[2017] IEHC 146

THE HIGH COURT

2015 No. 9118P

BETWEEN:

THE SQUARE MANAGEMENT LIMITED,

NATIONAL ASSET PROPERTY MANAGEMENT LIMITED AND INDEGO

PLAINTIFFS

- AND–

DUNNES STORES DUBLIN COMPANY

DEFENDANT

JUDGMENT of Mr Justice Max Barrett delivered on 2nd March, 2017.

I. Overview

1. A few steps from the County Library building in Tallaght is the terminus of the Luas Red Line. Across from the terminus is a wide expanse of tree-dotted car park that runs up to the red-brick wall of the well-known shopping centre 'The Square'.[1] This car park sits on the north-side of the Centre and on the far side of the car-park from the library is the northern entrance to the Centre. The car park appears generally to be busy during the Centre's opening-hours, but visitors looking for other parking can avail of an abundance of surface spaces, principally on the western and southern sides of the Centre, as well as in a multi-storey car park that sits at the north-eastern edge of the Centre.

> [1] The court was provided at hearing with a laminated map entitled 'TOWN CENTRE, TALLAGHT' and labelled 'Plaintiffs' Map'. The court understands this map to replace the map that was annexed to the plenary summons. In this judgment (i) the shopping centre complex ringed in deep blue and stated on that map to mark the 'Outline of the Centre lands' is referred to as 'the Centre' or 'the Square', (i) the balance of the lands ringed in green on that map and surrounding the Centre is referred as 'the Lands', and (iii) the proposed area of development, including the proposed multi-storey car park, marked in hatched blue on that map is referred to in this judgment as 'the Northern Car Park Area'.

2. The Square has enjoyed something of a fresh lease of life in recent years. Its owners now have grand plans to extend the shopping centre into the Northern Car Park Area. Their objective is, *inter alia*, to bring the centre physically closer to the heart of Tallaght[2] and to transform a still-popular but perhaps somewhat jaded shopping centre that is now close on 30 years old into a more modern and exciting commercial venue that is better placed to compete with what was referred to in court as the 'necklace' of high quality shopping centres that straggle the M50 motorway loop around Dublin City. Moving from south to west to north these are Dundrum Town Centre, Liffey Valley Shopping Centre, Blanchardstown Shopping Centre and the Pavilions in Swords. The Square sits roughly between Dundrum and Liffey Valley Shopping Centres, and it seems that its principal competitor, at least in its revamped form, would be Liffey Valley Shopping Centre.

3. Planning permission has been obtained for the proposed re-development and, while the diggers are not quite lined up on-site, the roll-out of the project seems largely ready to commence. Indeed, it has been suggested by the plaintiffs that there is now some urgency to starting into the development works in order that the Centre can maintain and enhance its competitiveness in a manner that is to the economic benefit of the owners and also, it is claimed, the existing tenants at the Centre whose commercial interests will be advanced by the increased visitor footfall that the planned refurbishments are expected to bring.

4. Of the existing tenants at the Centre, Dunnes is the largest. It is a so-called 'anchor tenant' operating a supermarket (which competes with an on-site Tesco supermarket) and a general merchandise store in a 116,000 square foot space that is spread over two floors. Dunnes maintains that the proposed development will breach its existing rights under certain lease and licence arrangements, not least, though not only, in the building over of the Northern Car Park Area.

II. The Parties

5. The Square Management Limited (SML) is a limited liability company incorporated in Ireland. It is the management company for the Square. SML is also the freehold owner of the retail units located within the Square which it holds subject to and with the benefit of various leases pertaining to those retail units.

6. National Asset Property Management Limited is a limited liability company incorporated in Ireland. It is the freehold owner of certain lands, including lands used for car parking that surround the retail units located within the Square.

7. Indego is a company with unlimited liability incorporated in Ireland. It is the holder of a grant of planning permission for the redevelopment of the Square (the 'Planning Permission') issued pursuant to a decision of An Bord Pleanála dated 23rd September, 2014.

8. Dunnes Stores Dublin Company ('Dunnes') is a company with unlimited liability incorporated in Ireland. It is the largest tenant and an 'anchor tenant' at the Square.

III. Key Documentation

9. The key documentation at issue in the within proceedings is the following:

(1) the 1988 Indenture

10. By lease dated 8th September, 1988 made between Dublin Corporation of the first part, Dublin County Council of the second part and L&C Properties Limited ('L&C') of the third part, the Corporation and the Council demised the Centre to L&C for a term of 10,000 years from the date of the lease.

(2) the 1988 Licence

11. In the 1988 Indenture, in addition to the demise of the Centre, the Corporation and the Council granted L&C a number of licences over the Lands, including a licence to lay out a car park on them and park vehicles there.

(3) the Guardian Indenture

12. By Indenture of Assignment and Transfer dated 1st August, 1989, made between L&C of the first part, the Corporation of the second part, the Council of the third part and Guardian Assurance plc of the fourth part: (i) L&C assigned its interests in the Centre under the 1988 Indenture to Guardian Assurance for the residue of the term under that Deed; (ii) the Corporation and the Council granted to Guardian Assurance the licences set out in the schedule to the 1988 Indenture, including the 1988 Licence.

(4) the 1989 Indenture

13. By Indenture of Lease of 1st August, 1989, made between Guardian of the first part and L&C of the second part: (i) Guardian sub-let the Centre back to L&C for 9,990 years from that date; (ii) Guardian granted to L&C, with the consent of the Corporation and the Council, "for the term of this Lease the benefit of" licences over the Lands in identical terms to those contained in the 1988 Indenture. National Asset Property Management Limited is the successor in title to the Corporation and Council, each as licensor, their respective interests having subsequently vested in South Dublin County Council from whom National Asset Property Management Limited acquired the Lands on foot of a transfer of 24th October, 2014.

(5) the E&G Lease

14. Dunnes acquired units E and G in the Centre by way of lease dated 11th June, 1990, made between L&C of the first part, Ansbacher and Company Limited of the second part, and Dunnes of the third part, for the term of 9,980 years from 1st March, 1990. Included in the provisions of the Third Part of the First Schedule to the E&G Lease is para. 6 which provides as follows:

> *"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 Demised Premises."*

15. The just-quoted text forms the central plinth on which the plaintiffs have constructed the within proceedings. The plaintiffs maintain that the proposed development is entirely consistent with, and contemplated by, cl. 6 of the E&G Lease. The court returns to this aspect of matters later below. In passing, the court notes that the plaintiffs have placed some weight on the fact that in para. 10(B)(g) of the Third Amended Defence and Counterclaim it is "*acknowledged [by Dunnes] that the extension of the Centre is contemplated in clause 6 of the Third Part of the First Schedule to the E&G Lease and the F Lease* [considered below]". It might have been preferable if "*the extension*" had read '*extension*', thus perhaps precluding the suggestion that "*the extension*" being referred to in para. 10(B)(g) is the now-proposed development in respect of which planning permission has been obtained. However, the court is satisfied that para. 10(B)(g) seeks merely to reflect what cl. 6 provides and, to the extent that any (if any) ambiguity arises, in what Dunnes is pleading in this regard, such ambiguity is entirely resolved when one has regard to the next succeeding sentence of the Defence and Counterclaim which states that "*[I]t is denied that the development as proposed was within such contemplation*".

(6) the Common Parts Transfer

16. By Common Parts Transfer and Assignment dated 19th October, 1990, made between Guardian of the first part, L&C of the second part, Ansbacher and Company Limited of the third part and SML of the fourth part, Guardian and L&C, as beneficial and registered owners respectively, granted, assigned and transferred to SML: (i) the common areas of the Centre and the reversions of the units in the Centre for the unexpired terms of the 1988 Indenture and the 1989 Indenture; (ii) the Licences specified in the First, Second and Third Parts of the 1988 Indenture and the 1989 Indenture respectively.

(7) The 1991 Indenture

17. By Indenture of 1st August, 1991, between SML of the one part, L&C of the second part and Dunnes Stores Dublin Company of the third part it was expressed that SML and L&C assigned to Dunnes the benefit of the licences specified in the 1989 Indenture to the intent that the licences would inure for the term of 9,980 years from 15th March, 1990.

