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**IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND**

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**ON APPEAL BY WAY OF CASE STATED**

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**Between:**

**CAR PARK SERVICES LIMITED**

**Appellant:**

**and**

**BYWATER CAPITAL (WINETAVERN) LIMITED**

**Respondent:**

________

**Before: Stephens LJ, McBride J and Sir John Gillen**

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**STEPHENS LJ**

**Introduction**

[1] Mr Eamon McCann (to whose interests Bywater Capital (Winetavern) Limited has succeeded) as the owner of premises at Winetavern Street/Gresham Street, Belfast, ("the car parking site") entered into what was described by the parties as a "licence" agreement dated 1 December 1997 ("the agreement") with Car Park Services Limited. In the agreement Mr McCann was described as the "Licensor" and Car Park Services Limited as the "Licensee." By virtue of the agreement the "Licensor" permitted the "Licensee," its servants and agents, the right to use the car parking site for the purpose of parking motor vehicles. On 26 March 2015 Car Park Services Limited, contending that the agreement created a tenancy rather than a licence, requested a new tenancy under Article 7 of the Business Tenancies (Northern Ireland) Order 1996 ("the 1996 Order"). The application for a new tenancy was opposed on the ground, amongst others, that the agreement was not a lease and did not grant any estate in the land, but rather was a licence. On 17 June 2015 under Article 10 of the 1996 Order, Car Park Services Limited made a tenancy application to the Lands Tribunal ("the Tribunal"). The Tribunal directed that three questions should be determined as preliminary issues of which the first was:

> "Did the agreement create a lease or a licence?"

The Tribunal having heard evidence in relation to this issue and having made factual findings decided that the agreement was "a licence, not a lease." Car Park Services Limited requisitioned under section 8(6) of Lands Tribunal and Compensation Act (NI) 1964 and the Tribunal stated a case for determination by the Court of Appeal as to:

> "… whether the Lands Tribunal were correct in finding that the agreement in writing, for the occupation by (Car Park Services Limited) of premises comprising a car park located at Winetavern Street/Gresham Street, Belfast, dated 1 December 1987 and entered into between Eamon McCann, as owner of the said premises, and (Car Park Services Limited) created a licence, and not a lease."

[2] As the issue is whether the agreement created a licence or a lease and so that I do not express any view at this stage as to the outcome I shall not refer in this judgment to the parties as "Licensor" or "Licensee" but rather I will refer to Car Park Services Limited as the appellant and to Bywater Capital (Winetavern Limited) as the respondent.

[3] Mr Edwin Johnson QC appeared for the appellant, Mr Hanna QC and Mr Stevenson appeared for the respondent. I am grateful to counsel for their assistance.

**The Background Facts**

[4] The background facts are taken from the case stated and from photographs of the car parking site.

[5] The carpark is a typical city centre surface carpark formed as a consequence of the demolition of derelict buildings leaving available a flat open area. On three sides the site is bounded by Winetavern Street, Gresham Street and North Street. It is separated from the surface of these streets by the public pavements then by a narrow low brick plantar which has been planted with grass. The plantar is on the car parking site. There are also rows of bollards on the car parking site. By these devices the only entrance and exit *for vehicles* is on Winetavern Street with that entrance being controlled by a mechanical barrier adjacent to a ticket booth. There is no fencing around those three sides of the carpark so that anyone can walk from the pavement over the low grass area between the bollards on to or across the site of the carpark. On its fourth side there are some existing three storey buildings. The surface of the carpark is tarmac which is painted with white lines delineating the car parking spaces. There are presently a row of signs along Winetavern Street with a capital "P" and an arrow pointing towards the carpark together with a larger sign

with a capital "P" and the word "Entrance" together with an arrow pointing to the entrance on Winetavern Street.

[6] The Tribunal found that at the time that they entered into the agreement the appellant and Mr McCann were not "asymmetrical" in their bargaining power. The company directors of the appellant included Mr McHugh, an accountant and Mr O'Kane, a builder/surveyor who was experienced in running car parks. Mr McCann is a well-known music promoter and property developer in Northern Ireland.

[7] Prior to entering into the agreement each of the parties had the opportunity to take legal advice and the Tribunal found that both had solicitors, who are well regarded, acting on their behalf. The court was informed that McCormick, O'Brien & Co were then the solicitors for the appellant and that Philip Gallen was the solicitor for Mr McCann.

[8] Mr McHugh knew prior to entering into the agreement that if the agreement was a licence the 1996 Order would not apply. His fellow Director, Mr O'Kane, proceeded on the basis that the agreement was a licence.

[9] Mr McCann knew that there was a difference between a licence and a lease. However, he considered that after 18 months the licence became a lease and that there was protection under the 1996 Order. The Tribunal considered that this was either a result of him misunderstanding the advice given by his solicitor or his solicitor giving incompetent advice.

[10] Mr McCann gave evidence that he did not use the car park to park his own motor vehicle when he was in the vicinity unless he paid for a ticket. He considered that "he could not be using it for my convenience." The Tribunal noted that he had a vested interest in the turnover of the car park as this was linked to the rent that the appellant was required to pay although Mr McCann's fee would have made no difference. The Tribunal did not consider that Mr McCann's use of the car park provided any real clue as to *the construction of the agreement* given that he had little need to use it and he either received incorrect legal advice or misunderstood that legal advice.

[11] The car parking site as referred to in the agreement extended to 0.9 acres. The appellant continued to occupy and operate its car parking business from the car parking site from 1 December 1997 and still does so though the extent of the site increased in 2008 – 2009. In 2008 the appellant became aware that Mr McCann had acquired several derelict properties adjacent to what was then the car parking site. Shortly thereafter there was an agreement between Mr McCann and the appellant that the appellant could demolish the derelict buildings and occupy the additional areas for its car parking business. This agreement was undocumented. The planning application was made by Mr McCann and not by the appellant. In 2009 the appellant carried out the works required to convert the additional area into its car parking operation. These works formed a car

park which was some 0.3 acres larger than the original car parking site. The parties agree that the increase in size of the car parking site is irrelevant to the issues in this appeal and that the outcome governs both the original and the extended sites.

[12] In or around 13 March 2013 Mr Gavin Clarke of Osborne King was appointed fixed charge receiver ("the receiver") of Mr McCann's interest in the car parking site. Subsequently, on 12 February 2016, the respondent became the successor in title to Mr McCann and since that date has held the car parking site subject to the agreement.

**The terms of the agreement**

[13] The terms of the agreement are as follows:

> "THIS LICENCE made the 1st day of December 1997 between EAMON McCANN of 15 Wellington Park, Belfast (hereinafter called "the Licensor") of the one part and CAR PARK SERVICES LIMITED having its registered office at 16 Donegall Square South, Belfast (hereinafter called "the Licensee") of the other part.
>
> WHEREBY IT IS AGREED AND DECLARED as follows:
>
> (1) Subject as hereinafter provided the Licensor will permit the Licensee, its servants and agents, the right to use the land (hereinafter called "the car parking site") described in the Schedule hereto for the purposes of parking motor vehicles and for no other purposes whatsoever.
>
> (2) This Licence shall be exclusive to the Licensee commencing on the 1st day of December 1997 and continuing four weekly until revoked by the Licensor or determined by the Licensee by the giving of four weeks' written notice.
>
> (3)
> (a) … (Rather than setting out this part of clause (3) which contains a complicated formula for calculating the rent I summarise its effect. It provides that every 4 weeks the appellant must pay £11,153.84 so that even if no cars are parked and no revenue is earned that amount must be paid. The appellant is then entitled to keep revenue up to £4,615.38 which is in excess of £11,153.84 but then is

required to pay 75% of all car park revenue in excess of £15,769.22.)

(b) The Licensee shall keep a proper and accurate account of each and every vehicle admission to the car parking site, the duration of each stay, the fee charged and all records and receipts pertaining thereto shall be available at any time to the Licensor for verification, inspection and audit.

(c) At the end of each four week period the Licensee shall provide the Licensor with a detailed account of the cumulative car park revenue for the said period.

(4) The Licensor shall not be liable to the Licensee its servants or persons authorised by the Licensee to enter upon the car parking site for the purpose of parking motor vehicles, or otherwise, in respect of any personal injury, loss, damage or inconvenience howsoever caused to such persons or to any goods and chattels or motor vehicles brought by any such person onto the car parking site.

(5) The Licensee shall pay all rates and taxes (if any) payable in respect of the car parking site.

(6) The Licensee shall erect at its own expense whatever additional gates, paling fences or barriers that it considers necessary for using the land for car parking purposes and shall keep the surface of the car parking site and existing fences and entrance gates on the site in good order and condition to the reasonable satisfaction of Licensor.

(7) The Licensee shall keep the car parking site free of any rubbish and litter and shall make proper arrangements for the removal thereof.

(8) The Licensee shall be solely responsible for the effecting of any necessary insurance.

(9) The Licensee shall arrange and obtain all necessary statutory approvals including Planning Permission if necessary and renew these as and when necessary.

(10) The Licensee shall not erect on the car parking site or any part thereof any building or structure other than those

> necessary in the operation of the car park and shall remove same upon the termination of the Licence.
>
> (11) The Licensee shall indemnify and keep indemnified the Licensor from and against all actions, proceedings, costs, claims and demands by third parties in respect of any damage or liability caused by or arising on the site in respect of damage to property or personal injury or any other claim arising out of the Licence hereby granted.
>
> (12) It is hereby further agreed between the parties hereto that this Licence creates no tenancy or lease whatever between the parties and that possession of the car parking site is retained by the Licensor subject however to the rights created by this Licence and that such rights are not assignable by the Licensee.
>
> **SCHEDULE REFERRED TO**
>
> All that plot of ground situate at Winetavern Street/Gresham Street, Belfast and shown for general identification purposes only on the map or ground plan attached hereto and therein surrounded by a red line."

**The decision of the Lands Tribunal**

[14] The Tribunal having set out the factual background and the terms of the agreement recorded that both parties' considered that the correct way to construe the agreement was that set out by Lord Hoffmann in *Investors Compensation Scheme v West Bromwich Building Society* [1998] 1 WLR 896 and discussed in *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50. The Tribunal also recorded that there was no real dispute between the parties that the principles that the Tribunal must apply were those set out in *Street v Mountford* [1985] AC 809 despite the fact that it concerned residential as opposed to business premises. The Tribunal made a number of factual findings which I have set out in the background facts to this judgment. However the Tribunal found that the evidence adduced by the parties was of "limited value in construing the agreement." The Tribunal then considered each of the clauses in the agreement. It considered that clauses 1 and 2 gave a personal right to the appellant only and that this favoured the agreement being a licence. The Tribunal considered that clause 4 was neutral and of no assistance as were clauses 5, 6, 7, 8, 9, 10 and 11. It considered that clause 12 was in very straightforward terms and that the parties expressly agreed that there is no tenancy or lease between the parties and that possession of the car parking site is retained by Mr McCann subject only to those personal rights created by the licence and further that such rights are not assignable by the appellant to anyone else. The judgment continued:

> "Clause 12 could not be clearer. The objective intention of both parties captured in this clause is that the (appellant) will have a licence, that he will not have exclusive possession and that the relationship will not be that of landlord and tenant. The (appellant) and its directors should have been in no doubt when they signed this agreement that what they were committing to was a licence, not a lease and that while the (appellant) had exclusive personal rights of occupation for the purpose of carrying on a carpark, the (appellant) did not enjoy exclusive possession of the carpark and thus did not have the protection of the (1996 Order)."

The Tribunal referred to and relied on *National Carpark Limited v The Trinity Development Co (Banbury) Limited* [2001] EWCA 1686. It noted that there was no covenant for quiet enjoyment and no express right of entry on the premises demised and that these omissions were further support for the conclusion that the agreement was a licence and not a lease. The Tribunal also referred to *Clear Channel UK Limited v Manchester City Council* [2005] EWCA 1304 and concluded that the agreement was a licence and not a lease.

**The submissions on appeal**

[15] In summary, the appellant's case in the appeal is as follows.

(a) The task of the Tribunal was, and the task of the Court of Appeal is to construe the agreement.

(b) In deciding whether the agreement took effect as a lease or a licence, the critical question was, and is whether the agreement granted exclusive possession of the car parking site to the appellant.

(c) The appellant contends that the decisive factor, in the decision of the Tribunal, was clause 12 of the agreement. However the appellant contends that clause 12 puts a label on the rights granted by the remainder of the agreement and that whether that label was justified depended upon the remaining terms of the agreement.

(d) The appellant contends that the remaining operative terms of the agreement which actually gave the appellant the right to make use of the car parking site did grant exclusive possession of the site to the appellant.

(e) The appellant contends that by its judgment the Tribunal has sanctioned a system of contracting out of the 1996 Order by the simple expedient of introducing the equivalent of clause 12 into an agreement.

This is to be seen in the context that the legislature in Northern Ireland, in marked contrast to the legislature in England and Wales, has consistently rejected any system for contracting out of the protection provided to tenants of business premises by the 1996 Order and by its statutory predecessor, the Business Tenancies Act (Northern Ireland) 1964. On that basis the Tribunal ought to have identified clause 12 for what it was, namely a pretence which was an attempt to contract out of the statutory business protection.

