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Judgment: approved by the Court for handing down (subject to editorial corrections) | *Delivered:* **10/05/12**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

CHANCERY DIVISION

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2010 No 085194

IN THE MATTER OF AN INDENTURE OF LEASE DATED 22 JUNE 2005 AND MADE BETWEEN LIDL NORTHERN IRELAND GmbH OF THE FIRST PART AND JERMON LIMITED OF THE SECOND PART

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BETWEEN:

CALLENDER STREET TRUSTEES LIMITED AS TRUSTEES OF THE MKB PROPERTY UNIT TRUST

Plaintiff`;

And

LIDL NORTHERN IRELAND GmbH

Defendant.

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DEENY J

[1] In 2005 the defendant Lidl Northern Ireland GmbH ("Lidl") was the owner of retail premises at Moira Road, Lisburn. It had acquired these and was proposing to operate one of its own supermarkets in the premises. Lidl agreed to lease Unit 2, adjoining their premises, to Jermon Limited. A capital sum was paid on the execution of the lease with a peppercorn rent only to follow. Under clause 1.1 of the third schedule to the lease the lessee covenanted, further to clause 3.18 of the Lease of 22 June 2005:-

> "not to use or permit the Demised Premises or any part thereof to be used for any of the Prohibited Uses."

The title of the lessee has passed to the plaintiffs herein.
They are desirous of sub leasing the unit to T J Morris Limited trading as Home Bargains. On or around 26 January 2010 the plaintiff agreed to 'Heads of Terms' for a sub lease of the Demised Premises with T J Morris Limited. They then sought confirmation from the defendant's solicitors that there was no objection to that course based on the lease by letter of 24 May 2010. On 15 June 2010 Messrs C & H Jefferson, who were acting in this matter for Lidl, replied saying that their client "having given careful consideration to the matter, is of the opinion that the proposed user of T J Morris Limited does conflict with the prohibited user in the head lease of 22 June 2005. Consequently we are instructed to reserve its rights in respect of any action for breach of covenant if the letting to T J Morris proceeds on the terms proposed." Following a further exchange of correspondence an Originating Summons was then issued on 1 July 2010 seeking a declaration that, on the true constructions of the lease it did not prohibit the following user, "namely, use by T J Morris Limited of the Demised Premises as a retail store falling within Class A1 of the Town and Country Planning (Use Classes) (NI) Order 1987 (sic) to operate as a variety store retailing a variety of products, with 30% food, and alcohol restricted to no more than 2% of the total racking in the demised premises." In fact there was no such Order in 1987. The 1989 Use Classes Order was revoked on the coming into operation of the Planning (Use Classes) Order (NI) 2004, on the 29th November 2004.

[2] The matter was heard by me on 19 and 20 April 2012. Mr Stephen Shaw QC appeared with Mr William Gowdy for the plaintiff. Mr Stewart Beattie QC appeared with Mr Craig Dunford for the defendant. I am obliged to counsel for their helpful written and oral submissions.

[3] The prohibited uses clause is to be found in clause 1.1 of the lease of 22 June 2005 and reads as follows:

"The Prohibited Uses shall mean

> (a) as a supermarket for the sale of discounted foods and in particular, without prejudice to the generality of the foregoing, the use of the Demised Premises or any part of it by Aldi Stores Limited or any company that is a member of the same group as Aldi Stores Limited as defined in Article 31 of the Business Tenancies (NI) Order 1996 Provided Always however that this prohibition will not apply to other food retailers such as Somerfields, Waitrose, Safeway, William Morrison, J Sainsbury, Tesco, Iceland, Mace, Spar, Centra, Supervalu, Cost Cutter, Coop, Marks and

> Spencer, Asda and Dunnes Stores and further that this prohibition will not apply to new retailers with similar styles to those food retailers listed in the proviso above."

The clause then went on to prohibit the use of the premises as a fun fair, betting office etc. At (h) in the same clause there is an express prohibition against "any use by Aldi Stores Limited or any associated or group company". That would appear to be tautologous in the light of the prohibition in (a). Mr Shaw says it shows that the purpose of the matter was really to prevent Aldi, who are a major rival of Lidl, from occupying the premises. But looking at the clause overall it clearly seeks to exclude a supermarket which is similar to Aldi rather than "similar" to the 16 named retailers.

