THE HIGH COURT

Record No. 2018/11189 P

[2023] IEHC 563

Between

REXBAY LIMITED

PLAINTIFF

AND

PAUL McCANN, STEPHEN TENNANT AND (BY ORDER) HAKUBA LIMITED

DEFENDANTS

JUDGMENT of Ms. Justice Stack delivered on the 6th day of October, 2023.

INTRODUCTION

1. These proceedings concern two neighbouring Units in the development known as Point Village Shopping Centre ("the Centre") at North Wall Quay, Dublin 1, both located at Level 0 of the Centre and facing onto Point Village Square, a relatively new development.

2. The plaintiff's claim is one brought against the first and second defendants for breach of an Exclusivity Clause contained in a Side Letter to a Lease held by the plaintiff in Units 3 and 20 of the Centre. The plaintiff forms part of the Enterprises Entertainment Group ("the Group") which operates various Starbucks cafés throughout the country and I will refer to the

premises demised to the plaintiff, which have been altered so as to create a single trading Unit, as "the Starbucks outlet".

3. The third defendant has purchased the Centre from the first and second defendants, has consented to being joined to the proceedings, and has adopted the position maintained by the first and second named defendants. Consequently, I will in general refer in this judgment to "the defendants".

4. The Starbucks outlet was demised by Lease made 7 September, 2015, between Henry A. Crosbie of the first part, the first and second defendants as joint statutory receivers and as agents and attorneys of Henry A. Crosbie of the second part, and the plaintiff (variously, "the plaintiff" or "Rexbay") of the third part ("the Rexbay Lease"), by virtue of which, the Starbucks outlet was demised to Rexbay for the term of ten years from the Term Commencement Date as defined therein.

5. Clause 1.1 of the Rexbay Lease defined *"Permitted Business"* for the purpose of the Lease as:-

> "*Use of the Premises as a coffee shop and restaurant which shall trade under the name of Starbucks for a minimum of two years from the Term Commencement Date provided that at no time is the Premises to be used for any of the uses listed in Clause 3.11(a)."*

6. Clause 3.11 (a) of the Rexbay Lease then lists a number of uses which are not permitted. Clause 3.11(b) contains a covenant on the part of Rexbay not to use or permit any part of the Premises to be used for any purpose other than for the Permitted Business (as defined above) and for no other purpose without the prior consent of the Landlord.

7. The case turns on the provisions of a Side Letter, also dated 7 September, 2015, agreed between the first and second defendants and Rexbay, and which is stated to be supplemental to the Rexbay Lease.

8. This agreed a number of specific matters which were negotiated between the parties, such as a rent-free period and a break option for Rexbay, and it is specifically provided that the benefit of the Side Letter *"is personal [to] Rexbay Limited t/a Starbucks and will not apply to any third party or any successor in title or assignee of Rexbay Limited t/a Starbucks"*.

9. Clause 3 of the Side Letter is headed "*Exclusivity*" and provides as follows:-

*"3.1 The Landlord shall not grant or consent to the granting on a First Letting Basis (as defined below) a new lease in respect of any part of the Centre to (i) Costa Coffee, (ii) Butlers Chocolate, (iii) Insomnia, or (iv) Caffé Nero (v) Esquires or any other similar type of coffee chain store where coffee is their primary product (**"Excluded Coffee Chain"**) PROVIDED THAT the provisions of this paragraph shall not extend to a prohibition on use of a Unit for the sale of coffee and other hot beverages where such use is ancillary to the main or permitted use of such Unit (e.g. a bakery, sandwich bar or restaurant) and further provided that the provisions of this paragraph shall not extend to the parts of the Centre known as the Cinema at levels 3, 4 & 5 as outlined in red and coloured grey on the map attached to the Schedule One hereto.*

*3.2 It is hereby agreed that **"First Letting Basis"** for the purpose of this Side Letter means the granting of an occupational lease to a new tenant of a Unit in the Centre.*

3.3 The covenants and agreements contained in paragraph 3.1 shall only apply to a lease granted on First Letting Basis.

3.4 If an application is made by a tenant in occupation of a Unit in the Centre for consent to assign or sub-let to an Excluded Coffee Chain then the Landlord, on receiving such application, shall, within five Working Days of receipt of any such application, notify the Tenant of such application. The Tenant shall have the right within five Working Days thereafter to instruct the Landlord to reject any such

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

...

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

10. The correct interpretation of Clause 3 is central to the issues in dispute and I am going to refer to it throughout as the "Exclusivity Clause".