[16] On behalf of the respondent and in summary it was submitted that:

(a) The essential question is whether the agreement, upon its true interpretation, confers a right of exclusive possession.

(b) The essential element of exclusive possession is that of exclusionary power. In effect the tenant must have a right of territorial control which he may vindicate by an action in trespass even as against his own landlord.

(c) The most important provisions of the agreement are clauses 1, 2 and 12. By clauses 1 and 2 of the agreement the respondent permitted the appellant to use the land for one specific purpose, namely that of parking motor vehicles, and for no other purpose whatsoever.

(d) The right thereby conferred on the appellant was exclusive to the appellant. In other words the respondent was not free to exercise any such right himself, or to confer a similar right to anyone else. That right was not assignable by the appellant. Subject only to that right, clause 12 provided, in express and unambiguous terms, that possession of the land was retained by the respondent. This was not simply a case in which the respondent was reserving to himself limited rights to enter, view and/or repair. By clause 12 he was effectively retaining all rights of possession, and therefore all rights of control over the land, with the sole exception of the exclusive right to use the land for the purpose of parking motor vehicles.

(e) So long as the respondent did not interfere with the appellant's exclusive right to use the land for the parking of motor vehicles, the respondent was lawfully entitled to use the land for any other purpose, or simply to walk across it and/or to permit others to do so. For example, subject to obtaining planning permission if necessary, the respondent would have been entitled:

(i) to erect, and commercially exploit advertising hoardings on the boundaries of the site;

(ii) to permit 'over-sailing' licences for construction cranes;

(iii) to grant easements to run services through cables or conduits under the surface of the land, or above the height of any cars parked on the land;

(iv) to erect a mobile phone mast; or

(v) to erect structures on the Land supporting a platform to be used for other purposes above the level of any cars that might be parked on it.

It was contended that this analysis was supported by the observations of HHJ Cooke, sitting as a deputy High Court Judge, in *Kettel v Bloomfold Limited* [2012] EWHC 1422 (Ch) at [16] – [24].

(f) It was submitted that the language of the agreement is entirely consistent with it creating a licence rather than a lease. It is described as a "licence", and the parties are described as "Licensor" and "Licensee" and the consideration is expressed to be a "Licence Fee." Moreover, clause 2 provides that the Licensor will "permit" the Licensee to use the land. A permission is not the same as a grant, and there are no words in the Agreement approximating to a demise of land. There was also no covenant for quiet enjoyment, no express right of re-entry for breach of the Agreement, and no reservation of any other right of re-entry, all of which provisions would characteristically have been found in a tenancy.

(g) It is submitted that clauses 3-11 of the agreement are all neutral, and are equally consistent with it being construed either as a lease or as a licence, particularly bearing in mind that, whether it is a lease or a licence, its purpose is to make provision for the operation of a commercial car park on the land.

(h) That the very clear expression of agreement in clause 12 that "this Licence creates no tenancy or lease whatever between the parties" is significant and should be accorded suitable weight bearing in mind the observations of Jonathan Parker LJ in *Clear Channel UK Limited v Manchester City Council*.

(i) This is not a case of impermissible contracting out as the anterior question is whether there was a tenancy to which the 1996 Order applied.

**Legal Principles**

[17] The distinction between a tenancy and a licence is of importance as the 1996 Order protects a tenant but does not protect a licensee.

[18] The importance is also to be seen in the context that it is not possible to contract out of the provisions of the 1996 Order nor was it possible to contract out of the protections afforded by its statutory predecessor, the Business Tenancies Act (Northern Ireland) 1964. This is in contrast to the statutory regime in respect of business tenancies in England and Wales. The Landlord and Tenant Act 1954 ("the 1954 Act") as originally enacted did not permit contracting out of the protections for business tenancies. However this was amended by section 5 of the Law of Property Act 1969 which introduced into section 38 of the 1954 Act a new subsection (4). This subsection permitted contracting out of the protection provided by the 1954 Act, by obtaining an appropriate order of the court. The system for contracting out was further simplified by the Regulatory Reform (Business Tenancies) (England and Wales) Order 2003/3096. A new section 38A was inserted into the 1954 Act, with effect from 1 June 2004, which permits contracting out by following the procedure specified in section 38A, without the need to obtain a court order.

[19] The court has been referred to *Clear Channel UK Ltd v Manchester City Council*, *Scottish Widows Plc v Stewart* [2006] EWCA Civ 999 and to *National Carparks Limited v Trinity Development Co (Banbury) Limited* [2001] EWCA Civ 1686 which are all decisions of the Court of Appeal in England and Wales. The agreements under consideration in all of those cases were entered into between the parties at a time when it was possible by virtue of section 5 of the Law of Property Act 1969 to contract out of the protections for business tenancies. The agreement under consideration in *Clear Channel* was in effect dated March 2001, the agreement in *Scottish Widows* was dated 16 October 2003 and the agreement in *National Carparks Limited* was dated 18 November 1982.

[20] The leading authorities on the distinction between a tenancy and a licence are *Street v Mountford* and *AG Securities v Vaughan* [1990] 1 AC 417. The following principles can be extracted from those authorities though I have altered references to the Rent Acts so as to refer to the 1996 Order:

> (a) "To constitute a tenancy the occupier must be granted exclusive possession for a fixed or periodic term certain in consideration of a premium or periodical payments" (page 818 E-F of *Street v Mountford*). So where there is a grant of exclusive possession to the occupier for a term and at a rent then, save in exceptional circumstances (none of which apply in this case), there is in law a tenancy whatever label the parties may have chosen to attach to it.

(b) By virtue of that definition one of the three hallmarks of a tenancy is exclusive possession by which is meant that the tenant can keep out strangers and keep out the landlord unless the landlord is exercising limited rights reserved to him by the tenancy agreement to enter and view and repair. "A reservation to the landlord, either by contract or statute, of a limited right of entry, as for example to view or repair, is, of course, not inconsistent with the grant of exclusive possession" (page 827 E of *Street v Mountford*).

(c) "(The) consequences in law of the agreement once concluded, can only be determined by consideration of the effect of the agreement. If the agreement satisfied all the requirements of a tenancy, then the agreement produced a tenancy and the parties cannot alter the effect of the agreement by insisting that they only created a licence" (page 819 E-F of *Street v Mountford*).

(d) "The professed intentions of the parties" "cannot alter the effect of the agreement" (pages 819 H and 826 E-F of *Street v Mountford*).

(e) "Since parties to an agreement cannot contract out of the (1996 Order) a document which *expresses the intention, genuine* or bogus, *of both parties* or of one party to create a licence will nevertheless create a tenancy if the rights and obligations enjoyed and imposed satisfy the legal requirements of a tenancy" (page 458 E-F of *AG Securities v Vaughan*) (emphasis added). It is clear that both parties can genuinely intend to create a licence but nevertheless a tenancy will have been created if the rights and obligations enjoyed and imposed satisfy the legal requirements of a tenancy.

(f) "The duty of the court is to enforce the (1996 Order) and in so doing to observe one principle which is inherent in the (Order) and has long been recognised, the principle that parties cannot contract out of the (Order)" (page 459 D of *AG Securities v Vaughan*).

(g) In order to determine whether exclusive possession was granted by the agreement it is necessary to minutely examine the detailed rights and obligations contained in the agreement (page 823 B of *Street v Mountford*). The purpose of the minute examination is not to assign some of the provisions of the agreement to the category of terms which are or are thought to be usually in the category of terms to be found in a tenancy agreement or of assigning other provisions to the category of

terms which are or are thought to be usually in the category of terms to be found in a licence (page 826 C of *Street v Mountford*). Rather what is required is a minute and careful consideration of the terms of the agreement to determine whether there is a grant of exclusive possession to an occupier. An illustration of the minute examination of the terms of an agreement is contained in the speech of Lord Jauncey in *AG Securities v Vaughan*. He stated that an obligation to pay for all gas and electricity consumed in "the flat would be an entirely reasonable arrangement so long as they alone were using the power but would become curious, to say the least, if others nominated by the Licensor were sharing the flat and consuming power" (see page 476 letters B – C). Lord Jauncey did not consider it appropriate to consider whether the curiosity could be cured by the implication of a term that if others were nominated then the total costs would be shared and I proceed on the basis that this was because it was not appropriate for there to have been such an implication.

(h) "The (1996 Order) is irrelevant to the problem of determining the legal effect of the rights granted by the agreement" (page 819 G of *Street v Mountford*). "Although the (1996 Order) must not be allowed to alter or influence the construction of agreement, the court should, … be astute to detect and frustrate (pretence) whose only object is to disguise the grant of a tenancy and to evade the (Order)" (see page 825 H of *Street v Mountford* and page 462 H of *AG Securities v Vaughan*).

(i) "An express statement of intention is not decisive and … the court must pay attention to the facts and surrounding circumstances and what people do as well as to what people say" (page 463 H – 464 A of *AG Securities v Vaughan*).

(j) In order to construe the agreement regard should be had to the circumstances which existed at the time when it was entered into (page 475 E of *AG Securities v Vaughan*). "Subsequent actings of the parties may not be prayed in aid for the purpose of construing the agreements" (pages 475 F and 469 B-C of *AG Securities v Vaughan*). The matrix of facts ordinarily excludes the previous negotiations of the parties, (see *Investors Compensation Scheme v West Bromwich Building Society* [1998] 1 WLR 896 at 912-3). However in *AG Securities v Vaughan* Lord Templeman stated that "(in) considering one or more documents for the purpose of deciding whether a tenancy has been created, the court must consider the surrounding circumstances including any relationship between the prospective occupiers, *the course of*

*negotiations* and the nature and extent of the accommodation and the intended and actual mode of occupation of the accommodation" (see page 458 G – H) (emphasis added). The context here is legislative protection of tenants and for my part the course of negotiations might for instance demonstrate that the intention contained in the concluded agreement in fact is the product of pressure to evade the Order. Another instance is that a financial inducement to contract out of the Order by using the device of a licence might have been offered which could be evidence of a mutual intention to do what is prohibited. I also note from paragraph [27] of his judgment that Sir John Gillen makes reference to issues that "may have arisen" in "the course of negotiations" giving examples of them. My view and it appears that Sir John Gillen agrees is that the course of negotiations can be considered. However it is not necessary to resolve the issue as to whether this is an area of exception to the ordinary rule that the matrix of facts excludes the parties previous negotiations as neither party relied on any aspect of the negotiations.

(k) Subsequent actings of the parties "may be looked at for the purposes of determining whether or not parts of the agreement are a sham in the sense that they were intended merely as "dressing up" and not as provisions to which any effect would be given" (pages 475 F and 469 C of *AG Securities v Vaughan*).

[21] A person may be the sole occupier of property and yet not have exclusive possession. Exclusive possession is as in (b) above.

[22] At paragraph [20](h) I set out the obligation to detect and frustrate "pretence." I note that McBride J, whose judgment I have read in draft, refers to "sham" rather than "pretence" giving definition to a "sham" agreement relying on the passage in *Hadjiloucas v Crean* [1988] 1 WLR 1006 at 1019 (D)-(G). I agree with McBride J when she states at paragraph [85] of her judgment that even if there is no "pretence" the court should still determine whether "the parties have placed the wrong legal label on their agreement by calling it a licence when in fact it is a lease as it grants exclusive possession." I also agree with McBride J that there should be a *proper analysis* of the agreement to make that determination.

[23] The question arises as to whether the absence of terms can be taken into account in construing the agreement. Consideration of what terms are not in the agreement can assist in determining whether the occupier has exclusive possession. Again I emphasise that this is not an analysis of what terms are or are not usually to be found in a lease or usually to be found in a licence but rather whether the absence of a term informs as to whether the occupier has exclusive possession. Accordingly, the absence of a covenant for quiet enjoyment or the absence of an express right of

re-entry can be taken into account as tending to indicate a licence as opposed to a lease but I would caution that regard must be had to substance rather than form and that this is not an area for judges "awarding marks for drafting" (see page 826 F of *Street v Mountford*). Furthermore the absence of terms can also be a part of a dressing up or of pretence.

[24] The professed intentions of the parties may simply be a declaration that the agreement is a licence and not a lease. Similarly the label attached by the parties may simply be that one is the "licensor" and the other is the "licensee." However, the professed intentions and the labels can also take different and more sophisticated forms such as a joint declaration that exclusive possession is not given or as in this case "that possession of the car parking site is retained by the Licensor subject however to the rights created by this Licence." In *Family Housing Association v Jones* [1990] 1 WLR 779 the impact of a joint declaration that exclusive possession was not given was considered. Balcombe LJ stated in respect of clause 5 of the agreement in that case that the express agreement that exclusive possession was not granted was as much of a label as was the reference to a "licence" in the same clause and that neither could prevent the agreement creating a tenancy if that was its true effect. Slade LJ who agreed with the judgment of Balcombe LJ also stated that the express agreement in clause 5 that exclusive possession was not granted "was as capable of being contradicted by the facts of the case as would have been a statement of her understanding that she was not to have a tenancy." A label cannot prevent the arrangement from constituting a tenancy if that is its true effect.

