THE COURT OF APPEAL

Neutral Citation Number: [2017] IECA 256

Court of Appeal Record No. 2017/162

Ryan P.
Hogan J.
Whelan J.

BETWEEN/

THE SQUARE MANAGEMENT LTD., NATIONAL ASSET PROPERTY MANAGEMENT DAC AND INDEGO LTD.
PLAINTIFFS / RESPONDENTS

- AND –

DUNNES STORES DUBLIN COMPANY

DEFENDANT / APPELLANT

JUDGMENT of Ms. Justice Whelan delivered on the 6th day of October 2017

Introduction
1. Dunnes Stores Dublin Company (hereinafter "Dunnes") holds the leasehold interest in two units at Tallaght Shopping Centre (hereinafter "the Shopping Centre"). On 23rd September, 2014 An Bord Pleanála granted planning permission, Planning Register Reference Number SD13A/0192 to the third named respondent, Indego, for the phased construction of, *inter alia*, a six level multi-storey car park to include 832 car parking spaces on part of the common areas including the Northern Car Park Area of the Shopping Centre. Overall, the development proposed results in a net increase in parking capacity of 432 spaces at the Shopping Centre.

2. This appeal concerns whether the first and second named respondents (hereinafter referred to as "the Landlord"), as owners of the Shopping Centre and its common areas are entitled to carry out the development on foot of the planning permission.

3. Dunnes contends that they enjoy rights either under the terms of an Indenture dated 1st August, 1991 (hereinafter "the 1991 Indenture") or otherwise pursuant to the terms of leases dated 11th June, 1990 (hereinafter "the E & G Lease") and 21st August, 1992 (hereinafter the "F Lease") of such a nature as to entitle it to veto or otherwise restrain the proposed development. They further insist that the common areas of the shopping centre and, in particular, the Northern Car Park Area be maintained for the respective terms of the said leases in its current configuration of 289 surface level car parking spaces. In the case of the E & G Lease the residue of the term outstanding is in excess of 9,950 years.

4. In a comprehensive judgment delivered 2nd March, 2017, Barrett J. in the High Court found for the Landlords holding *inter alia* that the 1991 Indenture was null and void: see [2017] IEHC 146. He further held that the development was permitted by the terms of the E & G and F Leases and that the proposed development was not a derogation from the grants of either of the said leases.

The Title
5. The title was considered in detail by Barrett J. in his judgment. Given that the respective rights of the parties at issue in this appeal are governed by the terms of certain key deeds it is necessary to briefly set them out again.

6. The Landlord's title may be summarised as follows:-

> On 22nd October, 1984, an Agreement was made between Dublin Corporation of the one part and L & C Properties Limited of the other part whereby L & C agreed to build the development which later came to be known as Tallaght Shopping Centre. Dublin Corporation agreed to grant to L & C Properties a lease on the terms of a draft Head Lease annexed to the said agreement subject to the terms as therein provided.

7. A specific proviso contained in the said agreement provides as follows:-

> "(5) The Corporation shall provide by way of licence to the Lessee at a fee of 1 Pound (IR £1.00) per annum in the form annexed hereto car – parking facilities for up to 2,000 car spaces on completion of the Approved Development with finished and adequate access roadways services and roadways to service yard areas footpaths and pedestrian malls and lighting to serve the same at a location or locations agreed or to be agreed between the Corporation and the Lessee in proximity to the Approved Development regard being had at all times to the further development of the Town Centre, Tallaght, such car parking facilities to be maintained by the Lessee to the satisfaction of the Corporation and the same shall be handed over by the Corporation to the Lessee complete in all respects as to such access roadways, footpaths and pedestrian malls, lighting, entrances and exits, surface markings, foundations and surfaces not later than the date of completion of the approved development under clause (3) hereof. The said Licence shall provide, *inter alia*, that the Lessee shall be entitled to make such appropriate regulations as it may consider necessary in relation to the operation of the said car park."

8. This agreement was ultimately rescinded by a subsequent agreement made between the same parties on 8th September, 1988 and was superseded by a Lease executed on the same date.

The 1988 Indenture
9. The Landlord's leasehold root of title thus derives from an Indenture of Lease made on 8th September, 1988 (hereinafter "the 1988 Indenture") between Dublin Corporation of the first part, Dublin County Council of the second part, and the Landlord's predecessor in title, L & C Properties Limited of the third part.

10. In the 1988 Indenture, "the licensed lands" are defined as meaning the lands "hereby licensed upon the terms and conditions

contained in the First, Second and Third parts of the Third schedule hereto."

11. It demises 10 acres for the term of 10,000 years from 8th September, 1988.

12. The Third Schedule to the 1988 Indenture is in three parts each pertaining to a different parcel of the adjoining lands. Various elements are of note in the context of these proceedings. Part 2 of the Third Schedule pertains to the lands described by the parties in these proceedings as the "call back lands", being lands the title to which was retained by Dublin Corporation and which it reserved for anticipated future building development and in respect of which it reserved to itself the right to call for possession of all or part of same. In the meantime, Dublin Corporation granted a licence to the lessee to lay out the "call back lands" as car parking facilities on a temporary basis pending it being required by the Corporation or its successors or assigns for building purposes.

13. The "call back lands" comprised three plots of ground over part of the Northern Car Park Area at the shopping centre and continued in the beneficial ownership of Dublin Corporation and hence subject to termination of the licence and the possibility of possession being called for. Later, title passed to South Dublin County Council and ultimately the "call back lands" were acquired by the second named respondent, National Asset Property Management DAC on or about 24th October, 2014.

14. In part 3 of the Third Schedule to the 1988 Indenture, Dublin Corporation and Dublin County Council granted a licence to the Lessee, L & C Properties, to enter upon certain lands marked yellow on the annexed map "for the purpose of constructing, maintaining and servicing, *inter alia*, car parking facilities and other works provided for in the Fourth Schedule at the lessee's expense".

15. In substance, the lessee was granted a non-exclusive licence to park and any car parking provided by the lessee was to be available for use by the Corporation including for the users of any buildings constructed on the "call back lands".

The Guardian Indenture
16. By Indenture of Assignment and Transfer of 1st August, 1989 (hereinafter the "Guardian Indenture") between L & C Properties Limited on the first part, Dublin Corporation on the second part, Dublin County Council on the third part and Guardian Assurance plc on the fourth part, L & C assigned its interest in the shopping centre under the 1988 Indenture to Guardian Assurance for the residue of the term of 10,000 years. Dublin Corporation and Dublin County Council granted to Guardian Assurance the licences "as appurtenant to the premises the licenses specified in Parts One, Two and Three of the Third Schedule of the Lease subject to the provisions and conditions therein contained".

The 1989 Indenture
17. By Indenture of Lease dated 1st August, 1989 (hereinafter "the 1989 Indenture") made between Guardian of the first part and L & C of the second part, Guardian sub demised the property back to L & C for the term of 9,990 years from the date of the Indenture. Guardian granted to L & C, with the consent and by the direction of the Dublin Corporation and Dublin County Council certain licences over the demised lands in substantially identical terms to the licences contained in the 1988 Indenture.

18. The operative part of the 1989 Indenture provides as follows:-

> "2. In consideration of the Lessee undertaking and covenanting to construct and complete the Covenanted Works pursuant to the covenant in that behalf hereinafter contained at clause D hereof in accordance with the terms and provisions of the Fourth Schedule hereto and in consideration also of the covenants and conditions on the part of the Lessee therein contained the Lessor with the consent and by the direction of the Corporation and the Council as to its estate, right, title and interest in the licensed lands and the Corporation and the Council respectively as to all their estates, rights, titles and interests in the Licensed Lands hereby grant to the Lessee as appurtenant to the demised lands for the term of this Lease the benefit of the licences in accordance with the provisions contained in the First, Second and Third Parts of the Third Schedule hereto upon the terms and conditions therein contained."

Common Parts Transfer
19. There was a further Indenture dated 19th October, 1990 ("the Common Parts Transfer") made between Guardian Assurance, first part, L & C Properties, second part, Ansbacher, third part and The Square Management Limited, fourth part. Guardian and L & C, as beneficial and registered owners respectively, granted, assigned and transferred to The Square Management Limited the common areas of the shopping centre together with the leasehold reversions of the shopping centre units for the respective residues unexpired of the terms of the 1988 and 1989 Indentures together with the licences specified in the First, Second and Third Parts of the 1988 and 1989 Indentures respectively. It is noteworthy that neither Dublin County Council nor Dublin Corporation was a party to the Common Parts Transfer.

2014 Transfer
20. By deed of Transfer dated 24th October, 2014 made between South Dublin County Council of the one part and National Asset Property Management Limited of the other part, South Dublin County Council (which had previously acquired the interest of Dublin Corporation in, *inter alia*, the call back lands) transferred certain properties adjacent to the shopping centre including the common areas and the "call back lands" to National Asset Property Management Limited.

Dunnes' title

The E & G Lease
21. By Indenture made 11th June, 1990 between L & C Properties Limited first part, Ansbacher and Company Limited second part and Dunnes Stores Dublin Company third part (the "E & G Lease"), Dunnes acquired a unit in the shopping centre for the term of 9,980 years from 1st March, 1990 subject to the yearly rent of £1 thereby reserved and the covenants on the part of the tenant and the conditions therein contained. The habendum in the E & G Lease provides:-

> "AND for the consideration aforesaid the Landlord with the consent of the Bank hereby grants unto the Tenant the Licence specified in the Fourth Part of the First Schedule hereto."

The Fourth Part of the First Schedule sets out the licence granted to Dunnes as follows:-

> "Licence Subject to the provisions of the Third part of this Schedule the right of the Tenant, its permitted Successors, Assigns, Licensees and invitees to use the car parking spaces as designated for such use by the Landlord during the term hereby granted."

22. Dunnes agreed with the Landlord in Section III, at clause 3.2 (15) to perform and observe applicable covenants in the 1989 Indenture:-

> "3.2(15) "Other than the covenant to pay the rent, the covenant to construct and complete the covenanted works and the Approved Development as provided in the Superior Lease and any other covenants which shall be deemed to be varied or of no relevance having regard to the provisions of these presents, to perform and observe the covenants, conditions and provisions in the Superior Lease insofar as same apply to the Demised Premises."

23. Section V of the E & G Lease contains the following proviso:-

> "Limitation on Acquisition of Easements
>
> 5. 1 (3) The Tenant shall not be entitled to any rights of light and air to the Demise Premises to any other right or easement whatsoever (other than those hereby expressly granted) which would or might restrict or interfere with the free user, development, reconstruction or rebuilding of the Square, Towncentre Tallaght or any part thereof but the Tenant shall always be entitled to such rights of light and air to the Demise Premises which may reasonably be considered necessary for the proper carrying on of its trade or business."

24. There is a further proviso for the benefit of the Landlord in Part V, Clause 5.1 (4):-

> "Adjoining Lands
>
> 5.1 (4) (…) the Landlord shall have power at all times without obtaining any consent from or making any compensation to the Tenant to deal as the Landlord may think fit with any of the lands and premises adjoining or opposite to the Demised Premises and to erect or suffer to be erected on such adjoining, nearby, opposite or neighbouring lands and premises any building whatsoever whether such buildings shall or shall not affect or diminish the light or air which may now or at any time or times during the said term be enjoyed by the Tenant or other Lessees or Tenants or occupiers of the Demised Premises or any part thereof."