(8) F Lease

18. By Indenture of Lease made on 21st August, 1992 (the 'F Lease') between SML of the first part, L&C of the second part and Denis Guiney Limited of the third part, L&C demised unto Denis Guiney Limited a lease for the term of 35 years of Store F, Level 3, as described in the First Part of the First Schedule. (Dunnes has since supplanted Denis Guiney Limited as tenant). The definition of "Common Areas" in the F Lease provides, *inter alia*, "*that if the Landlord shall cause or permit any alterations in the buildings, built or erected or hereafter 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 where necessary be modified accordingly." The Third Part to the First Schedule provides in para. 6 for the right of the Landlord and Freeholder to alter and/or redevelop the Centre, including the Common Areas. The Fourth Part bears the heading "*Licence*" and provides as follows: "*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 Freeholder during the term hereby granted.*"

(9) Revocation of Rights

19. By letter of 6th February, 2015, SML notified Dunnes as follows regarding the provision of car parking during the proposed redevelopment of the Square:

> *"In due course, you will be provided with details of the arrangements for the phased redevelopment works. However, in the meantime, the purpose of this letter is to formally serve notice upon you that the Common Areas, including the car parks in the Centre, will be altered and redeveloped within the meaning of clause 6 of the Third Part of the First Schedule of your Lease. For the avoidance of doubt, the car parking spaces designated for use by The Square Management Limited will be relocated from time to time from January 2016 onwards, in order to facilitate the phased*

redevelopment works once they commence."

20. Dunnes replied by letter of 6th March, 2015, stating, *inter alia*, that "Your purported notice has no legal effect or standing and we are under no obligation to reply or comply with any timelines you may wish to impose", that "you are and have at all times…been aware of our claim in respect of property rights at the Centre", and that "We are not in agreement with the contents or proposals set out in your letter, and we fully reserve our rights to challenge all or part of them". By letter dated 23rd March, 2015, SML sought clarification from Dunnes as regards the alleged "property rights" referred to in the letter of the 6th March. No reply was received to this letter of the 23rd March. So by letter of 29th October, 2015, the plaintiffs' solicitors informed Dunnes, *inter alia*, as follows:

> *"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."*

IV. Claims, Counterclaim and Motivation

21. The plaintiffs maintain that the proposed development is entirely consistent with, and contemplated by, cl. 6 of the E&G Lease. The plaintiffs further claim that (i) the E&G Lease and the F Lease involve a specific grant of licence and a reservation of rights to develop nearby or adjoining lands; (ii) Dunnes has not acquired any new or additional rights to the lands; (iii) the proposed development will enhance Dunnes' commercial interests; (iv) the plaintiffs have terminated any licence by service of notice and offered to provide an increased number of parking spaces in a multi-storey car park at the same location; (v) Dunnes cannot have acquired any right by prescription because it has an express licence to use the Lands. The plaintiffs now seek, *inter alia*, a declaration that Dunnes has no proprietary or other rights in respect of the Lands beyond those rights that Dunnes enjoys pursuant to the E&G Lease and the F Lease.

22. Dunnes' defence and counterclaim can be summarised as follows. First, the proposed development is in breach of Dunnes' rights under the 1989 Licence, the benefit of which was transferred to it under the 1991 Indenture. Second, by way of alternative, if (a) the 1989 Licence is subject to the terms of E&G Lease and the F Lease or (b) Dunnes does not have the benefit of the 1989 Licence but merely has a licence to park under the said leases, then the proposed development is outside what is permitted by the reservation contained in cl. 6 of the E&G Lease and the F Lease. Third, again in the alternative but on a related note, the proposed development is impermissible as it would constitute a derogation from the grant of the E&G Lease and the F Lease to Dunnes. Fourth, again in the alternative, but not it seemed to the court a ground of claim on which especial reliance was placed, at least at hearing, if Dunnes does not have any licence to park cars on the lands, then it has acquired by prescription an easement to use the lands for car parking, which right would be affected adversely by the development of the Lands.

23. There has been some suggestion by the plaintiffs that the purpose and/or effect of Dunnes' assertion of the rights aforesaid represents an effort by Dunnes, without lawful cause or justification, to impede and/or frustrate the redevelopment of the Square in circumstances where Dunnes has already challenged the planning permission in judicial review proceedings. It is perhaps to be regretted, but this is no fault of Dunnes, that there is not a more efficient means of addressing all the issues arising from Dunnes' concerns in a single set of proceedings; however, the court sees nothing in Dunnes' actions or contentions in the within proceedings but a legitimate effort by Dunnes to protect the rights that it considers to arise under the applicable lease and licence documentation.

V. Reliefs Sought

24. The court understands that the reliefs being sought of it now are (a), subject to (b), the declaratory reliefs referred to in the second amended statement of claim and the third amended defence and counterclaim, (b) of those reliefs only the declaratory reliefs that do not relate to ownership of the Centre and the lands, an agreed map as to ownership of the Centre and Lands having been agreed between the parties during the course of the hearing of the within application (those agreed lands being referred to hereafter as 'the Agreed Lands'), (c) such further or other orders as are deemed necessary by the court, and (d) the costs of the within proceedings.

25. The relevant declaratory reliefs sought in the second amended statement of claim are as follows:

> (1) a declaration that Dunnes has no right to use the Agreed Lands or any part thereof (whether for car parking or otherwise) beyond the rights expressly provided for in the E&G Lease;
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> (2) a declaration that Dunnes has no right by way of easement, by prescription or any other entitlement to use the Agreed Lands or any part thereof (whether for car parking or otherwise) arising from the F Lease or by any assignment of the F Lease to Dunnes;
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> (3) a declaration that the purported assignment of licences contained in the 1991 Indenture is null and void and of no effect;
>
> (4) a declaration that if the 1991 Indenture is valid it operates as a sub-licence of the rights purported to be granted thereby;
>
> (5) further or in the alternative, the plaintiffs claim 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 Schedule thereof;
>
> (6) without prejudice to (2), a declaration that any right of Dunnes to use the Agreed Lands or any part thereof (whether for car parking or otherwise) beyond the rights expressly provided for in the E&G Lease is determinable on the giving of notice and the period of notice contained in the letter from the Plaintiff's solicitors dated 29 October 2015 was valid and sufficient.

26. The relevant declaratory reliefs sought in the third amended defence and counterclaim are as follows:

> (i) a declaration that Dunnes and its 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 and egress from the Centre over the Agreed Lands as currently laid out and to park vehicles on the

Agreed Lands;

(ii) a declaration that the said Licence is irrevocable save in the circumstances provided for in clause 2(a) of that Part;

(iii) a declaration that the letter from the plaintiffs' solicitors dated the 29th October, 2015, did not have the effect of revoking the licence;

(iv) in the alternative, a declaration that Dunnes and its permitted successors, assigns, licensees, tenants, under-tenants, servants, agents, customers and invitees, have an easement to use the Agreed Lands as currently laid out as a means of access to and egress from Units, E, F and G in the Centre and to park vehicles on the Lands;

(v) if necessary, a declaration under s.35(2) of the Land and Conveyancing Law Reform Act 2009 declaring the existence of such easement; and

(vi) a declaration that the erection of buildings on the Agreed Lands would constitute a significant and permanent interference with Dunnes' rights over the Lands.

VI. Key Questions Arising

27. At its heart, this is a case of contractual interpretation which, the plaintiffs contend, and the court accepts, to turn on four key questions.

28. First, 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?

29. Second, does the 1991 Indenture have the effect that Dunnes enjoys an irrevocable right for its customers to park on the Northern Car Park Area?

30. Third, 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?

31. Fourth, does Dunnes have an easement of right of way and parking by prescription over the Northern Car Park Area?

VII. Principles of Contractual Interpretation

32. There does not appear to be any dispute between the parties as to the general principles of contractual interpretation applicable in the within proceedings. Even so, it may be helpful for the court to mention briefly various applicable principles of contractual interpretation as identified in four prominent cases, viz. *Analog Devices B.V. v. Zurich Insurance Company* [2005] 1 I.R. 274, *BNY Trust Company (Ireland) Limited and Anor v. Treasury Holdings* [2007] IEHC 271, *Rainy Sky SA v. Kookmin Bank* [2011] 1 W.L.R. 2900 and *ICDL v. European Computer Driving Licence Foundation Ltd.* [2012] 3 I.R. 327.

