourse of buyers and sellers which needs to be accommodated. Convenience can only be judged by that criteria. In that context I should finally add that I do not accept the ingenious argument put forward by counsel on behalf of Birds to the effect that those who bought tickets from Birds which would lead either by chance or skill to them obtaining a prize could be said to be "buying" the prize. It is clear from the authorities (see for example *Lambert v. Rowe* [1914] K.B. 38) that the term buying is to be used in its ordinary common sense way. A person who buys a ticket which enables that person to compete for a prize by (say) knocking down skittles or by (say) their ticket being drawn from a hat, cannot be said to have "bought" the prize in any ordinary sense of the word. I am not satisfied that any such activities form any part of the legal incidence of a market or fair and I am not satisfied, it follows, that any removal has to have regard to such matters in considering the suitability of the location.

9. Conclusions

9.1 It follows that my primary conclusion is to the effect that, as a matter of law, the entitlement to have a market or fair (not defined by "metes and bound") conducted does not attach to any particular portion of land and cannot affect the legal title to any land such as would allow a declaration to be made in any form which would impair that title. If I am wrong in that view then I am satisfied that it cannot be said that market or fair obligations were, in this case, in fact, appropriated to the Market Place and, for like reasons, I am also satisfied that each of the markets and each of the fairs specified in the letters patent with which I am concerned above have been extinguished by non user under the provisions of the 1995 Act.

9.2 Had I been satisfied that the markets or fairs concerned could have and had been appropriated to the Market Place, I would then have been satisfied that Birds had standing to assert the public entitlement involved and to obtain an injunction restraining the lands from being used in any way which would prevent the markets or fairs concerned from taking place on it. In addition I would not have been satisfied that Birds had lost any such entitlements. Any such injunction would, of course, have needed to have been couched in terms which recognised Listowel Mart's entitlement to remove the markets or fairs concerned to another location which met the parameters which I have set out in paras 8.5 and 8.6.