[25] One potential form of the professed intentions of the parties or of a label is a retention of possession clause. Such a clause was considered by Hoffman J in *Essex Plan Limited v Broadminster Limited* [1988] 2 EGLR 73. That case concerned an agreement in respect of premises then owned by Derbyminister which was to be run as a market by licenced traders occupying stalls. Clause 9 of the agreement declared that it constituted a licence and "that possession of the premises is retained by Derbyminister subject to the rights created by this licence." Hoffman J held that quite irrespective as to whether there was exclusive possession this was an exceptional case in which a tenancy nevertheless had not been created. Hoffman J then considered, obiter, whether under the agreement the occupier did have exclusive possession. He held that "each case must depend upon the precise terms of the agreement and its surrounding circumstances." He went on to find that on the special facts of that case, taking into account the market use which was contemplated by the parties, a retention of possession by the owner subject to the occupation rights granted by Essex plan could not be ignored as a sham. I agree that whether such a clause is a "dressing up" and not a provision to which any effect would be given depends upon the precise terms of the agreement and its surrounding circumstances. Furthermore I would add that subsequent actings of the parties may be looked at to determine whether it was a "dressing up" or "pretence."

[26] Both *Street v Mountford* and *AG Securities v Vaughan* concerned residential accommodation to which the Rent Acts would apply if a tenancy had been granted.

A feature of the residential market is an inequality of bargaining power between the owners of property and those seeking shelter during a housing shortage so that a person seeking residential accommodation "may concur in any expression of intention" and "may sign a document couched in any language in order to obtain shelter." What then is the position absent such an inequality of bargaining power? That question received consideration in *Clear Channel UK Ltd v Manchester City Council*, in *Scottish Widows Plc v Stewart* and in *National Carparks Limited v Trinity Development Co (Banbury) Limited*.

[27] *Clear Channel UK Ltd v Manchester City Council* concerned a claim that an agreement constituted a tenancy rather than a licence. Jonathan Parker LJ in giving the judgment of the court rejected that contention on the basis that the agreement did not contain a sufficient definition of the land which was said to be subject to the alleged tenancy. Thereafter, obiter, he made the additional comment that he found "it is surprising and … unedifying that a substantial and reputable commercial organisation like Clear Channel having (no doubt with legal assistance) negotiated a contract with the intention *expressed in the contract* that the contract should *not* create a tenancy, should then invite the court to conclude that it did." He went on to state again obiter:

> "Nor, of course, do I intend to cast any doubt whatever on the principles established in *Street v Mountford*. On the other hand the fact remains that this was a contract negotiated between two substantial parties of equal bargaining power and with the benefit of full legal advice. Where the contract so negotiated contains not merely a label but a clause which sets out in unequivocal terms the parties intention as to its legal effect, I would in any event *have taken some persuading* that its true effect was directly contrary to that expressed intention." (emphasis added)

[28] These obiter comments were subsequently cited with approval in relation to commercial use and especially very short term use for a specific purpose by Lloyd LJ in *Scottish Widows Plc v Stewart*. Mr Stewart had guaranteed payment of rent for 12 months after the termination of a tenancy though that period would be shortened if the premises were re-let. After termination of the tenancy and during the 12 month period Scottish Widows allowed Midnight Design Limited to use the premises for 8 days from 17 - 24 October 2003 on foot of an agreement expressed to be a licence. The question arose in the guarantee proceedings as to whether this in fact created a tenancy so that the premises were re-let relieving Mr Stewart of some of his liability on foot of the guarantee. The agreement allowed Midnight Design Limited occupation and use of the property. The fact that they could probably have filled the premises completely with a set and lighting apparatus did not mean that they had exclusive possession. The court held that occupation was not the same as possession

and there was nothing in the agreement which entitled Midnight Design Limited to exclude Scottish Widows. Scottish Widows had granted Midnight Design Limited the ability to store goods but that this was not indicative of exclusive possession. Lloyd LJ then stated that:

> "Residential premises provide a rather different context, both for practical reasons and in terms of the statutory context. *As regards commercial use, and especially very short-term use for a specific purpose*, while of course the court must be astute to ensure that parties do not avoid the true legal consequences of their acts by giving an agreement the wrong label, it seems to me that there is much force in the attitude articulated by Johnathan Parker LJ in *Clear Channel UK Limited v Manchester City Council*." (emphasis added)

I consider that this statement is to be seen not only in the context of the statutory regime in England and Wales but also in the context of the express recognition of the requirement that the court should be astute to ensure that parties do not avoid the true legal consequences of their acts for which see *Street v Mountford.* I also consider that in both *Clear Channel* and in *Scottish Widows* there is express recognition of an intention not to cast any doubt whatever on the principles established in *Street v Mountford*.

[29] *National Carparks Limited v Trinity Development Co (Banbury) Limited* concerned an agreement under which NCP agreed to manage and administer a carpark and were granted what was described as a licence. NCP contended that the agreement amounted to a tenancy. Arden LJ addressed not only the question as to what was the impact of the parties' express declaration in clause 8 that the agreement was a licence but also the impact of that express declaration in circumstances of symmetry of bargaining power. Arden LJ concluded that some attention should be given to the express declaration though "it must be approached with healthy scepticism, particularly, for instance, if the parties' bargaining positions are asymmetrical." Arden LJ went on to agree "That it does not give rise to any presumption. At most it is relevant as a pointer." Buxton LJ agreed that the parties' expressed declaration "must be at least potentially relevant to the intent that is to be collected from the agreement as a whole." That it "must be relevant to look at the agreement as a whole and at what the parties have indicated that they seek to do; but bearing in mind also the important guidance given in *Street v Mountford*, that if the parties had in fact agreed upon exclusive possession, they cannot offset that agreement simply by labelling the agreement in a certain way or by saying that that is not what they have agreed." He went on to state:

> "I therefore, like my Lady, would look at this agreement as a whole and although, like her, I think it

> is possible and open to the court to reach the conclusion that she has without reference to the considerations that I have just set out, nonetheless I cannot accept the argument that those considerations must be put entirely out of our minds."

I consider that the statements as to the effect of the professed intentions of the parties were obiter.

[30] It was contended by Mr Hanna that in *Clear Channel* the words "taken some persuading" meant that a burden of proof with a heavier standard of proof existed when it came to the question of whether the professed intentions of both of the parties should be disregarded in circumstances where there was symmetry of bargaining power and both parties had legal advice. It was also contended by Mr Hanna relying on *Scottish Widows* that the burden and standard of proof was of particular application as regards commercial use and especially very short term use for a specific purpose. Furthermore, it was contended by Mr Hanna that these principles should apply in this jurisdiction.

[31] I note that in *Scottish Widows* the application of any heavier burden was especially applicable to very short term use for a specific purpose. It is correct that on the facts of this case the use was for a specific purpose but it was not very short term. On that basis I consider that *Scottish Widows* can and should be distinguished.

[32] In addition as a matter of general principle I do not consider that the passages in *Clear Channel* and in *Scottish Widows* should apply in this jurisdiction in so far as it is suggested that those passages support an analysis of an agreement commencing with the professed intentions of the parties or attributing greater weight to those professed intentions in circumstances of symmetry of bargaining power with legal advice. I come to that conclusion for the following reasons:

(a) The statutory context in Northern Ireland in relation to business tenancies is different from England and Wales in that contracting out is permitted in England and Wales but not in Northern Ireland. Accordingly, it is the duty of the courts in Northern Ireland to enforce the 1996 Order and to observe the principle that the parties cannot contract out of that Order. It can no longer be said that a similar duty or a duty with a similar emphasis rests on the courts in England and Wales. In the statutory context in England and Wales it is understandable in that jurisdiction for the parties' professed intentions and the labels attached by them to an agreement to have a greater impact.

(b) I consider that *Scottish Widows* was a clear case of a very short term use of premises for a specific purpose. Those were highly relevant facts and surrounding circumstances, to which the court should have regard in construing the agreement as a licence, see page 475 E of *AG Securities*.

(c) *Street v Mountford* is authority for the proposition that the professed intentions of the parties cannot alter the effect of an agreement and *Attorney General Securities v Vaughan* is authority for the proposition that even the *genuine intentions of both of the parties* will not alter an agreement if the rights and obligations enjoyed and imposed satisfy the legal requirements of a tenancy.

(d) The purpose of the 1996 Order is to protect tenants. Its purpose is not restricted to the protection of particular categories of tenants, for instance smaller business tenants, business tenants who are in asymmetrical bargaining positions or who have not received legal advice. Nor is protection excluded for those who could afford to but chose not to obtain legal advice.

(e) The natural and understandable response to a party expressly agreeing to a licence and then contending that it is a tenancy has to give way to the fact that in this jurisdiction contracting out is *unlawful*.

[33] I also reject the argument that the professed intentions of the parties and the labels attached by the parties "must be put entirely out of our minds." They must be given weight in the context of considering the agreement as a whole.

[34] I am grateful to Sir John Gillen for providing a draft of his insightful judgment which I have read. It commands considerable respect but I am unable to agree with it. Sir John's legal analysis differs from mine in that he has identified at paragraph [141] the mischief which the 1996 Order addresses as that evinced in the Law Commission Report dated March 2011 and as set out in paragraphs [125] – [126] and as summarised by him at paragraph [127] that being "to protect smaller businesses." I had understood that Sir John included in that protection those who may be more vulnerable in the market place as opposed to "experienced businessmen in this field" (paragraph [128]) or experienced businessmen "advised by solicitors" (paragraph [141]) or those tenants where there is a clear inequality of bargaining power. Sir John states that the aim of the legislation was not to frustrate "the avowed intention of *experienced businessmen* with *the assistance of lawyers* to draw up agreements as they deemed fit" (emphasis added paragraph [146]) so that there should be no impediment to the wishes of businessmen who have deliberately set out to create a licence rather than a tenancy. He discerns the mischief to be addressed by the 1996 Order not from the Order itself but from a Law Reform Advisory Committee Report dated 1994 and from a report of the Law Commission quoting only from the second of these documents, which was published in 2011 ("the 2011 report"), some 15 years after the 1996 Order. Sir John reasserts the primacy of language in the interpretation of contracts presumably provided the mischief to be addressed by the legislation was not overridden whilst concluding at paragraph [160] with the phrase "take some persuading" which elevates intention to more than a "pointer."

[35] I do not consider that the mischief to be addressed by the 1996 Order can be discerned in the way suggested by Sir John. The Law Reform Advisory Committee

Report which was published prior to the 1996 Order does not confine the mischief to "smaller businesses" nor does it suggest that protection should only be afforded to those who may be more vulnerable in the market place nor does it refer to symmetrical or asymmetrical bargaining but rather it contains a clear and simple recommendation that the prohibition against contracting out is at the heart of the legislation and that it should remain (see paragraph 3.5.9). There is nothing in that report that confines the mischief or defines the aim of the legislation in the way suggested.

[36] One view expressed in the 2011 report to the Law Commission which was subsequent to the 1996 Order was that smaller business tenants should continue to enjoy the degree of business protection that has been afforded under legislation in Northern Ireland since 1964. The 2011 report of the Law Commission being subsequent to 1996 Order does not bring about any legislative change of the law or any change of the mischief to be addressed by the 1996 Order. The Law Reform Commission is not the legislature. This issue was addressed in *McArdle v O'Neill* [2002] NICA 42. An earlier case of *Algie v EHSSB* [2000] NI 181 had concerned the proper construction of Order 18 Rule 8(1) of the Rules of the Court of Judicature (Northern Ireland) 1980. In *Algie* reference was made at page 188 A-B to the Interim Report of the Civil Justice Reform Group. Subsequently the Court of Appeal in *McArdle v O'Neill* stated that the Court of Judicature Rules Committee was due to consider amending the Rules along the lines indicated in the interim report "but until that is done the provisions of Order 18, Rule 8(1) have to be applied as they stand." I consider that similar reasoning should be applied to the effect of the 2011 report on the 1996 Order.

[37] I also consider that if the mischief is as defined by Sir John then one is left in a state of uncertainty as to the exact definition of the categories of tenants which are to be afforded less protection by attributing greater weight to their expressed intentions.

[38] I remain of the view that the 1996 Order is to protect tenants and that its purpose is not restricted to the protection of particular categories of tenants.

[39] I remain of the view that the primacy of language is not consistent with *Street v Mountford*. I consider that to elevate the professed intentions of the parties to a status where a court requires "to take some persuading" is more than a pointer. I also consider that reform of the law in the area of business tenancies is for the legislature not for a "current trend in judicial thinking."

**Discussion**

[40] By virtue of clause 1 the respondent permitted the appellant "the right to use the land" which was called for the purposes of the agreement "the car parking site." It can be discerned from the identification of the car parking site and the schedule to the agreement that the site extended to *all* that plot of ground situate at

Winetavern Street/Gresham Street, Belfast. Accordingly the right to use the car parking site is the right to use *the entire site* by which is meant *all the land*. I consider this to be the most significant part of this clause as an indicator of exclusive possession. Any possession of the respondent that interfered with that right would not be permitted. Referring to some of the examples given by the respondent in paragraph [16] (e) there would be obvious interference with the right if the respondent were to come onto the site in order to dig foundations for and then to erect a mobile phone mast or if the respondent came onto the site in order to dig foundations for and then to construct on the site structures to support a platform to be used for other purposes above the level of any cars that might be parked on it. There would also be interference with that right, albeit for a shorter period of time if the respondent dug trenches across the site to run services or conduits across the site. There would be interference if the respondent came onto the site to erect poles in order to carry services above the height of any cars parked on the land. Similarly there would be interference if the respondent came onto the site in order to dig foundations for and then to erect advertising hoardings on the boundary.