11. The Side Letter also provided that, except as otherwise therein defined, words and expressions in the Side Letter should have the meaning assigned to them in the Lease. This is material to the definition of "*Centre*" in Clause 3.1 and also "*Unit*" which was defined in the Rexbay Lease as *"a unit or other premises within the Lettable Areas occupied by a tenant or licensee or designed to be so occupied"*.

12. Trading commenced from the Starbucks outlet in November, 2015. Just under two years later, Unit 1, which was immediately next to it and separated only by a service corridor, was demised to a limited liability company ("the Tenant") who commenced trading there with the benefit of two separate franchises. One of those franchises permitted the Tenant to operate a Freshii outlet – Freshii being a franchise for the sale of salads, soups, burritos and so on – and one permitted the operation of a Handprint coffee outlet which would sell speciality coffees. As will be apparent from that limited description, it is the use of part of Unit 1 to operate a Handprint coffee outlet which has given rise to these proceedings.

13. By lease made 11 September, 2017, between Henry A. Crosbie (acting through the first and second defendants) of the first part, the first and second defendants of the second part, and

the Tenant of the third part ("the Unit 1 Lease"), Unit 1 was demised to the Tenant for the term of 15 years from 11 September, 2017.

14. Although Rexbay does not, in these proceedings, attempt to enforce the terms of that Lease, but rather relies on the Side Letter, the Lease on its face was drafted so as to comply with the provisions of the Side Letter. It contained the same definition for *"Unit"* and *"Centre"* as in the Rexbay Lease, and *"Permitted Business"* was defined as: *"use of the Premises for the preparation on site of salads, wraps, burritos, soups, frozen yogurt and pressed juices primarily for consumption off site".*

15. Like the Rexbay Lease, Clause 3.11(a) contained a list of prohibited uses, including, at sub-paragraph (U), *"the sale of coffee or other hot beverages unless the sale of such products is strictly ancillary to the main use and/or Permitted Business".*

16. Shortly after the grant of the Unit 1 Lease, the Tenant entered into a franchise agreement dated 1 October, 2017, with Freshii Development, LLC and Freshii Foods Ltd. This granted the Tenant the right to operate a Freshii restaurant at the *"approved location"* as defined in the franchise agreement. It was common case that the wrong address was put in the franchise agreement with Freshii and that it was intended to refer to Unit 1.

17. On 28 November, 2017, the Tenant entered into another franchise agreement with Hand Print Coffee Ltd. That agreement, in consideration of the payment of the fee set out therein, granted the Tenant a non-exclusive licence to carry on the *"branded business"* from the *"premises"*, which was defined as the entire of Unit 1. *"Branded business"* was defined as: *"the business of promotion and sale of coffee and consumables to consumers on a retail basis…"*

I. WHETHER THE OPERATION OF THE HANDPRINT FRANCHISE WAS A BREACH OF THE EXCLUSIVITY CLAUSE

18. The Plaintiff says it makes a very simple argument: the Exclusivity Clause prohibits a first letting to an Excluded Coffee Chain and it defines a coffee chain by way of brand rather than by corporate entity. They say Handprint was quite clearly a branded coffee chain, having coffee as its primary product and having multiple stores, albeit that this was a new chain and the Point Village outlet was the first to open.

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

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

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

Principles of interpretation

22. All sides are agreed that the Side Letter is a contract between the plaintiff and the first and second defendants, and that it should be interpreted in line with the usual principles of interpretation applicable to contracts. There was no dispute between the parties as to the relevant principles of interpretation which were summarised by McDonald J. in *Brushfield Limited v. Arachas Corporate Brokers Limited* [2021] IEHC 263 (at para. 110) and, insofar as they are material to these proceedings, are as follows:

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

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

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

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

(e) A distinction is to be made between the meaning which a contractual document would convey to a reasonable person and the meaning of the individual words used in the

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

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

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

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

23. Having already set out the words of the Exclusivity Clause, I now need to consider the context in which it was agreed. But before doing so, I wish to make it clear that the defendants are correct in their submission that the subjective intention of the plaintiff (acting through its director, Mr. Ciarán Butler) is inadmissible to interpret the Exclusivity Clause. I completely accept this but, as discussed further below, Mr. Butler did not give evidence of his subjective

intention – what he *thought* he was agreeing, as opposed to what he did in fact agree – or of any negotiations between the parties which would similarly be inadmissible (and which may, on the facts of any given case, overlap with evidence of subjective intention).

