UNAPPROVED **NO REDACTION NEEDED**

THE COURT OF APPEAL

Court Of Appeal Record No.: 2023/302
High Court Record No.: 2018/11189P
Neutral Citation No.: [2024] IECA 289

Noonan J.
Binchy J.
Meenan J.

BETWEEN/

REXBAY LIMITED

RESPONDENT/ PLAINTIFF

- AND -

PAUL MCCANN, STEPHEN TENNANT AND HAKUBA LIMITED

APPELLANTS/ DEFENDANTS

JUDGMENT of Mr. Justice Binchy delivered on the 27th day of November 2024

1. This is an appeal from a judgment of the High Court of 6th October 2023 whereby Stack J. found the appellants liable for losses claimed to have been incurred by the respondent arising out of the breach by the appellants of the terms of an exclusivity clause contained in a side letter to a lease of a premises, which lease was granted by the first and second named appellants to the respondent on 7th September 2015 (the "Lease"). Having concluded that the defendants had acted in breach of the exclusivity clause, the trial judge assessed the damages sustained by the respondent as a result of that breach in the sum of €116,518.00 and made a decree in that amount, together with Courts Act interest in the sum of €9,959.81 in favour of the respondent, together with the costs of the proceedings. While the appellants have appealed from the entirety of the judgment of the High Court, they did not pursue any appeal from the quantum of damages as assessed by the trial judge.

Background

2. Under the terms of the Lease, the first and second named appellants, as joint receivers and as agent and attorney of Henry A. Crosbie, did demise unto the respondent the premises known as Units 3 and 20, Level 0 (the "Demised Premises") forming part of the development known as Point Village, North Wall Quay, Dublin 1 (the "Centre") for the term of ten years from the commencement date as defined in the Lease. The third named appellant subsequently purchased the Centre from the first and second named appellants and consented to being joined in the proceedings, and adopted the position being maintained by the first and second named appellants in the proceedings. The permitted business of the Demised Premises, as defined in the Lease, was that of a coffee shop and restaurant which was to trade under the name of Starbucks for a minimum period of two years from the term commencement date as also defined in the Lease.

3. On the same date that they entered into the Lease, the parties also entered into the side letter mentioned above (the "Side Letter") which conferred on the respondent certain entitlements not reflected in the Lease, including, *inter alia*, a rent-free period, a break clause and, most relevantly so far as these proceedings are concerned, a degree of exclusivity as regards the sale of coffee in the Centre. The Side Letter is stated to be personal to the respondent and that it will not apply to any third party or any successor in title or assignee of the respondent, and that, at the election of the first and second appellants, account may be taken of it in the context of future rent reviews.

4. The dispute between the parties arises out of an obligation of the appellants to the respondents undertaken pursuant to Clause 3 of the Side Letter, under the heading of "*Exclusivity*". So far as is relevant to the dispute, Clause 3 provides as follows:-

> *"3.1 The Landlord shall not grant or consent to the granting on a First Letting Basis (as defined below) a new lease in respect of any part of the Centre to (i) Costa Coffee, (ii) Butlers Chocolate, (iii) Insomnia, or (iv) Caffé Nero (v) Esquires or any other similar type of coffee chain store where coffee is their primary product ("**Excluded Coffee Chain**") PROVIDED THAT the provisions of this paragraph shall not extend to a prohibition on use of a Unit for the sale of coffee and other hot beverages where such use is ancillary to the main or permitted use of such Unit (e.g. a bakery, sandwich bar or restaurant) and further provided that the provisions of this paragraph shall not extend to the parts of the Centre known as the Cinema at Levels 3, 4 & 5 as outlined in red and coloured grey on the map attached to the Schedule One hereto.*
>
> *3.2 It is hereby agreed that a "**First Letting Basis**" for the purpose of this Side Letter means the granting of an occupational lease to a new tenant of a Unit in the Centre.*
>
> *3.3 The covenants and agreements contained in paragraph 3.1 shall only apply to a lease granted on First Letting Basis.*
>
> *3.4 If an application is made by a tenant in occupation of a Unit in the Centre for consent to assign or sub-let to an Excluded Coffee Chain then the Landlord, on receiving such application, shall, within Five Working days of receipt of any such application, notify the Tenant of such application. The Tenant shall have the right within Five Working days thereafter to instruct the Landlord*

to reject any such application to assign or sub-let, as the case may be, in which event the Tenant shall indemnify and keep the Landlord indemnified from and against all actions, proceedings, costs, damages, expenses, claims and demands arising out of any such refusal to give consent for such assignment or sub-letting.

3.5 - 3.6 …

3.7 If the Landlord so elects, it shall be assumed that the Premises has the benefit of the exclusivity provided for in paragraph 3.1 of this Side Letter for the purposes of calculating the open market rental value pursuant to Schedule 4 of the Lease."

For convenience, I will hereafter refer to Clause 3 of the Side Letter as the "Exclusivity Clause".

5. The Side Letter also provides that, save as otherwise provided therein, words and expressions in the Side Letter shall have the meaning assigned to them in the Lease. For present purposes, it is necessary only to refer to the definition of "*Unit*" as appearing in the Lease, which is defined as follows: "*a unit or other premises within the Lettable Areas occupied by a tenant or licensee…*".

6. By lease dated 11th September 2017, the appellants demised unto a company named AA Fine Catering Limited ("AAFC") Unit 1 of the Centre for the term of 15 years from 11th September 2017 (the "the Unit 1 Lease"). The "*Permitted Business*" as provided for in the Unit 1 Lease was stated to be the use of Unit 1 for "*the preparation on site of salads, wraps, burritos, soups, frozen yogurt and pressed juices primarily for consumption offsite*." I should make it clear that it forms no part of the case made by the respondent that the provisions of the AAFC Lease are in any way in breach of the terms of the Side Letter; rather it is the use to which part of Unit 1 has been put by AAFC that is said by the respondent to constitute a breach of the obligations of the appellants under the terms of the Side Letter. Specifically, the use complained of is the use of part of Unit 1 for the purpose of the sale of coffee under a brand known at the time as “Handprint Coffee”.

7. I pause to mention here that, as the trial judge observed, the respondent does not by these proceedings seek to require the appellants to enforce the provisions of the Unit 1 Lease against AAFC. Indeed, such relief is expressly barred by the terms of the Lease which provides at Clause 5.11:-

> *“Save as herein expressly provided otherwise, neither the grant of this Lease nor anything herein contained shall confer on the [respondent] any right to the benefit of or to enforce directly or indirectly any covenant or condition contained in any lease or other instrument relating to the [Centre] or any nearby premises.”*

The Use of Unit 1

8. Following upon the grant of the Unit 1 Lease, AAFC operated two franchises in Unit 1, one being a franchise known as Freshii, which was a restaurant franchise the business model of which revolves around the provision healthy meals such as salads, rice bowls, wraps, oatmeal, fresh and frozen yogurt, healthy portable snacks and beverages, and the other being a franchise known as Handprint Coffee which, as the name suggests, was a franchise concerned with the promotion and sale of specialist coffee and consumables to consumers on a retail basis. AAFC had obtained the Freshii franchise pursuant to an agreement made with the developer/owner of that franchise dated 1st October 2017, and it was granted the Handprint franchise pursuant to an agreement made with the developer/owner of that franchise on 28th November 2017. The dispute between the parties centres around the operation of the Handprint Coffee franchise which the respondent contends is in breach of the terms of the Exclusivity Clause.

9. It should also be observed at this point that neither franchise at Unit 1 survived the Covid-19 pandemic, although the Freshii franchise does of course continue to operate at other locations. However, the shutdown of the operations of the franchises at Unit 1 had an obvious limiting impact upon the losses claimed in these proceedings.