[41] Clause 1 goes on to limit the right to use the land to the purpose of parking motor vehicles and for no other purposes whatsoever. It is suggested by the respondent that by virtue of this limitation the right to use was limited to the surface of the car park and to that part of the air space above the surface necessary for parking cars or vehicles. That all the land below the surface remained in the possession of the respondent. In the alternative that the area below the surface which remained in the possession of the respondent was that part below the surface that was deeper than was appropriate for the foundations of whatever additional gates, paling fences or barriers that the appellant considered necessary or was appropriate for the foundations of any building or structure necessary in the operation of the car park. Those contentions have to be seen in the context of all the terms of the agreement read together and in the context of the surrounding circumstances. I consider that the contentions would have some force if the retention of possession part of clause 12 was not "pretence" or "dressing up" or if the rights purported to be reserved by it did not accord with a proper analysis of the agreement, see paragraph [22] above.

[42] Clause 2 provides that the "licence" shall be exclusive to the licensee. The last part of clause 12 provides that "the rights created by this licence "are not assignable by the Licensee." The effectiveness of these concepts of exclusivity and non-assignability are to be seen in the context that Car Park Services Limited is a limited liability company so that a change in the ownership of the company would occur on a transfer of its issued share capital. The "rights" may be granted to the appellant company but the owners of the shares in the appellant company can transfer the shares to whomsoever. So in practical terms there is very limited impact of either of the concepts as by a sale of the shares in the company the rights though remaining in the company would be under the control of the new owners of the company. I consider that this is a factor to be taken into account when determining whether the

appellant's rights were purely personal and non assignable. In view of the practical impact of these concepts I do not consider that they are pointers to a licence.

[43] Clause 2 also provides for a commencement date of 1 December 1997, for continuation on a 4-weekly basis and for revocation or determination on 4 weeks written notice. On the basis of this clause I do not consider that short term use was envisaged. There was no finding that the circumstances which existed at the time when the agreement was entered into included any immediate plans for the redevelopment of the car parking site. There was no finding that that this was seen as a temporary short term stop gap pending an envisaged development. I am confirmed in that view by other clauses in the agreement which for instance enabled the appellant to erect buildings, and fences and required it to enter into an insurance policy which ordinarily would be on an annual basis. That is different from a licence for a few days as in *Scottish Widows* or the stop gap measure in *Essex Plan* pending negotiations for a tenancy. I do not consider that this clause when seen in the context of the surrounding circumstances is neutral but rather is a pointer towards exclusive possession.

[44] Clause 3 provides for the payment of rent every 4 weeks. Clause 3 (b) requires the keeping of proper and accurate accounts. Clause 3 (c) requires the provision of a detailed account *at the end of each four week period*. At the very least it was intended that there would be a number of four week periods indicating again that this was not intended to be a short term stop gap measure. I do not consider that this clause when seen in the context of the surrounding circumstances is neutral but rather is a pointer towards exclusive possession.

[45] Clause 4 is an exclusion of liability clause. It provides that the respondent shall not be liable *to certain persons* in respect *of certain personal injury loss or damage*. Those persons are (a) the appellant, (b) the appellant's servants or agents and (c) persons authorised by the appellant to enter upon the car parking site for the purpose of parking motor vehicles *or otherwise* (emphasis added). The liabilities are in respect of "any personal injury, loss or damage or inconvenience *howsoever caused* to such persons or to any goods or chattels or motor vehicles brought by any such person onto the car parking site" (emphasis added). Insofar as this clause purports to exclude the respondent's liability to persons who are not a party to the agreement it is ineffective. Insofar as it is effective it excludes the liability of the respondent *howsoever caused*. If it was intended that the respondent would also be in possession of the car parking site and if its activities could have caused personal injury to those classes of persons, for instance by a crane over sailing for construction purposes, then the question arises as to why the respondent's liability should be excluded so that the appellant as occupier without any ability to control the activities of the respondent would be solely liable. I consider that this clause would be an entirely reasonable arrangement so long as the appellant alone was in possession of the car parking site but would become curious if the respondent could also use the car parking site and thereby create risks to the appellant, to the appellant's servants and agents, and to persons authorised by the appellant to enter upon the car parking site.

I recognise that it is conceivable that the appellant assumed these additional obligations in the knowledge that the extent of its liability to the respondent might be measured not by the appellant's own actions but by the actions of the respondent. However I consider that as drafted this clause is not neutral but rather is a pointer towards exclusive possession.

[46] Clause 5 imposes an obligation on the appellant to pay all rates and taxes (if any) in respect of the car parking site. If the parties intended that the respondent could retain possession so as to erect, and commercially exploit advertising hoardings on the boundaries of the site, to erect a mobile phone mast or to erect structures on the land supporting a platform to be used for other purposes above the level of any cars that might be parked on it and if those activities increased the net annual value of the site, as some of them undoubtedly would, then it would be curious if the appellant was liable for the increased rates. This clause would be an entirely reasonable arrangement so long as the appellant alone was in possession of the car parking site. I acknowledge that there might be arguments about the extent of the car parking site so as to exclude these additional features or that there could be a suggestion that there should be an implied term in the agreement to the effect that the appellant would not be liable for the increase in the amount of rates payable. However this clause on a literal interpretation gives no indication of any intention of the parties of possession by the respondent and in *AG Securities v Vaughan* Lord Jauncey did not consider it appropriate to consider whether any curiosity could be cured by the implication of a term. Again I recognise that it is conceivable that the appellant assumed the additional obligation to pay any increase in rates in the knowledge that the extent of its liability to pay rates might be measured not by the appellant's own commercial use but also by the commercial use of the respondent. However I consider that as drafted this clause is not neutral but rather is a pointer towards exclusive possession.

[47] Clause 6 permits the appellant to erect at its own expense whatever additional gates, paling fences or barriers that *it considers necessary* for using the land for car parking purposes. I consider that in exercising that right there is no obligation on the appellant to take into account any possession, occupation or use of the land by the respondent let alone obtain the respondent's permission. There is nothing to prevent the appellant from constructing, subject to planning permission, a gate at any location even if this interfered for instance with the positioning by the respondent of any advertising hoardings or of a mobile phone mast or other structures to support a platform to be used for other purposes above the level of any cars that might be parked on the site. Again I consider that this part of clause 6 is a pointer towards exclusive possession by the appellant.

[48] Clause 6 also obliges the appellant to keep the surface of the car parking site and existing fences and entrance gates on the site in good order and condition. Again I consider that obligation is entirely reasonable so long as the appellant alone was in possession of the car parking site.

[49] Clause 7 imposes an obligation on the appellant to keep the car parking site free of all rubbish. I consider that obligation is entirely reasonable so long as the appellant alone was in possession of the car parking site.

[50] Clause 8 imposes an obligation on the appellant to be *solely* responsible for the effecting of any necessary insurance. It is contended by the respondent that the obligation on the appellant to insure necessarily requires some form of possession on the part of the respondent. It is asked "why otherwise would the respondent if not in possession or occupation, require the appellant to insure?" I do not consider that this correctly reflects the risks attached to personal injury litigation in this jurisdiction. An owner regardless as to whether in occupation or possession can find itself embroiled in litigation. Rather I consider that this clause is a pointer towards exclusive possession. Why should the appellant pay the increased premium brought about by any increase in risk created by the respondent's activities on the site? How could the appellant who is *solely* responsible for affecting any necessary insurance propose to an insurance company without knowledge of the risks to be created by the respondent or without knowledge of the respondent's claims history? I consider that the arrangement in clause 8 would be an entirely reasonable arrangement so long as the appellant alone was in possession of the car parking site. The clause would become curious if the respondent was in possession of the site or did so to an extent that was anything other than minimal such as under a right equivalent to inspecting the condition of the premises.

[51] Clause 9 provides that the appellant shall arrange and obtain *all* necessary statutory approvals. Those approvals are not limited to but include planning permission. There are no exceptions relating to any potential occupation of the car parking site by the respondent which require statutory approval such as the erection of advertising hoardings or telecommunication masts.

[52] Clause 10 provides that the appellant shall not erect any building other than those necessary in the operation of a car park and shall remove same upon the termination of the licence. Under this clause the appellant has the right to erect buildings on any part of the car parking site so long as they are necessary in the operation of a car park. Some buildings would clearly fall within clause 10 as being necessary such as ticket booths. Questions might arise as to whether other buildings were necessary such as staff facilities, covered car park facilities, car wash or valeting facilities or a multi-storey car parking facility. There is no requirement in clause 10 for the appellant to take into consideration any occupation of the car parking site by the respondent when exercising its right to erect any building let alone obtain the respondent's permission. Again I consider this is a pointer towards exclusive possession.

[53] Under clause 11 the appellant is to indemnify the respondent in relation to all claims by third parties in respect of any liability caused by or *arising on the site*. I consider that arrangement would be an entirely reasonable arrangement so long as the appellant alone was in possession of the car parking site. The clause would

become curious if the respondent was in possession of the site so that, for instance, an object falling from an over sailing crane caused injury to a person or damage to a car so that the appellant would be obliged to indemnify the respondent. Again I consider this is a pointer towards exclusive possession.

[54] I consider that clauses 1-11 inclusive are pointers towards or indicators of exclusive possession.

[55] Mr Hanna submitted that clause 12 could be broken down into three distinct parts. He submitted that the first part included the words "(it) is hereby further agreed between the parties hereto that this Licence creates no tenancy or lease whatever between the parties." He conceded that this part was a label. He submitted that the second part included the words "that possession of the car parking site is retained by the Licensor subject however to the rights created by this Licence." He submitted that this was substantive as opposed to labelling. He then submitted that the third part included the words "that such rights are not assignable by the Licensee." He conceded that these words were of less importance for the reasons given in paragraph [42].

[56] I agree that the words contained in clause 12 can be broken down into those separate parts and that the most significant part is the second containing what purports to be a retention of possession clause. After giving consideration to the terms that are missing from the agreement and after having given further consideration to the various examples given by the respondent in paragraph [16] (e) I will return to consider the question as to whether clause 12 is a pretence or if the rights purported to be reserved by it do not accord with a proper analysis of the rest of the agreement.

[57] There is no covenant for quiet enjoyment and there is no express right of re-entry to view or repair. I accept that these are pointers towards a licence but I approach those factors with a degree of caution particularly in relation to the absence of a right of re-entry to view given that the surrounding circumstances were such that the respondent could see the state of the site from the public streets or like any other member of the public walk across the site or upon payment of a small fee could gain access in order to walk over the site.

[58] I have already given some consideration to the respondent's examples set out in paragraph [16] (e). In relation to the example of the erection of structures on the land supporting a platform to be used for other purposes above the level of any cars that might be parked on the site, I have already adverted to disruption and interference with the right to use the entire car parking site occasioned by the works of construction and by the structure itself. I consider that this example had a somewhat fanciful aspect to it. For instance how would the respondent gain access to the platform? Would there be stairs or a lift on the surface of the car park? If so then they would interfere with the appellant's right to use the entire site.

[59] In relation to services above and below the surface of the site these would disrupt and be an interference with the right of the appellant to use the entire site during the course of construction and by virtue of structure necessary to support the overhead cables. However during the course of the hearing whilst acknowledging that the surface could not be disturbed the suggestion then became one of boring under the site. No consideration had been given as to how this would be done from one public street to another public street or why permission could not be sought at far less expense to lay the services in a conventional manner in a trench along the streets. These examples had all the hallmarks of a degree of imagination but none of the hallmarks of the parties' intentions in 1997.

[60] The remaining example was that the appellant could not prevent Mr McCann or those authorised by him or by the respondent from simply walking across the car parking site and accordingly that the appellant did not have exclusive possession. That example turns on whether the retention of title part of clause 12 was pretence or if the rights purported to be reserved by it do not accord with a proper analysis of the agreement, see paragraph [22] above. I consider that approaching the agreement by considering its operative terms leads to the conclusion that it was pretence given all the other indicators in the agreement and the surrounding circumstances. I arrive at that conclusion on the basis that by the operative terms of the agreement the parties intended that the appellant was to have exclusive possession. I do not consider that the retention of possession clause was seriously intended to have any practical operation or to serve any purpose apart from the purely technical one of seeking to avoid the ordinary legal consequences attendant upon letting the appellant into possession at a four weekly rent. I arrive at that conclusion on the basis of my analysis of the agreement. Alternatively I consider that the rights purported to be reserved by clause 12 do not accord with a proper analysis of the agreement in that exclusive possession was granted to the appellant.

[61] In addition and as a distinct and separate reason I arrive at the conclusion that clause 12 was pretence on the basis of the subsequent actings of both parties. There is no evidence that over a period of some 15 years from 1 December 1997 until 13 March 2016 Mr McCann or anyone authorised by him was in possession of the car parking site or planned for or even considered doing anything along the lines now suggested by the respondent. Rather the evidence was that Mr McCann paid for use of the site. That is not evidence as to the *construction of the agreement* but is evidence that the retention of possession clause was pretence. Furthermore all the evidence was that the appellant was the only person in possession of the site.