24. The evidence which Mr. Butler gave about the negotiation of the Clause was related to the context in which it was negotiated. For example, Mr. Butler gave evidence that the area was *"marginal"*, that is, it did not have a large footfall. As a result, he wished to protect the Starbucks trade. In effect, he wanted no direct competition from a similar offering in the Centre as that would reduce the custom available to Starbucks. In interpreting, therefore, the notion of an Excluded Coffee Chain, one could approach it on the basis that what was excluded was a business so similar in nature that the Starbucks trade would be negatively affected. I return to this issue when I come to interpret the Exclusivity Clause.

Factual evidence as to the nature of the business being conducted in Unit 1

25. Ms. Mary Rose O'Shea, the Group Property Manager, visited Unit 1 on 4 January, 2018. She reported back to Mr. Butler, and they both then visited Unit 1on 11 January, 2018. Ms. O'Shea also took photos in July and October of that year which were put in evidence.

External appearance and advertising

26. The photos were very useful in demonstrating the outward appearance of Unit 1 in 2018. "Freshii" appears over both entrances to Unit 1, but the entrance on the right is surrounded by glazing that is covered with very prominent advertising for Handprint Coffee. On the street outside is an A-board and other pavement advertising, and Ms. O'Shea gave evidence that a giant coffee cup had been in this location on an earlier visit. The witness did

not have a photo of it, but gave evidence that it was about four feet tall and about three feet in diameter. Mr. Butler, who also saw it, gave evidence that it was perhaps taller.

27. The background to the Handprint advertising in the window was predominantly blue, whereas the Freshii logo advertising seemed to use green as its background. As a result of this visual indicator and the sheer size of the advertising for Handprint Coffee on the frontage, it seems to have been very evident to the casual passer-by on Point Square that coffee was a significant offering within Unit 1.

28. The Freshii banners over the doors of Unit 1 were clearly visible and I think would have been understood as indicating that there was only one outlet. This was emphasised by the defendants as indicating that it was a Freshii outlet. However, the sale of coffee as a stand-alone product was also being heavily promoted and the size of the advertising was designed to attract coffee customers. I do not think the giant coffee cup and the very large cellophane advertising on the glazing near the righthand door would go unnoticed by anyone looking at Unit 1 from a distance. I should add that there was evidence that the Freshii banner signs over the two entrances are, in reality, somewhat smaller than presented in the 2017 plans drawn up in connection with the fit-out, but I don't think anything turns on this as they seem from the photographs to have been clearly visible.

29. The A-board in the photo, which appears to have been taken in October, 2018, advertises pumpkin spice latte (*"Bewitchingly Good!"*) and is accompanied to the left by pavement advertising which is predominantly blue and simply says: *"Handprint Coffee"*. The Handprint Coffee trademark is also on the A-board. The A-board is turned so as to attract passers-by walking immediately outside Unit 1 and indeed, because of its size, is easily visible to those walking past the Starbucks and other neighbouring units.

30. By the time a customer reached the righthand door, I think there would have been no doubt but that they were being encouraged to buy coffee as a stand-alone or primary product.

All of the advertising at or near the righthand door was Handprint advertising which only mentioned coffee. By contrast the lefthand door had, on the glazing to its right, advertising for *"burritos-bowls"* and other dishes. The pavement advertising at this door was dedicated to various chilli dishes sold by Freshii.

Internal appearance and layout

31. The photographs make it clear that, on entering Unit 1, there were two separate offerings. Just inside the Handprint door, there are signs directing customers to the right for the Handprint queue and to the back of the Unit for the Freshii counter. The digital menu board at the Freshii counter advertised the various food and drink offerings provided by Freshii, which included coffee. The lefthand portion of this menu board rotated or alternated, sometimes promoting dishes such as chilli, sometimes promoting the coffee sold at the Freshii counter.

32. Mr. Ramsey, a Chartered Building Surveyor and Chartered Property Manager Surveyor, inspected Unit 1 on behalf of the plaintiff. He also researched the branding of Handprint coffee from the opening of its outlet in Unit 1.

33. He said that Unit 1 as a whole measured $130m^2$ and, of this, the Handprint counter and display area comprised $5.4m^2$ whereas the Freshii counter and display area comprised $20.44m^{2.}$. The remainder of the area comprised certain back of house facilities, discussed in more detail below, and a large area containing counters running along the walls with high chairs, suitable for one- or two-person diners, four-person dining tables and chairs, and a lounge area with low seating and low tables. The latter was carpeted whereas the rest of the seating area was more canteen style.