10. In early 2018, the respondent became aware that Unit 1 was being used in connection with the sale of coffee under the Handprint brand. While in due course I will describe in some detail the configuration of Unit 1 so far as concerns the operation of each franchise, suffice to say for now that the Handprint franchise was operated by way of what may loosely be described as a concession within Unit 1, from an area of approximately $5m^2$ and with access to other areas for storage and sanitary purposes, as well as access by Handprint customers to a lounge area within the premises. The respondent considered that the operation of the Handprint franchise, involving as it did the sale of a specialty coffee, was in breach of the Exclusivity Clause. While this Court was not provided with a copy of the pre-action correspondence, it is understood that the respondent requested the cessation of the operation of the Handprint franchise within Unit 1, but that the first and second appellants took the view that its operation did not entail any breach of the terms of the Side Letter and declined to take any action to require AAFC to desist from that activity at Unit 1. The respondent then caused these proceedings to issue by way of plenary summons on 20th December 2018.

The Proceedings

11. At paras 18-21 of her judgment, the trial judge succinctly summarises the issues raised by the proceedings as follows:-

> *"18. The Plaintiff says it makes a very simple argument: the Exclusivity Clause prohibits a first letting to an Excluded Coffee Chain and it defines a coffee chain by*

way of brand rather than by corporate entity. They say Handprint was quite clearly a branded coffee chain, having coffee as its primary product and having multiple stores, albeit that this was a new chain and the Point Village outlet was the first to open.

19. The plaintiff says that it did not matter if the operation of an Excluded Coffee Chain is not the sole – or even the main – business being run from Unit 1 as the Exclusivity Clause is broad enough to capture partial user of the kind that was in fact carried on. Furthermore, the proviso in Clause 3.1 only applies to the sale of coffee where it is "ancillary" to a business which primarily serves food, such as a bakery or sandwich bar, and that the sale of coffee must be an essential component of that business rather than a separate business in its own right.

20. They therefore say that the Handprint offering was not "ancillary" to the Freshii offering but was a separate business, as evidenced by separate branding, advertising, points of sale, and separate queues clearly designated as such within Unit 1. And, of course, it was run on foot of an entirely separate franchise agreement with a different franchisor.

21. By contrast, the defendants say that the Exclusivity Clause does not apply because the letting to the Tenant [i.e. the letting to AAFC] was not a "First Letting" within the meaning of the Clause. Consideration of this argument will require a more detailed consideration of the terms of the Clause. They also say that Handprint was clearly "ancillary" to the Freshii offering because it was a less significant aspect of the overall business being conducted in Unit 1, with the Freshii offering accounting for the majority of the sales, taking up a larger area in Unit 1, and so on."

12. A further issue raised in the proceedings, by the amended defence of the appellants (following discovery made by the plaintiff), concerned the entitlement of the appellants to make any claim for the losses allegedly sustained. The appellants pleaded that the respondent had no standing or entitlement to maintain the cause of action pleaded in circumstances where the respondent admits that it does not conduct the sale of coffee to customers in the Demised Premises. In an amended reply to defence delivered on 17th November 2021, the respondent denies making such an admission and expressly pleads that it has the standing to maintain these proceedings as the party entitled to the benefit of the exclusivity agreement (i.e. the Side Letter), as the party entitled to the benefit of the Lease and as the party which owns the trade carried on from the Demised Premises and which is entitled to the gross margin on all sales conducted thereon.

Judgment of the High Court

13. Having set out the background to the dispute, the trial judge, at para. 22 observed that the Side Letter is a contract between the respondent and the first and second appellants, and that therefore it should be interpreted in line with the usual principles of interpretation applicable to contracts. She further observed that there is no dispute between the parties as to the relevant principles, which were summarised by McDonald J. in *Brushfield Limited v. Arachas Corporate Brokers Limited* [2021] IEHC 263, at para. 110. She then set out the relevant principles as follows:-

"(a) The process of interpretation of a written contract is entirely objective. For that reason, the law excludes from consideration the previous negotiations of the parties and their subjective intention or understanding of the terms agreed;

(b) Instead, the court is required to interpret the written contract by reference to the meaning which the contract would convey to a reasonable person having all the background knowledge which would have been reasonably available to the parties at the time of conclusion of the contract;

(c) *The court, therefore, looks not solely at the words used in the contract but also the relevant context (both factual and legal) at the time the contract was put in place;*

(d) *For this purpose, the context includes anything which was reasonably available to the parties at the time the contract was concluded. While the negotiations between the parties and their evidence as to their subjective intention are not admissible, the context includes any objective background facts or provisions of law which would affect the way in which the language of the document would have been understood by a reasonable person;*

(e) *A distinction is to be made between the meaning which a contractual document would convey to a reasonable person and the meaning of the individual words used in the document. As Lord Hoffmann explained in the Investors Compensation Scheme case at p. 912, the meaning of words is a matter of dictionaries and grammar. However, in order to ascertain the meaning of words used in a contract, it is necessary to consider the contract as a whole and it is also necessary to consider the relevant factual and legal context. That said, in the present case, no argument was made about the relevant legal or regulatory context against which the policy of insurance was put in place;*

(f) *While a court will not readily accept that the parties have made linguistic mistakes in the language they have chosen to express themselves, there may be occasions where it is clear from the context that something has gone wrong with the language used by the parties and, in such cases, if the intention of the parties is clear, the court can ignore the mistake and construe the contract in accordance with the true intention of the parties;*

(g) *As O'Donnell J. made clear in [Law Society v. MIBI [2017] IESC 31], of the dispute before the court.(sic) At para. 14 of his judgment in that case, O'Donnell J. said:-*

> *"It is necessary therefore to see the agreement and the background context, as the parties saw them at the time the agreement was made, rather than to approach it through the lens of the dispute which has arisen sometimes much later.""*

14. Unsurprisingly, no issue arises in this appeal as to the application of these well-established principles to the dispute that has arisen between the parties. Having set out those principles, the trial judge continued as follows at paras. 23 and 24:-

> *"23. Having already set out the words of the Exclusivity Clause, I now need to consider the context in which it was agreed. Before doing so, I wish to make it clear that the defendants are correct in their submission that the subjective intention of the plaintiff (acting through its director, Mr. Ciarán Butler) is inadmissible to interpret the Exclusivity Clause. I completely accept this but, as discussed further below, Mr. Butler did not give evidence of his subjective intention – what he thought he was agreeing, as opposed to what he did in fact agree – or of any negotiations between the parties which would similarly be inadmissible (and which may, on the facts of any given case, overlap with evidence of subjective intention).*
>
> *24. The evidence which Mr. Butler gave about the negotiation of the Clause was related to the context in which it was negotiated. For example, Mr. Butler gave evidence that the area was "marginal", that is, it did not have a large footfall. As a result, he wished to protect the Starbucks trade. In effect, he wanted no direct competition from a similar offering in the Centre as that would reduce the custom available to Starbucks. In interpreting, therefore, the notion of an Excluded Coffee*

Chain, one could approach it on the basis that what was excluded was a business so similar in nature that the Starbucks trade would be negatively affected. I return to this issue when I come to interpret the Exclusivity Clause."

15. The trial judge then proceeded to consider the factual evidence as to the nature of the business being conducted at Unit 1. Here again, there is really no material dispute between the parties, and so I propose to summarise very briefly the findings of fact of the trial judge in this regard. Unit 1 comprises approximately $130m^2$. The Freshii counter and display area takes up $20.44m^2$, and the Handprint counter and display area takes up $5.4m^2$. The remainder of the premises, the judge found, comprised certain back of house facilities shared by both Freshii and Handprint (mainly comprising utilities) and a large area containing counters running along the walls with highchairs, suitable for one or two person diners, four person dining tables and chairs and a lounge area with low seating and low tables. The latter area was carpeted whereas the rest of the seating area was more canteen style.

16. The judge found that on entering Unit 1, customers were directed to two separate points of sale, one for each brand and that it was not possible to purchase Freshii produce at the Handprint till or *vice-versa*. Separate receipts, identified by brand, were issued to customers.