25. The rights and easements excepted and reserved for the benefit of the Landlords are specified in the Third Part of the First Schedule. Of central importance in these proceedings is clause 6 which provides:-

> "6. Subject to the conditions for reinstatement herein contained full and free right and liberty to alter and/or redevelop (by way of improvement, development, renovation, refurbishment or otherwise) or carry out modifications or extensions or additions to or at the Centre including the Common Areas and to authorise any present or future owner or occupier of nearby or adjoining premises (within or outside the Centre) to demolish, build or rebuild, alter or develop the building or buildings thereon or use the same in any manner notwithstanding that any such demolition, building, rebuilding, alteration, development or user as aforesaid may affect or interfere with or diminish the light coming to the Demised Premises or may temporarily interfere with the occupation, use or amenity or engagement of the Demise Premises."

1991 Indenture

26. By Indenture made the 1st August, 1991 (hereinafter "the 1991 Indenture") between The Square Management Limited of the first part, L & C Properties Limited of the second part and Dunnes of the third part, The Square Management Limited and L & C assigned the benefit of the licences specified in the 1989 Indenture to Dunnes "TO THE INTENT that the said Licences shall endure for the term of 9,980 years from the 15th day of March, 1990."

27. Central to Dunnes' appeal is the nature and extent (if any) of the rights they enjoy under this Indenture.

The F Lease

28. By Indenture of 21st August, 1992 (hereinafter "the F Lease") between Square Management of the first part, L & C Properties Limited of the second part and Denis Guiney Limited of the third part, L & C demised unto Denis Guiney Limited a commercial unit (Store F, Level 3) in the shopping centre for the term of 35 years from 1st September, 1992. The said demise was granted together with the easements and rights specified in the Second Part of the First Schedule excepting and reserving unto the Landlord and the Freeholder the rights, easements, exceptions and reservations in like terms to the E & G Lease.

29. By virtue of a Transfer of Leasehold Folio 78275 L, County Dublin dated 20th December, 2002, Denis Guiney Limited transferred its leasehold interest under the F Lease to Dunnes. Dunnes thereby acquired the lessee's title under the F Lease.

Purported Revocation

30. Following the granting of planning permission to Indego by An Bord Pleanála on 23rd September, 2014 the Landlords corresponded with Dunnes regarding the proposed carrying out of the development on foot of the permission. Ultimately, on 29th October, 2015 the landlords' solicitors wrote to Dunnes in the following terms:-

> "If and insofar as it is asserted that you have any rights to use the lands at the Centre (whether for car parking or otherwise) beyond the rights expressly provided for in your lease dated 11th June, 1990 (which assertion is not admitted), for the avoidance of doubt any such purported rights are hereby revoked with effect from 1st July, 2016 and this letter should be treated as notice of such revocation."

31. At issue in this appeal is whether this letter was effective to revoke the rights of Dunnes under the 1991 Indenture.

Pleadings

32. On 9th November, 2015, the Landlords instituted the within proceedings by summons seeking:-

- a declaration that Dunnes had no estate in the common areas.
- an injunction restraining Dunnes from asserting any estate, interest, title or right of property over the common areas or any part thereof.
- a declaration that Dunnes had no right to use the common areas beyond the rights expressly provided for in the E & G Lease.

• an injunction restraining Dunnes from asserting that that it has any right to use the common areas (whether for car parking or otherwise) beyond the rights expressly provided for in the E & G Lease.

• a declaration that any right of Dunnes to use the common areas beyond the rights expressly provided for in the E & G Lease is determinable on the giving of notice and

• a declaration that the period of notice given by letter dated 29th October, 2015 was valid and sufficient.

33. In their second amended statement of claim delivered the 1st April, 2016 the Landlords plead the terms of the E & G Lease and the F Lease.

34. They claim that they are authorised pursuant to the rights expressly excepted and reserved to them pursuant to the Third Part of the First Schedule, Clause 6 in both the E & G and F Leases. They also plead that Dunnes have no proprietary or other rights in respect of the common areas beyond the rights they enjoy pursuant to the E & G Lease and the F Lease. It is further pleaded that the purported assignment by the 1991 Indenture of licences granted in the 1989 Indenture is null and void and of no effect.

35. In addition to the relief sought in the plenary summons, the following relief is claimed:-

• A Declaration that Dunnes has no right by way of easement or any other entitlement to use the lands or any part thereof (whether for car parking or otherwise) arising from the F Lease.

• A Declaration that the purported assignment of licences contained in the 1991 Indenture is null and void and of no effect.

• A declaration that if the 1991 Indenture is valid it operates as a sub-licence of the rights purported to be granted thereby.

• A declaration that the benefit of the licences claimed by Dunnes, whether acquired by assignment or by sub-licence, take effect as a licence coupled with an interest being the E & G Lease and the F Lease and take effect subject to the terms of those Leases and in particular Clause 6 of the Third Part of the First Schedule.

36. In its third amended defence and counterclaim delivered on 2nd November, 2016 Dunnes deny that the 1991 Indenture is null and void or that it failed to assign the benefit of the licences contained in the 1989 Indenture. Dunnes plead that the Landlords are estopped from pleading that the 1991 Indenture is null, void or of no effect. Dunnes plead that estoppel arises in a number of discrete ways including; by the execution of the 1991 Indenture, by the conduct of Guardian Assurance plc, South Dublin County Council and Dublin City Council standing by and raising no objections to the 1991 Indenture, by the conduct of the Landlords in acting in a manner consistent with Dunnes having been assigned car parking rights and by virtue of the letters dated 3rd October, 1990 and the deeds of confirmation dated 22nd January, 1991 and 12th March, 1992.

37. Dunnes also counterclaimed seeking:-

• A declaration that Dunnes has the benefit of a licence pursuant to Part III of the Third Schedule to the 1989 Indenture to have access to and egress from the centre over the lands as currently laid out and to park vehicles on the Lands.

• A declaration that the licence is irrevocable save in the circumstances provided for in Clause 2 (a) of Part III of the Third Schedule.

• A declaration that the letter from the Landlords' solicitors dated 29th October, 2015 did not have the effect of revoking the licence.

• A declaration that the erection of buildings on the lands would constitute a significant and permanent interference with Dunnes' rights over the lands.

38. Claims concerning an alleged easement as a means of access and egress to and from Units E, F and G are not being proceeded with in this appeal.

The High Court

39. The action was heard in the High Court over 6 days between the 29th November and 7th December, 2016. Barrett J. delivered his detailed and considered judgment on 2nd March, 2017. In part VI of his judgment, he set out the key questions which in his view arose, accepting the Landlords' contention that the case was one of contractual interpretation turning on the answers to the following four key questions:-

(i) Does the E & G Lease entitle the Landlord to carry out development on the Northern Car Park Area, being "nearby or adjoining premises" within the meaning of that Lease?

(ii) Does the 1991 Indenture have the effect that Dunnes enjoys an irrevocable right for its customers to park on the Northern Car Park Area?

(iii) If the Landlords have the right to carry out development on the Northern Car Park Area, does the proposed development interfere with Dunnes' rights such as to amount to a derogation from grant?

(iv) Does Dunnes have an easement of right of way and parking by prescription over the Northern Car Park Area?

40. As stated above, the claim for easements of right of way and parking are not being pursued in this appeal.

41. Barrett J. considered that the general principles of contractual interpretation were applicable and he cited with approval, in part VII of the judgment, the principles adumbrated by Lord Hoffmann in *Investors Compensation Scheme Limited v. West Bromwich Building Society* [1998] 1 W.L.R.896, as cited with approval by Geoghegan J. in *Analog Devices B.V. v. Zürich Insurance Company* [2005] 1 I.R. 274.

42. He further cited with approval the well known dicta of Lord Clarke in *Rainy Sky v. Kookmin Bank* [2011] 1 W.L.R. 2100 where at

page 2908 he stated:-

> "The language used by the parties will often have more than one potential meaning. I would accept the submission made on behalf of the appellants that the exercise of construction is essentially one unitary exercise in which the court must consider the language used and ascertain what a reasonable person, that is a person with all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract, would have understood the parties to have meant. In doing so, the court must have regard to all the relevant surrounding circumstances. If there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other."

43. The trial judge, in part VIII of his judgment, embarked upon an analysis of the 1988 and 1989 Indentures. He noted and attached importance to the use of the phrase "as appurtenant to the demised lands" in both Indentures. He went on to consider in part IX certain legal text books; Megarry & Wade, *The Law of Real Property* (8th ed.) and Wylie, *Irish Land Law* (5th ed., 2013) as well as the Supreme Court judgment in *Honiball v. McGrath* [2002] IESC 26 and concluded, quite correctly in my view, at paragraph 47 of the judgment:-

> "it is clear from the foregoing that the consequence of a licence being coupled with an interest is that such licence cannot be conveyed independently but must remain coupled caboose-like to the relevant interest."

44. In part X of his judgment, Barrett J. considered the terms of the E & G Lease. He attached weight, at paragraph 52 of the judgment, to the fact that Dunnes had failed to adduce any factual evidence of detriment that will be occasioned to it as a consequence of the proposed development:-

> "Its only witness as to fact, Mr. Druker, a retired estate agent whose half-century of experience involved his advising clients primarily in the areas of property agency and development, was quite frank in this regard (Day 4, p.50). Asked as to the facts on which he based his suggestion that the proposed development will affect Dunnes' business, Mr. Druker stated that he was offering an opinion. When counsel for the plaintiffs suggested that this was not based on any fact, Mr. Druker indicated that this was so. Pressed still further by counsel, who stated "I want to know on what facts you say that [the proposed development] will adversely affect Dunnes Stores", Mr. Druker answered "I can't give you the facts because it hasn't, it hasn't occurred." Likewise, Mr. Markey, a chartered surveyor and former director of Lisney, called by Dunnes as an expert witness, indicated (Day 5, p.40) that he had not adduced any empirical evidence to support the conclusions in his expert report."

45. At para. 53, Barrett J. continued:-

> "Leaving aside this weakness in the factual evidence provided by Dunnes, the truth is that following the completion of the proposed development Dunnes' customers will continue to have an abundance of surface parking available to them. Indeed, there may even be a surfeit of surface parking (…) Moreover, the court is entirely persuaded by the evidence that this parking will be quickly and easily accessible."

46. Dunnes assert that in this regard the trial judge misdirected himself. They further assert that the fact that there will be other surface car parking is not relevant in this case. The issue, from its perspective, is interference with the most convenient car park which they claim constitutes an amenity.