**Conclusion**

[62] I do not consider that the Tribunal was correct but rather I consider that the agreement granted the appellant exclusive possession and is therefore a lease rather than a licence. I answer "No" to the question in the case stated which I have set out at paragraph [1] of this judgment.

**<u>McBRIDE J</u>**

**Question for Determination**

[63] The question for determination in this appeal is whether the agreement dated 1 December 1997 created a licence or a lease.

[64] I am grateful to counsel for the appellant and respondent who carried out extensive legal research and then very ably presented their respective submissions to the court supported by a number of legal authorities.

[65] I have read the judgment of Stephens LJ and respectfully adopt paragraphs [1] – [16] of his judgment. I agree that the Lands Tribunal ("the Tribunal") erred when it found that the agreement created a licence rather than a lease. I make this finding however on a different basis from Stephens LJ and for this reason and also because of the dissent expressed by Sir John Gillen, I now set out the reasons for my decision.

**<u>Relevant legal Principles</u>**

**Difference between a Licence and a Lease**

[66] The leading authority on whether an agreement creates a lease or a licence is *Street v Mountford* [1995] AC 809. Lord Templeman confirmed that, save in exceptional circumstances (none of which applies in this case) a tenancy is created when the occupier is granted exclusive possession for a term in consideration of a rent - see pages 826-827.

**Exclusive Possession**

[67] *Street v Mountford* establishes that there are three necessary ingredients for the creation of a tenancy. The only ingredient in dispute in the present appeal is whether the appellant enjoyed exclusive possession of the lands.

[68] The grant of exclusive possession was conceded in *Street v Mountford.* Nonetheless the court made certain observations as to the meaning of exclusive possession. At page 816 (B) and (C) Lord Templeman stated:

> "The tenant possessing exclusive possession is able to exercise the right of an owner of land, which is in the real sense his land albeit temporarily and subject to

> certain restrictions. A tenant armed with exclusive possession can keep out strangers and keep out the landlord unless the landlord is exercising limited rights reserved to him by the tenancy agreement to enter and view and repair. A licensee lacking possession can in no sense call the land his own …"

This was quoted with approval in *National Car Parks Ltd v Trinity Development Co (Banbury) Ltd* [2001] EWCA Civ 1686 when Arden LJ at paragraph 12 stated:

> "… Exclusive possession means the ability to exclude all persons, including the landlord, from possession save in so far as the landlord is exercising a right of re-entry conferred by the agreement."

[69] The meaning of exclusive possession has also been considered in two leading texts. In *Woodfall's Law of Landlord and Tenant* Volume 1, paragraph 1.023 the learned authors state:

> "Exclusive possession is the ability on the part of the tenant to exclude all persons, including the landlord, from possession. Since `exclusivity is of the essence of possession' it is difficult to see what difference there is between possession and exclusive possession."

[70] *Wylie, Irish Land Law 3rd Edition* at paragraph 17.009, in dealing with the concept of exclusive possession, expresses the view that the courts increasingly look to the degree of 'control' a person has over the use of the premises to ascertain if in fact he can "call the place his own".

[71] From these authorities I deduce that exclusive possession is enjoyed by a person when he has actual possession of the lands to the extent that he can call the lands his own. This means that he can exclude all persons from the land including the landlord. In determining whether a person exerts such control the court needs to carefully consider the acts carried out by the person, having regard to the nature of the land in question.

[72] The authorities also make clear that exclusive possession is not inconsistent with a landlord reserving limited rights of possession, for example, the right to enter to inspect the lands. Such a right is not inconsistent with exclusive possession as it is so limited in time and its nature that the occupier can still claim "the place as his own". I further consider that exclusive possession is not inconsistent with a landlord reserving certain other limited rights of possession such as, the right to enter and carry out repairs, the right to remove or affix fixtures or to exercise certain easements over or under the land, as these rights are also limited both in time and nature.

Therefore if the rights reserved are so limited in nature and in time - that having regard to the nature of the land in question the occupier can still regard the land as his own - the reservation of such rights, I find, does not prevent the occupier from being in exclusive possession of the land. This approach, I find, is supported by the fact that many standard leases reserve such limited rights of possession to landlords and therefore it is clear such rights do not prevent the tenant being in exclusive possession.

[73] In *Street v Mountford* at page 817(E)-(H) the court held that the determination of the question whether an agreement grants exclusive possession requires careful consideration by the court of:-

> "…the purposes of the grant, the terms of the grant and the surrounding circumstances."

[74] A similar approach was adopted by Mustill LJ in *Hadjiloucas v Crean* [1988] 1 WLR 1006 at page 1022 paragraph (E)-(F) when he said:

> "Since an intention to confer exclusive possession was conceded in *Street v Mountford* the decision has nothing directly to say about the manner in which the existence of such an intention should be ascertained. Sometimes the task will be straightforward and sometimes it will be difficult. The terms of the agreement will always be of prime importance, though not always decisive. Sometimes the meticulous perusal of the document will be required … the surrounding circumstances will always be material on this point as well as on the questions of sham and intention to create legal relations."

In *Essex Plan Ltd v Broadminster Ltd* [1988] 2 GLR 73 Hoffman J said at page 75:

> "… Each case must depend upon the precise terms of the agreement and its surrounding circumstances".

[75] In some cases it is relatively easy, based on the available evidence to determine that exclusive possession has been granted. In other cases it is more difficult. In *Street v Mountford* the landlord conceded that exclusive possession had been granted and therefore the House of Lords did not have to determine this factual issue. In determining whether exclusive possession is granted the court must look at the purpose of the grant, the surrounding circumstances and the terms of the whole agreement, considering it clause by clause to see if the clauses, individually or collectively, shed any light on the question whether the appellant had exclusive possession of the land. The purpose in considering the agreement clause by clause is not an exercise in determining whether such clauses normally appear in a lease or

not, but rather to determine whether the actual terms of the agreement show that exclusive possession was or was not granted. Sometimes the evidence of the parties can assist the court in determining whether exclusive possession was granted but as was noted by Mustill LJ in *Hadjiloucas v Crean [1988] 1 WLR 1006 at 1024G,*

> "Any layman asked to consider whether an agreement gave exclusive possession to an occupier would be likely to think that one of the most useful pointers would be the way in which the parties conducted themselves whilst the agreement was in force but before any dispute. In this he would be mistaken…"

[76] The determination of the question whether a person enjoys exclusive possession is of necessity fact specific as it involves a meticulous consideration of the terms of the agreement entered into having regard to the surrounding circumstances which existed at the time the agreement was entered into. Whilst some assistance may be derived from considering cases in which the court has had to determine whether a particular agreement granted exclusive possession or not, such cases are not precedents to be slavishly followed. Counsel for both parties provided and sought to support their respective submissions by reliance on a number of such cases, some of which were first instance decisions. I consider that little reliance can be placed on such authorities.

**What is the relevance, if any, of the "intention" expressed by the parties to the agreement to determining the question whether the agreement is a lease or a licence?**

[77] This was a question upon which the parties took diametrically opposed views. Counsel for the appellant, relying particularly on *Street v Mountford* and *AG Securities v Vaughan*; *Anthoniades v Villiers* [1991] AC 417, submitted that the court should not give any weight to the views expressed by the parties in the agreement. He referred to a number of passages from both these authorities. In particular he referred to dicta of Lord Templeman in *Street v Mountford* at page 819 when he noted that the agreement entered into by the parties professed an intention by both parties to create a licence and their belief that they had in fact created a licence. In answer to the submission that the court, in such circumstances, could not decide that the agreement created a tenancy without interfering with the freedom of contract enjoyed by both parties, Lord Templeman responded at page 819 paragraphs (E)-(F) by saying:

> "… The consequences in law of the agreement, once concluded, can only be determined by consideration of the effect of the agreement. If the agreement satisfied all the requirements of the tenancy, then the agreement produced a tenancy and the parties cannot

> alter the effect of the agreement by insisting that they only created a licence. The manufacturer of a five-pronged implement for manual digging results in a fork even if the manufacturers, unfamiliar with the English language, insists that he intended to make and has made a spade".

Lord Templeman reiterated this point elsewhere in his judgment when he stated at page 821 paragraph (C):

> "Words alone do not suffice. Parties cannot turn a tenancy into a licence merely by calling it one"

And again at page 826 paragraph (H) he stated:

> "… The only intention which is relevant is the intention demonstrated by the agreement to grant exclusive possession for a term at a rent."

[78] In *AG Securities* at page 463(C)-(D) Lord Templeman stated that *Street v Mountford* reasserted the principle:

> "Where the language of licence contradicts the reality of lease, the facts must prevail. The facts must prevail over the language …"

And again at page 463(H) to 464(A) he stated:

> "My Lords, in *Street v Mountford* [1985] AC 809 this House stipulated with reiterated emphasis that an express statement of intention is not decisive and that the court must pay attention to the facts and surrounding circumstances and what people do as well as to what people say".

In a similar vein Lord Oliver stated at page 466(H):

> "The critical question however in every case is not simply how the arrangement is presented to the outside world in the relevant documentation but what is the true nature of the arrangement. The decision of this House in *Street v Mountford* established quite clearly that if the true legal effect of the arrangement entered into is that the occupier of the residential property has exclusive possession of the property for an ascertainable period in return for

> periodical money payments a tenancy is created, whatever the label the parties may have chosen to attach to it".

[79] In contrast counsel for the respondent submitted that the court is required to apply the techniques of construction of the ordinary law of contract and ought therefore to ascertain the intention of the parties in light of the principles now authoritatively drawn together in the judgment of Lord Clarke JSC in *Rooney Sky SA v Cookmin Bank* [2011] 1 WLR 290 at paragraphs 14-30. Such contracts should be interpreted in the way in which a reasonable commercial person would construe them. In that case Lord Clarke cited with approval the following guidance given by Lord Hoffman in *Investors Compensation Scheme v West Bromwich Building Society* [1998] 1 WLR 896 at page 912 (1)-(5):

> "(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', … it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.
>
> (3) The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. …
>
> (4) The meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean.
>
> (5) … 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 …"

[80] Applying Lord Hoffman's principles the respondent submitted that the agreement fell to be interpreted principally by ascertaining what the parties would reasonably have been understood to have meant by using the words which they used in the agreement against the relevant background which was reasonably available to them at the time when the agreement was made. Counsel relied on the

cases of *National Car Parks Ltd v Trinity Development Co (Banbury) Ltd* [2001] EWCA Civ 1686, *Clear Channel UK Ltd v Manchester City Council* [2005] Civ 1304, *Scottish Widows plc v Stewart* [2006] EWCA 999 in support of his submission that the label attached by the parties to a transaction, particularly in the case of a commercial transaction between businessmen, where their respective bargaining positions are not asymmetrical and where both have been legally represented, should not lightly be disregarded when determining the intention of the parties. In particular he relied on obiter dicta by Arden LJ in *National Car Parks v Trinity* when she said as follows:

> "[26] … The court must, of course, look at the substance but as I see it, it does not follow from that that what the parties have said is totally irrelevant and to be disregarded. For my part, I would agree with the judge that some attention must be given to the terms which the parties have agreed. On the other hand it must be approached with healthy scepticism, particularly, for instance, if the parties' bargaining positions are asymmetrical…
>
> [28] So the court must look to the substance and not to the form. But it may help in determining what the substance was, to consider whether the parties expressed themselves in a particular way. Of course I bear in mind in *Street v Mountford* that the apparent effect of an agreement which, it was common ground, conferred exclusion possession on the occupier, was to create a tenancy on that ground. It would in my judgment be a strong thing for the law to disregard totally the parties' choice of wording and to do so would be inconsistent with the general principles of freedom of contract and the principle that documents should be interpreted as a whole. On the other hand I agree with Mr Furber's submission that it does not give rise to any presumption. at most it is relevant as a pointer.
>
> [29] While this declaration is not, of course determinative, as I have explained, the court, it seems to me, must proceed on the basis that where two commercial parties have entered into an agreement of this nature, calling it a licence, they have received appropriate advice, they were aware of the importance of the term and they were intending to enter into such an agreement with an appreciation of its significance. I also bear in mind that there has been no suggestion that any of the terms of this

> agreement constitutes a sham, in the sense they were never intended to be acted upon as a result of some other agreement between the parties."

He further relied on dicta by Buxton LJ in the same case when he stated as follows:

> "[42] I cannot therefore agree that *Street v Mountford* requires an approach to this agreement as extreme as that which was argued for by the appellant. It must be relevant to look at the agreement as a whole and at what the parties have indicated that they seek to do; but bearing in mind also the important guidance given in *Street v Mountford*, that if the parties had in fact agreed upon exclusive possession, they cannot offset that agreement simply by labelling the agreement in a certain way or by saying that that is not what they have agreed.
>
> [43] I therefore, like my Lady, would look at this agreement as a whole and although, like her, I think it is possible and open to the court to reach the conclusion that she has without reference to the considerations that I have just set out, nonetheless I cannot accept the argument that those considerations must be put entirely out of our minds."