17. The trial judge observed that the dining area was more suitable for eating meals and therefore for consuming the principal products sold by Freshii, being wraps, soups, burritos and salads, whereas the lounge area was more suitable for drinks and snacks, and not for the consumption of Freshii's primary products. The judge found that the while the primary product of Freshii was food, specifically healthy dishes which were suitable for takeaway lunches, it also offered coffee and advertised that it did so. It had a dedicated service area for coffee where one could add sugar, stir the coffee place a lid on a takeaway cup etc.

18. The trial judge referred to photographs produced in evidence by a Ms. O'Shea, the Group Property manager of the group of companies of which the respondent is a member. Ms. O'Shea had taken the photographs on her visit to Unit 1, in January 2018, when the trading activities within Unit 1 had been brought to her attention. The trial judge noted that the Freshii banners over the doors of Unit 1 were clearly visible from outside and that they would have been understood as indicating that there was only one outlet in the premises. However, she noted, the sale of coffee as a stand-alone product was also being heavily promoted and that the size of the advertising was designed to attract coffee customers. Specifically, the trial judge referred to a giant coffee cup displayed on very large cellophane advertising on the glazing beside the right hand door of Unit 1, which she thought would not go unnoticed by anyone looking at Unit 1 from a distance.

19. The trial judge found that the photographs make it clear that, on entering Unit 1, there were two separate offerings. Just inside the right hand door, there were signs directing customers to the right for the Handprint queue and to the back of the Unit for the Freshii counter. She concluded that by the time customers reached the right hand door, they would have been in no doubt but that they were being encouraged to buy coffee as a stand-alone or primary product. The left hand door advertised dishes sold by Freshii.

20. The trial judge further observed that there was an overlap between the two offerings. She found that while the primary product of Freshii was food, specifically heathy dishes, it also offered coffee and advertised that it did so. Having reviewed all of the evidence regarding the layout of the premises, the trial judge arrived at an important conclusion, stating, at para. 41: "*In essence, there were two businesses, seeking to attract two types of customers, one who attended primarily to buy food and one who attended primarily to buy coffee.*"

21. The trial judge also had regard to the distinctive branding used in connection with each enterprise noting that the uniforms worn by the staff operating the Handprint counters were quite distinct from those worn by Freshii staff. She also had regard to the Handprint social media content which was placed in evidence in which there was no mention of Freshii and which made in plain that Handprint marketed itself as a specialised, dedicated, coffee brand. She concluded, at para. 46:-

> *"…I think it is clear that the relationship was one of collaboration between the two chains. Indeed, this is confirmed by the fact that the Tenant [i.e. AAFC], which was a limited liability company unconnected to either of them, entered into two separate franchise agreements."*

22. I pause at this point to mention that, while the appellants take issue with the conclusion of the trial judge that there were two businesses operating out of the premises as distinct from two franchises, which is accepted, they do not otherwise appeal any of the foregoing findings of fact of the trial judge.

The Context in which the Side Letter was Signed

23. The trial judge then proceeded to consider the interpretation of the Exclusivity Clause. She first considered the context in which the Side Letter was agreed. She had regard to the evidence of Mr. Butler, a director of the respondent, that he was already familiar with the Centre when he was approached by the letting agent acting on behalf of the appellants, at which time none of the units were let other than the cinema. There was therefore very limited footfall and therefore it was important to capture as much as possible of the trade relating to the use for which the Unit (i.e. the Demised Premises) was to be let, in order to make it viable. Mr. Butler was clear that the Exclusivity Clause was vital and that the Lease would not have been signed without such a clause.

24. The trial judge also referred to Mr. Butler's evidence that Clause 3.7 of the Side Letter permitted the Landlord to elect to have the Exclusivity Clause considered for the purpose of rent review. Since the Exclusivity Clause would potentially increase the profitability of the Demised Premises, that potential could in turn be reflected in increased rent. In other words, the trial judge said, the tenant could pay extra rent in return for the Exclusivity Clause. Drawing all of this together, the trial judge observed, at para. 53:-

> *"The relevance of these matters is that it establishes that the purpose of the Exclusivity Clause (as indeed its name suggests) is that Starbucks would be the only dedicated coffee shop in the Centre."*

25. The trial judge considered it very significant that Mr. Butler drew a distinction between the wholesaling of coffee, where coffee is provided to restaurants, shops and service stations, for onward sale to retail customers, and a speciality coffee brand where the franchisor retains complete control over the brand and the retail unit. This evidence, the judge said, was consistent with the evidence of Mr. Paul Doyle, Managing Director of Bannon Property Consultants, who gave evidence on behalf of the appellants. Mr. Doyle expressed the view that there are two separate markets which are relevant to the sale of coffee: the first being outlets which 'lead' with coffee or where coffee is the primary product, and the second being outlets which sell coffee, but where this is ancillary to the sale of food.

<u>*First Letting Basis*</u>

26. Having considered the context in which the Side Letter was signed, the trial judge then moved to consider the meaning of "*First Letting Basis*" as that term is defined and used in the Exclusivity Clause. In particular, she considered an argument advanced by the appellants that the definition of this term makes it clear that, in order for the Exclusivity Clause to apply, the Excluded Coffee Chain must occupy the entirety of the unit leased, and furthermore, the letting should be directly to the coffee chain in question and not to a separate entity, in this case AAFC.

27. The trial judge rejected this argument because, she held, the Clause does not say that. She noted that the prohibition in the Clause is on the granting, on a First Letting Basis, of a new lease in respect of *any part of the Centre*. She said that every part of a Unit in the Centre is, by definition, part of the Centre also, and, she reasoned, if Clause 3.1 was intended to prohibit the lease of a 'Unit' (i.e. an entire unit in the Centre) to an excluded coffee chain, it would have said so.

28. The trial judge drew support for this interpretation from Clause 3.4, concluding that both Clauses 3.1 and 3.4 are directed to ensuring that the respondent can prevent competition from "*an Excluded Coffee Chain*".

29. The trial judge also expressed the view that Clause 3.4, which confers on the respondent a right to veto any application made by other tenants to the Landlord to assign or sublet to an Excluded Coffee Chain would be unlikely to occur in the absence of sub-division of a unit. It should be observed that the trial judge does not explain why she considered this to be so, but in any case, she stated that this suggests that the Exclusivity Clause was not drafted to apply only where an Excluded Coffee Chain occupies an entire unit.

30. The judge also considered an argument made by the appellants that Clause 3.1 only applies where coffee is the primary product sold in the unit the subject of the first letting. In considering this argument, the trial judge stressed that it is not in dispute that coffee *was not* the primary product sold in Unit 1 as a whole. However, the judge considered that the words "*where coffee is their primary product*" form part of the definition of "*Excluded Coffee Chain*" and are not intended to qualify the earlier phrase "*any part of the Centre*" or indeed the term "*First Letting Basis*". Moreover, the judge held, this view is supported by the purpose of Clause 3.1 which is to exclude dedicated coffee shops with coffee as their primary product. Therefore, the judge held, it is incorrect to suggest that Clause 3.1 requires that coffee would be the primary product sold in the Unit "*as a whole*" (my emphasis). She concluded that both the words of Clause 3.1 and the context in which it was negotiated favour an interpretation of "*any part of the Centre*" as including parts of units as well as entire units.

31. The judge also considered – and rejected – an argument that in order for Clause 3.1 to apply, the letting would have to be to a coffee brand, and not to a corporate entity. She rejected this argument on the basis that it is "*abundantly clear*" that the focus of Clause 3.1 was to prevent the opening of a competing business, regardless of whether it was operated directly by the owner of a brand or through a franchise. Accordingly, all possible structures by which such a business would trade are covered by the Exclusivity Clause, the focus being on the operation of a coffee chain store anywhere else in the Centre.

32. Next, the judge considered an argument that Handprint is not a "*coffee chain*" and therefore Clause 3.1 can have no application. The judge rejected this argument also, holding that the fact that Handprint was to be the first outlet in the chain does not mean that it was not part of a chain. She noted that it was clear from social media, introduced in evidence at the trial, that Handprint was to be a chain, and it opened on the basis of a franchise agreement which in itself suggested that there would be other outlets. Furthermore, she noted that new outlets appeared to have opened within a short time following upon the opening of the outlet in Unit 1.