47. In considering the Common Parts Transfer & Assignment dated 19th October, 1990, the trial judge noted that neither Dublin Corporation or Dublin County Council were a party to the said instrument. At paragraph 60 of the judgment, he continues:-

> "As can be seen, there is no mention of the Corporation and the Council, the original grantors of the licences, an omission which meant that it might conceivably be contended, at some future stage, that one or other or both of them had not in fact consented to the assignment of the licences (which it will be recalled, were personal in nature). It was sought to "close out" this concern by having the Corporation and Council respectively execute Deeds of Confirmation that confirmed the transfer of licences; that is their intended purpose and effect. Thus by Deed of Confirmation of 22nd January, 1991 between Dublin County Council of the first part, Guardian Assurance of the second part, L & C of the third part and SML of the fourth part, it was agreed, *inter alia*, that "the benefit of the… Licences may be freely assigned by GA and L & C to Management (and confirm retrospectively their consent to any such assignment already made at the date hereof [the fact of such assignment must, of course, have been known] and acknowledge that such assignment had effect to vest said Licences in Management". A like confirmation features in the separate Deed of Confirmation executed on 12th March, 1992, between Dublin Corporation of the first part and Guardian Assurance, L & C and SML of the second, third and fourth parts respectively."

48. The trial judge identifies a number of key features about the 1991 Indenture:-

> • that the term of 9,980 years granted did not accord with the term of 9,990 years granted in the 1989 Indenture;
>
> • that the term of the licence specified in the 1991 Indenture is 9,980 years from 15th March, 1990 whereas the term of the E & G Lease is 9,980 years from 1st March, 1990.

49. Arising from these two observations, Barrett J. opined at para. 63 of the judgment:-

> "[A] question perhaps arises whether the 1991 Indenture is effective in what it seeks to achieve, given that it seeks to assign something different from what was granted. However, the court does not consider it necessary to address this aspect of matters because of the third point below."

50. The trial judge proceeded to set out his third point as follows at para. 63:-

> "[T]his, it seems to the court, is where the 1991 Indenture flounders, the 1991 Indenture seeks to effect a bare assignment of the licences whereas, as has been touched upon by the court previously above, what one is treating with when one comes to the licences at issue in these proceedings is, in each case, a licence coupled with an interest and, to borrow from the above-quoted segment of Megarry and Wade;
>
> > "At common law such a licence is both irrevocable and assignable, but only as an adjunct to the interest with which

it is coupled. It therefore has no independent existence merely as a licence."

In purporting to assign otherwise (and it does) the 1991 Indenture must be and is therefore null and void and of no legal effect. Without prejudice to the foregoing, the court notes that it does not accept the alternative possibility proffered by the plaintiffs that the 1991 Indenture operates as the grant of a sub-licence coupled with, subject to and for the term of the E & G Lease. To reach such a conclusion it would be necessary to do considerable violence to the text of the 1991 Indenture. Moreover, the court has seen no authority to support the proposition that the terms of a licence coupled with an interest are overridden by any terms attached to the interest to which it is coupled."

51. For reasons set out hereafter, I do not agree that the 1991 Indenture created a bare licence or that it is null and void and of no legal effect.

52. Barrett J. considered Dunnes' contention that by the open letters dated 3rd October, 1990 and the 1991 and 1992 Deeds of Confirmation, Dublin City Council and Dublin Corporation agreed that the benefit of the licences could be freely assigned to SML for the use by SML, its successors and assigns in common with all others so authorised by SML, its successors and assigns provided such use was for the purposes specified in the 1989 Indenture. At paragraph 64 of the judgment the Barrett J. states:-

"The purpose and effect of the 1991 and 1992 Deeds of Confirmation has already been considered above; they sought to "close out", on a historical and continuing basis, an issue as to consent that was then perceived to arise in and under the Common Parts Transfer and Assignment. So far as the letters of 3rd October, 1990, are concerned, they commence respectively with text which embeds the consents they contain in the overall context of the 1988 Indenture and the 1989 Indenture and then expressly state as follows, in sub-para. (b) of each letter:-

"The benefit of the [1988 Indenture and 1989 Indenture] may be freely assigned by Guardian Assurance… and L & C… respectively to… [SML] for the use by… [SML], its successors and assigns in common with all others so authorised by… [SML], its successors and assigns **provided that such use is for the purposes as specified in the said Indentures** for the benefit of the Square Towncentre, Tallaght, County Dublin." [emphasis added]

53. At paragraph 65 of the judgment, Barrett J. considers this extract from the letters and its import in the following manner:-

"What are the purposes to which the above-quoted text refers? It seems to the court that those purposes must be the building and setting of shop units by way of lease, including the E & G Lease of 11th June, 1990, and the F Lease of 21st August, 1992. The Deeds and the letter do nothing to detract from the express content of those leases, nor, when it comes to the 1991 Indenture, do those Deeds or letters cure the central deficiency presenting the 1991 Indenture, being that it seeks to effect a bare assignment of licences that each come coupled with an interest, even though at common law such a licence is assignable only as an adjunct of the interest with which it is coupled."

Non-Derogation from Grant

54. Barrett J. then turned in para. 66 to a consideration of the principle of non-derogation from grant which Dunnes had invoked:-

"… by reference to what it maintains is an obligation, implicit in the grant of the leases not to extend the Centre in a manner which causes permanent interference to the use and enjoyment of Dunnes' units (the permanent/temporary aspect of matters has already been touched upon by the court previously above)."

55. The trial judge then cited with approval Laffoy J.'s judgment in *Conneran v. Corbett & Sons* [2004] IEHC 389 and in particular the following passage:-

"As regards the rule that a man may not derogate from his grant, the philosophy here is that, when a man transfers his land to another, knowing that it is going to be used for a particular purpose, he may not do anything which is going to defeat that purpose and thereby frustrate the intention of both parties when the transfer is made. Usually application of this principle creates property rights in favour of the grantee which take the form of restrictions enforceable against the grantor's land. " (para.67)

56. He also considered in detail the decision of the English High Court *in Platt v. London Underground Ltd* [2001] 2 E.G.L.R. 121 and considered 11 principles set forth by Neuberger J. in that judgment.

57. At paragraph 71, Barrett J. states:-

"Between them *Conneran* and *Platt* offer abundant guidance to the court in seeking to determine whether there has been a derogation from grant in the context of the within proceedings. *Conneran* points the court in the direction of looking for "a real and substantial interference with the express and implied rights acquired by the plaintiffs under the leases". Likewise *Platt*, among the various principles it identifies (which point in the main to factual considerations that will differ from case to case) mentions, as a helpful test for identifying derogation, "whether the act or omission has caused the demised premises to become unfit or substantially less fit than the purpose for which they were let…". In essence, it seems to the court that what one is looking for when testing for derogation from grant is actual or likely deprivation of a grantee's reasonable enjoyment of its existing rights as grantee."

58. Barrett J. reviewed in detail the evidence of Dunnes' witnesses and concluded at paragraph 73:-

"The essence, indeed the height, of Dunnes' case when it comes to derogation from grant is that during the roughly 14 month period that it will take to construct the new multi-story car park which is a part of the proposed development, Dunnes' customers will not enjoy the surface car parking in the Northern Car Park Area. There is uncontradicted evidence before the court that customers will instead avail of the South, West and East surface car parks, as well as the existing multi-story car park."

59. He concluded at para. 74:-

"This evidence does not show that Dunnes' use of the demised premises will be affected in such a manner as to constitute a derogation from grant. And the evidence adduced by the plaintiffs points to anything but a derogation from grant arising or likely to arise."

60. The judge reviewed the evidence regarding existing car parking arrangements including the evidence of the landlords' witnesses Mr. Hamill and Mr. Millward. He recalled Mr. Hamill's evidence at trial where he had stated:-

> "I'm not sure why huge reliance is placed on 289 spaces [in the Northern Car Park Area]… There are 2,000 at least other spaces in the shopping centre, 400 of which are in the current multi-story car park, and there is absolutely loads of surface car parking to facilitate every shopper and every unit in the shopping centre."

61. Barrett J. noted that one of the Landlords' witnesses, Mr. Millward (day 4, p.6) confirmed in his evidence that during the construction phase there would be a significant number of parking spaces available – in the region of 26,000 hourly parking slots per day for the use of shopping centre customers even while the Northern Car Park Area is closed.

62. With regard to the post-development parking arrangements the trial judge determined as follows at paragraph 77 of the judgment:-

> "Mr. Markey, in the course of his oral testimony, indicated that the ideal scenario at the Square is surface car parking of 600 spaces. Following the proposed development, the unchallenged evidence in the case is that there will be more than 1,000 such spaces. There was some suggestion by Dunnes that there might be congestion in the lift area that will feed from the to-be-constructed multi-story car park. There is no empirical evidence before the court to support this contention and the evidence of Mr. Hamill and Mr. Gallagher in this regard indicates that the lift arrangements, and the flexibility for alternative lift arrangements if required, has been well thought through so as to avoid any congestion issues presenting or being allowed to continue."

63. At paragraph 81 of the judgment, the trial judge noted the expert evidence that had been adduced at the hearing regarding the commercial benefits of the development:-

> "Moreover, though he suggests in his expert report that Dunnes' customers might go to the nearest Aldi if deprived of the Northern Car Park Area, Mr. Markey accepted in his oral testimony that the nearest Aldi has underground parking only and no surface car park. And, when asked a few questions by the court, Mr. Markey indicated that the proposed improvements should rebound to the benefit of all tenants."

64. The trial judge did not accept that there may or will be any derogation from grant if the proposed development proceeds as planned.

65. For the reasons set out hereafter I agree with the trial judge's determination that the proposed development does not give rise to any derogation from grant.

Revocation Notice

66. Barrett J. then considered the issue of the validity of the revocation notice in respect of the licence created by the 1989 Indenture which was served on Dunnes on 29th October, 2015. It was contended on behalf of Dunnes at the trial that the said notice was ineffective. The trial judge determined the issue at para. 83 as follows:-

> "The court has already concluded that the purported assignment of the licences by way of the 1991 Indenture is ineffective and thus it does not need to consider whether the purported revocation of what was never assigned was in fact effective."

67. He then goes on to say, *obiter*:-

> "Had the court been required to consider whether the notice of revocation was effective, it would have found that it was not effective. This is because clause 2 (a) of the licence provides that the licence is irrevocable, subject to a proviso that it may be revoked in instances of breach which the court understands not to arise. (…) A licence that is quiet as to its revocability is the complete opposite of a licence which, as here, states itself expressly to be irrevocable save in defined circumstances which do not present."

68. I agree that the letter of the 29th October, 2015 was not effective to revoke the 1991 Indenture for the reasons hereinafter set out.

69. At the conclusion of his judgment, the trial judge raised and answered a series of questions as follows:-

> 1. Does the E & G Lease entitle the Landlord to carry out development on the Northern Car Park Area, being nearby or adjoining premises within the meaning of that Lease?
>
> Answer; Yes.
>
> 2. Does the 1991 Indenture have the effect that Dunnes enjoy an irrevocable right for its customers to park on the Northern Car Park Area?
>
> Answer; No.
>
> 3. If the plaintiffs have the right to carry out development on the Northern Car Park Area, does the proposed development interfere with Dunnes' rights such as to amount to a derogation from grant?
>
> Answer; No.
>
> 4. Does Dunnes have an easement of right of way and parking by prescription over the Northern Car Park Area?
>
> Answer; No.