34. The dining area was more suitable for eating meals and therefore for consuming the principal products sold by Freshii, which were wraps, soups, burritos and salads, whereas the

lounge area was more suitable for drinks and snacks. Mr. Ramsey said that this was designed and laid out for the consumption of drinks and snacks, and not for consumption of Freshii's primary products.

35. Although not hugely significant in itself, I think it is worth noting that the layout drawings provided to the landlord by Freshii in 2017 indicate that the overhead signage above the Freshii menu displays was to highlight that Freshii sold burritos, bowls, salads, wraps, soups, juices and coffee, but when the signage was actually erected, the word *"coffee"* was omitted.

36. Of more significance in those drawings is that the area reserved for what eventually became the Handprint counter did not contain any construction or fit-out detail, whereas a full specification for the Freshii counter and shared areas was depicted. This suggests that the coffee wholesaler who was in the course of establishing Handprint as a retail brand would supply that detail independently to the Tenant.

37. There was in fact an overlap of products between the two offerings. While the primary product of Freshii was food, specifically healthy dishes which were suitable for takeaway lunches, it also offered coffee and advertised this fact. It had a dedicated service area for that product where one could add sugar, stir the coffee, place a lid on a takeaway cup, and so on. Both offerings had a fridge with bottled water and soft drinks.

38. It also seems clear that that Handprint, together with Freshii, had the use of the back of house areas at the rear of Unit 1 for refrigeration, storage, staff toilets, customer toilets, waste disposal, wash-up etc. Mr. Butler gave general evidence that the various regulations applicable to both franchises would require each of them to have those facilities. That was not disputed and therefore the facilities shown on the plans for the Unit at the time of the Freshii fit-out would have had to have been shared for Handprint to operate legally.

39. Very importantly, the customer was directed to two separate points of sale, one for each brand, and it was not possible to purchase Freshii produce at the Handprint till, or *vice versa*. Separate receipts, identified by brand, were then issued to the customer. This was, presumably, to comply with the Tenant's obligations to the franchisors under the respective franchise agreements.

40. Mr. Ramsey concluded from his inspection of Unit 1 in 2020 that *"the fit-out, layout and design incorporating two separate counters ...is a good way to attract and market to two types of customers"*, noting that *"there is separate branding, separate queueing, separate ordering, separating billing for two separate offerings which utilise shared services."*

41. I think that this is a good summary of how the Unit was laid out and how it operated. In essence, there were two businesses, seeking to attract two types of customers, one who attended who attended primarily to buy food and one who attended primarily to buy coffee.

Branding

42. It seems clear that the two businesses being run from Unit 1 enjoyed distinct branding. Although there was some suggestion that there was insufficient evidence of the uniforms worn by staff at the Handprint counter as they were not shown in the photos taken in 2018, I am satisfied that the staff wore Handprint uniforms. The wearing of particular uniforms was required by the Handprint franchise agreement and posts from Handprint's dedicated social media accounts indicated quite clearly that its staff would have Handprint uniforms, quite distinct from those worn by Freshii staff. When Mr. Ramsey visited in 2020, the same staff member served both counters, but that was at a time when there were significant public health restrictions in place, reducing the numbers of persons who could be present in a space. It would not have been representative of the way the businesses operated prior to the pandemic.

43. The Handprint social media which was put in evidence also showed that the branding for this outlet was managed by the franchisor. It is clear from the presentation of the Handprint brand via social media and other media outlets that it was not specific to the Point Village location, but was managed from accounts run on behalf of the Handprint as a whole, and therefore served to advertise for each of its locations, of which it had at least two from early 2018, subsequently opening a third.

44. It was also manifest from the printouts of Tweets, Facebooks posts, and the copies of the advertising itself, that Handprint was marketing itself as a specialised, dedicated, coffee brand. On its Facebook page, it advertised itself as follows:

> *"Handprint Coffee is Ireland's most environmentally aware coffee chain. From sustainable sourcing to fully compostable cups, our handprint is all over it."*

45. Handprint also had a dedicated website which was reviewed by Mr. Ramsey in 2020. This contained a section describing the brand and stated:

> *"From the very first seed; to your very last sip, Handprint Coffee delivers a unique coffee experience."*

46. There was no mention of Freshii in these statements and I think it is clear that the relationship was one of collaboration between two chains. Indeed, this is confirmed by the fact that the Tenant, which was a limited liability company unconnected to either of them, entered into two separate franchise agreements.