33. For all of the foregoing reasons, the trial judge concluded that the operation by AAFC of a Handprint franchise in Unit 1 was *prima facie* prohibited by Clause 3.1. The judge then moved to consider whether or not the Handprint offering was ancillary to the Freshii offering.

The "Ancillary" Proviso

34. In the course of her consideration of this issue, the trial judge again referred to the evidence of Mr. Doyle, who stated in evidence that there is a clear distinction between a coffee shop that sells food, and a food focused offering that also sells coffee. The trial judge noted that this evidence was consistent with that of the evidence of Mr. Butler. She considered that this distinction is reflected in the wording of Clause 3.1, which makes it plain that the granting of a lease to a chain of coffee shops with coffee as its primary product is excluded, whereas the incidental sale of coffee as part of a food offering is "*ancillary*" and is protected by the proviso in the Clause.

35. The trial judge considered an argument advanced on behalf of the appellants, that, in considering this issue, it is necessary to consider the user of Unit 1 as a whole, and that viewed in that light, the Handprint business was ancillary to the Freshii business. The trial judge rejected this argument for several reasons. She rejected it firstly because of her earlier conclusion that AAFC was conducting two businesses from Unit 1. She said that the wording of Clause 3.1 was directed at the type of business which is being conducted and not at the floor area used, and that it follows from that the operation of the Handprint franchise, which was a separate business with coffee as a lead product, was not saved by the proviso in Clause 3.1. She did not consider that the overall usage per square foot of each business to be material, because she had already concluded that Clause 3.1 prohibits a letting for use as an Excluded Coffee Chain, even if that is going to account for only some of the use of the unit that is being let.

36. The judge rejected an approach to the interpretation of "*ancillary*" whereby a dominant user of the Unit is identified – in this case the Freshii user – by reference to which any other business is considered to be subsidiary or ancillary. While she noted that Mr. Doyle referred to the fact that each of the three Handprint outlets which had opened were present in a Freshii outlet, she did not consider that this demonstrated more than that there was a collaboration of some kind between Freshii and Handprint and she considered this to be irrelevant to the question of whether a dedicated coffee counter was "*ancillary*" to the "*permitted business*" of Unit 1.

37. The trial judge also considered arguments advanced on behalf of the respondent by reference to the Oxford English Dictionary definition of "*ancillary*" which is:-

> *"providing necessary support to the primary activities or operation of an organization, institution, industry or system".*

The respondent had stressed that in order to be ancillary, the support provided must be 'necessary' and that in this instance that was not so because Freshii could, and did, sell its own coffee to its own customers.

38. A further argument advanced by the respondent was by reference to Jowitt's Dictionary of English Law (5th ed., Sweet and Maxwell, 2019) which defines an "*ancillary claim*" as:-

> *"a claim made alongside another claim which either arises from it or is otherwise connected with it in some way and of obviously lesser importance (which normally means that either it could not or would not have been brought but for the principle claim).*"

By way of analogy, the respondent argued that the Handprint business could exist as a stand-alone user of Unit 1, independent of Freshii, and could not therefore be considered to be ancillary to the Freshii business, and the trial judge appeared to accept that argument.

39. The trial judge also rejected an argument advanced by the appellants that because Mr. Butler was aware that it was not unusual for dedicated coffee chains to trade within a larger enterprise, for example within service stations, that that knowledge formed part of the background context and that Mr. Butler should therefore be taken to have agreed not to exclude this type of arrangement. However, the trial judge rejected this argument for the very reason that Mr. Butler, being aware of such arrangements negotiated the Exclusivity Clause to exclude them, and agreed to a wording that said there should not be in any "*part of the Centre*" a coffee chain selling coffee as its primary product.

40. On this issue, the trial judge concluded that it is "*abundantly clear*" that the opening of the Handprint offering within Unit 1 was a breach of the Exclusivity Clause. Freshii, she said, already had the capacity to sell coffee and did not need a separate supplier, and again she emphasised in her conclusion on this issue that the reality of the matter was that there were two separate businesses being run by the same corporate tenant within the one Unit. The trial judge considered therefore that the Handprint business was not ancillary to that of Freshii, and, therefore, the proviso did not apply. In light of these findings, the judge concluded that the Handprint business was in contravention of the Exclusivity Clause, such as to entitle the respondent to damages for breach of the same.

Standing of Rexbay to Bring the Claim

41. Before moving to consider quantification of damages, the trial judge considered the argument advanced by the appellants that the respondent did not have standing to bring the proceedings. Each of the parties called an accountant by way of expert evidence to address this issue. The appellants relied upon a range of facts which were not in dispute in support of their argument that the respondent was not conducting a trade from the Demised Premises including: the respondent does not carry out any sales of coffee from the premises, does not have a bank account, is not the franchisee of the Starbucks brand, does not employ any of the staff working at the Demised Premises and does not own any of the fit-out at the Demised Premises.

42. The respondent's response to this argument is that it is just one company in a group of companies, the treasury function of which is carried out by another entity within the group, namely Atercin Liffey Unlimited Company ("Atercin"). Mr. Butler gave evidence that the sole business of the respondent was the running of the Starbucks café at the Demised Premises, and that Atercin managed that business on behalf of the respondent. Mr. Joseph Walsh, an accountant who gave evidence on behalf of the respondent, stated that income and expenses paid for by Atercin – which included wages and activities outsourced to other group companies, were recharged and accounted for in the accounts of the respondent. Moreover, the gross profit from the trade of the Starbucks outlet was remitted by Atercin to the respondent, which accounted for it as its turnover and from which it accounted for the staff costs, rent and service charges of the outlet, and also from which it discharged corporation tax. The respondent remitted profits to its parent company in the group, Desert Ltd., and Isle of Man company. Atercin has a different parent company, namely Galba Limited. The judge expressed the view that the remittance of profits by the respondent to Desert Ltd. would seem to contradict the view of the appellants' accountant, Mr. Declan Walsh, that only Atercin was trading and that only a trading company could retain profits. The judge observed that Mr. Declan Walsh did not comment on this in his evidence.

43. Having considered these and other arguments the trial judge concluded at paras. 134 and 135:-

> *"134. … The evidence is to the effect that the plaintiff negotiated the Lease, the Side Letter, and indeed the Licence permitting it to use an outside area for seating, and it holds the benefit of each of these documents. It pays the rent and service charge and reimburses Atercin in respect of the franchise fee. It accounts for turnover in the Starbucks outlet as well as the staff and other costs, accounts for the profits, assumes responsibility for the tax on those profits, and then decides what is to be done with them (which generally means that it remits them in full to its sole shareholder). All of this points to Rexbay controlling the deployment of all significant assets relating to the*

Starbucks outlet. It can, for example, decide to exercise its break clause, which would have the inevitable result that the current trade would cease.

135. In my view, it is clear that Rexbay is the corporate person which stands to lose or gain depending on variations in trade from the Starbucks outlet and it is therefore entitled to claim damages for the loss occasioned by the first and second defendants' breach of the Exclusivity Clause."

44. Having thus concluded, the judge proceeded to quantify the losses which she considered the respondents sustained as a result of the breach of the Exclusivity Clause. However, it is not necessary to consider this part of the judgment as this forms no part of the within appeal.

<u>Notice of Appeal and Submissions of Appellant</u>

45. While, by their notice of appeal of 24th November 2023, the appellants raise seven grounds of appeal, in their submissions they say that these grounds can be grouped into two broad themes namely:

(1) Interpretive issues arising from Clause 3 of the Side Letter, to wit:

  (a) whether the correct approach is to interpret the Clause as prohibiting a unitary letting of an entire unit in certain defined circumstances, or whether the correct approach is to interpret Clause 3 as being engaged such that an internal part of a demised premises under a letting can be considered in isolation to see if it falls foul of the relevant prohibition and

  (b) certain related issues concerning the interpretation of the term "*ancillary*" in the proviso to Clause 3.1 of the Side Letter.