Orders

70. Arising from its findings and determination the High Court proceeded to make, *inter alia*, the following orders which are the subject

of this appeal:-

> "5. That the defendant has no right to use, whether by way of easement or prescription or otherwise, the lands outlined in green on the map set out in the Schedule hereto or any part thereof, whether for car parking or otherwise, beyond the rights expressly provided for in Indenture of Lease dated 11 June 1990 and made between (i) L & C Properties Limited, (ii) Ansbacher and Company Limited and (iii) Dunnes Stores Dublin Company (known as the "E & G Lease") and in Indenture of Lease dated 21st August 1992 and made between (i) The Square Management Limited, (ii) L & C Properties Limited and (iii) Denis Guiney Limited (known as the "F Lease");

71. I agree with that determination and order for the reasons hereinafter set out.

72. The other order which is subject to appeal is as follows:-

> "6. That the purported assignment of licences contained in Indenture of Assignment dated 1 August 1991 and made between (i) The Square Management Limited, (ii) L & C Properties Limited and (iii) Dunnes Stores Dublin Company (known as the "1991 Indenture") is null and void and of no effect."

73. I very respectfully do not agree with this determination as hereinafter stated, though in my view, this does not materially affect the determination of the central issue in this appeal.

74. It was also ordered that Dunnes' counterclaim be dismissed.

The Appeal

75. Dunnes appeal from aspects of the judgment and orders made in the High Court. In respect of orders 5 and 6 above the following are the grounds of appeal:-

> "1. The trial judge erred in law and fact in failing to find that the Appellant has the right to use the lands outlined in red on the map at Schedule 2 to the High Court Order ("the Lands") for parking pursuant to the licence granted in Part III of the Third Schedule to the Indenture dated 1 August 1989 between Guardian Assurance plc of the First part, the Right Honourable the Lord Mayor, Aldermen and Burgesses of Dublin of the Second part, the County Council of the County of Dublin of the Third part and L & C Properties Limited of the fourth part ("the 1989 Indenture"), the benefit of which was transferred to the Appellant under the Indenture dated 1 August 1991 between the First Respondent of the First part, L & C Properties Limited of the Second part and the Appellant of the Third part ("the 1991 Indenture") quite apart from the rights provided for under the Lease dated 11 June 1990 between L & C Properties Limited ("L & C") of the 1st part, Ansbacher and Company Limited of the 2nd part and the Appellant of the 3rd part ("the E & G Lease") and in the Lease dated 21 August 1992 between the First Respondent of the First part, L & C of the Second part and Denis Guiney limited of the Third part ("the F Lease")."
>
> 2. The trial judge erred in law and fact in holding that the licence granted in part 3 of the 3rd Schedule to the 1989 Indenture is a licence coupled with an interest.
>
> 3. The trial judge erred in law and fact in holding that the 1991 Indenture sought to effect a bare assignment of a licence coupled with an interest.
>
> 4. Further and in the alternative, if the licence in Part III of the Third Schedule is a licence coupled with an interest, the trial judge erred in law and fact in holding that the 1991 Indenture effected a bare assignment of such licence in circumstances where the Appellant had then, and continues to have, an interest in the lands outlined in blue on the map at Schedule 2 to the High Court order ("the Centre").
>
> 5. The trial judge erred in law in failing to find that the First Respondent, being a party to the 1991 Indenture, could not disclaim it by reason of the doctrine of estoppel by deed.
>
> 6. The trial judge erred in law in holding that principles of contractual interpretation were to be applied to the interpretation of deeds.
>
> 7. The trial judge's judgment fails to deal at all with the doctrine of estoppel by deed despite the Appellant expressly raising it in written submissions filed prior to hearing and in the closing oral submissions in the High Court."

76. In respect of order 7 made by the trial judge dismissing all of Dunnes' counterclaim, Dunnes appeal the refusal of certain declarations sought. The following grounds of appeal are relied upon:-

> "1. Dunnes counterclaim – had firstly sought a declaration that they and their permitted successors, assigns, licensees, tenants under tenants, servants, agents, customers and invitees, have the benefit of a licence, pursuant to Part III of the Third Schedule to the 1989 Indenture, to have access to an egress from the Shopping Centre over the Lands as currently laid out and to park vehicles on the Lands. In support of this ground of appeal, Dunnes rely on the grounds of appeal set out earlier above and which it advances in support of its appeal in relation to Orders 5 and 6.
>
> 2. The second relief counterclaimed for by Dunnes was "A declaration that the said licence is irrevocable save in the circumstances provided for in clause 2 (a) of Part III." Dunnes' assert that the trial judge erred in refusing to grant this declaration in circumstances where he (correctly, in Dunnes view) found, at paragraph 83 of his judgment, that the licence was irrevocable.
>
> 3. The third declaration sought by Dunnes in the counterclaim was; "A declaration that the letter from the Plaintiffs' solicitors dated 29 October 2015 did not have the effect of revoking the said licence." Dunnes assert that it's entitlement to this declaratory relief follows from relief number 2 above and the finding of the trial judge, at paragraph 83 of his judgment, that the said letter would not have been effective to revoke the licence.
>
> 4. Dunnes further appeal the dismissal of their application in the counterclaim for "A declaration that the erection of buildings on the Lands would constitute a significant and permanent interference with the Defendant's rights over the lands." This aspect of the appeal is based on three grounds as follows;

i. The trial judge erred in fact in law in his interpretation of clause 6 of the Third Part of the First Schedule to the E & G and F Leases in that he failed to find that the availability of surface car parking in the Northern Car Park Area was an amenity of the Appellant's units in the Centre and an aspect of the occupation and use of, and engagement with, the said units. The Appellant contend that the surface car parking constituted an amenity of its Units.

ii. The trial judge erred in fact in law and finding, at paragraph 51 of his judgment, that, following completion of the proposed development works by the Respondents on the Lands in the Northern Car Park Area, there would be no permanent interference with the occupation, use, amenity or engagement of the Appellant's units in the Centre. The appellant contends that the completed works will constitute a permanent interference with one of the amenities of its Units – car parking in the Northern Car Park Area – and that consequently the works are not permitted by Clause 6 of the Third Part of the First Schedule to the E & G and F Leases.

iii. The trial judge erred in law in asking himself the wrong questions and/or in failing to ask the correct question otherwise posed by him in the course of his judgment, that is whether the proposed development was entirely consistent with and contemplated by clause 6 of the Third Part of the First Schedule to the E & G Lease (and the F Lease), in that the trial judge failed to consider the issue of permanent as opposed to temporary interference with amenity.

Cross Appeal

77. The Landlords have filed a notice of cross appeal which is confined to one ground:-

> "Without prejudice to the Respondents' contention that the form of the 1991 Indenture could not or did not effect an assignment, and/or was void, the Trial Judge stated that if necessary he would have held that the Notice of Revocation was invalid. The Respondents say that such a finding would have been made in error. If the 1991 Indenture operated to effect a bare licence, such licence was granted without consideration, did not induce the Appellant to act to its detriment and the Appellant has not relied upon it. In those circumstances such bare licence was revoked by notice notwithstanding its term that it was irrevocable save for default which has not occurred."

Decision

I. 1988 Indenture

78. Counsel for Dunnes took issue at the hearing of this appeal on 5th July, 2017 with the Landlord placing reliance on the terms of the 1988 Indenture, asserting that the terms of the 1988 Indenture had not been opened to the High Court. It would appear that a main objection is to the reliance which the Landlord now places in clause 21 of the 1988 Indenture.

79. A perusal of the transcript of the hearing before the High Court suggests that the 1988 Indenture was in fact opened to the trial judge on behalf of the Landlord. For example, in the transcript of day one, at page 26, counsel for the Landlord makes reference the 1988 Indenture. The said Indenture is further referenced on day six of the hearing at page 15 of the transcript. Indeed, it is noteworthy that counsel for Dunnes makes reference to the 1988 Indenture at page 90 of the High Court transcript, day six when discussing the agreed chronology of title with the trial judge:-

> "We then agreed the title documents on page 4, which is the Lease of 8th September, which is known as the 1988 Indenture – and in that is the 1988 licence, which is of central importance the Indenture of assignment and transfer of 1st August, 1989, which has the mirror image licence, as Mr. Ralston has referred to it, as the 1988 Indenture and just how that transpired."

80. In the course of his judgment in the High Court, Barrett J. considered the 1988 Indenture and quoted from its provisions at paragraph 37 and 38 thereof. It is clear that he considered the 1988 Indenture in reaching aspects of his determination. This is to be expected since the Indenture is an important muniment of title and indeed the Landlord's Leasehold root of title. I note too that in the 1989 Lease, the 1988 Indenture is expressly referred to and therein described as constituting "the Superior Lease". No valid reason has been advanced that would justify disregarding the 1988 Indenture. To do so is unwarranted and, in my view, should not be acceded to.

81. Accordingly, it is appropriate to have regard to the Leasehold root of title document as being 1988 Indenture. It is substantially similar to the 1989 Indenture. However, I am satisfied that even if the 1988 Indenture is disregarded, the outcome of this appeal remains unchanged in all material respects.

82. In the operative part of the 1988 deed, three separate licences are granted as follows:-

> "In consideration of the Lessee undertaking and covenanting to construct and complete the covenanted works pursuant to the covenant in that behalf hereinafter contained at clause D hereof in accordance with the terms and provisions of the Fourth Schedule hereto and in consideration also of the covenants and conditions on the part of the Lessee therein contained the Corporation and the Council as to their respective estates rights titles and interests in the licensed lands hereby grant to the Lessee as appurtenant to the demised lands the licenses in accordance with the provisions contained in the First, Second and Third, Parts of the Third Schedule hereto upon the terms and conditions therein contained."

83. In the 1988 Indenture the Lessee covenanted with Dublin Corporation, *inter alia*:-

> XXI. "To permit the Corporation at any time during the said term to execute works and make erections upon or erect rebuild or alter any buildings or erections on the lands of the Corporation or their successors in title adjoining or near to the lands hereby demised and to use and develop their adjoining or neighbouring lands in such manner as they may think fit notwithstanding that the access of light or air for the time being appertaining to the Approved Development or any part thereof or any building for the time being on the demised lands may thereby be interfered with AND to permit the Corporation its servants and agents at all times to have access to any sewer, drain or other service ducts in or under the Approved Development or the demised lands for the purpose of utilising the same in connection with any future development by the Corporation its successors and assigns in the vicinity of the demised land, PROVIDED ALWAYS that in carrying out any such works the Corporation shall take into consideration the Current Dublin County Council development plan and all matters and requirements in connection therewith the trading, business and activity of the Town Centre and its occupiers."