33. *Analog Devices* was a case concerned with the interpretation of an exclusion clause in an insurance contract. In the course of his judgment for the Supreme Court, Geoghegan J., at 280-281, quoted with approval the following principles of contractual interpretation, as identified by *Lord Hoffmann in Investors Compensation Scheme Ltd v. West Bromwich Building Society* [1998] 1 W.L.R. 896, 912:

> *"(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 next mentioned, 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 of 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 grammar; 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 meaning 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; see Mannai Ltd v. Eagle Star Assurance Co. Ltd [1997] A.C. 749.*
>
> *(5) The 'rule' that words should be given their 'natural and ordinary meaning' reflects the commonsense 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 in Antaios Compania S.A. v. Salen A.B. [1985] A.C. 191, 201:*
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> > *'if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business commonsense, it must be made to yield to business commonsense.'"*

34. In *ICDL*, a case concerned with the proper interpretation of a limitation of liability clause in a commercial licence agreement, the Supreme Court also adopted Lord Hoffmann's summary of principle in *ICS*. In *BNY Trust Company (Ireland) Limited v. Treasury*

Holdings [2007] IEHC 271, a case concerned with the proper interpretation of a co-ownership agreement, Clarke J. referred with approval to the above-quoted passage of Lord Diplock in *Antaios Compania Naviera*, and the observations of Lord Steyn in *Mannai Investment Co. Ltd v. Eagle Star Assurance Company* [1997] 3 All E.R. 352 which emphasised the need for a commercially sensitive construction of a commercial contract.

35. One last decision of note when it comes to the general principles of contractual interpretation is the decision of the United Kingdom Supreme Court in *Rainy Sky*, a case concerned with whether or not a bank pay-out was due under certain performance bonds. There it was held that if there are two possible constructions of a contractual provision a court is entitled to prefer the construction which is consistent with business common-sense. Per Lord Clarke, at 2908:

> *"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 who has 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."*

36. Armed with the above general principles of contractual interpretation the court turns now to consider the various issues presenting in the within proceedings.

VIII. The 1988 Indenture and 1989 Indenture Considered

37. By lease dated 8th September, 1988 made between Dublin Corporation of the first part, Dublin County Council of the second part and L&C of the third part, the Corporation and the Council demised the Centre to L&C for a term of 10,000 years from the date of the lease. Clause B of that lease reads as follows:

> *"B. NOW THIS INDENTURE WITNESSETH AS FOLLOWS:-*
>
> *1. In consideration of the rents and the increases thereof hereinafter provided the covenants and conditions hereinafter reserved and contained and on the part of the Lessee to be paid, performed and observed, the Corporation hereby demises unto the Lessee ALL THAT AND THOSE the Lands and premises described in Part I of the First Schedule hereto (hereinafter called 'the demised lands')[1] EXCEPTING AND RESERVING as provided for in Part II of the First Schedule hereto TO HOLD the same unto the Lessee its successors and assigns for the term of ten thousand years from the date hereof YIELDING AND PAYING THE RENT (and the increases thereof) as specified and provided for in the First and Second Parts of the Second Schedule hereto on the dates therein specified to the Corporation at or in the office for the receipts and payments to be made to or by the Finance Officer and Treasurer of the Corporation for the time being."*
>
> *[1] Part 1 of the First Schedule defines the demised Lands as "ALL THAT AND THOSE that part of the lands at Tallaght in the County of Dublin containing 10 acres statute measure or thereabouts statute measure as more particularly described and delineated on Map Index No. 10489/13 annexed hereto and thereon edged red". That is the area of the building that now constitutes the Centre.*

38. Clause B then continues:

> *"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 Corporation and the Council as to their respective 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." [Emphasis added].*

39. As will be seen later below the emphasised text has assumed some importance in the within proceedings.

40. The 1988 Indenture was followed just under a year later by the 1989 Indenture, being an Indenture of Lease of 1st August, 1989, made between Guardian of the first part and L&C of the second part whereby (i) Guardian sub-let the Centre back to L&C for 9,990 years from that date; (ii) Guardian granted to L&C, with the consent of the Corporation and the Council, "*for the term of this Lease the benefit of*" licences over the Lands in identical terms to those contained in the 1988 Indenture. As mentioned above, National Asset Property Management Limited is the successor in title to the Corporation and Council. Clause B.2 of the 1989 Indenture is worded very similarly to its counterpart in the 1988 Indenture, providing 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." [Emphasis added].*

41. As will be seen later below the emphasised text has assumed some importance in the within proceedings.

42. Of the three parts of the Third Schedule mentioned in the just-quoted text, Part III is the particular focus of the within proceedings. The introductory text to the Third Schedule and Part III provide as follows:

> *"THIRD SCHEDULE*
>
> *For the term of this Leases [sic] the Lessor with the consent of the Corporation and the Council respectively as to its estate, right, title and interest in the Licensed Lands and the Corporation and the Council respectively as to all their estate, right, title and interest in the Licensed Lands hereby grant the Licences (hereinafter more particularly*

described[)]…

PART III

1. The Lessor, with the consent of the Corporation and the Council as to its estate, right, title and interest and the Corporation and the Council as to their respective estates, rights, titles and interests hereby licence the Lessee to enter upon the lands hatched yellow [on a defined map]…annexed hereto for the purposes 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 Lessor, 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, assigns licensees and invitees and in particular foe the users of all buildings constructed on the lands shown outlined and hatched and cross hatched [on a defined map]….

2. In relation to the area agreed to be licensed under this Agreement, the following general provisions shall apply:-

(a) This Licence shall be irrevocable subject only to the proviso that it may be revoked in whole or in part by the Lessor, the Corporation or the Council as the case may be by notice or notices in writing to the Lessee at any time in the event of the Lessee breaching or suffering or permitting a breach of the terms hereof and such breach remains unremedied for a period of 1 month after the Lessor, the Corporation or the Council (as the case may be) notify the Lessee of same.

(b) The Lessee shall insure, or cause to be insured against public liability and such other risks as may be reasonably required by the Lessor, the Corporation or the Council in the joint names of the Lessee, the Lessor and the Corporation or the Council as the case may be the said areas so to be licensed and shall produce to the Lessor, the Corporation and to the Council on demand all policies of insurance reasonably required by the Lessor, the Corporation and by the Council in that regard and shall indemnify and keep the Lessor, the Corporation and the Council effectually indemnified from and against all motions proceedings costs damages expenses claims and demands by virtue of the use of the areas so licensed to the Lessee or by virtue of the carrying out of any works on the said areas by or on behalf of the Lessee.

(c) Nothing in this Agreement or in the Licence hereby granted shall constitute or be deemed to constitute a Tenancy in favour of the Lessee or otherwise.

(d) The Licence hereby agreed to be granted is personal only to the Lessee.

(e) In the event of this Licence being determined by the Lessor or by the Corporation or by the Council as the case may be the Lessee shall if required by the Lessor, the Corporation and/or the Council make good and restore the said lands to their former state and condition. Failure by the Lessee to remove all structures, debris and spoil and to make good the said lands as may be required by the Corporation or the Council as the case may be on serving the said Notice shall be deemed to be an express authority for the Lessor, the Corporation or the Council as the case may be to remove or restore the said lands to the former state at the cost of the Lessee and without any compensation whatsoever to the Lessee….

(f) This Licence shall not be deemed to confer exclusive possession on the Lessee and the Lessee hereby acknowledges that so long as this Licence subsists in relation to the lands or any part thereof hereby licensed, the Lessor, the Corporation and the Council as the case may be shall be entitled to share the possession of the said lands together with all others so authorised by the Corporation or the Council as the case may be provided such use shall be consistent with the use thereof by the Lessee.

(g) The Corporation hereby undertakes not to develop the site marked 'B' on [a defined plan]…as a fast food restaurant for a period of five years from the 1st day of June 1988." [Emphasis added].

IX. "…as appurtenant to the demised lands…"

43. The court has highlighted the use of the phrase "*as appurtenant to the demised lands*" in the 1988 Indenture and the 1989 Indenture. What is the meaning and purport of this phrase? It seems to the court that the most natural and also the most commercially sensible reading of the phrase is that it means that the licences granted in the said indentures are what is known as licences coupled with an interest, i.e. they exist solely for the benefit of the property interest with which they are connected, being here "*the demised lands*". In terms of learned commentary and precedents of relevance, both Megarry and Wade in *The Law of Real Property* (8th ed.) and Wylie in *Irish Land Law* (5th ed.), as well as Fennelly J., for the Supreme Court in *Honiball v. McGrath* [2002] IESC 26, make various observations of interest.