Interpretation of the Exclusivity Clause

47. I have set out at the beginning of this judgment the essential positions of the parties. It is convenient, however, to analyse the legal issues relating to whether the plaintiff has

established a breach of the Exclusivity Clause by reference to the arguments made by the defendants.

48. The defendants say, first, that the letting to the Tenant of Unit 1 was not a *"First Letting"* within the meaning of Clause 3.1 and therefore, by reason of Clause 3.3, the Exclusivity Clause simply did not apply. To reach a decision on that, I must consider a number of more refined legal points which were made as part of that fundamental submission.

49. Alternatively, they say that the Handprint business was *"ancillary"* to the Freshii business, and therefore, even if Clause 3.1 applies to the letting to the Tenant, it was saved by the proviso contained in Clause 3.1.

50. However, in accordance with the established principles of interpretation, the words of the Clause must be considered in the context in which they were agreed.

Context in which the Side Letter was agreed

51. As already mentioned above, Mr. Butler gave evidence that he was already familiar with the Centre when he was approached by the letting agent to take a Unit for the purposes of a Starbucks unit as the only unit let was the cinema and I understood him to say that one of the companies in the Group was the tenant of that part of the Centre.

52. At the time he was approached, none of the units were let, other than the cinema, and he regarded the location as marginal. Because the units were empty, there was limited footfall and his view was that it was important to capture as much as possible of the trade relating to the use for which the unit was to be let, in order to make it viable. As such, he was clear that the Exclusivity Clause was vital and that the Lease would not have been signed without it. He pointed out that Clause 3.7 permitted the landlord to elect to have the Exclusivity Clause considered for the purpose of rent review. As that would have tended to increase the

profitability of the Rexbay Unit, that would have increased the rent. In other words, the tenant could pay extra rent in return for the Exclusivity Clause.

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

54. Very significantly, Mr. Butler drew a distinction between the wholesaling of coffee where coffee is provided to restaurants, shops and service stations, for onward sale to retail customers, and a speciality coffee brand where the franchisor retains complete control over the brand and the retail unit. He gave evidence that he had a lot of experience in franchising and he described the Handprint branding as *"well thought out"* and was of the view that there was no doubt that it was positioning itself as a new coffee chain selling handcrafted beverages.

55. This evidence was consistent with the evidence of Mr. Doyle, a valuer called by the defendants, who was of the view that there were two separate markets which were relevant to the sale of coffee. These were outlets which *"lead"* with coffee or where coffee was the primary product, and outlets which sold coffee but where this was ancillary to the sale of food. I deal in more detail with his evidence when I come to assess whether the sales from the Handprint counter in Unit 1 were ancillary to the Freshii business, but suffice it to say that his evidence as to these two separate markets not only tallies with Mr. Butler's evidence, but is reflected in the drafting of the Exclusivity Clause itself, which excludes coffee shop chains with coffee as their principal product, but does not prevent the ancillary sale of coffee by food outlets.

56. It is against that background that I consider the interpretation of the Exclusivity Clause by reference to the two broad arguments referred to above, that is, whether the letting of Unit 1 was one to which Clause 3.1 applied, and whether the sale of coffee in the Handprint outlet was *"ancillary"* to the business conducted by the Freshii offering.

1. Whether Clause 3.1 applied to the letting of Unit 1: meaning of *"First Letting Basis"*

57. There were, as I understood it, a number of aspects to the defendant's argument that the letting to the Tenant in 2017 did not fall within the definition of *"First Letting Basis"* and therefore was not prohibited by it. It was said that, to fall within the definition, the Excluded Coffee Chain must occupy the entire Unit, and furthermore that the letting should have been directly to the coffee chain in question and not to a separate corporate entity.

i. Letting must be to a brand which occupies the entire Unit

58. The defendants say that Clause 3.2 governs the applicability of Clause 3.1 by defining *"First Letting Basis"* as meaning the letting of *"a Unit in the Centre"*, which means the entire Unit and not just part. While the entire of Unit 1 was let to the Tenant, the defendants say that the entire Unit must be used by the Excluded Coffee Chain in order to attract the provisions of Clause 3.1. They submit that reference to *"a Unit"* in Clause 3.2 feeds into the interpretation of Clause 3.1, the result being that the *"new lease ... to [an Excluded Coffee Chain]"* must mean that the entire Unit must be let for that purpose.

59. That did not occur here because the letting was to a corporate entity, which operated two franchises, only one of which could possibly fall within the definition of Excluded Coffee Chain. Consequently, the defendants say, Clause 3.1 did not apply to the letting of Unit 1.