[4] As indicated in the user clause the proposed sub lessee seeks they only want to use 30%, presumably by floor space, for food sales. (It matters little here whether they mean floor-space or "racking"; their witness was uncertain by what measurement.) In the course of the hearing two points were clarified. That 30% includes the 2% for alcohol. Furthermore after Mr Loughrey conceded to Mr Beattie QC in cross examination that there was nothing in the planning permission to stop the sub lessee from selling more than 30% food once it obtained a sub lease, Mr Shaw said the sub lessee would accept a restriction on that amount as a covenant in any sub lease. He submitted that that, coupled with an express reference in any judgment of the court against any larger share for food, would be an effective protection against the sub lessee seeking a waiver of the covenant after 21 years. The proposed sub lease is only 15 years but the Business Tenancies (NI) Order 1996 would apply and could extend that. I accept that submission of Mr Shaw.

[5] It was said from the beginning in the affidavit of Gillian Steele on behalf of the Plaintiffs that Home Bargains is "a discount retailer, but is not solely or predominantly a retailer of discounted food". It was accepted at the hearing that it would not only be selling food in unit 2 but that the food they sold would indeed be discounted. I need not therefore set out the extensive evidence of the successful discounting by Home Bargains – it is a rapidly growing and successful format in Great Britain although it only arrived in Northern Ireland in 2010. Mr Michael Burroughs, town planner for Lidl, had a survey carried out in Carrickfergus as that town has supermarkets or stores operated by Home Bargains, Lidl and Tesco. It showed that of 22 foods listed at paragraph 50 of his proof of evidence Tesco was cheapest in one only, Lidl in five and Home Bargains in sixteen. It is clear, therefore, that it is a retailer of discounted foods.

[6] Mr Shaw also accepted in opening the matter before me that Home Bargains was indeed self service and selling food, both characteristics of a supermarket but, importantly he submitted, the selling of discounted food was not its core or primary function and therefore it was not a supermarket as specified in the lease. In his closing submissions Mr Shaw put a further gloss on that by emphasising the word

"for" after supermarket in the opening words of paragraph (a). He was stressing that to offend against the prohibited use clause the sub lessee's premises would have to be "a supermarket for the sale of discounted foods" which he submitted it was not. As Mr Beattie had already closed, with brevity, as did Mr Shaw, at the invitation of the court, I did not hear his response. But I imagine he would say that there was nothing in those words that prevented a prohibition on a supermarket for the sale of discounted foods which was for the sale of other goods as well, if that fell within the meaning of the supermarket. Given that Home Bargains is not a member of the same group as Aldi Stores Limited nor one of the sixteen retailers named in (a) the issue for the court is whether it is "a supermarket for the sale of discounted goods" prohibited by the clause. The defendant's counsel point out that the plaintiff did not seek at any time to argue that Home Bargains could bring itself within the closing words of the proviso in (a) i.e. "this prohibition will not apply to new retailers with similar trading styles to those food retailers listed in the proviso above." Home Bargains was certainly new to Northern Ireland after 2005. The fact that it does not assert through the plaintiff that it has a similar trading style to any of sixteen named food retailers who were present in Northern Ireland in 2005 might indeed reinforce a point discussed below i.e. the dynamic nature of retailing. Mr Burroughs said the sixteen were all the multiple food retailers in Northern Ireland in 2005, save a couple of locally based firms with few outlets i.e. Curleys, or Longs in the north-west.

[7] In support of their case the plaintiffs called two witnesses. The first of these was Mr William McCombe MRICS of McCombe Pierce. In opening the case Mr Shaw acknowledged that McCombe Pierce were actually the letting agents for the plaintiffs at this property but he said that Mr McCombe was not personally involved. He had only realised the former role after completing his proof of evidence. His proof of evidence was dated 5 April 2012 and served on the defendant's solicitors on or about 11 April, without the leave of the court. To its credit the defendant did not object but obtained a responding report from Mr Kenneth Crothers FRICS. Mr McCombe said that he had experience working in this field especially with Tesco who had supermarkets ranging from 3,000 square feet to 113,000 square feet. He had to correct his proof in saying that the two Home Bargain units which he visited in Northern Ireland did in fact provide trollies to their customers and not only baskets as he had said at 6.1(b) of his proof.