44. Per Megarry and Wade, at para. 34.005:

> *"3. Licence coupled with an interest. The one form of licence which caused no problems at common law was a licence coupled with a recognised interest in property. A right to enter another man's land to hunt and take away the deer killed, or to enter and cut down a tree and take it away, involves two things, namely, a licence to enter the land and the grant of an interest (a profit à prendre) in the deer or tree. 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. It may be reinforced by the principle that a person may not derogate from his grant, which is explained further above. In any case, such a licence is not only irrevocable but is enforceable by and against successors in title of the grantee and grantor respectively, as part and parcel of the interest granted.*
>
> *The interest to which the licence is 'coupled', must, of course, have been validly created. Similarly, the licence is only effective against a third party if the interest to which it is attached is enforceable against the third party under the normal rules of registered and unregistered conveyancing….".*

45. Wylie, at para. 22.04, under the heading "*Licences Coupled with an Interest*" observes as follows:

> *"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. A common example of such a case is where a profit à prendre is granted, eg, shooting or fishing rights. Such rights in respect of the land cannot be enjoyed unless accompanied by a licence to go on to the land to exercise them. The profit can be passed as an interest in land to successors in title of the grantee and it binds successors in title of the grantor, as does the licence necessarily attached to the profit.".

46. Turning then to *Honiball*, this was a case in which a claim to enter the main house in a retirement village was rejected as the licence claimed was not necessary to the enjoyment of the demised properties (retirement bungalows). As a case it is therefore distinguishable from the within proceedings in that here the licence at issue is essential to the enjoyment of the demised premises when it comes to access and car parking. Notwithstanding this key distinction, the following observations of Fennelly J., at 17, are of interest:

"I also reject the submission that the lease conferred on each lessee an implied right of access to Clonmannon House. Such an implication would have to follow necessarily and obviously from the terms of the deed. It is said that the covenants entered into by Home Affairs make no sense if there is no right of access. In one sense, that is so. A party does not normally undertake an obligation to another person to repair a property if that other has no interest in having that repair carried out. However, the implication of the grant of a property right would require more. It would have to be demonstrated that the term effecting such a grant would as a matter of compelling necessity have to be implied to give what is usually called business efficacy to the terms of what is expressly agreed. If, for example, the deed, as distinct from the care contract had contained the obligation to provide services at Clonmannon House, it would have been impossible for the beneficiary to enjoy them without a corresponding right to enter the house. Home Affairs can perfectly well perform its repair obligations at Clonmannon House without conferring any right of access on the bungalow lessees. Such a right would have to be considered by reference to the care contract. To the extent that it provides for services to be rendered at Clonmannon House, the law will imply a right of access if that is clearly necessary in order to receive the services. It does not follow, however, that a proprietary right has to be granted. For essentially similar reasons, I reject the contention that there is here a license coupled with an interest. In truth the appellants' argument begs the question. Sometimes a right in land cannot be effectively enjoyed unless accompanied by the grant of a license to enter….The appellants cannot point to any such antecedent interest in land. Rather their case is the converse, namely that the interest in land is required if they are to enjoy the benefit they claim to have been conferred by the care contract."

47. What conclusions can be drawn from the foregoing extracts from commentary and case-law? The court will return to this aspect of matters following its consideration of the 1991 Indenture later below. Suffice it for now to note that 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.

X. The E&G Lease Considered

48. Dunnes acquired units E and G in the Centre for a premium of £500k by way of the E&G Lease for the term of 9,980 years from 1st March, 1990. The habendum clause, at cl. 2.2, being the clause that defines the type of interest rights to be enjoyed by the grantee/tenant, states, inter alia, that "*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*". That Part provides that "*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*". And turning back to the said third part, one finds the following, at para. 6:

"Subject to the conditions for reinstatement herein contained full and free rights 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 Demised Premises." [Emphasis added].

49. In short, the habendum clause says that the licence in Schedule 1, Part 4 is to be granted. Schedule 1, Part 4 provides a licence to use such car-parking spaces as are designated by the Landlord. But that licence comes subject to the just-quoted para. 6 which, in effect, overrides all.

50. Is the Northern Car Park Area "*nearby or adjoining premises*"? Patently so, and this was confirmed by the plans and maps produced in the evidence of Mr Gallagher, a practising architect, of Lafferty Architects and Project Managers.

51. Does the "*notwithstanding that…may temporarily interfere*" text have the effect that demolition, building, etc. that permanently interferes with the occupation, use, etc. of the Demised Premises is not allowed? To answer that question it helps to recall what one is looking at. A licence to use certain car parking space has been granted, and the landlord is in effect reserving a right to authorise certain demolition, etc. work thereon and also use thereof "*notwithstanding that* [same]…*may temporarily interfere*" with the occupation, use, etc. of the "Demised Premises", those Demised Premises being Stores E and G. Allowing for a moment that the building works to be done as part of the proposed redevelopment "*may temporarily interfere with the occupation, use or amenity or engagement of the Demised Premises*", does the fact that the now-proposed development will occupy what is presently the Northern Car Parking Area, present an issue as regards para. 6? To the court's mind it does not. Because, at the latest, once the development works are complete, the occupation, etc. of the Demised Premises, being Stores E and G, will continue without interference. In passing, the court notes that Dunnes, in its written submissions, when elaborating on the terms "*occupation*", "*use*" and "*amenity*" in para. 6, consistently seeks to emphasise the importance to it of surface car-parking, stating, *inter alia*, as follows:

"66. Dunnes submits that a key feature of its 'occupation' of its supermarket unit is the availability of the large (289) spaces, adjacent, easily-accessible, same-level parking in the North Car Park.

67. …It is submitted that the typical 'use' of a supermarket includes availing of convenient car parking close to the store which can be easily and quickly accessed with a heavy shopping trolley or shopping bag….

68. The online Oxford Dictionary defines 'amenity' as 'a desirable or useful feature or facility of a building or place'. It is

submitted that a close, easily accessible car park, at the same level as the store is a desirable and useful feature of a supermarket....

69. The 'engagement' by customers with Dunnes' units also clearly includes the use of a car park and, in particular, the journey from shop to car.

70. Dunnes submits that such occupation, use, amenity and engagement will be drastically and irreversibly interfered with by the proposed extension, specifically by reference to the relationship between the supermarket unit and the North Car Park."

52. The court cannot but note that Dunnes has adduced no 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.

53. 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: Mr Markey indicated in the course of his oral testimony (Day 5, p.19) that the ideal scenario at the Square is surface car-parking of 600 spaces. And following the proposed development, the unchallenged evidence in the case is that there will be more than 1,000 such spaces. (And that is leaving aside the enhanced multi-storey car parking that will be available – and which is planned to be developed as a priority). Moreover, the court is entirely persuaded by the evidence that this parking will be quickly and easily accessible. Just to take the southern car park by way of example, Mr Millward, a retail consultant and managing director of Millward Associates Limited, indicated as follows in his oral testimony (Day 3, p.6):

"There's Level 2 North which is the focus of Dunnes' concerns, the pace distance was 155 paces, taking 94 seconds. The distance to the south was 224 paces, taking 135 seconds. However, I think this is opportune as a moment to reiterate… that my evidence from the Pavilions in which the typical Dunnes visitor is visiting 2.9 other shops and purchasing at 2.6 other shops, we're not talking about engaging with Dunnes in isolation, the consumer is engaging with the totality of the retail food and beverage and services mix in the shopping centre. And so, those journeys may originate in Dunnes but we know that those consumers will very likely be availing themselves of other experiences. So it is not a journey that is made in isolation. It is very likely that people making the journey both to the north and the south, indeed the Level 3 West and the Level 1 East car parks will be doing other shopping or eating or drinking activity. But the journey to the south involves 224 paces and 135 seconds."