60. I think the difficulty for the defendants is that Clause 3.1 speaks explicitly of *"a new lease in respect of <u>any part of the Centre</u> to [an Excluded Coffee Chain]"*. [Emphasis added.] It doesn't mention the letting of a Unit, let alone the letting of an entire Unit to an Excluded Coffee Chain. Instead, it speaks of a lease of *"any part of the Centre"* to an Excluded Coffee

Chain and this, on its face, is an expansive phrase which, interpreted literally, includes any part of a Unit.

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

62. I digress here to say that I think the defendants have fallen into the trap of viewing Clause 3.1 through the *"lens of the dispute which has arisen sometimes much later"* as it was put by O'Donnell J. (as he then was) in *Law Society v. MIBI* [2017] IESC 31 at para. 14. The Clause must be read as a whole, against the background of the context in which it was agreed, and not by reference only to those portions which are material to this dispute.

63. When this is done, the purpose of *"First Letting Basis"* becomes clearer. The Exclusivity Clause as a whole, on its face, distinguishes between a new lease to a new tenant on the one hand, and the assignment or sub-letting by an existing tenant on the other. Clause 3.1 applies to the former, and Clause 3.4 to the latter.

64. The obligations of the Landlord differ depending on which of these situations arises. In the case of assignment or sub-letting by an existing tenant, the Landlord's only obligation is to tell Rexbay of the existing tenant's application for consent to an assignment or sub-letting and then Rexbay has the right, within a relatively short time limit, to veto the proposed transaction.

65. When viewed against the background of this dichotomy, the focus of Clause 3.2 is to define the circumstances in which the Landlord's obligations in Clause 3.1 would apply. The Landlord, when granting a new lease to a new tenant, cannot just pass it over to Rexbay for Rexbay to decide whether or not it will veto: the Landlord is obliged to refrain from letting. As

that is the purpose of the definition of *"First Letting Basis"*, there is an emphasis in Clause 3.2 on a *"new tenant"* and in Clause 3.1 itself on the grant of a *"new lease"*. It is the fact that it is a *first* letting, rather than the question of how much of the Unit is going to be occupied by an Excluded Coffee Chain, which is the focus of Clause 3.2.

66. By contrast, the definition of *"Excluded Coffee Chain"* is incorporated by reference into Clause 3.4, confirming that both Clause 3.1 and Clause 3.4 are directed to ensuring that Rexbay can prevent competition from such a chain. The purpose of this definition is, as its own terminology suggests, to define what is excluded.

67. I also think it is interesting that Clause 3.4 speaks of a tenant in occupation of a Unit, but does not stipulate that the entire Unit is being either assigned or sub-let. In particular, the reference to sub-letting suggests that Rexbay's rights extend to the subdivision of a Unit as it seems unlikely that sub-letting would occur in the absence of such subdivision. This suggests that the Exclusivity Clause was not drafted so as to apply only where an Excluded Coffee Chain occupied an entire Unit.

68. It should also be noted that the Side Letter provides that the definitions in the Rexbay Lease are to apply to it, and *"Unit"* was defined in the Rexbay Lease as *"a unit or other premises within the Lettable Areas occupied by a tenant or licensee or designed to be so occupied"*. As this was not argued, I am not entirely sure of the meaning of *"or other premises"*, but it arguably suggest a more flexible definition of *"Unit"* than that assumed by the defendants. In any event, I think it confirms that the reference to *"Unit"* in Clause 3.2 is designed, not to restrict the application of the Exclusivity Clause to situations where the Excluded Coffee Chain occupies the entire Unit which has been let, but to identify the area within which the plaintiff was to enjoy exclusivity for its business. This area was all lettable premises within the Centre.

ii. Coffee must be the primary product sold in the Unit

69. To bolster the argument that the letting to which Clause 3.1 applies must be one where the Excluded Coffee Chain occupies the entire Unit being let, the defendants submitted that Clause 3.1 only applied where coffee was the primary product sold in the Unit which was the subject of the First Letting. I should first stress that it is not in dispute that coffee was not the primary product sold in Unit 1 as a whole. That was very clear from the evidence in any event. However, I think this argument is based on a misreading of Clause 3.1.

70. First, the phrase *"where coffee is their primary product"* is part of the definition of *"Excluded Coffee Chain"*, and not of the definition of *"First Letting Basis"*. Indeed, the phrase in question appears after – and appears to have been intended to illustrate the meaning of – the phrase, *"any other similar type of coffee chain store"*. It does not appear to have been intended to elucidate or indeed to qualify the earlier phrase *"any part of the Centre"*, let alone the definition of *"First Letting Basis"*.