(2) The nature of the plaintiff's trading arrangements together with how those trading arrangements interact with principles relating to:

(a) remoteness of damages principles as a matter of contract law;

(b) principles associated with separate legal personality within corporate groups; and

(c) the doctrine of privity of contract.

46. The appellants' case in relation to the first broad theme is straightforward. They claim that the trial judge erred in holding that the prohibited conduct described in Clause 3.1 of the Side Letter occurred when any part of a unit is used by an Excluded Coffee Chain following a letting of a unit. In doing so, the appellants submit that the judge accepted the argument advanced on behalf of the respondent that the phrase "*any part of the Centre*" was not merely a geographic reference to rental units within the Centre, but rather permits of an analysis of the internal use of portions of an individually let unit to see whether that internal portion, in isolation, might be said to amount to an "*Excluded Coffee Chain*". The appellants submit that in so interpreting the scope of the prohibited conduct, the trial judge erred because in doing so she did not have due regard to the use of the term "*on a First Letting Basis*" within the prohibition.

47. The definition of this term, the appellants submit, is of particular importance to the appeal. The appellants submit that the "*unitary*" nature of the conduct described i.e. the granting of an "*occupational lease*" is a well-known landlord and tenant concept, and that the reference to the granting of such a lease to a "*new tenant*" is also unitary. This argument is supported, it is submitted, by the repeated statement at Clause 3.3 that "*The covenants and agreements contained in paragraph 3.1 shall only apply to a lease granted on a First Letting Basis.*" It is submitted that the reference to "*a lease granted*" engages both with the unitary nature of the prohibited conduct, that is the act of granting of a lease in particular circumstances, and the use of well-known landlord and tenant terminology, i.e. a "*lease*".

48. All of this leads to the fundamental point of the appellants in this appeal and that is that the trial judge erred in interpreting Clause 3.1 of the Side Letter in such a manner that the restriction imposed by the clause could be applied to a part of the Unit 1, i.e. the part used by Handprint, instead of considering the prohibited conduct by reference to Unit 1 as a whole for the purposes of assessing whether there had been a breach of the Side Letter. It was submitted that not only was this an erroneous interpretation of Clause 3.1, it had the consequence of causing the trial judge to fall into further error in her interpretation of what constitutes an "*ancillary*" use for the purposes of the proviso in Clause 3.1. In other words, having found that it was permissible to divide Unit 1 into two separate parts by reference to the activities in each part, this led the trial judge to conclude, erroneously, that the Handprint franchise was a separate, standalone, business that was not ancillary to the principal business conducted at Unit 1, i.e. the Freshii business, which the appellants contend was the case.

49. In discussions with the court, counsel for the appellants said that their primary argument is that the only cause of action that the respondent can have is one advanced on foot of the Side Letter, and that the Side Letter makes it clear that the prohibited conduct is the grant of a new lease to an Excluded Coffee Chain store of a Unit i.e. an entire unit within the Centre. That said, however, counsel made it clear that he was not arguing that the appellants had no liability simply because they had granted AAFC a lease which did not breach Clause 3.1 in its terms; it is also their case that AAFC has complied with the terms of the Unit 1 Lease and in the conduct of what is defined therein as the "*Permitted Business*". In making this submission, I understood counsel to agree that, in considering whether or not there has been a breach of Clause 3.1 of the Side Letter, it is open to the court to consider not just the terms of the Unit 1 Lease, but also the business conducted by AAFC at Unit 1.

50. In their written submissions, at para. 4.11, the appellants stated that the first and second named defendants clearly granted an occupational lease of a unit, on a "*First Letting Basis*" to a tenant, i.e. AAFC, where the sale of coffee was ancillary to the main permitted user of the Unit 1 Lease. However, they submit, that lease was not a grant of a lease to an "*Excluded Coffee Chain*", but even it was, it was saved from being a breach of the Side Letter by reason of the proviso.

51. While under the terms of the Unit 1 Lease, the "*Permitted Business*" is the: "*use of the Premises for the preparation on site of salads, wraps, burritos, soups, frozen yogurt and pressed juices primarily for consumption offsite*", the Unit 1 Lease also contains an express prohibition on the sale of coffee or other hot beverages unless the sale of such products is "*strictly ancillary to the main use and/or Permitted Business*". While the trial judge found that the sale of Handprint coffee was not ancillary to the main use of Unit 1 as conducted by AAFC, counsel submitted that the trial judge arrived at this conclusion by reducing the area under consideration to just that part of Unit 1 where Handprint Coffee was being sold, rather than by looking at the premises as a whole; and that had she looked at the premises as a whole i.e. the "*Unit*" demised by the Unit 1 Lease, it would have been apparent that the main business being operated was the use permitted by the Unit 1 Lease i.e. the Freshii business, and that the sale of coffee under the Handprint franchise was ancillary to the permitted use of Unit 1.

52. Counsel further submitted that it does not matter that what was being sold was a branded coffee because the proviso in Clause 3.1 provides that the prohibition does not extend to the "*sale of coffee and other hot beverages where such use is ancillary to the main or permitted use of such Unit*". Therefore, it was submitted, it does not matter if the coffee sold is branded coffee, as long as the sale of it is ancillary to the main use. Counsel made the point that what is prohibited by Clause 3.1 is the granting of a lease of a Unit (i.e. a whole Unit) to a tenant which is either one of the specifically identified coffee chain stores, or alternatively a coffee chain store where "*coffee is their primary product*". In this instance, viewing Unit 1 as a whole, it was leased by the appellants to AAFC which operated two franchises from the premises, and in the submission of the appellants the sale of coffee under the Handprint brand cannot be regarded as the "*primary product*" of the tenant, having regard to the fact that the main business conducted by the tenant at Unit 1 was the "*Permitted Business*" in accordance with the terms of the Unit 1 Lease, that being the business of the Freshii franchise.

53. As to the second limb of the appeal, in general terms it is the appellants' case that all that the respondent did was hold the benefit of the Lease and the Side Letter and engage in a purely bookkeeping exercise whereby net profits of Atercin are remitted as a matter of undocumented policy to the respondent, which then in turn remits its net profits, also as a matter of undocumented policy, to another group company.

54. The appellants submitted, amongst other things, that the respondent does not hold the Starbucks franchise, it does not have employees, it does not sell the coffee and it does not have a bank account. Counsel submitted that the facts as admitted by the respondent support only one conclusion, that it was Atercin, which holds the Starbucks franchise, that was carrying on the trade, and that the overwhelming body of evidence points to that conclusion. It was submitted that the only evidence to the contrary is the undocumented evidence of Mr. Butler that Atercin was managing the business on behalf of the respondent, and that, in accordance with that policy, Atercin remitted the gross profits of the enterprise to the respondent. It was submitted that in the absence of documentary evidence of these arrangements, the trial judge had no basis upon which to conclude that the respondent was conducting the business at the Demised Premises, and/or that it was entitled to the profits of that business.

Respondent's Notice and Submissions

55. In its respondent's notice the respondent relies upon the judgment of the High Court as being correct in all material respects, and each ground of appeal is expressly denied.

56. The respondent submits that the appellants accept that the Unit 1 Lease was granted on a First Letting Basis, and that the appellant does not appear to appeal from the finding of the trial judge that Handprint is an Excluded Coffee Chain. In these circumstances, the respondent submits, that the appellants' submission that the entirety of Unit 1 must be used by the Excluded Coffee Chain exclusively in order to engage the provisions of Clause 3.1 is undermined by the express wording within Clause 3.1, relied upon by the trial judge i.e. that Clause 3.1 is engaged where there is granted "*…a new lease in respect of any <u>part</u> of the Centre…*" to an Excluded Coffee Chain [emphasis added]. It is clear, the respondent submits, that, as the trial judge found, the Exclusivity Clause covers any part of the Centre because, by definition, every part of a unit is also part of the Centre. It is submitted that had the appellants wanted to confine the exclusivity conferred by the Side Letter to a lease of a "*Unit*" in the Centre, and not to any part of the Centre, then it would have been phrased accordingly, and it is clear that Clause 3.1 is not confined in its application to "*Units*".