[8] He was cross examined by Mr Beattie. He acknowledged he was the senior partner in the firm with three other partners but he had forgotten that they were the letting agents as he did not do it himself. But Mr Beattie then put to him a document issued by DTZ McCombe Pierce relating to this very unit which invited interested parties to contact either Mr McCombe or a Mr McCauley for further details, providing Mr McCombe's email address among other information. Mr McCombe did not know why his name was there. He admitted that his firm would be remunerated on a successful letting and that as a general rule that would be a percentage of the rent. The proposed rent here was £83,000 per annum. He admitted that it did appear that he had a vested interest in the outcome of the litigation. He further admitted that he had not properly checked on this before accepting

instructions. He further admitted that the declaration which he signed should have included a reference to his firm and its hope of obtaining an agency fee.

[9] Pausing there I would point out that his declaration is not in the correct form for a High Court witness as laid down by Practice Direction 11 of 2003. Clause 8 of that requires the witness to state the following:

> "I confirm that I have not entered into any arrangement whereby the amount or payment of my fees, charges or expenses is any way dependent upon the outcome of this case".

Clearly he could not comply with that in a proper declaration in this case. Finally he admitted that his report consisted of his personal views rather than the citation of relevant professional documents in the public domain. In those circumstances there seemed no point in Mr Beattie cross examining him further. I have myself adverted to the duties of an expert witness in Hayes v. McGuigan (No 1) [2011] NI Ch 6. I remain of the view expressed there that the duty of an expert to be independent would be undermined if he had some financial interest in the outcome of the case. Clearly Mr McCombe, as a senior partner in the firm, desirous of letting this property for a fee, has indeed such an interest.

[10] Subsequently, and unsatisfactorily, Mr Eamon Loughrey, town planner for the plaintiffs, was asked if he agreed with the views of Mr McCombe and he said he did but he did not condescend to particulars. Put like that I have looked again at the proof of Mr McCombe and his evidence. He points out, which is not denied, that the Home Bargains units in Northern Ireland do not sell fresh foods or frozen foods with other dairy products. Their sales are confined to sales at ambient temperature. But this point it seems to me is of no assistance to the plaintiffs. Neither law nor planning policy nor the lease could prevent the lessee of this property, once lawfully in possession, from choosing to sell food from freezers or fresh food if it so chose. The fact that this is Home Bargain's trading style at present does not necessarily mean that it would accord with their retail approach in five or ten years' time.

[11] Finally, on this rather unfortunate topic of the witness, I observe that the plaintiffs are the trustees of the MKB Property Unit Trust. I observe that the solicitors for the plaintiffs are MKB Russells. If that is not a mere coincidence it is a little surprising that the plaintiffs themselves, and their solicitors were not aware that McCombe Pierce were in fact the letting agents for the property and yet they proceeded to instruct their senior partner. I note from a letter at page 55 of the bundle that McCombe Pierce were the "Landlord's Project Managers" on this project as well as agents which makes it all the more puzzling. That letter is in the exhibits to the Plaintiff's solicitor's affidavit. (Authorial underlining throughout).

[12] The plaintiffs called Mr Eamon Loughrey, a partner at DPP and a town planner with 13 years' experience in planning and licencing. He had actually advised Lidl regarding this particular development in 2001 when he worked for Michael

Burroughs Associates. He had acted for them on numerous occasions. In his opinion "Home Bargains is not a supermarket. It specialises in non convenience goods, convenience goods are secondary in its retail offer." His principal support for that view was to the effect that the "definition of a supermarket is set out in Planning Policy Statement 5, Retailing in Town Centres, Glossary of Terms as follows:

> "Supermarket – Self service store selling mainly food, with a gross retail floor space of less than 2,500 square metres, often with its own car parking."

One notes that the unit here is of 919 square metres. The glossary does not provide a minimum floor space. Mr McCombe referred to Tesco operating supermarkets from 3,000 square feet upwards and the case law gives examples smaller than that.