[81] Counsel for the respondent placed particular emphasis on obiter dicta by Parker LJ in *Clear Channel* when he said as follows:

> "[28] I venture to make one additional comment, however. I find it surprising and (if I may say so) unedifying that a substantial and reputable commercial organisation like Clear Channel, having (no doubt with full legal assistance) negotiated a contract with the intention *expressed in the contract* (see Clause 14.1 quoted above) that the contract should *not* create a tenancy, should then invite the court to conclude that it did.
>
> [29] In making that comment I intend no criticism whatever of Mr McGhee, who sought valiantly to make bricks without straw. Nor, of course, do I intend to cast any doubt whatever on the principles established in *Street v Mountford*. On the other hand the fact remains that this was a contract negotiated between two substantial parties of equal bargaining

> power and with the benefit of full legal advice. Where the contract so negotiated contains not merely a label but a clause which sets out in unequivocal terms the parties' intention as to its legal effect, I would in any event have taken some persuading that its true effect was directly contrary to that expressed intention. In the event, however, as the judge so clearly demonstrated, the case admits of only one result."

[82] These observations by Parker LJ were subsequently approved by the Court of Appeal in *Scottish Widows v Stewart* at paragraphs 63-64 where Lloyd LJ said:

> "…while of course the court must be astute to ensure that parties do not avoid the true legal consequences of their act by giving an agreement the wrong label, it seems to me that there is much force in the attitude articulated by Jonathan Parker LJ in *Clear Water UK Ltd v Manchester City Council [2005] EWCA Civ 1304* at paragraph 29."

[83] The view that the court should interpret contracts in accordance with the ordinary and natural meaning of the words used by the parties has also been reasserted by the Supreme Court in *Arnold v Britton* [2015]UKSC 36.

[84] I am satisfied that nowhere in *Street v Mountford* do their Lordships seek to undermine the general rules of construction which apply to contracts and I am therefore satisfied that the court should continue to apply the principles set out by Lord Hoffman in *Investors Compensation Scheme* as refined by the Supreme Court in *Arnold v Britton* to ascertain the intention of the parties. However, as explained by Mustill LJ in *Hadjiloucas, Street v Mountford* sets out situations and circumstances in which the court may take an agreement otherwise than at is face value. He identified these, at page 1019(D)-(G), as follows:

> "…By way of preface it is necessary to distinguish between three situations in which aside from any question of rectification, the court may take an agreement otherwise than that at its face value. The first exists where the surrounding circumstances show that the agreement between the parties was never intended to create any legally enforceable obligation. The second is the case of the 'sham', in the sense in which that word has been used in numerous cases …. Correctly employed, this term denotes an agreement or series of agreements which are deliberately framed with the object of deceiving third

> parties as to the true nature and effect of the legal relations between the parties. The third situation is one in which the document does precisely reflect the true agreement between the parties, but where the language of the document (and in particular its title or description) superficially indicates that it falls into one legal category, whereas when properly analysed in light of the surrounding circumstances it can be seen to fall into another. … In particular it must always be kept in mind that an agreement which is not a sham may yet fail to achieve the kind of legal relationship which the parties have overtly set out to create."

[85] Therefore, in accordance with *Street v Mountford* the court ought to take an agreement at its face value unless one of the exceptions set out by Lord Templeman in *Street v Mountford* applies. Consequently the court must first apply the ordinary principles of interpretation of contracts to ascertain the meaning of the agreement. As set out by Lord Hoffman in *Investors Compensation Scheme v West Bromwich Building Society* and by the Supreme Court in *Arnold v Britton* the court should interpret clear and unambiguous words in an agreement according to their ordinary and natural meaning. Such an approach to interpretation is especially called for in a case where the parties are in symmetrical positions, namely where each has had the benefit of legal advice, where they have equal bargaining power and where they are experienced business men entering into commercial transactions. The views expressed by the parties however, are not determinative of the question. The court must then go on to consider whether one of the exceptions set out by Lord Templeman in *Street v Mountford*, as explained by Mustill LJ in *Hadjiloucas,* applies. In the present case the relevant exceptions are first, whether the agreement is a 'sham' and second, whether the parties have placed the wrong legal label on their agreement by calling it a licence when in fact it is a lease as it grants exclusive possession.

[86] *Street v Mountford* is binding on this court unless it can be distinguished. Arguably in *Street v Mountford* and also in *AG Securities* there was an inequality of bargaining power between the parties whereas in the present case there was symmetry between the parties as they each had the benefit of legal advice and each was an experienced business man. None of the parties sought to distinguish *Street v Mountford* on this basis. I further note that neither Arden LJ nor Buxton LJ in *National Car Parks* held that *Street v Mountford* could be distinguished on this basis even though the parties in that case had equality of bargaining power. Rather both Arden LJ and Buxton LJ treated *Street v Mountford* as a binding authority and stated that if the parties had in fact agreed upon exclusive possession then they could not offset that agreement by simply labelling it in a different way. Similarly Parker LJ in *Clearwater,* despite his comments about the expressed intention of the parties in the agreement, made it clear that he was not casting any doubt on the principles

established in *Street v Mountford.* I am not therefore satisfied that the fact the parties had equality of bargaining power is a basis upon which to distinguish *Street v Mountford.*

[87] Further I find that the dicta which counsel for the respondent relies on do not conflict with the ratio in *Street v Mountford.* When carefully analysed Arden LJ and Buxton LJ simply assert that the words used by the parties are not an irrelevant consideration and some attention has to be given to them and the words used are a pointer. None of this conflicts with the ratio in *Street v Mountford.*

[88] Indeed *Street v Mountford* directly addresses the question before this court, namely in what circumstances should the court look behind an agreement which at face value states it is a licence. In answer to that question the House of Lords held that this can be done when what the parties say does not reflect what they have done. I therefore find that *Street v Mountford* is on all fours with the issue before this court and is a binding authority on this court.

**Relevance of the Business Tenancies (Northern Ireland) Order 1996 ("the 1996 Order") to the determination of the question in dispute**

[89] The 1996 Order provides certain protection to tenants. It does not provide protection to licensees. Under its terms, unlike its English counterpart, the parties cannot contract out of the 1996 Order. This means that an agreement cannot contain a 'contracting out' clause and the parties cannot create an agreement which is a "sham" or otherwise a device to avoid the consequences of the 1996 Order.

[90] In *Street v Mountford* Lord Templeman dealt with the question whether the protection afforded by similar legislation, namely the Rent Acts, was relevant to the determination of the question whether an agreement created a lease or a licence. He stated at page 819(G):

> "I accept that the Rent Acts are irrelevant to the problem of determining the legal effect of the rights granted by the agreement. Like the professed intention of the parties the Rent Acts cannot alter the effect of the agreement".

He added at page 825(H):

> "Although the Rent Acts must not be allowed to alter or influence the construction of an agreement, the court should, in my opinion, be astute to detect and frustrate sham devices and artificial transactions whose only object is to disguise the grant of a tenancy to evade the Rents Act".

[91] In *AG Securities* at page 462(H) he clarified the quote by stating:

> "It would have been more accurate and less liable to give rise to misunderstandings if I had substituted the word `pretence' where the reference is to `sham devices' and `artificial transactions' in *Street v Mountford*."

He further stated in *AG Securities* at page 459(C)-(D)

> "The duty of the courts is to enforce the (Rent) Acts and in so doing to observe one principle which is inherent in the Acts … the principle that parties cannot contract out of the Acts."

[92] The purpose of the 1996 Order is to protect tenants. The 1996 Order does not differentiate between different types of tenants whether according to their size, bargaining power or otherwise. Therefore if an agreement creates a tenancy the tenant is afforded protection. If an agreement creates a licence and is not a sham or device designed to evade the 1996 Order, then no protection is afforded by the 1996 Order. As the 1996 Order does not permit the parties to contract out of the 1996 Order the court will strike down any "contracting out" clauses and will also be astute to strike down any "sham" agreements or other devices which are designed to 'contract out' of the 1996 Order.

[93] I therefore conclude that the only relevance of the 1996 Order when determining whether an agreement is a licence or a lease is that it places a duty on the court to be astute to ensure that any agreement entered into between parties is not a sham or otherwise a device designed to evade the 1996 Order. If the court finds that it is not entered into for this purpose and it does not contain a contracting out clause, then, thereafter the 1996 Order is irrelevant to the question of construction of the agreement.

[94] Mustill LJ defined the meaning of `sham' or `pretence' in *Hadjiloucas* at page 1019(E)-(F) as follows:

> "Correctly employed the term denotes an agreement or series of agreements which are deliberately framed with the object of deceiving third parties as to the true nature and effect of the legal relations between the parties".

**Consideration**

[95] For these reason outlined I am satisfied that *Street v Mountford* is binding on this court and therefore the approach that this court must take in interpreting whether the agreement is a lease or a licence is to :-

(a) First, consider whether the intention of the parties was to create a licence or a lease having regard to the words used by the parties in light of the entire agreement and the surrounding circumstances.

(b) If the court finds the parties intention was to create a licence then the agreement will be a licence unless one of the exceptions set out in *Street v Mountford* applies.

(c) The court must then consider whether the agreement is a sham.

(d) If not, the court must then consider whether the parties have given the agreement the wrong legal label. For example, if the court finds that the agreement in substance grants exclusive possession then the agreement creates a lease and not a licence notwithstanding the expressed intention of the parties that it is a licence.

(e) In the event that one of the exceptions applies then the court is entitled to look behind the agreement.

[96] The agreement was a commercial transaction entered into by businessmen who had the benefit of legal advice and had equal bargaining power. Throughout the agreement the parties refer to the agreement as a licence and the parties as 'licensee' and 'licensor'. In particular clause 12 specifically states that the parties agree "that this licence creates no tenancy or lease whatsoever". In these circumstances and given that the agreement uses clear and unambiguous language I should give the words used their ordinary and natural meaning. I am therefore satisfied that the parties' expressed intention was to create a licence and not a lease.

[97] Such a stated intention by the parties however, is not determinative of the matter. The court must thereafter consider whether one of the exceptions set out by Lord Templeman in *Street v Mountford* applies, namely whether the agreement is a sham or device designed to "contract out" of the 1996 Order or whether the agreement granted exclusive possession and therefore by calling the agreement a licence the parties attached the wrong legal label and the court is therefore entitled to find that the agreement is actually a lease.

[98] In *AG Securities* the court noted that the duty of the court was to enforce the Rent Acts and in particular to enforce the principle that parties cannot contract out of these Acts. In determining whether the agreement was a sham their Lordships took into account not only the terms of the agreement but also the negotiations of the

parties, what was contemplated by the parties when the agreement was entered into and the subsequent acts of the parties. As Lord Jauncey stated at page 475(F):

> "Accordingly although the subsequent actings of the parties may not be prayed in aid for the purposes of construing the agreements they may be looked at the for the purposes of determining whether or not parts of the agreements are a sham in the sense that they were intended merely as `dressing up' and not as provisions to which any effect would be given."

[99] In *AG Securities* the court held that Clause 16 of the agreement was a sham. This clause reserved to Mr Antoniades the right to go into occupation or to nominate others to enjoy occupation of the whole of the flat jointly with Mr Villiers and Miss Bridger. The court held that the circumstances showed that the flat was not suitable for sharing and therefore this clause had an air of unreality about it in light of the reality that the appellants lived in the flat as a 'quasi matrimonial' home and no one realistically contemplated that the respondent would either live in or put another person in to share the accommodation and in the event the respondent never attempted to exercise the powers reserved to him by clause 16. In these circumstances the court was satisfied that the clause was not a genuine reservation of possession but was rather a 'pretence' designed to contract out of the Rent Acts.

[100] I find that the facts of *AG Securities* are very different from the facts of the present case. Essentially in that case the words of the agreement contradicted what the parties had actually intended as demonstrated by the surrounding circumstances and the actions of the parties after they entered into the agreement.

[101] There is no clause in the agreement in this case which has "an air of unreality" about it. There is nothing in the terms of this agreement or the negotiations of the parties which contradict what the parties contemplated when they entered into the agreement. There are no acts by the parties after they entered into the agreement which contradict its terms or show that the agreement was a pretence or an attempt by the parties to evade the protection of the 1996 Order. Rather I am satisfied that when the parties called the agreement a licence they genuinely believed that they had created a licence. In *Street v Mountford* the court was satisfied that the agreement was not a sham (see Lord Templeman in *AG Securities* at page 462H) even though the parties called an agreement which granted exclusive possession a licence. The court therefore cannot find an agreement is a sham simply on the basis that it grants exclusive possession. It must go on to find that the agreement was deliberately framed to deceive a third party as to the true nature and effect of the legal relations between the parties. On the basis of the evidence before the court I am not satisfied that the agreement was a sham or a device designed to evade the protection afforded by the 1996 Order.

[102] As I have found that the agreement is not a sham I must now consider whether the parties, when they called it a licence actually applied the wrong legal label and despite their stated intentions had in fact created a lease because the agreement granted exclusive possession to the appellant.

[103] The Tribunal is an expert tribunal, having the benefit not only of an experienced Judge but also an expert Mr Spence, MRICS Dip Rating IRRV (Hons) sitting on the panel. It determined that the agreement did not grant exclusive possession. In *MA (Somalia) v Secretary of State for the Home Department [2011] 2 All ER 65* at paragraph 43 Sir John Dyson said:

> "Courts should approach appeals from (expert tribunals) with an appropriate degree of caution … they and they alone are the judges of the facts … Their decision should be respected unless it is quite clear that they have misdirected themselves in law. Appellate courts should not rush to find such misdirection simply because they might have reached a different conclusion on the facts or expressed themselves differently".