54. As to the suggestion by Dunnes that there might be congestion in the lift area that will feed from the to-be-constructed multi-storey car park, there is no empirical evidence before the court to support this contention and the evidence of Mr Hamill (a director of SML and Indego) and Mr Gallagher (a practising architect of Lafferty, Architects and Project Managers, who was called on behalf of the plaintiffs) indicates in this regard 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. Per Mr Hamill (Day 1, p.98):

"The lifts, the intent of the lifts is that they are airport-style lifts. So those very large lifts that you see in Terminal 2 in Dublin Airport. And every level of the car park will exit only onto Level 2 which will push all the shoppers who park in this car park into that Level 2, which is the premier level in the shopping centre, out through a three-metre wide retail-focused corridor into a ten-metre wide mall which leads directly into the current North Mall in a seamless way, although the buildings are not connected."

55. Per Mr Gallagher (Day 2, p.12):

"The lifts, lift sizes are generous 21 persons lifts….[What has been done thus far] is known as a scheme design. There is a detailed design phase to go through where we do a thorough analysis and we would get in experts. The experts we've used in the past on shopping centres is a UK firm called Dunbar & Boardman and they're recognised specialists. What we get them to do is….[a] lift vehicle management study….So if there is a requirement for these lifts to go greater…the Centre owners are about the success of the shopping centre, [and] we'll absolutely adopt that."

XI. The Common Parts Transfer and Assignment Considered

56. By Common Parts Transfer and Assignment dated 19th October, 1990, Guardian Assurance and L&C, as beneficial and registered owners respectively, granted, assigned and transferred to SML: (i) the common areas of the Centre and the reversions of the units in the Centre for the unexpired terms of the 1988 Indenture and the 1989 Indenture; (ii) the Licences specified in the First, Second and Third Parts of the 1988 Indenture and the 1989 Indenture respectively. Notably, neither Dublin Corporation nor Dublin County Council were party to the Common Parts Transfer and Assignment, a point to which the court returns later below.

57. Clause 2.1 of the Common Parts Transfer and Assignment provides as follows:

"NOW THIS INDENTURE WITNESSETH that in consideration of the reciprocal rights granted and covenants, conditions and stipulations to be performed and observed by the Landlord with GA and L&C, GA & L&C as beneficial and as registered owners respectively hereby GRANT AND ASSIGN AND TRANSFER and the Bank at the request of L&C and as the owner of the Charge…hereby GRANTS ASSIGNS DISCHARGES AND CONFIRMS unto the Landlord:-

(a) ALL THAT the Assigned Premises as more particularly described in Section I hereof and as described for the identification of location in the First Part of the First Schedule;

(b) the reversions expectant upon determination of the leases of the Sold Owner/Occupier Units as set forth in the Sixth Schedule hereto…

hereto together with the easements and rights specified in the Second Part of the said First Schedule EXCEPTING AND

RESERVING unto GA and L&C respectively and their respective Assignees, Lessees, Servants and Licensees the rights and easements specified in the Third Part of the said First Schedule."

58. The 1988 Indenture and the 1989 Indenture have been considered previously above and there is not a great deal to note about the Common Parts Transfer and Assignment beyond, as recited above, what it achieves and provides, as well as the absence of Dublin Corporation and Dublin County Council as parties thereto, an aspect of matters to which the court now turns.

XII. The 1991 and 1992 Deeds of Confirmation Considered

59. It appears that after the Common Parts Transfer and Assignment was executed some doubt arose as to whether the licensed lands had been transferred properly to SML. The particular clause that gave rise to concern was the habendum clause, cl. 2.2, which provides, *inter alia*, as follows:

> *"[that] for the consideration aforesaid GA and L&C hereby GRANTS AND ASSIGNS AND TRANSFERS to the Landlord and the Bank as registered owners of the Charge aforesaid HEERBY GRANTS ASSIGNS DISCHARGES AND CONFIRMS to the Landlord the Licenses specified in the First, Second and Third Parts of the Third Schedule of the Superior Lease and Licence and the Sub-Lease and Licence respectively with respect to all of the lands the subject of the said Licences as shown on the Plans annexed to the Superior Lease and Licence and the Sub-Lease and Licence respectively."*

60. 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.

XIII. The 1991 Indenture Considered

61. By Indenture of 1st August, 1991, between SML of the one part, L&C of the second part and Dunnes Stores Dublin Company of the third part it was expressed that SML and L&C assigned to Dunnes the benefit of the licences specified in the 1989 Indenture to the intent that the licences would inure for the term of 9,980 years from 15th March, 1990. The Indenture, though relatively short, is not untroublesome in what it provides, and it is worth quoting the recitals and principal text of same in full so as to get a proper understanding of what the 1991 Indenture sought to achieve and what it does achieve. Dunnes has contended, by reference to *Woodfall's Law of Landlord and Tenant*, Vol. 1, para. 5.015, that it is established law that recitals are only used as an interpretative tool when there is some ambiguity in the operative part of the deed; however, even the text that Dunnes relies upon in support of this contention does not go so far; it asserts the general primacy of the operative text but does not suggest that a court is ever excluded from having regard to the recitals, and this must be so *a fortiori* where, as here, it seems that text is missing from the operative clause, and where too there is a complete divergence between the parties before the court as to the effect and effectiveness of the 1991 Indenture. Thus, per *Woodfall*:

> *"The function of recitals is to narrate the history leading up to the making of the lease,[1] or to make a broad statement about its overall objective or purpose.[2] Since any document must be construed as a whole, recitals may be taken into account in the construction of a lease, although recitals will not normally be given the same weight as the operative parts of the deed.[3] There are three rules applicable to the construction of an instrument containing recitals. If the recitals are clear and the operative part is ambiguous, the recitals govern the construction. If the recitals are ambiguous and the operative part is clear, the operative part must prevail. If both the recitals and the operative part are clear, but they are inconsistent with each other, the operative part is to be preferred[4]….*
>
> *In some circumstances a recital may take effect as an obligation…[5].*
>
> *A recital will normally estop the parties to the deed, and their successors, from denying the truth of any facts which are recited,[6] unless it is intended to be the statement of only one party.[7]"*
>
> [1] *IRC v. Raphael* [1935] AC 96.
>
> [2] *Mackenzie v. Duke of Devonshire* [1896] AC 400.
>
> [3] *Orr v. Mitchell* [1893] AC 238.
>
> [4] *Re Moon, ex parte Dawes* (1886) LR 17 Q.B.D. 275; *Walsh v. Tevanion* (1850) 15 Q.B. 733; *Mackenzie v. Duke of Devonshire* [1896] AC 400; *Leggott v. Barrett* (1880) LR 15 Ch.D. 306.
>
> [5] *Easterby v. Sampson* (1830) 9 B&C 505.
>
> [6] *Greer v. Kettle* [1938] AC 156.
>
> [7] *Stronghill v. Buck* (1850) 14 QB 781.

62. For the reasons stated above, and consistent with applicable principle, the court turns to consider the recitals and operative text of the 1991 Indenture. These read as follows:

> *"WHEREAS:*
>
> *(1) By [the 1989] Indenture…Dublin County Council and Dublin Corporation did thereby grant, inter alia, Licenses in respect of certain lands as more particularly described in the…[1989] Indenture…upon the terms and conditions therein appearing for the benefit of the hereditaments and premises known as the Square, Towncentre, Tallaght in the County of Dublin.*

(2) L&C and [SML]…is entitled to the benefit of the Licenses granted by Dublin Corporation and Dublin County Council more particularly specified in the…[1989] Indenture…

(3) [SML]…is entitled to be registered as owner of the hereditaments and premises known as the Square, Towncentre, Tallaght in the County of Dublin but not comprising Lettable Premises in the standard form of 35 year Lease and 9980 year Lease used in disposing of Units in the Square, Towncentre, Tallaght in the County of Dublin.

(4) [Dunnes]…has agreed to acquire part of the Lettable Premises in the Square, Towncentre, Tallaght in the County of Dublin, more particularly described as Stores E and G, Levels 2 and 3, the Square, Towncentre, Tallaght in the County of Dublin (hereinafter called 'the Unit') from L&C.

(5) For the purpose of giving effect to the purchase of the Unit by [Dunnes]…from L&C, [Dunnes]…has requested L&C and [SML]…to assign the benefit of the Licences more particularly described in the…[1989] Indenture…to [Dunnes], its Successors and Assigns, Licensees, Tenants, Under-Tenants and Invitees and all other persons authorised by [Dunnes]… which L&C and [SML]…have agreed to do.