84. National Asset Property Management DAC is successor in title to the Corporation.

85. Secondly, the licences granted over the "call back lands" as appurtenant to the demised lands are set forth in Part Two of the Third Schedule as follows:-

> "1. The Corporation hereby licences the Lessee to enter upon the lands to which outlined and hatched and cross hatched blue on Map Index Number 10489/13 annexed hereto reserved by the Corporation for future building development but which the Lessee shall be permitted to lay out as car parking facilities (but excluding the laying of any underground pipes or other services) on a temporary basis pending its been required by the Corporation or its successors or assigns for building purposes or otherwise subject as hereinafter appears. In the event of the Corporation so requiring the said lands or any part thereof, the Lessee shall be given at least four calendar months notice in writing (expiring on any day) of the intention so to require the said lands or any portion or portions thereof and the Lessee shall at the expiry of the said notice period yield up and vacate the lands or the portion or portions thereof so required and remove all structures erected thereon (whether pursuant to the consent of the Corporation or otherwise)."

86. The licence granted in Part III of the Third Schedule as appurtenant to the demised lands are granted in the following terms:-

> "The Corporation and the Council as to their respective estates rights titles and interests hereby licensed the Lessee to enter upon the lands hatched yellow on Map Index Number 10489/13 annexed hereto for the purpose of constructing, maintaining and servicing the car parking facilities, service roads, pedestrian malls, footpaths, kerbs, lighting, adequate landscaping and necessary drainage facilities and all other works as provided for in the Fourth Schedule hereto to be constructed at the Lessee's expense and for no other purpose without the prior written consent of the Corporation or the Council as the case may be. Any car parking provided in the area hereby licensed shall be available for use by the Corporation its successors and assigns licensees and invitees and in particular for the users of all buildings constructed on the lands shown outlined and hatched and cross hatched blue on Map Index Number 10489/13."

87. In Part III, 2 (a), the licence is expressed to be irrevocable subject only to the proviso that it may be revoked in whole or in part in the event of the lessee breaching or suffering or permitting a breach of its terms for such breach remains on remedies for a period of one month after notice is served. The following further provisions are of note:-

> "(c) Nothing in this agreement or in the licence hereby granted should constitute or be deemed to constitute a Tenancy in favour of the Lessee or otherwise.
>
> (d) The Licence hereby to be granted is personal to the lessee.
>
> (e) …
>
> (f)The licence is not deemed to confer exclusive possession on the licensee."

88. The licences created mirror those granted in the 1989 Indenture. In each case the licences granted are expressly appurtenant to the leasehold interest granted.

II. Construction of a Deed

89. Wylie & Woods, *Irish Conveyancing Law* (3rd ed., 2005) outlines the general principles which govern construction of conveyances in the following terms:-

> "[17.15] The overriding rule of construction of a deed is to give effect to the intention of the parties as expressed in the deed. It is important to note that this does not justify the ignoring of the express words in pursuance of what is otherwise conceived to be the intention of the parties. The essential question is what is the meaning of the words actually used by the parties, not what did the parties mean to say and, perhaps, fail to make clear by the words they used. As Ball J. put it in *O'Donnell v. Ryan* (1854) 4 I.C.L.R. 44:
>
> > "The very plain and well-established principle is, that in construing legal instruments, we are not at liberty either to transpose language or to reject words out of the instrument, or to import them into it, unless it becomes necessary to do so in order to carry out the manifest intention of the parties, appearing by the language they have used. I say the manifest intention apparent on the instrument; for it would be obviously a vicious construction to transpose, or reject, or supply words, in order to give effect to an intention not manifested by the parties, but only conjectured by the court, that is, an intention which, in the mind of the court, the parties may have entertained, but which the language of the instrument did not clearly import that they did. To reject words having a definite signification, and treat them as insensible, or to import into the instrument words which the parties themselves have not thought fit to use, or to transpose words so as to alter the meaning of a legal instrument, would be manifestly to take such a liberty with it as neither law nor reason could justify, unless it be absolutely necessary to do so for the purpose of preventing the defeat of the object which the parties have clearly shown they had in view."
>
> The meaning of a deed must be gained from reading it as a whole, and where the transaction is effected by two or more documents these should be construed together."

90. At 17. 16, the authors continue as follows:-

> "In determining the meaning of the words used in the conveyance, the general rule is that the "grammatical and ordinary" sense of the words is to be taken, unless this would lead to some absurdity, repugnance or inconsistency with the rest of the deed."

91. With regard to recitals, the authors state at para. 18.38:-

> "A narrative recital explains the entitlement of the grantor to make the conveyance in question."

92. At 18.40, they proceed to state as follows:-

> "An introductory recital links the narrative recital or recitals with the rest of the deed. It does this by explaining the intended operation of the current deed, e.g. that it is to give effect to a contract for sale entered into by the parties."

93. In my view, the above excerpts represent a correct statement of the key principles of interpretation governing the construction of deeds and Indentures in this jurisdiction. I apply same to resolve the construction issues arising on this appeal.

94. In its essential features, as relevant to the net issues arising in the construction of the deeds under consideration in this appeal, it does not appear to me that the trial judge's approach actually deviated substantially from the principles set out above. In my view, Barrett J. sought to give effect to the intentions of the parties as expressed in the deeds under consideration.

95. It is noteworthy that the relationship of landlord and tenant is based on contract by virtue of section 3 of Deasy's Act 1860.

96. After the within appeals were lodged, O'Donnell J. delivered the majority judgment of the Supreme Court in *The Law Society of Ireland v. MIBI* [2017] IESC 31 where he stated:-

> "7. Both parties and all the judges are in agreement that the operative principles are those set out at pages 114-115 in the decision in the judgment of Lord Hoffman in *Investors Compensation Scheme Ltd v. West Bromwich Building Society* [1998] 1 All E.R. 98, and which has been adopted with approval in the Irish courts:
>
> > (1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.
> >
> > (2) The background was famously referred to by Lord Wilberforce as the "matrix of fact," but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.
> >
> > (3) The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in ordinary life. The boundaries of this exception are in some respects unclear. But this is not the occasion on which to explore them.
> >
> > (4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax. . . .
> >
> > (5) The "rule" that words should be given their "natural and ordinary meaning" reflects the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had. Lord Diplock made this point more vigorously when he said... :
> >
> > > ". . . if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business common sense, it must be made to yield to business common sense.""
>
> 8. These principles represent a significant staging point in the development of what might be described as a modern approach to the interpretation of contracts, a development which, as the principles recognise, has not necessarily reached its terminus."

97. It is noteworthy that in his partly dissenting judgment McMenamin J. in the same case when considering *Arnold v. Britton* [2015] UKSC 36 (a judgment concerning the construction of clauses in leases which may signify a possible recalibration of judicial approach by the UK Supreme Court away from *Investors Compensation Scheme Ltd. v. West Bromwich Building Society* [1998] 1 WLR 896) had this to say:-

> "17. In the neighbouring jurisdiction the contextual approach was applied in a number of cases after *I.C.S.* (see Attorney General for *Belize v. Belize Telecom* [2009] UK PC 10; *Transfield Shipping Inc. v. Mercator Shipping Inc.* [2008] UK HL 48). But there is evidence that Lord Hoffman's views have been the subject of some reassessment in the United Kingdom (see *Arnold v. Britton* [2015] UK SC; *Marks and Spencer plc v. BNP Paribas Securities Services Trust Co. (Jersey) Ltd.* [2015] UK SC 72.
>
> (...)
>
> 19. At the minimum, this revisiting of the criteria raises a question as to the extent to which the courts in the neighbouring jurisdiction now see the *I.C.S.* judgment as the last word in this evolving area of law. It raises the question whether the same approach should unquestioningly be adopted in our courts with possibly far reaching consequences in the future."

98. Lewison, Woodfall: *Landlord and Tenant*, (Volume 1, 1994) states at 11.007:-

> "**General approach to construction**
>
> The object to be achieved in construing any contract is to ascertain what the mutual intentions of the parties were as to the legal obligations which each assumed by the contractual words in which they sought to express them. For this purpose, however, the intention of the parties must be objectively ascertained, and what must be ascertained is what is to be taken as the intention which reasonable people would have had if placed in the situation of the parties. The actual intention of the parties is irrelevant; a court of construction can only give effect to what is perceived as the actual intention of the parties "if that intention appears from a fair interpretation of the words which they have used against the factual background known to them at or before the date of the lease, including its genesis and objective aim"."

99. Woodfall cites *Melanesian Mission Trust Board v. Australian Mutual Providence Society* [1997] 2 E.G.L.R. 128 in the Privy Council where Lord Hope stated:-

> "The approach which must be taken to the construction of a clause in a formal document of this kind is well settled. The intention of the parties is to be discovered from the words used in the document. Where ordinary words have been used they must be taken to have been used according to the ordinary meaning of these words. If their meaning is clear and unambiguous, effect must be given to them because that is what the parties are taken to have agreed to by their contract. Various rules may be invoked to assist interpretation in the event that there is an ambiguity. But it is not the function of the court, when construing a document, to search for an ambiguity. Nor should the rules which exist to resolve an ambiguity create an ambiguity which, according to the ordinary meaning of the words, is not there."

100. This authority and the approach to construction outlined therein by the Privy Council was subsequently considered in *JIS (1974) Limited v. MCP Investment Nominees I Limited (2003)* EWCA Civ.721 where Lord Justice Carnwath, delivering the judgment of the Court of Appeal of England and Wales, cited Lord Hope in *Melanesian* with approval and stated at paragraph 10 of the judgment:-

> "The starting point must be the wording of the contract. The [High Court] judge referred to some extracts from recent authorities about the admissibility and relevance of evidence as to the background of the contract. (…) I do not see any need to review those cases, because, whatever the limits of admissible background information, it is only of assistance insofar as it may throw light on the meaning of the language is used by the parties."

101. Lord Carnwath proceeded to consider whether any material difference in the approach to the construction of a deed could be gleaned from the evolving body of jurisprudence on the interpretation of contracts emanating from the UK House of Lords. O'Donnell J. recently characterised this in *The Law Society of Ireland v. MIBI* as "a modern approach to the interpretation of contracts, a development which, as the principles recognise, has not necessarily reached its terminus". Lord Carnwath having cited Lord Hope in *Melanesian*, stated:-

> "I do not see any material difference between that and the recent statements in, for example, *BCCI v. Ali* [2002] 1 AC 251, where Lord Bing ham said (para 8):-
>
> > "To ascertain the intention of the parties the court reads the terms of the contract as a whole giving the words used their natural and ordinary meaning in the context of the agreement, the parties' relationship and all the relevant facts surrounding the transaction so far as is known to the parties."
>
> Lord Hoffmann, having referred to his own speech in *ICS v. West Bromwich BS* [1998] 1 WLR 896 at 913 said:
>
> > "But the primary source for understanding what the parties meant is their language interpreted in accordance with conventional usage…"

102. Having reviewed further authorities, Lord Carnwath concludes on the issue of construction at para. 19:-

> "The task of interpretation does not allow the court to rewrite the contract."

103. In my view, it is significant in the instant case that neither party seeks rectification of any Indenture or deed. Hence, construction of the provisions of the Indentures at issue in this appeal must follow the strict approach in this jurisdiction which rigorously excludes the use of pre-contractual negotiations as evidence of intention.

104. In his judgment, Barrett J., whilst referencing the key judgments in relation to contractual interpretation, did not in fact deviate from the language that the parties had agreed upon in the deeds as providing the primary foundation for his hypothetical reconstruction of their intentions. At no point does he free the construction of the deeds from the shackles of their language or attempt to replace them with some broader notion of subjective intent in the manner of Lord Hoffmann.