[104] Whilst the Tribunal heard evidence from the parties it held, at paragraph [22] of its judgment, that this evidence was "of limited value in construing the agreement". The only relevant findings of fact the Tribunal made related to the fact the parties were not "asymmetrical" as both had legal advice and both were experienced business men. Otherwise the Tribunal did not find the subjective evidence of the parties to be "of any real assistance" and did not consider that their use of the car park provided any real clue as to the construction of the agreement. In determining whether the agreement granted exclusive possession the Tribunal considered the terms in meticulous detail. Normally the determination of the question whether an agreement grants exclusive possession is a mixed question of law and fact. In such circumstances the appeal court should respect the findings of the Tribunal. In the present case however the Tribunal's determination of the question of exclusive possession was based purely on a consideration of the meaning of the terms of the agreement rather than on the evidence given by the parties. Determining the meaning of the terms of an agreement is a pure question of law. In such circumstances this court can properly consider whether the Tribunal misdirected itself in law as to the construction of the agreement, notwithstanding the cautionary note by Lord Dyson.

[105] In determining whether exclusive possession was granted the Tribunal carefully considered the terms of the agreement and the terms which were omitted from the agreement. I agree that this was the correct approach. I further consider that the terms of the agreement must be considered in light of the surrounding circumstances. One of the surrounding circumstances relevant to the determination is the nature of the lands in question and I respectfully adopt Stephen LJ's

description of the lands and the background circumstances as set out in paragraph [4]-[12] of his judgment. In respect of the terms omitted from the agreement I accept that the court may take these into account in determining whether an occupier has exclusive possession. This is relevant however only to the extent that the absence of such terms points to the occupier having or not having exclusive possession. A consideration of whether such terms are or are not normally found in a lease however is not the question to be answered. The court should only consider whether the absence of certain terms means that exclusive possession was or was not granted, which is an entirely different question from whether such terms normally are found in a lease.

[106] In respect of the terms of the agreement I consider that clause 1 is the most relevant clause in determining the question whether the appellant was granted exclusive possession as it sets out the rights granted to the appellant. Clause 1 states:

> "Subject as hereinafter provided the Licensor will permit the Licensee, its servants and agents the right to use the land (hereinafter called `the car parking site') described in the schedule hereto for the purposes of parking motor vehicles and for no other purposes whatsoever."

Under clause 1 the appellant is entitled to use the entire lands to operate a commercial car park. They cannot use it for any other purpose. The parties agreed that the respondent could not, for example use the lands or any part of the lands to park his own car without paying a fee and if he did so such actions would constitute a trespass and could be restrained by an application for an injunction on the part of the appellant. It was further accepted that the respondent could not use the land in any way which was inconsistent with the appellant's use of the lands as a commercial car park.

[107] The respondent however submitted that, in accordance with the agreement, he could use the land for all other purposes. The question therefore arises, for what other purposes could the respondent use these lands, in circumstances where the appellant was granted the right to operate a commercial car park on the lands. Mr Hanna QC contended that the respondent could use the land in a number of ways, namely:

- To walk across the land.
- Invite others to walk across it.
- Erect advertising hoardings along the boundaries.
- Grant over-sailing licences for construction cranes.
- Grant easements to run services under or over the car park.
- Erect a mobile phone mast or new line.
- Erect structures on the land which did not interfere with the operation of the car park.

- He stated that the preservation of these rights meant the appellant was not in exclusive possession.

[108] In support of this submission he relied on the observations of HHJ Cooke in *Kettel v Bloomfold Ltd* [2012] EWHC 1422 at paragraphs [16]-[24].

[109] In respect of the right of the respondent to walk across the car park and/or to invite others to walk across the car park I find that he would be entitled to do this provided such actions did not amount to an interference with the appellant's use of the lands as a commercial car park. I am not however satisfied that such actions amount to acts of possession or that the exercise of such rights would prevent the appellant being in exclusive possession. The authorities are clear that a tenant can still enjoy exclusive possession despite the fact a landlord retains a right to re-enter the premises for the purposes of inspection. I find that a right to walk across an open car park is of such a negligible nature as not to amount to an act of possession and the respondent's right to do so would not prevent the appellant being in exclusive possession.

[110] In respect of the erection of advertising on hoardings on the boundary fences I find that there are a number of potential problems in the respondent asserting such a right having regard to clause 6 which places the burden on the appellant to erect fences and to keep them in reasonable condition to the satisfaction of the respondent. The question therefore arises whether in fact the respondent could erect hoardings and use them for advertising as suggested. It is not necessary however for the court to answer this question because I am satisfied that, even if such a right existed, its qualitative nature is such that it does not prevent the appellant being in exclusive possession.

[111] In respect of over-sail licences, historically it was considered that a landowner owned everything above and below the surface of the land and the latin maxim '*cuius est solum eius est usque ad coelum et ad inferos'* was said to apply. This however is no longer the case and the rights of a landowner are now restricted to airspace above his land to such height as is necessary for the ordinary use and enjoyment of his land and the structures upon it – see Lord Wilberforce in *Commissioner for Railways v Valuer General* [1974] AC 328. Without determining the question whether a construction crane would require an over-sail licence I am satisfied that if a licence is required, the respondent would be the person who would have the ability to grant such a licence. I am however satisfied that the nature of the possession thereby retained by the respondent, namely to grant a licence for a time limited period (that is the length of the period that construction is on-going) and for such a limited purpose is negligible. I therefore find that the qualitative nature of such a right is not such as to prevent the appellant being in exclusive possession of the lands.

[112] In relation to the rights reserved to the respondent to grant easements under and over the land, I find that, practically, such grants could not take place without interfering with the appellant's use of the land as a commercial car park and

therefore the appellant could seek injunctive relief for such actions. Further the idea that the respondent could erect a mobile phone mast or a building over the car park without interfering with the appellant's use of the land has, to quote Lord Jauncey "an air of unreality about it". Additionally, under the agreement the appellant has a right to build structures on the land. Thus if the respondent built on the land and interfered with the sub-soil the appellant could bring an application for injunctive relief on the basis he needed to make use of the sub-soil for the foundations of any building he intended to or had erected.

[113] I am therefore satisfied that clause 1 grants exclusive possession to the appellant as he has physical control of the land and can effectively call it his own. Any rights of possession reserved to the respondent are qualitatively not of such a nature as to prevent the appellant being in exclusive possession.

[114] Like the Tribunal, I consider that all the other clauses in the agreement are neutral in the sense that they do not assist one way or the other in determining whether the appellant was granted exclusive possession. I accept that some of these clauses may appear to be unusual or even unreasonable if the agreement is held to be a lease; that however is not the question to be determined.

[115] Counsel for the respondent laid much weight upon clause 12 and submitted that this pointed to the existence of a licence as it reserved rights of possession to the respondent. I am satisfied, for the reasons set out above, that any rights reserved to the respondent are of a negligible nature and therefore do not prevent the appellant being in exclusive possession. I am satisfied that clause 12 is merely a label and therefore cannot change the nature of the agreement entered into between the parties.

[116] I accept that the court may take into account the fact that the agreement does not contain certain terms, in determining whether an occupier has exclusive possession. Whilst the lack of a covenant for quiet enjoyment and the lack of a covenant for re-entry in some cases may point to the appellant not having exclusive possession, each case depends on its own facts. A covenant for quiet enjoyment is implied by law. Whilst some landlords would seek to limit the covenant enjoyed under Deasy's Act there is no evidence in the present case that this was necessary even if a lease had been granted given the nature of the premises. Further the lack of a covenant to re-enter, whilst normally found in leases does not point away from exclusive possession as the landlord was able to walk across the car park freely in this case and therefore such a clause was unnecessary.

[117] In all the circumstances I am satisfied that the agreement granted exclusive possession as any rights reserved were negligible.

**Conclusion**

[118] I am satisfied that the agreement is a lease and not a licence. Itherefore am in agreement with Stephens LJ and grant the appeal. This is because, notwithstanding the parties' stated intention that the agreement was a licence, the court must in accordance with the binding authority of *Street v Mountford,* exceptionally, look behind this expressed intention as the agreement in fact granted exclusive possession and therefore the parties by calling it a licence attached the wrong legal label. I answer "No" to the question in the case stated.

[119] In resonance with Parker LJ I find, it unedifying that a substantial and reputable commercial organisation like Car Park Services Limited, having negotiated a contract, with the benefit of legal advice, expressing the intention that the agreement should create a licence, which is not a sham, should then invite this court to conclude that the contract created was in fact a lease. That is something which is completely at odds with what they expressly agreed. I consider however that I am bound by the House of Lords decision in *Street v Mountford* and as I have found the occupier was granted exclusive possession, notwithstanding the parties' expressed intention that they had created a licence, the court must give effect to what they did and not what they said they did.

**SIR JOHN GILLEN**

[120] I have read and gratefully adopt the background facts, the terms of the agreement, the decision of the Lands Tribunal ("the Tribunal") and the submissions of the appellant and respondent carefully set out by Stephens LJ in paragraphs [1] to [16] of his judgment.

[121] I have come to the conclusion however that the answer to the question posed in this application should be "YES" and I would have affirmed the decision of Horner J.

[122] At the outset I am conscious of the statutory obligation in Northern Ireland to avoid contracting out of the 1996 Order. It is clear that Northern Ireland differs from the situation in England and Wales and the Republic of Ireland in that it has eschewed any system for contracting out of the business protection provided to tenants of business premises by the 1996 Order and by its statutory predecessor the Business Tenancies Act (Northern Ireland) 1964.

[123] Article 24 of the 1996 Act provides as follows:

> "Restrictions on agreements excluding provisions of this Order
>
> 24. Without prejudice to Article 23(7) or 25, or paragraph 6 of Schedule 2, so much of any agreement

relating to a tenancy to which this Order applies (whether contained in the instrument creating the tenancy or not) as—

(a) purports directly or indirectly by any means whatsoever to preclude any person from making an application or request under this Order; or

(b) provides for the termination or surrender of the tenancy in the event of the tenant's making such an application or request; or

(c) provides for the imposition of any penalty, restriction or disability on any person in the event of his making such an application or request; or

(d) purports to exclude or reduce compensation under Article 23, shall be void."

[124] The restrictive approach adopted in Northern Ireland has been discussed in the report of Law Reform Advisory Committee for Northern Ireland on Business Tenancies published in 1994 (LRAC No. 2 (1994)) at Chapter 3 (pages 5-17) and the Northern Ireland Law Commission Report on Business Tenancies March 2011 (NILC 9 (2011)) at Chapters 3-5 (pages 12-31).

[125] The rationale for this restrictive approach is clear. The latter report at paragraph 5.5 records:

> "The contrary view, espoused by those who do not favour regulation, or who favour only a limited degree of relaxation, is that 'market regulation' still serves the useful purpose and proper function in this area of commercial activity. Their view is that the smaller business tenant should continue to enjoy the degree of business protection that has been afforded under legislation in Northern Ireland since 1964."

[126] At paragraph 5.7 the report concludes:

> "So it appears to us that, consonant with our equality duty, we should not propose an absolute 'market freedom' solution but we should recommend the continuance of an appropriate degree of 'market regulation'."

[127] I regard these reports as recording what the state of the law currently is without of course changing the law in any way. It is clear therefore that *the aim* and *purpose* behind the stricter regime in Northern Ireland was to protect smaller businesses.

[128] In the instant case, it seems to me inescapable that the avowed intent of the parties, both of whom were advised by solicitors, was to form a licensor/licensee agreement with the entire agreement punctuated by references to "Licensor" and "Licensee". Moreover insofar as the hallmark of a lease is "exclusive possession", clause 12 expressly purports to reserve certain possession rights to the "Licensor". It must also be borne in mind that the evidence before the Tribunal was that the respondents were experienced businessmen in this field.

[129] At paragraph [23] Horner J said:

> "The applicant and Mr McCann were not 'asymmetrical'. The applicant, whose directors include Mr McHugh, an accountant who gave evidence and Mr O'Kane, a builder/surveyor was experienced in running car parks. Mr McCann is a well-known music promotor and property developer in Northern Ireland."

[130] I also note with approval that at paragraph [15] Horner J referred to Lord Clarke's assertion in Rainy Sky SA v Kookmin Bank [2011] UKSC 50 at paragraph [14]:

> "… the ultimate aim of interpreting a provision in a contract, especially a commercial contract, is to determine what the parties meant by the language used, which involves ascertaining what a reasonable person would have understood the parties to have meant."

[131] Equally so, I am conscious of the need to ensure that parties are governed by the relevant statute law and, particularly in this context, do not escape its consequences by illusory or sham methods.

[132] It is worth repeating the statement of Lord Templeman in *Street v Mountford* [1985] AC 809 at 819E-F where he said:

> "… The consequences in law of the agreement, once concluded, can only be determined by consideration of the effect of the agreement. If the agreement satisfied all the requirements of a tenancy, then the agreement produced a tenancy and the parties cannot

> alter the effect of the agreement by insisting that they only created a licence. The manufacturer of a five pronged implement for manual digging results in a fork even if the manufacturer, unfamiliar with the English language, insists that he intended to make and has made a spade."