NOW THIS INDENTURE WITNESSETH that in pursuance of the said Agreement and in consideration of Dunnes…acquiring the Unit fom L&C, L&C and [SML]…hereby assign the benefit of the Licence more particularly specified in the…[1989] Indenture, [to Dunnes its Successors and][1] Assigns, Licensees, Tenants, Under-Tenants, Invitees and all other persons authorised by the Tenant TO THE INTENT that the said Licences shall enure for the term of 9980 years from the 15th day of March, 1990."

[1] There seems to be text inadvertently missing from the 1991 Indenture. The square-bracketed text inserted by the court at the above juncture appears to it to meet what Recital (5) contemplates.

63. There are a number of features to note about the 1991 Indenture:

– first, the 9,980 year period does not accord with the 9,990 year period in the 1989 Indenture;

– second, the duration of the Licence is 9,980 years from 15th March, 1990 whereas the duration of the E&G Lease is 9,980 years from 1st March, 1990.

Flowing from these two points, 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.

– third, and this, 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 of 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 attaching to the interest to which it is coupled. The only other plausible alternative is that the 1991 Indenture operates as a grant of the lease simpliciter; and for the reasons stated the court prefers the view that it has taken of matters as being correct).

64. In passing, the court notes Dunnes' contention that by 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. 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].

65. 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 in 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.

XIV. Non-Derogation from Grant

(i) Contention Made

66. Dunnes has invoked non-derogation from grant, in particular 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).

(ii) Legal Principles.

67. Wylie's *Irish Land Law* (5th ed., 2013), at 382, in a passage relied upon by Laffoy J. in *Conneran v. Corbett & Sons* [2004] IEHC

389 (considered below), describes the principle of non-derogation from grant in the following terms:

> *"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 person, 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."*

68. In *Birmingham, Dudley & District Banking Co. v. Ross* (1888) 38 Ch.D. 295, Bowen L.J., at 313, succinctly states the essence of the principle to be that "*that a grantor having given a thing with one hand is not to take away the means of enjoying it with the other*".

69. In *Conneran,* the plaintiffs held leases in Corbett Court shopping mall in the City of Galway and claimed rights in the nature of easements to bring deliveries of stock through a car-park and loading area. Laffoy J. noted that each of the leases gave an express right to use car-park delivery doors and the internal common parts for receiving deliveries, and even required that these be used. Laffoy J. found that there had been a total obstruction of the car-park delivery doors and that limited access to the rear of the mall a particular laneway via the passage that had formerly been part of the car-parking area was, per Laffoy J., at 19, "*totally unsuitable and impractical for effecting deliveries to and from the plaintiff's retail units*". In the circumstances, Laffoy J. expressed herself, again at 19, to be satisfied that there had been "*a real and substantial interference with the express and implied rights acquired by the Plaintiffs under the leases*" (emphasis added) and that it was no answer to say that there were other routes available, in circumstances where the plaintiffs had been deprived of "*not only of the most convenient route but of the only suitable route for efficient bulk deliveries of merchandise*."

70. In *Platt v. London Underground Ltd* [2001] 2 E.G.L.R. 121, a decision of the English High Court, Mr Platt had taken a lease of a kiosk in a London Underground passageway. Subsequently, London Underground closed off access to that passageway for a large portion of the day, depriving Mr Platt of all passing trade during the hours of closure. In finding that there had been a derogation from grant, Neuberger J. made the following observations, at 122, under the heading "*Derogation from grant: principles*":

> *"1. It is well established that a landlord, like any grantor, cannot derogate from his grant. To put in more normal language, as has been said in a number of cases, a landlord cannot take away with one hand that which he has given with the other….*
>
> *2. In order to determine whether a specific act or omission on the part of the landlord constitutes derogation from grant, it is self-evidently necessary to establish the nature and extent of the grant….*
>
> *3. "The exercise of determining the extent of the implied obligation not to derogate from grant] involves identifying what obligations, if any, on the part of the grantor can fairly be regarded as necessarily implicit, having regard to the particular purpose of the transaction when considered in the light of the circumstances subsisting at the time the transaction was entered into" per Sir Donald Nicholls V.C in Johnston & Sons Ltd v. Holland [1988] 1 EGLR 264 at 268A.*
>
> *4. There is a close connection, indeed a very substantial degree of overlap, between the obligation not to derogate from grant, the covenant for quiet enjoyment and a normal implied term in a contract….*
>
> *5. The terms of the lease will inevitably impinge upon the extent of the obligation not to derogate. Express terms will obviously play a part, possibly a decisive part, in determining whether a particular act or omission constitutes a derogation. An express term should, if possible, be construed so as to be consistent with what Hart J. called 'the irreducible minimum' implicit in the grant itself. However, as he went on to say, a covenant relied on by the landlord 'if construed as ousting the doctrine in its entirety is repugnant…and should itself be rejected in its entirety': see Petra Investments Ltd v. Jeffrey Rogers plc [2000] L&TR 451 at 471.*
>
> *6. When considering a claim based upon derogation from grant, one has to take into account not only the terms of the lease, but also the surrounding circumstances at the date of the grant as known to the parties….*
>
> *7. One test which is often helpful to apply where the act complained of is the landlord's act or omission on adjoining land is whether the act or omission has caused the demised premises to become unfit or substantially less fit than the purpose for which they were let….*
>
> *8. However, even that formulation, though helpful, may in many cases be too generous to the tenant. Thus permitting a competing business to be run from a next-door property was held not to be derogation from grant, see Port v. Griffith [1938] 4 All ER 295, but compare Oceanic Village Ltd v. Shirayama Shokusan Co Ltd [[2001] EGCS 20]….*
>
> *9. The circumstances as they were at the date of the grant of the lease are very important…..*
>
> *10. However, given that a lease is essentially prospective in operation, the central issue, where the complaint is of activities on the neighbouring premises owned by the landlord, is not merely 'the use to which the adjoining premises are put at the date of the tenancy', but also 'the use to which they may reasonably be expected to be put in the future', per Lord Millet at 468] in Southwark [London Borough Council v. Mills [1999] 4 All ER 449]….*
>
> *11. When assessing what the parties to a contract actually or must have contemplated, one should focus upon facts known to both parties and statements and communications between them. A fact that could only have been known to one party could not, save in very unusual circumstances, be a legitimate part of the factual matrix. A thought locked away in the mind of the parties, or even perhaps of both parties, cannot normally be a relevant factor when assessing the parties' understanding. In English law, at any rate, contract is concerned with communication as well as mutuality". [Emphasis added].*

71. 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.

72. Before turning to a consideration of the facts at hand to see whether such circumstances present in the within proceedings as to constitute a derogation from grant, the court pauses briefly to consider one further decision of passing interest to which the court was referred, in a case that bears some factual resemblance to the circumstances now before this Court. Thus in *Dunnes Stores (Bangor) Limited v. New River Trustee 11 Limited and Anor* [2015] NICh 7, the plaintiff sought from the High Court of Northern Ireland injunctive relief restraining the landlord from carrying out development on adjoining property, pleading, *inter alia*, that the said development in its entirety would amount to a derogation from grant by the defendants. Refusing the interlocutory injunction sought, Deeny J. referring, at 16, to the factors that informed his discretion in this regard stated that one factor, though "*of lesser importance*" was the fact that "*any unquantifiable loss to the plaintiff is mitigated by their newly acquired right to have direct access from and egress to the car park*", a point which might be contended to be consistent with the '*rising tide carries all boats*' logic which was aired at the hearing of the within application.

(iii) Factual Evidence

73. As mentioned above, the evidence of Dunnes' witnesses as to any detriment that Dunnes allegedly will suffer by virtue of the proposed development was strikingly weak. In fact Dunnes has adduced no factual evidence of detriment that will be occasioned to it as a consequence of the proposed development. It will be recalled that Dunnes' only witness as to fact, Mr Druker, was quite frank in this regard (Day 4, p.50), stating that he was only offering an opinion when asked as to the facts on which he based his suggestion that the proposed development will affect Dunnes' business, later stating that "*I can't give you the facts because it hasn't, it hasn't occurred*." Likewise, Mr Markey indicated (Day 5, p.40) that he had not adduced any empirical evidence to support the conclusions in his expert report. 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-storey 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 un-contradicted evidence before the court that customers will instead avail of the South, West and East surface car-parks, as well as the existing multi-storey car park. Mr Druker was questioned on this aspect of matters (Day 4, p.37):

> "*Counsel – …That means that even after the removal of the 289 spaces*
>
> *there are still going to be a very, very substantial number of surface car park spaces in the centre, isn't that correct?*
>
> *Mr Druker – Yes.*
>
> *…*
>
> *Counsel – So whilst some of the northern spaces, surface spaces will be gone, they will be replaced with a very substantial number in the multi-storey and with plenty of surface car parking available, isn't that correct?*
>
> *Mr Druker – That is correct."*

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. The court turns now to that evidence.