105. Barrett J. did have regard to the factual matrix and in doing so adopted an approach entirely in keeping with the jurisprudence emanating from the Supreme Court as exemplified by *Igote Limited v. Badsey Limited* [2001] 4 I.R. 511 and the principles set out in Wylie and Woods supra.

106. At page 518 of *Igote*, Murphy J, delivering the judgment of the court, stated:-

> "The intention of the parties may be gleaned only from the document ultimately concluded by them, albeit construing it in the light of surrounding circumstances but not ascertain their intentions from such circumstances. Such a process would be justified only when one or other of the parties claimed rectification of the document executed by him: that is not the present case."

107. I am satisfied that this represents a correct statement of the law as regards the approach to be adopted and relevance and weight to be attached to the surrounding circumstances at the time the parties enter into a deed or agreement in construing the meaning of language in a deed.

108. Indeed, in the recent judgment of the Supreme Court in *The Law Society of Ireland v. MIBI*, referred to above, O'Donnell J. eloquently and succinctly puts the approach thus:-

> "12. Legal agreements are not poetry intended to have nuances and layers of meaning which reveal themselves only on repeated and perhaps contestable readings. Agreements are intended to express in a clear and functional manner what the parties have agreed upon in respect of their relationship, and the agreements often do so in a manner which gives rise to no dispute. But language, and the business of communication is complex, particularly when addressed to the future, which may throw up issues not anticipated or precisely considered at the time when an agreement was made. It is not merely therefore a question of analysing the words used, but rather it is the function of the court to try and understand from all the available information, including the words used, what it is that the parties agreed, what it is a reasonable person would consider they had agreed. In that regard, the Court must consider not just the words used, but also the specific context, the broader context, the background law, any prior agreements, the other terms of this Agreement, other provisions drafted at the same time informing part of the same transaction, and what might be described as the logic, commercial or otherwise, of the agreement. All these are features which pointed towards the interpretation of the agreement, and in complex cases, court must consider all of the factors, and the weight to be attributed to each."

109. In that case the document under consideration was the MIBI Agreement, an administrative arrangement between the Government and the motor insurance industry.

110. The UK Supreme Court in *Arnold v. Britton* [2015] UKSC 36 considered the construction of provisions regarding service charge contributions contained in certain lease instruments. Lord Neuberger firstly summarised the current legal position:-

> "15. When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to "what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean", to quote Lord Hoffmann in *Chartbrook Limited v. Persimmon* [2009] UKHL 38, para 14. And it does so by focussing on the meaning of the relevant words, (…) in their documentary, factual and commercial context. That meaning is to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the lease, (iii) the overall purpose of the clause and the lease, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions."

111. In considering the 1988 and 1989 Indentures as with the E & G Lease, the F Lease and the 1991 Indenture, it is axiomatic that what the court is seeking in each case is to identify and declare the intention of the parties to each Indenture as expressed therein. This, in turn, depends primarily on the particular language used, as duly interpreted having regard to the context provided by the entire of the Indenture and the matrix of material surrounding circumstances, whilst acknowledging that the particular language used will always be of paramount importance.

III. Appurtenant

112. In the 1988 Indenture, as stated above, the licenses are granted on the following terms:-

> "…..the Corporation and the Council as to their respective estate's rights titles and interests in the licensed lands hereby grant to the Lessee as appurtenant to the demised lands the licenses in accordance with the provisions contained in the First, Second and Third Parts of the Third Schedule hereto upon the terms and conditions therein contained."

113. In the operative part of the 1989 Deed, it likewise provides:-

> "…the Lessor with the consent and by the direction of the Corporation and the Council as to its estate, right, title and interest in the Licensed Lands and the Corporation and the Council respectively as to all their estates, rights titles and interests in the Licensed Lands hereby grant to the Lessee as appurtenant to the demised lands for the term of this Lease the benefit of the licences in accordance with the provisions contained in the First, Second and Third Parts of the Third Schedule hereto upon the terms and conditions therein contained. "

IV. Licence Coupled with an Interest

114. The appurtenant nature of the licences created in the 1989 Indenture is a key to identifying their true legal nature. Wylie, *Irish Land Law*, (5th ed., 2013) 20.02 characterises a licence as:-

> "… permission to do something in relation to the land which would otherwise be a trespass. At common law, it seems to have been regarded as nothing more than that and certainly was not regarded as capable of creating an interest in land affecting third parties. Usually it does not confer on the licensee any exclusive right to possession of land, as a lease or tenancy agreement does, though there may be a limited right of occupation necessary to the enjoyment of the licence.… However, there is a danger of generalising in this area of law, because there are several different kinds of licences which may be created and they may have quite different characteristics."

115. In my view, on a true construction of the 1989 Indenture, the licences thereby granted constitute licences coupled with an interest since they were expressly created as appurtenant to the demised lands and included in the grant of a proprietary Leasehold interest over same. The licences lack the capacity to exist in gross or otherwise independently of the proprietary leasehold interests. They are wholly and necessarily required for the beneficial enjoyment of the sub demise having regard to the purposes for which it was granted as specified in the 1989 Indenture namely the carrying out of the "Approved Development" and the construction of the shopping centre.

116. The use of the word "appurtenant" was correctly identified by the trial judge as being of central importance since it clearly connotes that the licences being granted were in each case annexed to the land being demised so as to operate for its benefit. On a true construction of the two Indentures, it is clear that the licences granted are accessorial to the enjoyment of the demise. It is clear from the language in the 1988 and 1989 Indentures that the licences created and granted were never intended to exist in gross but rather were created for the purposes of benefiting the demised lands in each case. Accordingly, only the lands the subject matter of the demise can benefit from the licences granted. It is clear from the language of both Indentures that the licences granted in each deed were solely for the benefit of the lands demised by the said instrument. Given the appurtenant nature of the licences they are restricted by the character and the needs of the demised lands and in each case it is the Leasehold interest granted by the same deed which governs the nature and extent of the appurtenant licence. The appurtenant nature of the licences thus circumscribe their ambit. Hence, in my view, in the case of the 1989 Indenture, the licences granted are coupled with an interest, namely, the Leasehold interest in the said Indenture granted by way of sub demise.

V. Estoppel by Deed

117. Dunnes assert that the first named respondent is estopped from denying the validity and effectiveness of the 1991 Indenture by virtue of the doctrine of estoppel by deed. In *Greer v. Kettle* [1938] A.C.156, Lord Maugham stated:-

> "Estoppel by deed is a rule of evidence founded on the principle that a solemn and unambiguous statement or engagement in a deed must be taken as binding between the parties and privies and therefore as not admitting of any contradictory proof."

Lord Maugham reviewed earlier jurisprudence including *Stroughill v. Buck* [1850] 14 Q.B.781 and approved the dictum in that case where it was held:-

> "When a recital is intended to be a statement which all the parties to the deed have mutually agreed to admit as true, it is an estoppel upon all. But, when it is intended to be the statement of one party only, the estoppel is confined to that

party, and the intention is to be gathered from construing the instrument."

118. Halsbury's "Laws of England" volume 12, 1021 states:-

> "An estoppel by deed is said to arise where there is a statement of fact in a deed made between parties. If upon the true construction of the deed the statement is that of both or all the parties, the estoppel is binding on each party; if otherwise, it is binding only on the party making it….. Estoppel by deed is based on the principle that, when a person has entered into a solemn engagement by deed as to certain facts, he will not be permitted to deny any matter which he has so asserted. It is a rule of evidence according to which certain evidence is taken to be of so high and conclusive a nature as to admit of no contradictory proof. The averment relied upon to work an estoppel must be "certain to every intent" without any ambiguity, but may be contained in the recital or in any part of the deed."

119. Wylie & Woods, *Irish Conveyancing Law*, (3rd ed., 2005) states at 18.32:-

> "…it is settled that a recital in a deed may operate by way of estoppel against the party making it in any action relating to that deed. It is, however, crucial to recognise the limitations to this doctrine, whereby, in effect, what is untrue may nevertheless be held to have the effect of the truth. First, an estoppel will arise only in respect of a party who, on a proper construction of the deed, can be regarded as making the statement in the recital and those claiming through him. It will not bind parties who do not claim through him; nor, of course, will it operate in his favour. Secondly, an estoppel will not operate in favour of all the world, but only in favour of those persons who are intended to and do act on the faith of the statement in question, e.g. successors in title of one of the original parties to the deed containing the recital. Thirdly, an estoppel can be raised only in an action on the deed in question and not in relation to some matter collateral to the deed. Fourthly, for a recital to raise an estoppel, it must contain a clear and definite statement of fact, or, as Chatterton V.-C. once put it, it must be a " clear and unequivocal representation". A "general" recital or one which is vague or uncertain is not enough to justify a court in holding that a party or his successor is bound by the statement. The court will exercise caution in this regard."

120. In *Goodtitle v. Bailey* (1777) 2 Cowp.597, Lord Mansfield CJ said at 600:-

> "It shall never lie in [the grantor's] mouth to dispute the title of the party to whom he has so undertaken; no more than it shall be permitted to a mortgagor to dispute the title of his mortgagee. No man shall be allowed to dispute his own solemn deed."

121. Accordingly, the Landlords are estopped by the execution of the 1991 Indenture from purporting to contend that it was at all times null, void and of no effect. It is a fundamental principle of the common law that a grantor is precluded from disputing the validity of his own grant. The estoppel is not excluded by the fact that any want of title appears from the face of the deed itself and, indeed, it is clear that there are a number of drafting deficits in the 1991 Indenture. The Landlords are not entitled to rely on any such deficiency for the purposes of disclaiming the said Indenture.

122. However, this does not preclude the Landlords from advancing arguments as to the precise nature and extent of the rights which were actually granted by virtue of the terms of the 1991 Indenture. Neither would the respondents have been prevented from relying on defences such as *non est factum*, fraud, illegality or incapacity had there been a legal basis for doing so. It is clear from the authorities that in such cases the facts may be pleaded in order to defeat the deed even though they may contradict statements made on the face of the instrument.

123. Further it is not open to the Landlord to set up the variation as between the respective terms of the 1991 Indenture and the 1989 Indenture as rendering the 1991 Indenture null and void. Since the term granted by the 1991 Indenture is greater than the term of the E & G Lease the licence lapses at the determination of the interest with which it is coupled.