[133] In my opinion the approach of Horner J, adopted by him in paragraphs [25]-[32], reflects the current trend in judicial thinking which is to draw a distinction between the approach to contractual construction which elucidates the meaning of the words and an approach on the other hand which modifies or contradicts the words in pursuit of what appears to a judge to be a reasonable result in the context particularly where two parties are making a binding contract at arms' length.

[134] The latter approach found expression in the judgment of Lord Hoffmann in *I.C.S Limited v West Bromwich B.S.* [1998] 1 W.L.R 896 at 913B where he had laid out five principles of interpretation of documents. Principles 4 and 5 are as follows:

> "(4) The meaning which a document … would convey to a reasonable man is not the same as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even … to conclude that the parties must, for whatever reason, have used the wrong words or syntax …
>
> (5) The 'rule' that words should be given their 'natural and ordinary meaning' reflects the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had."

[135] That approach has attracted a measure of traditional criticism recently on the basis that it leads judges to reconstruct an ideal contract which the parties might have been wiser to make but never actually did.

[136] Lord Sumption in the course of his recent Harris Society Annual Lecture at Keble College, Oxford in May 2017 said:

> "It is I think time to reassert the primacy of language in the interpretation of contracts. It is true that language is a flexible instrument. But let us not overstate its flexibility. Language, properly used, should speak for itself and it usually does. The more precise the words used and the more elaborate drafting, the less likely it is that the surrounding circumstances will add anything useful. I do not therefore accept that the flexibility of languages of proper basis for treating the surrounding circumstances as an independent source from which to discover the parties' objective intentions."

[137] As Lord Sumption said later in that lecture, it is not normally the function of a contract to explain why it is in the terms that it is. An apparently harsher and reasonable term may have been agreed by way of compromise or in exchange for concessions in other areas. Once the courts resort to sources other than the language in order to identify the object of the transaction, it is difficult to justify the current law about the exclusion of extrinsic evidence. He added at page 9:

> "Moreover judges' notions of common sense tend to be moulded by their idea of fairness. But fairness has nothing to do with commercial contracts. The parties enter into them in a spirit of competitive co-operation with a view to serving their own interests. Commercial parties can be most unfair and entirely unreasonable, if they can get away with it. The problem about measuring their intentions by a yardstick of commercial common sense is that in practice it transforms the judge from an interpreter into a kind of *amiable compositeur*. It becomes a means of saving one party from what has turned out to be a bad bargain. The question is no longer what the parties agreed. It is: what would they have agreed if they were the objective, just and fair-minded people that in practice they are not."

[138] The trend back to the primacy of language in the interpretation of contracts is to be found in a decision of the Supreme Court in *Arnold v Britton* [2015] AC 1619. It is unnecessary for the purposes of this case to outline the factual background of this case. The relevance is that Lord Neuberger at [16]-[23] emphasised seven factors in interpreting a written contract, the first four of which are relevant to this case:

"[17] First, the reliance placed in some cases on commercial common sense and surrounding circumstances … should not be invoked to undervalue the importance of the language of the provision which is to be construed. The exercise of interpreting a provision involves identifying what the parties meant through the eyes of a reasonable reader, and, save perhaps in a very unusual case, that meaning is most obviously to be gleaned from the language of the provision. Unlike commercial common sense and the surrounding circumstances, the parties have control over the language they use in a contract. And, again save perhaps in a very unusual case, the parties must have been specifically focussing on the issue covered by the provision when agreeing the wording of that provision.

[18] Secondly, when it comes to considering the centrally relevant words to be interpreted, I accept that the less clear they are, or, to put it another way, the worse their drafting, the more ready the court can properly be to depart from their natural meaning. This is simply the obverse of the sensible proposition that the clearer the natural meaning the more difficult it is to justify departing from it. However, that does not justify the court embarking on an exercise of searching for, let alone constructing, drafting infelicities in order to facilitate a departure from the natural meaning. …

[19] The third point I should mention is that commercial common sense is not to be invoked retrospectively. The mere fact that a contractual arrangement, if interpreted according to its natural language. …

[20] Fourthly, while commercial common sense is a very important factor to take into account when interpreting a contract, a court should be very slow to reject the natural meaning of a provision as correct simply because it appears to be a very imprudent term for one of the parties to have agreed, even ignoring the benefit of wisdom of hindsight. The purpose of interpretation is to identify what the parties have agreed, not what the court thinks that they should have agreed. Experience shows that it is

> by no means unknown for people to enter into arrangements which are ill-advised, even ignoring the benefit of wisdom of hindsight, and it is not the function of a court when interpreting an agreement to relieve a party from the consequences of his imprudence or poor advice. Accordingly, when interpreting a contract a judge should avoid re-writing it in an attempt to assist an unwise party or to penalise an astute party."

[139] A further recent example of the primacy of language approach is to be found in a judgment of the Privy Council in *Krys v KBC Partners* [2015] UKPC 46.

[140] Of course I readily recognise that the instant case is not merely about construing a contract in a vacuum. It must be set in the context of the relevant legislation and in the Business Tenancies (Northern Ireland) Order 1996 ("the 1996 Order") whereby it is not possible to contract out of the provisions of that order nor it is possible to contract out of the protections afforded by its statutory predecessor the Business Tenancies Act (Northern Ireland) 1964. This contrasts with the situation in England whereby under section 38A of the Landlord and Tenant Act 1954, parties can contract out of these protections even without the need to obtain a court order.

[141] I consider it is safe to presume that the mischief addressed by the Northern Ireland legislation was that evinced in the Law Commission Report adverted above in paragraphs [125]-[127] of this judgment. The instant case is not an example of that mischief. Not only were the parties clearly experienced businessmen, but they were advised by solicitors who obviously were responsible for drafting the legal agreement. Moreover that agreement was revisited by the lawyers initially in December 1997 and again in 2008. The language of licence remained untouched and unamended. It is inconceivable that these solicitors were unaware of the importance of the 1996 legislation and the consequences of distinguishing between a tenancy and a licence.

[142] In my view it is inconceivable that either of these parties intended to create a tenancy and implausible to suggest that the solicitors intended to do other than draft a licence. The agreement is consistently punctuated by references to "Licensor" and "Licensee", nomenclature well-known to any solicitor.

[143] The fundamentals of a tenancy agreement were therefore understandably omitted. Thus there is no reservation to the landlord of an express right of entry on the premises demised. Why would there be such a reservation if only a licence is granted? What solicitor would have omitted such a term from a tenancy if, as Mr Johnson conceded, it means that if this is a tenancy the owner has no right to enter the premises to see if repairs are necessary in light of the exclusive right of possession on the tenant. What landlord, represented by a solicitor, would ever have allowed this to happen if this was a tenancy agreement?

[144] Similarly a covenant of quiet enjoyment is invariably found in every lease. As Horner J pointed out at paragraph [29]:

> "The reason for this is that the covenant implied by section 41 of Deasy's Act is so wide that any solicitor for a landlord would take care to circumscribe its operation. Thus the landlord would almost always give a narrower covenant of quiet enjoyment to the tenant."

[145] I therefore find it wholly unsurprising that at paragraph [29] of the judgment a highly experienced chancery practitioner and judge namely Horner J, sitting with a highly experienced sitting member namely Mr Spence of the Tribunal should state:

> "However, neither us has ever seen a business lease where such a covenant has been omitted."

[146] I consider that Parliament never intended to frustrate the avowed intention of experienced businessmen with the assistance of lawyers to draw up agreements as they deemed fit. It was never the intention to prevent such businessmen drawing up a licence rather than a tenancy in circumstances where the written agreement will needless to say make no reference to the issues that may have arisen in terms of compromise/cost/concessions made in the course of negotiations leading to such an agreement. Such factors may well have been the engine behind the decision to grant a licence rather than a lease and it would be unconscionable for this court to frustrate that decision in the absence of such knowledge .

[147] Turning again to the primacy of language used, clause 1 of the agreement specifically confines the appellant to restricted use namely the right to use the land "for the purposes of parking motor vehicles and for no other purposes whatsoever."

[148] If language is to mean anything, the phraseology employed in this clause affords the appellant solely an exclusive personal right to park vehicles on the relevant property. How can he argue to have exclusive possession if he cannot use the site for any other purpose whatsoever?

[149] Clause 2 follows this theme. The right is exclusive to the appellant. He was not permitted therefore to assign that right to any other person. Admittedly a limited liability company may change its shareholders, but the fact of the matter is that the appellant company had to be the company to exercise the right and could not assign it to any other company of another name. I consider this to be another clear example of the determination not to grant a tenancy but rather to confer a licence which is precluded exclusive possession.

[150] Clause 12 of the agreement by itself would not necessarily come to the aid of the respondent if the agreement or otherwise satisfied all the requirements of a tenancy. Merely to insist that you have created a licence would not be sufficient if the whole agreement was otherwise a sham. As Lord Templeman said in *Mountford's* case:

> "The manufacture of a five pronged implement for manual digging results in a fork even if the manufacturer, unfamiliar with the English language, insists that he intended to make and has made a spade."

[151] However, clause 12 does not sit alone. It has to be seen in the context of the rest of the agreement drawn up by experienced businessmen and solicitors. Given the terms of clauses 1 and 2, it is not at all surprising that clause 12 expressly agrees that "this licence creates no tenancy or lease whatever" and that "possession of the car parking site is retained by the Licensor subject however to the rights created by this licence and that such rights are not assignable by the Licensee". In my view the intention could not be clearer particularly in light of the contents of paragraphs [1] and [2].

[152] In light of these three clauses alone, I consider it wholly implausible to argue that for example the respondent could be prevented by the appellant from walking into the car park to view the property for the purposes of repair, that he would be precluded from raising an advertising billboard at the edge of the property provided it did not interfere with the car parking and that if he did so just outside the property the overhanding structure, however small, could be excluded by the appellant because of his rights of exclusive possession etc. It is inconceivable that the appellant could have exclusive possession to this degree given the terminology of the agreement.

[153] For the agreement to be a sham, it would have needed both parties and solicitors to have been party to it. Given the explicit terms of the agreement it would have to be a deliberate and ill-conceived attempt made to confound the terms of the 1996 legislation. I see not the slightest evidence that such an exercise is being performed by such distinguished members of the Law Society.

[154] Doubtless the other clauses in the agreement could be argued either way. For example clause 4, which ensures that the appellant will not be liable to the respondent in respect of personal injury, loss or damage suffered by the appellant or its servants and agents from using the car park, could be argued in favour of the respondent on the basis that if the appellant had exclusive possession then the need for such a clause would be reduced. Equally so the clause may have been simply entered by a careful solicitor out of an abundance of caution.

[155] Clause 3 providing for payment of rent every four weeks is equally consistent with a lease or a licence. Clause 5 dealing with rates by necessary implication confines those rates only to those incurred by the Licensee. Clause 6 confines additional erections to those necessary only for using the land for car parking purposes and is therefore consistent with a licence. Clause 7, imposing an obligation to keep the car parking site free of all rubbish, is a common feature of such licences, [39] Clause 8 is open either to the argument that the obligation on the appellant to insure necessarily requires some form of possession on the part of the respondent or arguably on the other hand could point to a tenancy if the respondent still had the right to conduct activities on the site and therefore imposed a greater premium.

[156] Clause 9 by implication confines the need to obtain statutory approvals for all "necessary" purposes for the car park. Obviously if the respondent wished to erect a building/billboard, the appellant would not require to obtain any statutory approval.

[157] Clause 11 provides that the appellant is to indemnify the respondent in relation to all claims by third parties in respect of any liability caused by or arising on the site. By implication that can only be relevant to the appellant's use of the land for the purpose of parking motor vehicles.

[158] In short, I agree with the conclusion of Horner J that basically these clauses are not helpful in reaching any conclusion as to the nature of the agreement and in any event how the agreement operated on the ground is not of any real assistance in the construction of the agreement made at the initial stage.

[159] I consider that the key clauses in this agreement are 1, 2 and 12. I borrow what Parker LJ said in *Clear Channel UK Limited v Manchester City Council* [2005] EWCA Civ. 134 at paragraph 29 in the context of this case:

> "…the fact remains that this was a contract negotiated between two substantial parties of equal bargaining power and with the benefit of full legal advice where the contract so negotiated contains not merely a label but a clause which sets out in unequivocal terms the parties' intention as to its legal effect."

[160] Like Parker LJ, I would have taken some persuading that the true effect of the contract in the instant case was directly contrary to the expressed intention. The object of the court's endeavours must be to understand the language of the agreement rather than to override it. The appellant in this case is contending for a result which is inconsistent with what the parties, advised by experienced lawyers, appear to have agreed. I can find no plausible explanation why their intentions should not be followed.

[161] Car Park Services Limited has requisitioned under section 8(6) of the Lands Tribunal and Compensation Act (NI) 1964 and the Tribunal has stated a case for determination by this court namely:

> "… whether the Lands Tribunal were correct in finding that the agreement in writing, for the occupation by (Car Park Services Limited) of premises comprising a car park located at Winetavern Street/Gresham Street, Belfast, dated 1 December 1987 and entered into between Eamon McCann, as owner of the said premises, and (Car Park Services Limited) created a licence, and not a lease."

[162] I answer "Yes" to the question stated and affirm the decision of Horner J.