[13] It can be seen therefore that Home Bargains can purport not to be a supermarket because it is not "selling mainly food". He went on to point out that it did not sell fresh or frozen foods but a limited range of branded food lines (see page 71 of the bundle). However, as I say at [10] above, it is clear that if a lawful sub lessee here, it could not be restricted to the current range of foods, sweets, etc it sells and nor is it offering to be so restricted. The potential for changing format is illustrated by the evidence of Mr Burroughs that the Home Bargains store at Rutherglen is the anchor supermarket for a shopping centre with four of its nine aisles devoted to food, more than proposed here.

[14] Mr Loughrey also relied on the Competition Commission defining Lidl, Aldi and Netto as "Limited Assortment Discounters" (LADs) but not including Home Bargains in that category. In the event, however, it transpired that the final version of the report did include Home Bargains in that category with Lidl and Aldi. He quoted Retail Rankings as describing Home Bargains as a "mixed goods retailer" in a different category to Lidl. He quoted Verdict, another reputable retailing commentator, as classifying Lidl, Aldi and Netto as "hard discounters" but excluding Home Bargains from that category. He pointed out that Lidl's floor space is given over to food, etc to the extent of some 71% and making it almost a mirror image of Home Bargains where the proportions are reversed.

[15] Rather unusually he put in a supplementary report after he received the report of Michael Burroughs for Lidl. He referred to protracted correspondence relating to a certificate of lawful use from the department in connection with a Home Bargains application at Longwood Business Park. Initially they seemed to view it as a supermarket but in his submission came to a different view although he acknowledged that the phrase mixed retailing does not seem to have been used. It seems to me the views formed in individual cases by individual planners or even a team thereof in 2010 is of very limited assistance to me in construing the clause agreed between the parties in 2005. This would cover his references to a planning permission at Coleraine in 2011 also. Mr Burroughs contested these points in a persuasive way in any event. Mr Loughrey acknowledged his "administrative error"

in failing to draw attention to the footnote which classed Home Bargains with Lidl and Aldi as LADs.

[16] I turn to the considerable weight of material contrary to Mr Loughrey's views either conceded by him in cross examination or established to the satisfaction of the court by the evidence of Mr Michael Burroughs and Mr Kenneth Crothers and the documents cited by them. The first point is one, however, for which I must take responsibility. I pointed out that what is in PPS 5 is a Glossary of terms and that a glossary is a collection of glosses or explanations rather than a set of definitions; it is more descriptive than prescriptive. The Glossary of Terms concludes with the following paragraph in bold type:-

> "**Retailing is a dynamic industry and new forms of retailing may rapidly evolve which are inadequately described by current conventional technology**."

I have to ask whether that last word is in fact meant to be terminology which would make more sense. In any event the experts do not disagree with that statement about retailing and the defendant says that Home Bargains is indeed an example of a new form of retailing which has since evolved and which is "inadequately described" in the glossary description on the previous page.

[17] I observe for completeness that supermarket is not defined as such in the Planning (Use Classes) Order (NI) 2004 nor it appears in any other statutory provision. But it was pointed out that it is defined in the important report of the Competition Commission of the United Kingdom entitled "The Supply of Groceries in the UK Market: Investigation" – 30 April 2008. Mr Burroughs exhibits the glossary from this report to his proof and one finds the following description at page 218 of the bundle:-

> "Store where the space devoted to the retail sale of groceries exceeds 280 square metres and which stocks a range of products from more than 15 product categories."

Groceries are described at page 210 as: "Food (other than that sold for consumption in the store), pet food, drinks (alcoholic and non alcoholic), cleaning products, toiletries and household goods" followed by a list of excluded products such as petrol, clothing, etc. It can be seen immediately that on this definition Home Bargains is indeed a supermarket because its retail sale of groceries i.e. food plus other items will comfortably exceed 30% approximately of a 919 square metre store, given that food alone is circa 30%.