VI. Veto

124. At the hearing of the appeal, Hogan J. probed the boundaries of Dunnes' claim regarding the effect of the 1991 Indenture in the following exchange with Mr. Gardiner S.C., commencing transcript page 33 line 26:-

> Mr Justice Hogan "… can you just clarify: If you have the benefit of the 1989 licence, which I know you say you do, but let's assume in your favour for the moment you do, ….. is the gist of your argument that no development of this car parking space is thereby permitted?"
>
> Mr Gardiner SC: "Yes, yeah. Now, obviously we can consent to development of the car parking space."
>
> Mr Justice Hogan: "yes"
>
> Mr Gardiner SC: "But development of the car parking space is not permitted under the terms of that licence. So that is the argument that we put forward."
>
> Mr Justice Hogan:" And, therefore,….the arguments that were given and the evidence that was given in the High Court… as to whether it will or it won't interfere with you or whether there's suitable alternatives and so on, all of that is irrelevant?"
>
> Mr Gardiner SC: "Yes."
>
> Mr Justice Hogan:" You essentially have a veto over any development in respect of what one could term the licensed area?"
>
> Mr Gardiner SC: "Correct, that is the submission and the manner in which the matter ran in the High Court potentially obscured that proposition because what occurred, as I mentioned earlier, is witness statements were put in on an issue in the case. An issue in the case was the loss of amenity. That issue in the case arose in considering clause 6 of the Lease. It didn't arise in any other part of the case. So we then had 4 days of evidence dealing with that issue, which has nothing to do with this issue. So the natural run of things, I suppose, that obscures actually some fairly narrow and central propositions. So the evidence of Mr Millward which is lengthy, only went to this right under the Lease to develop and nobody says there isn't a right to develop under the Lease. There is a right to develop under the Lease as long as the

development does not result in permanent interference..... Dunnes does have a veto under the Indenture over the car park lands and that is, I respectfully submit, unsurprising in the context of what occurred at the Centre because Dunnes paid £500,000 in effect towards the development of the centre and its units because it took this long Lease for which it paid a significant amount of money and in respect of which it identified it wanted car parking as essential for that business."

125. Ingenious as the argument of Mr. Gardiner SC was, I cannot accept it for a number of reasons nor, in my view, does the 1991 Indenture support it.

VII. Construction of 1991 Indenture

126. As outlined above, to ascertain the objective meaning of the language in the 1991 Indenture it is appropriate that the court have regard an objective basis to the surrounding circumstances that obtained at the time of execution of the 1991 Indenture. The approach of Lord Wilberforce in *Prenn v. Simmonds* and in the later decision of *Reardon Smith Line Ltd v. Yngvar* has been approved by the Supreme Court, as outlined above in *Igote Limited v. Badsey Limited.* and most recently incorporated in the *Law Society of Ireland v. MIBI.*

127. Applying the above principles to the 1991 Indenture the following emerges; two significant transactions occurred in the year 1990 that appear to have led directly to the execution of the 1991 Indenture. Firstly, Dunnes entered into the E & G Lease on 11th June, 1990 and thereby became a tenant in the shopping centre for the term of 9, 980 years from 1st March, 1990. That transaction is manifest from the recitals and terms of the 1991 Indenture itself. Dunnes is described throughout as "the Tenant". The contract for the E & G Lease is recited. The acquisition of the said Lease is specified in the habendum as the consideration for the assignment of the benefit of the Licence.

128. Secondly, by Common Parts Transfer & Assignment dated 19th October, 1990 Guardian Assurance and L & C, as beneficial and registered owners respectively, granted, signed and transferred to the First Landlord, Square: (i) the common areas of the Shopping Centre together with the reversions expectant in the retail units in the Centre for the residue of the terms of the 1988 Indenture of Lease and the 1989 Indenture of sublease; the Licences specified in the First, Second and Third Parts of the Third Schedules to1988 and 1989 Indentures respectively.

129. From a conveyancing perspective, it must have been a matter of concern to the purchaser of a long Lease, as Dunnes was in 1990, that neither Dublin Corporation nor Dublin County Council joined in or executed Transfer & Assignment of the Common Parts Indenture dated 19th October, 1990.

130. The operative part of the 1991 Indenture is important in identifying the ambit of its effect:-

> "NOW THIS INDENTURE WITNESSETH that in pursuance of the said Agreement and in consideration of Dunnes Stores Dublin Company acquiring the unit from L & C, L & C and the Square hereby assign the benefit of the Licence more particularly specified in the hereinbefore recited Indenture of Sub – Lease and Licence, Assigns, Licensees, Tenants, Under – Tenants, Invitees and all other persons authorised by the Tenant TO THE INTENT that the said Licences shall endure for the term of 9,980 years from 15th day March, 1990."

131. Notwithstanding some errors in the drafting, including omission of specific reference to the tenant in the operative part of the deed, I am satisfied that on its true construction this Indenture is a licence coupled with a recognised interest in property, namely, the E & G Lease of 11th June, 1990. The acquisition of the said interest is expressed in the operative part of this deed as constituting the consideration for the grant itself.

132. "The Law of Real Property" Megarry and Wade, 8th edition and 34 – 005 provides:-

> "At common law such a licence is both irrevocable and assignable, but only as an adjunct of the interest with which it is coupled. It therefore has no independent existence merely as a licence."

133. It is demonstrable from the operative part of the 1991 Indenture that the rights purported to be granted by it could have no independent existence merely as a licence.

134. Wylie, *Irish Land Law*, (5th ed., 2013) at 22.04 states:-

> "Often a licence is included in a grant of a proprietary interest in land and, in this sense, it may acquire the characteristics of an interest in land. Thus such a licence is irrevocable by the licensor so long as the proprietary interest lasts and may be assigned to a third party along with the interest in land."

135. Ultimately, in my view, the benefit of the licence created by the 1991 Indenture operates as a licence coupled with an interest, being the E & G Lease and the F Lease respectively and takes effect subject to the respective terms of those Leases and, in particular, subject to clause 6 of the Third Part of the First Schedule of each. It follows, therefore, that the terms of the licence created by the 1991 Indenture cannot be interpreted *in vacuo* – as Dunnes in effect to seek to do – but must rather be read in accordance with and subject to the express provisions of the respective First Schedule contained in each Lease.

136. The practical consequence is that Dunnes has no rights over the lands the subject of the 1991 Indenture beyond the rights expressly provided for in the E & G Lease and the F Lease. Nothing contained in the 1991 Indenture entitles Dunnes to interfere with the proposed development works.

VIII. The "call back lands"

137. It is important to bear in mind that at the date of execution of the E & G Lease, the F Lease and the 1991 Indenture, Dublin Corporation maintained substantial rights over its lands adjoining or near to the demised lands and over in particular the so-called "call back lands" being the three parcels of land in the title of the Corporation and subsequently in the title of Dublin County Council and which comprise part of the Northern Car Parking Area.

IX. Clause 6

138. The E & G Lease excepts and reserves in Section II, for the benefit of the Landlord as follows " EXCEPTING AND RESERVING unto the Landlord and his Lessees, Servants and Licensees the rights and easements specified in the Third Part of the said Schedule."

139. The exceptions and reservations are more particularly specified in the First Schedule, Third Part:-

> "6. Subject to the conditions for reinstatement herein contained full and free right and liberty to alter and/or redevelop (by way of improvement, development, renovation, refurbishment or otherwise) or carry out modifications or extensions or additions to or at the Centre including the Common Areas and to authorise any present or future owner or occupier of nearby or adjoining premises (within or outside the Centre) to demolish, build or rebuild, alter or develop the building or buildings thereon or use the same in any manner notwithstanding that any such demolition, building, rebuilding, alteration, development or user as aforesaid may affect or interfere with or diminish the light coming to the Demise Premises or may temporarily interfere with the occupation, use or amenity or engagement of the Demised Premises."

140. The Fourth Part of the E & G Lease grants the following licence to the tenant:-

> "Subject to the provisions of the Third Part of this Schedule the right of the Tenant, its permitted Successors, Assigns, Licensees and invitees to use the car parking spaces as designated for such use by the Landlord during the term hereby granted."

141. "The Common Areas" are defined in the Lease to mean:-

"the entire of the Centre including, … carparks …… and which do not form part of the Lettable Premises PROVIDED ALWAYS that if the Landlord shall cause or permit any alterations in the buildings, built or erected or hereinafter to be built or erected on the Centre or shall in any way alter the area or location of the Common Areas or any part thereof then the definition of "common areas" shall as and when necessary be modified accordingly."

142. At issue is whether the proposed development is permitted by the terms of Clause 6 of the Third Part of the First Schedule to the E & G and F Leases or whether it constitutes a permanent interference with an amenity enjoyed by the demised units.

143. Clause 6 must be construed having due regard to the provisions of the Leases in their entirety. In particular, the licence granted in the Fourth part of the First Schedule for Dunnes to use the car parking spaces as designated for such use during the term, significantly modifies the rights of Dunnes under clause 6. The right is expressly subject to the provisions of the Third Part of the First Schedule

144. The operative words in Clause 6 are clear. In their natural meaning they constitute an express reservation for the benefit of the lessor, to alter and/or redevelop the common areas during the term of the demise- being 9,980 years from 1st March, 1990. This provision is designed to ensure that the lessor is free to deal with the property adjacent to the demised premises to the extent expressly provided. In my view there was no ambiguity in the scope of this provision. According to the natural language of clause 6 it would have been apparent to the parties, or certainly by a reasonable person in the position of the parties, as at the date of execution of the Lease, that it reserved to the Landlord the right to carry out modifications or extensions or additions to or at the Centre including the common areas throughout the term of 9,980 years. It is self-evident that such works of development, extensions, additions demolition, building or rebuilding would, in general, require as a pre-requisite the obtaining of a grant of planning permission and hence upon their execution would be permanent in nature.

145. A purposive construction of clause 6 requires that it be considered and construed in light of the other relevant provisions contained in the Lease including, *inter alia*, the covenant on the part of the lessee at 3. (15) to maintain the covenants in the superior Lease being the 1989 Indenture. This covenant, in turn, imports the relevant covenants contained in the 1988 Indenture permitting the carrying out of developments on the lands. Dunnes have a continuing obligation pursuant to covenant 3.2 (15) to "perform and observe the covenants, conditions and provisions in the Superior Lease insofar as same apply to the Demise Premises."

146. Laffoy J.in *Conneran v. Corbett & Is* [2004] IEHC 2047, considered the effect of Clauses in a Lease permitting development. At page 2062 there is the following excerpt from *Gale on Easements* which she cites with approval:-

> "The effect of clauses permitting development is specifically considered in *Gale on Easements*, 16th edition, at p. 472 in the following passage: –
>
> > "It is quite common, particularly in Leases, to find the grant of an easement qualified by a reservation of a right to develop or alter the servient tenement in such manner as the servient owner shall think fit, notwithstanding that the access of light or air to the dominant tenement and (sometimes) any other easement appurtenant to the dominant tenement may be obstructed or interfered with. The effect of such a provision is a matter of construction in each case but the court will lean against a construction which would entitle the servient owner to deprive the dominant tenement of all access of light and air or the whole benefit of any other easement such as a right of access. Such a provision may however, permit acts which would otherwise amount to an unjustified obstruction to or interference with an easement and would otherwise be an actionable nuisance but not acts which would for practical purposes destroy the easement. In that case the servient owner can obstruct or interfere with a dominant owner's rights, provided the dominant owner is left with the reasonable enjoyment of them, though not necessarily in so convenient a manner or to such an extent as at the date of grant. So, where Leases of flats contained in a grant of rights of access over the forecourt but also such a provision as is under discussion, and the Landlord wished to delineate parking spaces on the forecourt with lockable posts and grant exclusive licences of the spaces, it was held that he was entitled to do so, despite the fact that the scheme proposed would substantially interfere with the rights of access granted by the Leases and otherwise amount to an actionable nuisance."