71. Secondly, a consideration of Clause 3.1 in context supports this view: its purpose was to exclude dedicated coffee shops with coffee as their primary product and therefore designed to attract customers who were specifically seeking to purchase coffee with any other purchases being ancillary to that.

72. In my view, therefore, it is incorrect to suggest that Clause 3.1 requires that coffee would be the primary product sold in the Unit as a whole. Both the words of the Clause and the context in which it was negotiated favour an interpretation of *"any part of the Centre"* as including parts of Units, as well as entire Units.

iii. The letting had to be to a coffee brand

73. The defendants also say that the letting of Unit 1 was not a letting on a *"First Letting Basis"* because it was not a letting to Handprint. The plaintiff says that does not matter because Clause 3.1 covers any letting for the purposes of operating a brand. In this case, of course, it was a letting to a corporate entity which then entered into a franchise agreement with Handprint.

74. In my view, the plaintiff is clearly correct in this. Part of the factual matrix, as the defendants admit, is that the plaintiff, acting through Mr. Butler, was well aware of the different types of retail coffee offering which were in existence at the time the Side Letter was agreed. Mr. Butler was asked if it was usual to operate coffee chains through the vehicle of a single corporate entity and he said he was unaware, but he pointed out that, if they were done by way of franchises, then coffee chains were unlikely to be operated by a single corporate entity. His view was that it was probably *"a complete and utter mix"*. Any individual letting could be to a particular corporate entity linked to the coffee brand, or it could be to a franchisee, i.e., an independent corporate entity which then operated the retail coffee offering on foot of a franchise agreement, as occurred here.

75. The obvious purpose of the Clause was to give the Starbucks outlet exclusivity for its business by excluding from the Centre any business of a similar type, the obvious purpose being to protect the sales in the Starbucks outlet. The question of whether Clause 3.1 only applies if the new tenant is in some way connected to the owner of the branded coffee chain must be considered in that context.

76. In my view, the Clause is quite general in nature. It does not mention the type of tenant to which it applies, other than to say that it must be a *"new tenant of a Unit"*. There is no dispute that the Tenant here fell within this definition. There is absolutely nothing in Clause

3.3 which could lead to an interpretation of *"First Letting Basis"* so as to exclude corporate entities who were taking a franchise from a coffee brand in order to operate a coffee shop which was part of a recognisable coffee chain. Any such interpretation would necessarily limit in a very significant way the exclusivity which the plaintiff wished to enjoy.

77. As I have said, the defendants stressed Mr. Butler's knowledge of the relevant retail trends and the types of outlets which were in existence. That is true, but that context includes his lack of direct knowledge as to how the other chains were structured. I think it is abundantly clear that the focus was to prevent the opening of a competing business, regardless of whether it was operated directly by the owner of a brand, or through a franchise. All possible structures by which such a business would trade were to be covered by the Exclusivity Clause, the focus being on the operation of a coffee chain anywhere else in the Centre.

78. If the words of the Clause excluded franchisees, then of course, that would be the plaintiff's own fault for taking a Lease without negotiating a sufficient level of exclusivity. But there are no words which suggest this. Indeed, as stressed by the plaintiff's counsel, the list of five well-known brands is not by reference to any corporate entities which might in fact operate these brands under franchise or by some other mechanism. The Clause is drafted to exclude a lease to those brands and not to a list of prohibited companies. This is reiterated by the general words at the end of the list, which are obviously designed to capture other brands (including new ones) which it would not be feasible to list exhaustively in Clause 3.1. I do not think this submission is well-founded.

iv. Handprint was not a "coffee chain"

79. It was also argued that Handprint was not a coffee chain as it was, at the time of the letting, the first and only Handprint outlet. I think this argument is unsustainable on the facts.

All of the evidence was to the effect that Handprint was established by an existing coffee wholesaler as a new chain. It was being promoted in the trade press: see *Shelf Life*, an industry publication, and *Business Plus* from December, 2017, both of which described Handprint Coffee as a new *"Irish coffee brand"* which was opening its *"first café in Dublin"*. The reference to the fact that the café was *"first*" necessarily implied that there would be more. Indeed, there certainly was for a time another Handprint outlet in the Freshii outlet in Sandyford and Mr. Butler gave evidence that there was at a third location in a new street which he thought was Green Street in the Grand Canal Docks area. Mr. Doyle confirmed the existence of this third outlet.