57. The respondent submits that the reliance placed by the appellants upon the Unit 1 Lease being to a single corporate entity (AAFC) operating two separate franchises in which the dominant user is Freshii is misplaced, and that this is demonstrated by the terms of Clause 3.4. Clause 3.4, it is submitted, gives the respondent a veto over a subletting of a unit to an Excluded Coffee Chain. It is submitted therefore that if a tenant applied to the appellants for permission to sublet a portion of Unit 1 to Handprint Coffee, the respondent would have a veto pursuant to Clause 3.4. That being the case, the interpretation of Clause 3.1 contended for by the appellants would be inconsistent with the veto conferred upon the respondent under the terms of Clause 3.4. In this regard the respondent places reliance upon the conclusion of the trial judge at para. 67 of the judgment under appeal, in which the trial judge expressed the view that an application made by other tenants to assign or sublet to an Excluded Coffee Chain would be unlikely to occur in the absence of subdivision of a unit.

58. The respondent also submits that Clause 3.1 does not define the term "*Excluded Coffee Chain*" by reference to the corporate entity that operates the particular chain, but rather it defines the term by brand, and the fact that the tenant is a corporate entity holding more than one franchise does not make permissible that which is otherwise impermissible by reason of Clause 3.1.

59. As to the reliance of the appellants on the definition of the term "*First Letting Basis*" as set out in Clause 3.2 of the Side Letter, the respondent submits that it is clear that the Unit 1 Lease falls within the definition. It is a lease of an occupational unit, and it is a lease to a new tenant of a unit at the Centre; and then returning to Clause 3.1, it is submitted that it is clear that the new lease is one in respect of any part of the Centre, and that it is to an Excluded Coffee Chain i.e. Handprint, which is precluded by Clause 3.1. The respondent submits that insofar as the Unit 1 Lease was a lease to Freshii, it was also a lease to Handprint, and that this is prohibited by Clause 3.1.

60. Moreover, the respondent submits that the appellants were aware of the intended use of Unit 1 at the time that they entered into the Unit 1 Lease, because this was apparent from the plans submitted by or on behalf of AAFC prior to the grant of the Unit 1 Lease.

61. In relation to the question as to whether or not the Handprint operation could be considered as being ancillary to that of Freshii, it was submitted on behalf of the respondent that the coffee sold by Freshii is a perfect example of what would constitute an ancillary use of Unit 1 for the sale of coffee, whereas the Handprint outlet is a perfect of example of what is not ancillary. It was submitted that the respondent could have no complaint if the sales of coffee within Unit 1 could be considered to be minor, but the evidence established that in 2018 the sales figures for Handprint were of the order of €105,151 with the corresponding figure for the Freshii outlet being of the order of €200,000.[1] I should add that it appears that these figures represent total sales by each franchise, and not just sales of coffee. The information provided indicates that during the same period, the value of Handprint's coffee sales was €76,971 (out of the total sales of €105,151).

62. Moreover, it was submitted that the interpretation of the word "*ancillary*" contended for by the appellants, coupled with the insistence by the appellants that the word "*Unit*" must be taken to mean only the entire Unit, would result in an interpretation that the proviso in Clause 3.1 would, for all practical purposes, be negated because it would mean that a use could be considered ancillary even if the vast majority of the Unit was being used for that purpose. In other words, as long as all of the Unit is not used for the purpose of the Excluded Coffee Chain, the use could be considered ancillary for the purpose of the proviso, and this could not be correct.

63. The respondent also submitted that as a matter of definition, the word "*ancillary*" connotes support of another, larger, enterprise and that without the larger enterprise the business that is said to be ancillary to it could not exist. In this instance, it was submitted that the evidence established that Handprint was a distinct business in no way dependent upon the existence of its neighbour, Freshii. On the contrary, it was submitted that in some ways it could be said that Handprint was in competition with Freshii, selling as it did, not just coffee, but also soft drinks and snacks of a kind also sold by Freshii.

64. Finally, as to the argument that the respondent did not have standing to bring a claim for losses, it was submitted that the trial judge had more than enough evidence before her to conclude that the respondent is the party that is entitled to the profits of the Starbucks business. She had evidence that Atercin remitted the gross margin on the sales to the respondent, that the respondent discharged the liability to corporation tax on profits and

[1] In fact it appears from the report of Mr. Declan Walsh of RSM Ireland, who gave evidence on behalf of the Appellants, that the Freshii sales for the period were of the order of €261,244.

remitted dividends to its 100% shareholder. The Court had before it the accounts of the respondent which demonstrated the foregoing. Furthermore, the Court had the evidence of Mr. Butler that Atercin is conducting the Starbucks business on the Demised Premises on behalf of the respondent, and that both companies operate within a group of companies, and that there is nothing unusual about these arrangements. The trial judge therefore had ample evidence to justify the conclusions that she reached on this issue, and accordingly the Court should not disturb those findings having regard to *Hay v. O'Grady* [1992] 1 I.R. 210.

Discussion and Decision

65. In discussions with the Court, counsel for the appellants submitted that their primary argument is that the Unit 1 Lease does not, in its terms, contravene the provisions of the Side Letter. That is plainly the case: the Unit 1 Lease defines the "*Permitted Business*" of Unit 1 as being: "*the preparation on site of salads, wraps, burritos, soups, frozen yogurt and pressed juices primarily for consumption offsite*." Moreover, the Unit 1 Lease also states that the sale of coffee is prohibited save only to the extent that it is ancillary to the *Permitted Business*. It follows that if the Court is not entitled to look beyond the express provisions of the Unit 1 Lease, the appeal should be allowed and the proceedings dismissed.

66. However, consideration of the respondent's case can hardly be so confined. If that were so it would be open to the appellants to escape their obligations under the Side Letter by complying with it in form but not in substance; in other words, by granting a lease that complies with the Side Letter, but at the same time consenting to trading that is in breach of it. This would render the Side Letter almost entirely ineffectual, and whatever about the precise scope of the Side Letter, the parties cannot have intended such an outcome.

67. During the course of the hearing before this Court, counsel for the appellants was asked whether the appellants were contending that any sub-division of a Unit would exclude the application of the Exclusivity Clause, with the result, for example, that it would be open to the appellants to permit a new tenant to put a small juice counter in the corner of the Unit, and a specialist coffee shop in the remainder. Counsel replied that this would be contrary to the Exclusivity Clause, because the main use of the Unit in those circumstances would be for the sale of coffee by an Excluded Coffee Chain. In making this point, however, counsel stressed that consideration of the main use of a Unit had to be by way of a "*unitary examination of what [is] the main or permitted use*" of a Unit. It could not be considered by sub-dividing the Unit. The importance of this is that the appellants agreed, correctly in my view, that the Court may look beyond the terms of the Unit 1 Lease to consider whether or not the operations within Unit 1 are compliant with the Exclusivity Clause. I will consider in due course their point that any such examination must be by reference to the trading operations in the Unit as a whole, but first I propose to consider two other central issues, each of which is the basis of a ground of appeal. Firstly, whether or not Handprint can be considered to have been an "*Excluded Coffee Chain*" as defined in the Exclusivity Clause, and, secondly, whether or not its operations can be said to be ancillary to those of Freshii.

Handprint – An Excluded Coffee Chain?

68. In Ground of Appeal 1(e), the appellants assert that the trial judge erred in holding, on the facts as found, that the letting to AAFC was a letting to an "*Excluded Coffee Chain*". At the hearing of this appeal it was submitted on behalf of the appellants that having regard to the agreed fact that the Handprint outlet opened at the Centre was the first such outlet, it could not constitute a "*Chain*", and counsel invited the court to contrast the single outlet opened by AAFC at the Centre with the other coffee chains identified in Clause 3(1) of the Side Letter. It is apparent that, in stark contrast to the Handprint franchise, those other well established coffee chains have multiple outlets established around the country. Counsel also asked the court, rhetorically, to consider whether or not, in arriving at the conclusion that Handprint was an "*Excluded Coffee Chain*", the trial judge was entitled to put weight on social media advertising to establish the future intentions of the brand owners to establish a chain.