147. The facts in *Conneran* are distinguishable in that on the evidence before the court in that case the Landlord had caused a total permanent obstruction of the plaintiffs' use of the car park delivery doors.

148. Having due regard to the above principles and the language of the Lease and considering Clause 6 in its entirety, as a matter of construction, in my view, the following observations can be made regarding same, when considered in conjunction with the other terms, licenses and provisions in the said Leases:

i) It permits the Landlord to carry out development at the Centre and on Common Areas.

ii) It permits the Landlord to carry out development which requires a grant of planning permission.

iii) It permits structures of a permanent nature to be constructed on the Common Areas and at the Centre.

iv) The Landlord is entitled throughout the term of the demise to alter, reconfigure and vary the existing layout and designation of the areas in use as car parking spaces.

149. It is clear from the terms of the E & G Lease including the definitions and terms above referred to that the extension, development, and in additions to the centre, including the alteration by development of the Common Areas was expressly contemplated by the terms of this Lease. There are similar provisions in the F Lease.

150. An express term should, if possible, be construed so as to be consistent with what Hart J. in *Petra Investments Limited v. Geoffrey Rogers plc* (2000) L & TR 451 at 471 called " the irreducible minimum" implicit in the grant itself. This approach found favour with Neuberger J. in *Platt v. London Underground Limited* (2001) 2 EGLR 121.

151. I am satisfied that it would have been apparent to a reasonable party at the time of execution of the E & G Lease and the F Lease that the provisions subject to which the licence to use the car parking spaces was been granted in the Fourth Part of the First Schedule rendered the said licence subject to the provisions regarding development and the carrying out of additions, modifications and extensions and so forth as specified in Clause 6.

152. The construction now ingeniously contended for on behalf of Dunnes is inconsistent with the reserved right of the Landlord to alter and redevelop the Shopping centre including the Common Areas as expressly provided for in clause 6.

153. The gravamen of Dunnes' argument is that any alteration as might lead to the slightest diminution in the existing number of 289 surface car parking spaces as are now available in their current location in the Northern Car Park Area and, in particular, the reconfiguration contemplated by the proposed development, amounts to a permanent interference with the occupation, use or amenity or engagement of the Demised Premises which breaches clause 6.

154. However, it is clear from the terms of the planning permission that the Landlords do not intend to permanently obstruct, impede inhibit, restrict or hinder Dunnes in the enjoyment of their demise or in regard to the availability for use of car parking spaces in the common areas for the benefit of the Demised Premises. Rather the development proposed will reconfigure (and increase the number of) the car parking spaces available under the licence granted to Dunnes pursuant to the Fourth Part of the First schedule

155. This approach accords with a purposive construction of the language contained in clause 6. Further, this approach accords with commercial common sense and commercial logic having due regard to the fact that the parties entered into, under the terms of the E & G Lease, for a letting of a unit in the shopping centre for a term of 9,980 years. The variation of the configuration of the car parking spaces from surface parking for 289 spaces to provision of a multi-storey car park for a very substantially greater number of vehicles whilst retaining a reduced but still significant number of surface level parking spaces on the Northern Car Park Area does not amount to a permanent interference with the occupation, use or amenity or engagement of the Demised Premises, having due regard to the provisions of the Leases in their entirety.

156. The existing 289 car parking spaces "at grade" do not constitute an immutable amenity for the benefit of Dunnes units.

157. There is no reasonable construction of clause 6 which would support a contention, such as Mr. Gardiner S.C. eloquently argued for, that what the parties had in mind when they entered into same was that, in effect, it would operate to sterilise the common areas and effectively preclude any development or alteration of the Centre or the common areas as was otherwise than temporary in nature.

158. As Lord Sumption put it in delivering the Harris Society annual lecture at Keble College, Oxford on 8th May, 2017:-

> "The common law has never , since the modern law of contract was developed in the nineteenth century, adopted literalism as a canon of construction. It has always recognised that language is imprecise, that context may modify its meaning, and that words may be used in a special sense."

X. Revocation

159. A licence coupled with an interest is irrevocable by the licensor for so long as the proprietary interest with which it is coupled lasts. Accordingly, the licence created by virtue of the 1991 Indenture remains operative only for the term of the E & G Lease.

160. The context surrounding the sending of the letter of 29th October, 2015, to Dunnes on behalf of the Landlords is relevant. On 6th March, 2015, Dunnes claimed in correspondence:-

> "…you are and have at all times been aware of our claim in respect of property rights at the Centre".

161. Despite been requested to clarify this claim by letter dated 23rd March, 2015:-

> "Please set out clearly within the next 14 days what property rights you are claiming to enjoy and how they are relevant to the Notice and the proposed redevelopment."

Dunnes failed to identify what "property rights" it was claiming at the centre.

162. The letter of 29th October, 2015 states:-

> "Notwithstanding the said letter dated 23 March 2015, you have failed, refused and/or neglected to specify the nature of the alleged property rights claimed by you or how they are said to arise.
>
> Our clients deny that you enjoy any property rights as a purported basis to seek to prevent, obstruct, delay or call into question the proposed redevelopment of the Centre."

163. The Notice of Revocation embodied in this letter provides:-

> "If and insofar as it is asserted that you have any right to use lands at the Centre (whether for car parking or otherwise) beyond the rights expressly provided for in your Lease dated 11 June 1990 (which assertion is not admitted), for the avoidance of doubt any such purported rights are hereby revoked with effect from 1 July 2016 and this letter should be treated as notice of such revocation."

164. As set out above I have found that the rights created by the 1991 Indenture constitute a Licence coupled with an interest being the Leasehold interests arising under the E & G Lease and the F Lease. Accordingly, the 1991 Indenture could not create property rights in favour of Dunnes at the Centre. In the course of this appeal Dunnes have maintained a contention that the 1991 Indenture created a contractual licence which assigned the benefit of the 1989 licence in its entirety not stripped of the contractual terms of the licence. They assert that the 1991 Indenture confers "property rights" upon them wholly independent of the E & G and F Leases capable of preventing the Landlords from carrying out development on the Northern Car Park Area.

165. The "property rights" contended for by Dunnes in March 2015 do not exist. As determined above, the licences arising under the 1991 Indenture will continue only so long as the proprietary interests in the units in question continues under the E & G Lease and/or the F Lease and subject to the terms of the said Leases. A licence does not create an interest in land.

166. However, the Notice of Revocation was inoperative insofar as it purported to revoke the 1991 Indenture. The Licence thereby created is irrevocable for the duration of the term of the " Leasehold interests" with which it is coupled.

167. Accordingly, it follows that the Respondents' cross appeal must be dismissed.

Summary
168. The reconfiguration of car parking by virtue of the construction of a multi-storey car park does not constitute interference with the "occupation, use or amenity or engagement " of the Demised Premises.

169. The carrying out of the works the subject of the grant of planning permission does not constitute a permanent interference with the occupation, use or amenity or engagement of the Demised Premises.

170. The words "notwithstanding that any such demolition, building, rebuilding, alteration, development or user as aforesaid……may temporarily interfere with the occupation, use or amenity or engagement of the Demise Premises.", in Clause 6, are directed towards the period of time during which the actual development works are being carried out at the Centre and the Common Areas. Any other construction would give rise to an absurdity.

171. Whilst the availability of car parking at the Centre is an amenity of Dunnes units , nothing in the Leases entitles Dunnes to insist on the availability of surface car parking or any specific number of car parking spaces available at surface level.

172. The reconfiguration of the car parking facilities at the Northern Area Car Park as contemplated by the proposed development does not interfere with an amenity of the demised premises so as to constitute a permanent interference with " the occupation or use or amenity or engagement " of the demised premises.

173. The Leases do not provide for an amenity of "… the most convenient car Park…" in the manner as contended for by Dunnes.

174. The Leases do not entitle Dunnes to insist on the maintenance of 289 car parking spaces at grade as an amenity of the demised premises.

175. Dunnes has no entitlement under the terms of its Leases to insist that the current layout and configuration of car parking at the Northern Car Park Area is immutable.

176. Dunnes has no entitlement to exercise a veto over the proposed development whether under the terms of the Lease or the Licence with which is coupled.

177. When Clause 6 is considered in light of the evidence at trial regarding the current available parking facilities of the Northern Area Car Park and the increase and enhancement in parking facilities contemplated by the terms of the grant of planning permission, there is no permanent interference with the express rights enjoyed by Dunnes under the Leases.

178. Contrary to Dunnes contentions, the number of car parking spaces that will be available for the benefit of Dunnes and other occupiers of units at the Centre following the completion of the proposed development (823) is relevant. It is a material consideration in evaluating whether there has been a derogation from grant on the part of the Landlords or otherwise a breach of the covenant for quiet enjoyment. It represents a significant increase over the current numbers (289), albeit laid out over a multi-storey configuration. The proposed development does not constitute a derogation from grant nor breach of any covenant contained in the Leases.

Conclusions
179. In respect of Orders 5 and 6 above, I would dismiss grounds 1 and 2 of the appellant's appeal.

180. With regard to the contention in ground 3 that the trial judge erred in law and fact in holding that the 1991 Indenture sought to effect a bare assignment of a licence coupled with an interest, I would accept that this is well founded. I find that the 1991 Indenture created a licence coupled with an interest being the leasehold interests created by the E&G Lease and the F Lease. However, this finding does not alter the conclusions regarding the central issue in this appeal.

181. In relation to ground 4, I would dismiss it since it is predicated on Dunnes succeeding in their claim to have a proprietary interest in the lands outlined in blue. I have already found that Dunnes' proprietary rights are confined to those created or arising pursuant to the E & G Lease and the F Lease respectively and not otherwise. The 1991 Indenture creates a licence coupled with an interest and as such does not create any proprietary rights in favour of Dunnes.

182. In regard to Dunnes' claim that the trial judge erred in law in failing to find that the first named respondent, being a party to the 1991 Indenture, could not disclaim it by reason of the doctrine of estoppel by deed this ground of appeal is upheld. However, this finding does not alter the conclusions regarding the central issue in this appeal. Further, the respondents were estopped from claiming that the deed, this was null and void but not from asserting that it did not create property rights in favour of Dunnes.

183. Turning to Dunnes' claim that the trial judge erred in law in holding that principles of contractual interpretation were to be applied to the interpretation of deeds, I would dismiss this ground of appeal.

184. In respect of Order 7 made by the trial judge dismissing all of Dunnes' counterclaim, Dunnes have appealed the refusal of the declarations sought. I would dismiss these grounds save and except as follows:-

- I would grant the declaration that the said licence is irrevocable save in the circumstances provided for in clause 2 (a)

of Part III.

- I would also grant the declaration that the letter from the Plaintiffs' solicitors dated 29 October 2015 did not have the effect of revoking the said licence.

185. However, it should be noted that these findings do not alter the conclusions regarding the central issue in this appeal.

186. All other grounds of appeal are dismissed.

187. I would also dismiss the cross appeal.