75. Existing car parking arrangements. There is no direct access from Dunnes demised premises into the Northern Car Park Area. Persons arriving in the Northern Car Park Area may, however, fetch trolleys from the Northern Car Park Area and tread through the Centre, past other shops, into Dunnes. There is also a facility whereby trolleys left in the car park by Dunnes' customers are returned by a third-party contractor to a trolley-line inside the Centre by way of a dedicated door; this access-point will be preserved. In his oral testimony, Mr Hamill suggested (Day 1, p.66) that the Northern Car Park Area "*is not really fit for purpose at all*", adding "*I'm not sure why huge reliance is placed on 289 spaces* [in the Northern Car Park Area]….*There are two thousand at least other spaces in the shopping centre, 400 of which are in the current multi-storey car park, and there's absolutely loads of surface car parking to facilitate every shopper and every unit in the shopping centre*." Mr Millward indicates in his expert report, at p.8, that only 31 per cent of all trolleys exiting the Centre exit into the Northern Car Park Area, and some 85 per cent of vehicles parked in the Northern Car Park Area are not engaged in a shopping trip that entails the use of a shopping trolley. In his oral evidence, Mr Millward indicated (Day 2, p.146) that a mere 1 in 6 cars in the Northern Car Park attracts a trolley. When it comes to whether shoppers at Dunnes' grocery store have a preference for the northern or southern car parks, Mr Millward, as mentioned previously above, indicated as follows in his oral testimony (Day 3, p.6):

> *"There's Level 2 North which is the focus of Dunnes' concerns, the pace distance was 155 paces, taking 94 seconds. The distance to the south was 224 paces, taking 135 seconds. However, I think this is opportune as a moment to reiterate… that my evidence from the Pavilions in which the typical Dunnes visitor is visiting 2.9 other shops and purchasing at 2.6 other shops, we're not talking about engaging with Dunnes in isolation, the consumer is engaging with the totality of the retail food and beverage and services mix in the shopping centre. And so, those journeys may originate in Dunnes but we know that those consumers will very likely be availing themselves of other experiences. So it is not a journey that is made in isolation. It is very likely that people making the journey both to the north and the south, indeed the Level 3 West and the Level 1 East car parks will be doing other shopping or eating or drinking activity. But the journey to the south involves 224 paces and 135 seconds."*

76. Construction phase parking arrangements. During the entirety of the proposed development the plaintiffs plan to have a pedestrian entrance at all times to the northern entrance. Moreover, it is their intent to complete the multi-storey car park first, in about 14 months, so that it can be opened to facilitate people who wish to park in that area. Mr Millward, in his oral testimony (Day 4, p.6), confirmed that there would be a significant number of parking spaces – in the region of 26,000 hourly parking slots per day – otherwise available to Centre-users even while the Northern Car Park Area is closed.

77. Post-development parking arrangements. As mentioned previously above, Mr Markey, in the course of his oral testimony, indicated (Day 5, p.19) 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-storey 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. Per Mr Hamill (Day 1, p.98):

> *"The lifts, the intent of the lifts is that they are airport-style lifts. So those very large lifts that you see in Terminal 2 in Dublin Airport. And every level of the car park will exit only onto Level 2 which will push all the shoppers who park in this car park into that Level 2, which is the premier level in the shopping centre, out through a three-metre wide retail-focused corridor into a ten-metre wide mall which leads directly into the current North Mall in a seamless way, although the buildings are not connected."*

78. Per Mr Gallagher (Day 2, p.12):

> *"The lifts, lift sizes are generous 21 persons lifts….[What has been done thus far] is known as a scheme design. There is a detailed design phase to go through where we do a thorough analysis and we would get in experts. The experts we've used in the past on shopping centres is a UK firm called Dunbar & Boardman and they're recognised specialists. What we get them to do is….[a] lift vehicle management study….So if there is a requirement for these lifts to go greater…the Centre owners are about the success of the shopping centre, [and] we'll absolutely adopt that. That comes on at detailed design stage, not a scheme design stage….[F]rom our design knowledge to date…we believe this [the current proposed plan] is adequate, but if it's proven through analysis that it's required to be more, and a lot of this analysis will take part in discussions with the anchor stores".*

79. Asked if a variation in lift size would require fresh planning permission, Mr Gallagher indicated that it was an immaterial, internal change that would not disadvantage a third party and so would not require fresh permission.

80. Commercial benefits of development. In his expert report, Mr Millward concludes, *inter alia*, at 9:

> *"As a result of my analysis and in the context of my experience as a retail consultant I conclude…*
>
> *a. That there will be no material detriment to Dunnes trading arising from the increased distance that trolley exits from Level 2 North will have to navigate to reach the new multi-storey car park*
>
> *b. That on the contrary, there will be a very considerable detriment to Dunnes trade and to the trade of every other tenant of The Square in the event that the Landlords' proposed development cannot proceed*
>
> *c. That far from causing a detriment to customer experience as claimed by Dunnes, the new improved shopping centre will create a considerable enhancement of that experience".*

81. Mr Hamill indicated in his oral testimony (Day 1, p.104) that Dunnes will not lose business following the development. And Mr Markey indicated (Day 5, p.27) that his contrary view that the development would have a 'knock-on' effect was "*not an expert opinion*". 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 (Day 5, pp.42-44) that the nearest Aldi has underground parking only and no surface car-park. And, when asked a few questions by the court (Day 5, pp.68-69), Mr Markey indicated that the proposed improvements should rebound to the benefit of all tenants. Mr Hamill (Day 1, p.58) indicated that while the Centre "as it currently stands is doing okay", it needs to be "*future-proofed*", stating: "*It sits along the M50 access, or* [as it] *is commonly called, the necklace of shopping centres which stretch from North Dublin, The Pavilions, to South Dublin, Dundrum. It competes on various levels with each one of…Liffey Valley, Blanchardstown, The Pavilions and Dundrum but cannot be future-proofed without having the ability to attract branded MSU-type traders and by having another generous-sized anchor store for comparison shopping*."

(iv) Conclusion as to derogation from grant.

82. Having regard to the above-mentioned legal principles and to the factual evidence presented at trial, the court does not accept that there may or will be any derogation from grant if the proposed development proceeds as now planned.

XV. The Revocation Notice

83. It will be recalled that a revocation notice in respect of the licence was served on Dunnes on 29th October, 2015. In its counterclaim, Dunnes contends that this notice is ineffective. 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. 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 cl.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. The court has been referred by the plaintiffs in this regard to the decision of the House of Lords in *Winter Garden Productions Limited v. Millennium Theatre* [1948] A.C. 173. However, the court does not see that *Winter Garden* assists the plaintiffs in converting the irrevocable into the revocable. In *Winter Garden*, there was no provision in the relevant licence that it was terminable and a declaration was sought that, *inter alia*, it was not therefore revocable. The House of Lords found that the licence was revocable. 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.

XVI. Easement by Prescription

84. In 2016, Dunnes claimed for the first time that it has acquired a right of parking in the Northern Car Park Area as an easement by prescription. The old forms of prescription under common law or lost modern grant were abolished by s.34 of the Land and Conveyancing Reform Act 2009; however, Dunnes claims its easement under s.38(b) of the Act of 2009 which preserves the right to claim a prescriptive period under the previous legal regime for a period of up to 12 years from 2009.