69. While these points are not without merit, I consider that the trial judge was entitled to conclude as she did that Handprint was an "*Excluded Coffee Chain*" for the purposes of Clause 3.1. The evidence before the court was that Handprint was being promoted in the trade press, in late 2017, as a "*new Irish coffee brand*" which was opening its "*first café in Dublin*". The judge noted that the manner in which the brand was marketed on social media made it clear that it was intended to be a chain, and the fact that it was opened pursuant to a franchise agreement itself suggested that there would be other outlets. Moreover, other outlets were subsequently opened elsewhere within a short time of the outlet in Unit 1. It was manifestly the case that the Handprint outlet was intended to be the first in a chain, and as a matter of fact it was found to be the first of three outlets by the time the proceedings came on for hearing in the High Court. The fact that it was the first of a chain is, in my judgment, insufficient to displace the conclusion of the trial judge on the issue. I would therefore dismiss this ground of appeal.

Ancillary to Freshii?

70. However, it is also contended by the appellants that even if Handprint is an "*Excluded Coffee Chain*", the sale of coffee by Handprint was ancillary to the main and permitted use of Unit 1, that being the business being conducted by Freshii on the Unit 1 premises, and it was therefore permissible by reason of the proviso contained in the Exclusivity Clause. In other words, in the context of the proviso, it does not matter if the coffee sold is sold by an "*Excluded Coffee Chain*". What matters in this context is whether the use of Unit 1 for that purpose is ancillary to the main or permitted use of Unit 1, which was the business being conducted under the Freshii franchise.

71. In Ground of Appeal No. 5, the appellants contend that the trial judge erred in her assessment of this issue by assessing it by reference to the type of coffee sold (which they say is not relevant), and also in assessing it on the basis that the respondent was conducting two stand-alone businesses. Further, the appellants contend that the trial judge erred in failing to take account of the turnover of coffee sales as a proportion of the entire business of AAFC.

72. The trial judge gave detailed consideration to this issue at paras. 84-104 of her judgment. As I have already summarised her analysis and conclusions on the issue (see paras. 34-40 above) I will not do so again here. Suffice to say the trial judge rejected the appellant's arguments on this issue mainly because she was satisfied that AAFC was operating two separate businesses within the one Unit, and that Handprint was a separate business "*fully capable of standing independently as its own business*" (para. 104 of the judgment).

73. While the appellants have appealed from the finding that the appellants were conducting two businesses, each to be considered independently of each other, they have not expressly appealed form the finding that Handprint was *fully capable of standing independently as its own business.* It may be that that is implied by the other grounds of appeal, but even if this is so, the point was not argued. Moreover, the trial judge did have evidence of Handprint's sales, which were significant, and that it was operated under a separate franchise agreement which necessitated the maintenance of a separate till and separate accounts. The trial judge therefore had ample evidence upon which to base her conclusion that Handprint was a separate business to that of Freshii, capable of standing independently from it, and that is therefore a finding with which this Court should not interfere, having regard to well-established principles enunciated by the Supreme Court in *Hay v. O' Grady* [1992] 1 I.R. 210.

74. The appellant's argument that the Handprint business is ancillary to that of Freshii is, to a significant degree, predicated on the proposition that the use of the entire of Unit 1 should be considered for the purpose of assessing whether or not the operation of the Handprint franchise is ancillary. The appellants submit that it is not permissible when conducting such an assessment to sub-divide Unit 1 and focus only on the business being conducted by Handprint. While there is some force in this argument, nonetheless I think it is a mischaracterisation of the conclusion of the trial judge on this issue, which I do not think depends, as the appellants contend, upon her earlier conclusion that the Exclusivity Clause should be interpreted so as to apply not just to a unit, but to any part of a unit. Once the trial judge had concluded, as a matter of fact, that Handprint was a separate business capable of standing on its own two feet, it was inevitable that this conclusion would influence the analysis of whether Handprint was ancillary to Freshii, even if it would not necessarily be determinative.

75. While the appellants criticise the trial judge for having regard to the dictionary definition of "*ancillary*" in light of the now well-known dictum of Lord Hoffman in *Investors Compensation Scheme Ltd v. West Bromwich Building Society* [1998] 1 All E.R. 98, that the meaning of words is a matter of "*dictionaries and grammar*" whereas "*the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean*", I do not believe that this passage should be interpreted so as to preclude the courts from availing, in appropriate cases, of the assistance of dictionaries which are surely the best reference point to identify the most common understanding of the meaning of a word. In any case, there was not really any dispute between the parties here as to the meaning of the word "*ancillary*", and in this Court the appellants did not advance any argument that the meaning of the word, which was implicitly accepted by the trial judge at para. 103 of her judgment, is incorrect. That meaning was one drawn by counsel for the respondent from the Oxford English Dictionary, it being: "*providing necessary support to the primary activities or operation of an organization…*".

76. Even if no dictionary definition were relied upon, it would be difficult to understand how a business that has been found to be independent in its own right can be said to be ancillary to another. The dictionary definition does no more than to affirm such an interpretation.

77. This interpretation is bolstered, as the trial judge found, by the context in which the Side Letter was negotiated. That context included the fact that Mr. Butler was aware, at the time that he negotiated the Side Letter, of coffee outlets of this kind operating within the sphere of a larger business. While the trial judge noted that appellants argued that being so aware, Mr. Butler must be taken to have agreed not to exclude this type of arrangement, the trial judge rejected that argument on the basis that it was precisely because he was aware of these types of arrangement that he negotiated an Exclusivity Clause to exclude them.

78. I have to say, respectfully, that neither proposition really aids the interpretation of the clause one way or another. On the one hand, it does not follow just from the fact that Mr. Butler was concerned to have exclusivity that the Side Latter must be interpreted as the respondent contends, while on the other hand it cannot be said that the fact that he knew of these kinds of arrangement means that he must be taken to have agreed not to exclude them. These are, in my view, circular and self-fulfilling arguments. The whole point of the proceedings is to determine whether or not the Handprint operation was covered by the Exclusivity Clause, and it falls to be interpreted, not on the basis of Mr. Butler's subjective intentions, nor on the basis that he must be presumed to have agreed to a particular interpretation because of his state of knowledge, but rather on the basis of the principles of interpretation already summarised above.

79. Although the "*shop within a shop*" concept was known to both parties at the time the Side Letter was negotiated, it seems reasonably clear that it was not discussed, or at least there was no evidence to this effect. In this regard, the observations of O'Donnell J. (as he then was) at para. 14 of *The Law Society of Ireland v. The Motor Insurers' Bureau of Ireland* [2017] IESC 31 are instructive:-

> *"…Much more difficulty arises when the issue, as here, is one which is not specifically addressed, discussed or negotiated. Although the question can be framed as to what the parties agreed about that specific issue, the true question is perhaps subtly different. It is necessary to understand the entirety of an agreement and then to consider what that means for the specific issue now raised. It is necessary therefore to see the agreement and the background context, as the parties saw them at the time the agreement was made, rather than to approach it through the lens of the dispute which has arisen sometimes much later."*

80. The interpretation of "*ancillary*" favoured by the trial judge was, in my judgment, more consistent with the background context than that contended for by the appellants. As earlier observed, the Centre at the time was largely unoccupied and located in an area of low footfall. Taking a unit in the Centre was clearly a much greater risk than taking a unit in a centre with higher occupancy and greater footfall. The reasonable person apprised, of all relevant background information, would be aware of the commercial importance to a new tenant of a specialist coffee shop of obtaining exclusivity in the Centre, and would also have been aware of the concept of selling coffee in a "*shop within a shop*", a concept that was well established by the time the Exclusivity Clause was negotiated and of which, the trial judge noted, and the appellants accept, Mr. Butler was aware at the time. In considering what is ancillary for the purpose of the Exclusivity Clause, the reasonable person would also take into account that cafes and restaurants, such as Freshii, sell their own, unbranded coffee, the sale of which it is accepted is ancillary for the purpose of the proviso. Obviously, it would make little sense to agree to an exclusivity clause the effect of would be to permit by way of "*ancillary*" sale that which is otherwise prohibited, and would substantially undermine the whole purpose of the Exclusivity Clause.