[18] While Mr Loughrey is quite right in saying that PPS 5 is the current planning document of relevance in Northern Ireland I am obliged to bear several other points in mind. First, of all, as he accepted, it is a guidance document by its nature. Secondly, a draft revised PPS 5 was published by the DOE in 2006 indicating, as Mr Burroughs pointed out, that the earlier was ready for replacement or out-dated. The

draft does not define a supermarket. Thirdly, England, Scotland and Wales have recently moved to a situation where there is no definition of a supermarket in their current documents. I do not really think this last point is a point against the plaintiffs as the reason for the deletion of the definition of a supermarket is not necessarily because of the dynamic nature of retailing but because both the UK and Scottish governments are keen to reduce the number of planning policies. Fourthly, Mr Beattie pointed out that the PPS 5 glossary description of mixed retailing, on which Mr Loughrey says Home Bargains falls under did not actually exclude supermarkets but only "free standing food supermarkets and food super stores". The witness also accepted in cross examination that there was no LAD which was not a supermarket. He had earlier accepted that Home Bargains was now classed as an LAD.

[19] Mr Mark Taggart, solicitor for Lidl, in his affidavit, exhibited an extract from The Grocer which Mr Loughrey accepted was a highly regarded and reputable publication. Its Grocer Gold Awards for 2010 for Discounter of the Year went to Home Bargains:-

> "T J Morris steps up as Aldi and co fall on hard times. Cut price T J Morris has seized the discounter of the year throne as consumer interest in hard discounters such as Aldi, Lidl and Netto wains."

This can be seen to balance the views of Verdict and Retail Rankings. In cross examination Mr Loughrey said (in agreement with Mr Burroughs' report) that all or virtually all supermarkets sell items as well as food. I see, at page 260 of the bundle that he had earlier agreed in the minute of the expert's meeting that "all supermarkets sell a mix of food and non-food goods." I accept the evidence of Mr Burroughs that the 16 supermarket operators named in the clause are not discounters, although they do have a variety of trading styles and sizes.

[20] Mr Shaw cross-examined Mr Crothers about the extent to which food would be sold on the floor space of the store. Some of the storage would not be exclusively non food in his opinion, particularly as the food being sold was ambient. Given that Home Bargains wanted 30% and that the store was 10,000 square feet one must assume that about 3,000 square feet would be devoted to sales of food. In his opinion that constituted a supermarket. There was a discussion about the nature of the shop which may or may not be relevant. Clearly Home Bargains is not a one stop shop but as Mr Crothers pointed out it may well sit with a shop which sold fresh and chilled materials or in a road like the Lisburn Road which still had green grocers and butchers etc. to complement the sale of tea, coffee, pasta, cereals, biscuits, tinned foods etc. by a store like Home Bargains. In re-examination he made the important point that Home Bargains had insisted on there being clarification of their right to 30% user for food. Even if it was not the dominant element in their trading style it was clearly one that was very important to them.

[21] The defendants' representatives had trawled the internet extensively. They pointed out that when you looked for a supermarket in various British towns and

cities Home Bargains would come up but I do not think I can place much stress on that. In looking at the material it seems to me that Home Bargains are careful not to describe themselves as supermarkets although their spokesman on 7 April 2010 in talking to the North West Evening Mail was quoted as saying: "People are a lot happier about shopping in discount supermarkets now". The proposed sub-lessee did release a press statement about Hull which said:

> "All of the current employees at Home Bargains on Holderness Road will join the team at the new store, which will replace Lidl in the shopping centre."

[22] Mr Crothers drew attention to the Glossary of Property Terms, compiled by Jones Lang Wooton in association with The Estates Gazette Ltd and South Bank Polytechnic, which was first published in 1989. A second edition of 2004 altered the definition of supermarket, consistent with the PPS 5 warning of the dynamic nature of retailing and consistent with the case being made by the defendant, to describe a supermarket as : "a self-service store offering a wide range of food and groceries." He also pointed out that with very slight amendment the Groceries Market Investigation (Controlled Land) Order 2010 which followed the Competition Commission report defined groceries in almost identical terms as that report, set out above. He was of the opinion, contrary to that of Mr McCombe, that the Home Bargain premises, of which there are now three in Northern Ireland, at least, did meet the essential criteria of supermarkets. They were laid out in aisles in the same way. They had checkouts with conveyor belts. They had trollies and baskets. They sold a wide range of food and groceries as well as other goods. They had the look and feel of a supermarket. My visit to Home Bargains and Lidl stores in Newtownards would bear out his opinion which I prefer to that of Mr McCombe.