85. *Gale on Easements* (19th ed.) defines prescription, at para. 4-01, as "*a title acquired by use or enjoyment had during the time and in the manner prescribed by law*". Fundamentally, prescription arises from acquiescence. As Lindley L.J. noted in *Dalton v. Angus* (1881) 6 App Cas 740, 773, a case concerned with the acquisition of a right to lateral support from adjoining land, "[*T]he whole law of prescription and the whole law which governs the presumption of inference of a grant or covenant rests upon acquiescence….It becomes then of the highest importance to consider of what ingredients acquiescence consists*". The critical ingredient is user as of right, a concept elaborated upon by Parke B. almost two centuries ago in *Bright v. Walker* (1834) 1 Cr M&R 211, a case concerned with a claim to a right of way over land in the possession of a lessee, and re-visited more recently by the High Court in *Zopitar Limited v. Jacob* [2015] IEHC 790, another case concerned with an unsuccessfully contended for right of way, where Gilligan J. stated, at paras. 81–82:

> *"81.…'User as of right' means without force, secrecy, and without oral or written consent of the servient owner, or, as it is often put, nec vi, nec clam, nec precario.*

82. The important question is whether the use would suggest to a reasonably careful and prudent owner of the land that a casual use only of the land was being made dependant for its continuance upon the tolerance and good nature of such servient owner, or would it put such servient owner on notice that an actual right of way was being asserted. It cannot therefore be secret, clandestine or surreptitious. The use also cannot be forced upon the servient owner, for prescription theory demands acquiescence in order for a right to be established. Finally, for the Court to be satisfied that there has been acquiescence to the establishment of a right, the necessary use cannot be referable to a consent, permission or licence. It cannot be precatory, in the sense of being precarious, that is, subject to the will of the servient owner and capable of being interrupted. The determination as to whether a case falls on either side of the acquiescence/toleration divide depends on its particular facts."

86. Among the other cases to which the court has been referred in this regard are *The Leopardstown Club Limited v. Templeville Developments Limited* [2013] IEHC 526, *Walsh v. Sligo County Council* [2013] IESC 48, two recent decisions of the English Superior Courts in *Lynn Shellfish Limited v. Loose* [2016] UKSC 14 and *Winterburn v. Bennett* [2016] EWCA 482, and the long-ago decision of the House of Lords in *Gardner v. Hodgson's Kingstown Brewery* [1903] AC 229.

87. In *Leopardstown Club*, a case which involved a variety of issues, including alleged breaches of rights of way and to adverse possession of certain land, Charleton J. observed as follows, at 20, under the heading "*Rights of way*":

"Consent is completely incompatible with prescriptive rights unless that consent has been given so far in the past as to be rendered irrelevant….Assertion of rights based on permission is untenable….What is clear is that the essential quality of prescriptive rights must arise by reference to right and not by reference to permission. A user giving right to prescriptive rights must be without force, without deception and cannot be based on permission from the owner of the land, or as early Norman French puts it nec vi, nec clam, nec precario".

88. This Court respectfully inclines to the view that a known consent even if given in the long-distant past does remain relevant. Even so, and without prejudice to the foregoing, a consent given in 1989 or 1990 is clearly not in any event "*given so far in the past as to be rendered irrelevant*". But the critical limb of Charleton J.'s observations clearly holds true: *"[T]he essential quality of prescriptive rights must arise by reference to right and not by reference to permission.*

89. In *Walsh*, the well-known case concerning alleged public rights of way affecting the avenues of the recently restored Lissadell Estate, the Supreme Court, at para. 93, made clear that once a licence is given to use land no claim to prescriptive rights can arise:

"User by permission of the owner is not user as of right. At the same time, user without express permission is not necessarily user as of right. Whether particular acts of user are to be described as being as of right requires account to be taken of all the circumstances. Acts may be tolerated or indulged by a landowner vis-à-vis his neighbours without being considered to be the exercise of a right."

90. In *Lynn Shellfish*, which featured a dispute concerning the proper extent of a private shellfish fishery, Lord Neuberger, at para. 37 of his judgment, re-affirms that the quality of use required to establish a prescriptive right to a profit or use "*is embodied in the expressions, which have been held to be synonymous in their meaning and effect, namely 'as of right' and nec vi, nec clam, nec precario (i.e. not secretly, not by force, and not with permission*)." Lord Neuberger also refers favourably to the helpful dictum of Lord Walker in *R (Lewis) v. Redcar and Cleveland Borough Council* (No 2) [2010] 2 AC 70, para. 30, that persons claiming to have acquired a right by prescription "*must by their conduct bring home to the landowner that a right is being asserted against him, so that the landowner has to choose between warning the trespassers off, or eventually finding that they have established the asserted right against him*."

91. In *Winterburn v. Bennett* [2016] EWCA 482, a case that has no little resonance in the context of the within proceedings where the plaintiffs maintain the car-parks, including the provision of signage and lighting in return for an annual service charge paid by Dunnes, the Court of Appeal of England and Wales, confronted with a case of unauthorised parking, held that the owner's continued objection to the unauthorised parking sufficed to defeat a claim of parking as of right. In *Gardner*, the payment of a service charge (and such a charge is payable and paid by Dunnes here) was held fatal to the prescriptive right claimed there. Per Lord Halsbury, at 231:

"[W]hat is conclusive, to my mind, against the appellant is that during the whole period during which this convenient access was used a sum of 15s a year was regularly paid in respect of the user of the way.

One of the most common modes of preventing such a user growing into a right is to insist upon a small periodical payment, and if such evidence as we have here were permitted to be evidence of a right, not only to the user upon terms of payment, but of a right to make the payment and continue the user in perpetuity, it would be a very formidable innovation indeed."

92. Under the E&G Lease and the F Lease Dunnes has an express licence (permission) the effect of which is that its customers can park in the Northern Car Park Area. So no question of user without permission can arise that would yield an easement by prescription. As Bland on Easements (3rd ed.) notes, at para. 1-87, "[*P]ermission is fatal to a claim of prescription*". As Lord Lindley noted in Gardner, at 240 "*The common law doctrine is that all prescription presupposes a grant. But if the grant is proved and its terms are known, prescription has no place*." Applying Lord Walker's test in Lewis, what conduct has been brought home by Dunnes to the plaintiffs that a right is being asserted against them, so that the plaintiffs have had to choose between asserting their rights, or finding that those rights have been established against them? There has been no such conduct. Dunnes' claim to easement by prescription must and does fail.

XVII. Conclusion

93. As mentioned above, this case turns on four key questions. These are stated and answered below by reference to the foregoing analysis:

- first, 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?

The court's answer to this question is 'yes'.

- second, does the 1991 Indenture have the effect that Dunnes enjoy an irrevocable right for its customers to park on the Northern Car Park Area?

The court's answer to this question is 'no'.

- third, 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?

The court's answer to this question is 'no'.

- fourth, does Dunnes have an easement of right of way and parking by prescription over the Northern Car Park Area?

The court's answer to this question is 'no'.

94. Having regard to the answers to the questions just posed and to all of the foregoing analysis, the court respectfully declines to grant Dunnes any of the declaratory reliefs that it seeks at this time. Of the declaratory reliefs sought of it at this time by the plaintiffs, the court recites below the declaratory reliefs sought and whether it will grant them:

(1) A declaration that Dunnes has no right to use the Agreed Lands or any part thereof (whether for car parking or otherwise) beyond the rights expressly provided for in the E&G Lease.

The court will grant a declaration that Dunnes has no right to use, whether by way of easement or prescription or otherwise, the Agreed Lands or any part thereof (whether for car parking or otherwise) beyond the rights expressly provided for in the E&G Lease and the F Lease.

(2) A declaration that Dunnes has no right by way of easement, by prescription or any other entitlement to use the Agreed Lands or any part thereof (whether for car parking or otherwise) arising from the F Lease or by any assignment of the F Lease to Dunnes.

The court declines to grant this declaration given the form of declaration that it has indicated at (1) that it is satisfied to grant.

(3) A declaration that the purported assignment of licences contained in the 1991 Indenture is null and void and of no effect.

The court will grant this declaration.

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

This form of declaration is redundant in light of the declaration to be granted under (3).

(5) Further or in the alternative, the plaintiffs claim 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 Schedule thereof.

This form of declaration is redundant in light of the declaration to be granted under (3).

(6) Without prejudice to (2), a declaration that any right of Dunnes to use the Agreed Lands or any part thereof (whether for car parking or otherwise) beyond the rights expressly provided for in the E&G Lease is determinable on the giving of notice and the period of notice contained in the letter from the Plaintiff's solicitors dated 29 October 2015 was valid and sufficient.

This declaration is declined.