81. For all of these reasons, I am of the view that, on the evidence before her, the trial judge was not just entitled to but also correct to conclude that the operation of the Handprint franchise was a standalone business, and that it was not ancillary to the Freshii business, although it was complementary to it. I would therefore dismiss those grounds of appeal that contend that the trial judge was wrong to conclude that there were two businesses operating in Unit 1, and that the operation of the Handprint franchise was not ancillary to the operation of the Freshii franchise.

82. In arriving at this conclusion, I have had regard to the argument that the trial judge erred by failing to take account of the small area occupied by Handprint and the fact that its turnover was considerably less than that of Freshii. In relation to the area, although the coffee stand itself was only $5m^2$, the fact is that it shared all of the back of house facilities with Freshii, and its customers also had access to lounge-like facilities in the Unit. As to turnover, the 2018 figures demonstrate very strong coffee sales and the total Handprint sales for that year were of the order of 40% of the total sales of those of Freshii.

First Letting Basis

83. There is no dispute between the parties that Unit 1 Lease was a letting to AAFC on a "First Letting Basis" as that term is defined in Clause 5.2 of the Side Letter. At para. 4.11 of their written submissions it is submitted on behalf of the appellants:-

"The First and Second Named Defendants, in this instance, clearly granted an occupational lease of a unit, on a "First Letting Basis" to a tenant, i.e., AA Fine Catering, where the sale of coffee by AA Fine Catering was "ancillary" to the main permitted user of the AA Fine Catering Lease. It did not grant a lease to an "Excluded Coffee Chain" but even if they had done so, the proviso in the side letter would have prevented such letting from being deemed to be a breach."

84. The requirement that a lease be made on a "*First Letting Basis*" is just one of the criteria that must be met before the Exclusivity Clause is engaged. As should already be apparent, it is a significant plank in the appellants' case that the prohibition contained in the Exclusivity Clause in the Unit 1 Lease was the granting of a lease of a *Unit*, i.e. an entire Unit in the Centre, to an Excluded Coffee Chain, and the trial judge erred in interpreting Clause 3.1 in such a manner as to apply the prohibition to part only of a Unit. On this point, I think the appellants are correct.

85. The conclusion of the trial judge on this issue is set out as follows at para. 61 of the judgment:-

"61. What the defendants are contending for here is an interpretation of the Exclusivity Clause which prohibits "the granting on a First Letting Basis… a new lease in respect of <u>the entire of a Unit</u> in the Centre." The problem is that the Clause simply does not say that. Every part of a Unit in the Centre is, by definition, part of the Centre also. If Clause 3.1 had wanted to prohibit the lease of a "Unit" to an Excluded Coffee Chain, it would have said so. But it does not. It uses the more expansive phrase "any part of the Centre" and does not limit it to "Units".

86. Unfortunately, in so holding, the trial judge has failed to take account of the definition of "*First Letting Basis*" in Clause 3.2 of the Side Letter. This issue is best illustrated by setting out the material part of Clause 3.1 and incorporating the definition of "*First Letting Basis*" in Clause 3.2, as follows:-

> *"3.1 The Landlord shall not grant or consent to the granting [of an occupational lease to a new tenant of* <u>a Unit in the Centre</u> (my emphasis)] *(as defined below) a new lease in respect of any part of the Centre to… any other similar type of coffee chain store where coffee is their primary product ("***Excluded Coffee Chain***") PROVIDED THAT…."*

87. While it is apparent that the insertion of the definition in Clause 3.2 into Clause 3.1, without any appropriate adaptation to the text results in surplusage, in that the words "*a new lease*" now appear redundant, nonetheless it is clear from the exercise that the words "*in respect of any part of the Centre*" refer back to the words "*Unit in the Centre*" i.e. it is clearly a reference to where in the Centre the relevant Unit is located, as distinct from suggesting that a lease might be granted in respect of any part of the Centre that is not a Unit.

88. However, this conclusion does not disturb the earlier conclusion reached above that the trial judge was correct in her conclusion that the tenant was conducting two businesses out of Unit 1, that of Freshii and that of Handprint. This was manifestly not expressly contemplated by the Exclusivity Clause, and it is necessary to interpret the Exclusivity Clause by reference to these different circumstances. Although not conceding their main point that it is impermissible to consider the Exclusivity Clause by reference to part only of a Unit, the appellants did agree that it is permissible for the Court to have regard to the trading operations conducted within Unit 1. Having done so, I have affirmed the conclusion reached by the trial judge on this issue. Once it was accepted, as I think it had to be, that the Exclusivity Clause may be interpreted by reference to the business conducted at Unit 1, through two different franchise operations, rather than by reference to the corporate identity of the tenant, the appellant's point about dividing the Unit fell away, and it became necessary to assess compliance with the Exclusivity Clause by reference to the conduct of the two businesses, rather than by reference to the granting of a lease to a single tenant. Such an approach is, I believe, consistent with the approach espoused by O'Donnell J. (as he then was) in *The Law Society of Ireland v. The Motor Insurers' Bureau of Ireland*, referred to above.

89. That being so, in my judgment it follows from all the foregoing conclusions that the trial judge was correct to hold that the opening of the Handprint franchise in Unit 1 was in breach of Clause 3.1 of the Exclusivity Clause, and all grounds of appeal related to this issue must be dismissed.

Does Rexbay have Standing to Bring the Proceedings?

90. The appellants advanced very strong arguments that the respondent does not have the standing to bring these proceedings because it is not trading from the Demised Premises, it is not the Starbucks franchisee and it is not therefore entitled to the profits generated by the Starbucks business at the Demised Premises.

91. The trial judge addressed the arguments of the parties on this issue at paras. 110-138 of her judgment, and held in favour of the respondent for the reasons given at paras. 134 and 135, which I have set out in full at para. 43 above. The conclusions of the trial judge on this issue were conclusions on a matter of fact founded on credible evidence, and while the appellants put forward strong arguments as to why the conclusions of the trial judge reached ran contrary to the preponderance of the evidence, I am satisfied that the conclusions of the trial judge on this issue fall well within the scope of the *Hay v. O'Grady* principles, and that this Court should not interfere with the conclusions of the trial judge on the issue.

92. That said, there is one issue for me which puts the issue beyond any doubt, and that is that the respondent accounted for the Starbucks profits and the taxes payable on those profits in its accounts. While the appellants sought to argue that this is an accounting exercise that does not equate to actual payment, I cannot agree. Clearly the respondent could not actually discharge the tax liability from cash, as it does not have a bank account. But the fact that it does not have a bank account and retains Atercin to carry out a range of functions on its behalf does not mean that it is not entitled to the profits of the enterprise. By declaring the profits and the taxes payable thereon to the Revenue Commissioners, the respondent is declaring through the most official and formal of channels, that it is entitled to the profits from the Starbucks business. Indeed, against that background it could hardly be the case that any other party could claim an entitlement to those same profits. Accordingly, I would also dismiss this ground of appeal.

93. The foregoing conclusions dispose of all grounds of appeal. Since this judgment is being delivered electronically, Noonan J. and Meenan J. have authorised me to indicate their agreement with it. As to costs, since the respondent has been entirely successful in resisting this appeal, my preliminary view is that it is entitled to an order requiring the appellants to discharge its costs incurred in this appeal. If the appellants wish to contend for a different order, then they may do so by written submissions, not to exceed 1,500 words, to be filed within 14 days from the date of delivery of this judgment. In such event, the respondent shall file any replying admissions it may wish to make, also not to exceed 1,500 words, within a further 14 days, excluding vacation days.