[23] I have taken into account the other material to be found in the reports of the witnesses and the oral evidence and the submissions of counsel, even if not expressly referred to.

The law

[24] While there is no express authority on the point of the precise words as such counsel are agreed that there are four cases which are of relevance. The first in time of these is Calabar (Woolwich) Limited v. Tesco [1978] 1 EGLR 113. In Calabar Sir John Pennycuick gave judgment on behalf of the Court of Appeal on 17 May 1977 (the case having been heard on 21 July 1976). The plaintiff sought to prevent Tesco from conducting a freezer centre at certain premises on foot of a covenant. The covenant between the plaintiff and Tesco's predecessors in title was "not to use of permit or suffer the ground floor of the demised premises to be used except for the purposes of a retail shop for the purposes of the lessee's business of a supermarket for the sale of groceries, provisions, garden produce, fresh meat, confectionary, domestic and hardware and toilet requisites and also as ancillary thereto for the sale of such other articles or things as are usually sold by and in supermarkets." Tesco

wanted to use the ground floor as a centre "for the sale of frozen foods, groceries, provisions and freezers" i.e. actual units for domestic use to keep frozen foods; free standing freezers were coming into fashion at the time. The Court of Appeal held they were entitled to do so. Although the self service element was central to the meaning of supermarkets it did not mean that everything had to be sold by way of self service and 15% of sales of these, no doubt substantial, units, did not mean that it was not a supermarket. It is clear that there was no finding that the supermarket had to be predominantly food. The court adopted the evidence of Tesco's witness who was then industrial editor of The Times (who said, inter alia, that "there can be no standard definition of a supermarket") as follows:

> "He deposed that "the word supermarket describes a system of selling within premises. In short it is a principle . . . a supermarket shop is one based on the principle of self service," and he says that the one underlying principle is the sale of goods through self service means."

It is right to say that elsewhere he did say that the first supermarkets were over 2,000 square feet in size.

[25] Sir John Pennycuick was not sure that the word supermarket had passed from being a term which could be defined by experts into a term in common parlance. I agree with my brother Girvan that it is now "more deeply embedded in common parlance" (Lundie below). Clearly the Court took a broad view of "supermarket" to allow it to sell freezers.

[26] The next relevant case is that of Northern Ireland Housing Executive v. Sloan [1984] NI 29, NICA. There the Executive's predecessor had provided some shops for a new housing estate. Each shop operator had an identical lease save for the function of the shop. The butcher and the home baker complained to the Housing Executive that the supermarket was selling goods which it should not sell because it was not permitted to carry on "any trade or business whatever other than that of a supermarket". The lease also provided for the Executive itself to rule on the issue of what could properly be sold; it ruled against the supermarket. Much of the judgment is concerned with whether that was in any way an unlawful ouster of the jurisdiction of the court, which it was found not to be. But Gibson LJ, in delivering the judgment of the court, with which Kelly LJ and Higgins J, agreed said this:

> "As I have earlier observed the first sentence in the covenant gives the defendant a right to carry on the trade or business of a supermarket in the premises. The only limitation on his rights in that regard is provided by the negative provision that he is not to engage in any other trade or business. The scope of

> the business of a supermarket is protean. Its shape and character and the range of goods with which it deals will vary with the size and situation of the premises as well as with a variety of external considerations: and much of the evidence on the trial turned on the question whether certain goods were within or without the proper scope of this particular supermarket. I do not think it necessary to embark upon that quest. Suffice to say, that whatever may be the proper sphere of activity of this shop the first sentence of the covenant permits it and forbids any activity beyond it."

If this definition is not expressly binding on me because to some degree perhaps obiter, it is nevertheless at least of great weight. Indeed Gibson LJ showed prescience in ascribing to a supermarket the qualities of the ancient sea god Proteus who could assume many shapes.

[27] I accept the submission of plaintiff's counsel that Basildon Development Corporation v. Mactro Limited [1986] 1EGLR 137 is a case that although about a "supermarket for the sale of groceries and provisions" turns very much on the particular facts. But the meaning of the word has also been considered by Girvan J in Lundie v. Andrew Millar and Company Limited [1990] NIJB 188. The plaintiff lessor operated a hot food bar close to the demised premises which it had leased to the defendant as a "supermarket and shop for the sale by retail of groceries, green groceries, provisions, fresh meat, frozen foods, barbeque chickens, milk, bread and cakes, toiletries, confectionary items, ice-creams, hardware, tobacco and cigarettes and home bakery and post office". The supermarket had a floor area of some 2500 square feet. The defendant then began to sell hot foods as well which the plaintiff objected to. The court found the defendant was not entitled to sell hot food items in a supermarket other than "barbeque chicken" expressly referred to in the lease. The judge quoted Gibson LJ in NIHE v. Sloan with approval and also Calabar and R v. Malden DC [1998] 1 PLR 90 and concluded:

> "It can be said that a supermarket is a retail store and thus a shop albeit selling goods usually in a self service format though with the possibility of serviced counters."

I think the defendant's counsel are correct in describing this as an identification rather than a definition of a supermarket but it clearly does not assist the plaintiffs.

[28] Considering those authorities in their totality it would not tend to support a view that the word supermarket has been held in the courts to require a predominance of food sales but rather that a supermarket can assume many shapes. The duty before the court is to construe this particular clause. A lease is a species of contract. There is a helpful discussion of the approach to contractual interpretation

in chapter 2 of Lewison on The Interpretation of Contracts (3rd Edition). It is sufficient I think for me to quote from Lord Hoffman's well known dictum in Investors Compensation Scheme v. West Bromwich Building Society [1998] 1 WLR 896:

> "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 at which they were at the time of the contract."

I find it helpful to quote the learned author's first two propositions from that chapter:

> "The interpretation of a written contract involves the ascertainment of the words used by the parties and the determination, subject to any rule of law, of the legal effect of those words.
>
> The object sought to be achieved in interpreting any contract is to ascertain what the mutual intentions of the parties were as to the legal obligation each assumed by the contractual words in which they sought to express them."

[29] In construing the clause I must ascertain objectively the intentions of the parties at the time of the contract. Some of the evidence proffered related to the views taken by planning officials as to Home Bargains when they did come to Northern Ireland in 2010 but, as I said, that can be of little assistance with regard to the intention of the parties in 2005.

Conclusions

[30] A reasonable person looking at this lease in or about 2005 would clearly be able to ascertain what was agreed between the parties. Lidl was a supermarket discounting goods, by means of mass purchase of a limited range of goods and saving on presentation and staffing in its stores. It was content to have any of sixteen named retailers or a supermarket similar in style to those as a neighbour, as it often already did. It was insistent, and the other party to the contract agreed, that it would not have Aldi as its neighbour or another supermarket for the sale of discounted food. The proposed sub lessee here clearly does sell food and it does discount it. The only issue therefore is whether it is a "supermarket for the sale of discount food".

[31] I consider that the description of a supermarket in the glossary to PPS5 of 1996 as a store selling "mainly food" is outweighed by the many other factors set out at paragraphs [15] to [22] above. The most significant of these are:

(i) PPS 5 is a guidance document only, of 1996, and the same glossary states that "new forms of retailing may rapidly evolve"; its draft replacement of 2006 contains no such description;

(ii) the description in the glossary of the authoritative Competition Commission Report of 2008 is quite different and clearly covers the proposed Home Bargains user;

(iii) that same Report puts Home Bargains in the same class of retailers as Lidl and the prohibited Aldi as Limited Assortment Discounters;

(iv) the 2004 edition of The Glossary of Property Terms i.e. the year before this lease, describes supermarket in a way which would again include Home Bargains;

(v) my own observation accords with the professional opinion expressed that Home Bargains looks and feels like a supermarket.

[32] The authorities in the case are also clearly against the plaintiff if not indeed expressly binding on me. They identify the self service nature of a store as a key factor and also the selling of groceries but they do not support a conclusion that to be a supermarket the goods sold have to be predominantly or mainly food.

[33] It should be noticed that the amount of food that the proposed sub lessee insists on being able to sell is going to involve about 3,000 square feet. That brings it within the minima that have been suggested at the hearing of the case before me for a supermarket and accords with at least two of the previous cases on the topic. It is not a case of de minimis sales. If the store were being sub divided and a deep discounting retailer was only going to take 3,000 square feet to sell discounted foods they would offend against the prohibited use clause; the fact that here the proposed retail use will extend beyond that offending use does not render the offending use inoffensive and compliant with the lease of 2005. Lundie, Calabar, the evidence of Mr McCombe and the Competition Commission's 280 square metres for groceries are relevant as to size and helpful to the defendant here.

[34] Home Bargains was not in Northern Ireland in 2005 (let alone 1996 when PPS 5 was published). It is most improbable that it was within the contemplation of the parties at that time. The parties did not choose, as they could have done, to define supermarket in the lease or cross-reference it to PPS 5.

[35] I agree with Gibson LJ that the nature of a supermarket is protean. It is a retail store, smaller than a super store but in excess of 2,000 square feet, which operates very largely on a self-service basis selling groceries, including food, and other goods but within such broad parameters it can vary greatly.

[36] I received a submission from Mr Shaw in closing that I should apply the doctrine contra proferentem in favour of his clients. For convenience I might be permitted to set out paragraph 22 of the judgment in Hollway v. Sarcon (No 177) Limited 2010 NICH 15 where I dealt with this topic:-

> "[22] In addition they rely on the proposition still referred to by lawyers by the concluding words of the Latin maxim 'verba cartarum fortius accipuntur contra proferentem' (Bacon's Maxims Three). A deed or other instrument shall be construed more strongly against the grantor or maker thereof. It is clear that Sarcon was the maker here. The rule applies only in cases of ambiguity and where other rules of construction fail. London and Lancashire Insurance v. Bolands Limited [1924] AC 836, 848; Lindus v. Melrose [1858] 3 H&N 177, 182. I share the view of Eveleigh LJ in The Olympic Brilliance [1982] 2 Lloyds' Rep. 205, CA that the principle was "usually a rule of, if not last, very late resort." This was a view shared by the Court of Appeal in Macy v Quazi The Independent 13/1/1987 and by Auld LJ in Direct Travel Insurance v McGeown [2004] 1 All ER Comm 609. The proper approach is to seek to ascertain the intention of the parties from their contract in its context. If the court is left in a real state of uncertainty as to the correct interpretation due to ambiguity in the language then contra proferentem applies. As Lord Sumner said in London and Lancashire Fire Insurance Co Ltd [1924] AC 836 at 848 it –
>
> "is a principle which depends upon their being some ambiguity that is to say some choice of expression – by those who are responsible for putting forward the clause, which leaves one unable to decide which of two meanings is the right one."

Sir John Pennycuick said in St Edmundsbury v Clark (No 2) [1975] 1 All ER 772, at 780, delivering the judgment of the Court of Appeal in England:

> ".. it is necessary to make clear that this presumption can only come into play if the court finds itself unable on the material before it to reach a sure conclusion on the construction of a reservation. The presumption itself is not a factor to be taken into account in reaching the conclusion.""

[37] In the case before me I am not at the stage of having to rely on the doctrine of contra proferentem or seek assistance from it. I am able to decide which is the right meaning. It seems to me that Home Bargains clearly falls within the definition of a supermarket for the sale of discounted foods. I would observe in any event that I am a little dubious as to whether the doctrine is meant to apply to a situation of this

kind. It cannot be an accident that no less than sixteen different stores have been named in the agreement all of which could be lessees of the unit. Furthermore other units similar in style could also be lessees. This would point to a substantial input from the plaintiff's predecessors in title at the time that the lease was drawn up rather than them having a lease imposed on them as in Hollway v. Sarcon without the opportunity to amend.

[38] In the light therefore of the evidence and of the law as it stands I conclude that the user clause sought by Home Bargains for a sub lease of unit 2 of the Moira Road Retail Park, Lisburn would be in contravention of the prohibited uses clause of the lease of 22nd June 2005. I decline to make the Declaration sought by the Plaintiffs and find for the Defendant.