80. The wording of Clause 3.1, and in particular the general words following the listing of five established brands, is clearly designed to cover any chain of coffee shop of a similar nature. There is nothing in the wording of Clause 3.1 to exclude new brands which, though promoting themselves as a chain, had as yet only opened one outlet, or which had not yet established themselves in the public consciousness.

81. If that were the meaning of the Clause, and new coffee chains were excluded, then its effectiveness would be greatly compromised as a new chain could open its first outlet, and then during the term of the Rexbay Lease, or indeed within a short time, establish itself as a brand which could compete with Starbucks. The fact that the Handprint offering was to be the first outlet in a chain does not mean it was not part of a chain. The manner in which the brand was marketed on social media made it clear that it was to be a chain, and of course it opened on the basis of a franchise agreement, which in itself suggested there would be other outlets. New outlets appear to have opened within a short time of the outlet in Unit 1 and certainly prior to the pandemic.

82. Any argument that Handprint was not a coffee chain because it was the first outlet of a new chain which had not yet established itself as a brand, cannot in my view be accepted.

Conclusion on whether Clause 3.1 applied to the opening of the Handprint outlet

83. For those reasons, I am satisfied that the operation by the Tenant of a Handprint franchise in Unit 1 was *prima facie* prohibited by Clause 3.1.

2. Whether the Handprint offering was "ancillary" to the Freshii offering

84. The defendants say that, in any event, the Handprint offering which was put in place in December, 2017, was "*ancillary*" within the meaning of the proviso in Clause 3.1, and there is in any event no breach of the Exclusivity Clause. It should be recalled that the proviso clarifies that Clause. 3.1 should not extend to a prohibition on the use of a Unit *"for the sale of coffee and other hot beverages where such use is ancillary to the main or permitted use of such Unit (e.g. a bakery, sandwich bar or restaurant) …."*

85. A key feature of the proviso is that it defines what is permissible as the sale of coffee and other hot beverages which is ancillary to a particular business, being the permitted business of the user in question. It should be noted that the *"Permitted Business"* was defined in the Unit 1 Lease is *"use of [Unit 1] for the preparation on site of salads, wraps, burritos, soups, frozen yoghurt, and pressed juices primarily for consumption offsite"*.

86. Only coffee sales which were ancillary to a business where the primary product was food were within the proviso. Again, the context whereby it is agreed that there were two distinct markets for the sale of coffee is highly material to the drawing of the line between what was prohibited by Clause 3.1 and what was explicitly saved by the proviso.

87. Before analysing the specific arguments of the defendant under this heading, or indeed commenting on any of the authorities opened, it should first be noted that the interpretation of

Clause 3.1 is a process of the interpretation of a contract between the parties and therefore of ascertaining their intention as disclosed by the words of the Clause as a whole, when interpreted in context. The word "*ancillary*", which is critical here, must therefore be interpreted in light of the particular terms of Clause 3.1 and the context in which that clause was agreed – it must not be interpreted by reference to its use in other contexts.

88. The question, therefore, is what is *"ancillary"* to the business of preparing salads, wraps, burritos and so on in Unit 1, primarily for consumption offsite. What kinds of coffee sales would be ancillary to the running of a food outlet of that type?

89. The defendants relied in closing submissions on the evidence of Mr. Paul Doyle, Managing Director of Bannon Property Consultants and Chartered Valuation Surveyors.

90. Mr. Doyle is an expert in valuation, in the course of which he considers user clauses and exclusivity clauses such as the one at issue here and considers their potential impact on the values of income stream from tenants and on the value of an asset generally. In his report, Mr. Doyle says that *"there is a clear distinction between a coffee shop that sells food, and a food focussed offering that also sells coffee."*

91. He also states that *"[t]here is a clear market distinction between coffee shops and food outlets that sell hot drinks as ancillary to their main use. Practically, all food offers will sell tea and coffee as ancillary to their principal use as customers regularly require this."*

92. In his oral evidence, he referred to coffee shops, such as Insomnia and Starbucks and referred to the fact that Insomnia *"would lead with the sale of coffee"*. He confirmed the evidence of other witnesses that coffee shops *"will sell other items with that which would layer under the primary function of being a coffee shop."*

93. He then described the sale of coffee by food outlets (naming Pita Pit and Eddie Rockets) as *"ancillary"*, saying: *"I'll have a meal and the chances afterwards I might have a cup of coffee."* He the described the purchase of coffee from a Frank and Honest machine in Centra

when one decides to do one's shopping and clearly regarded that as *"ancillary"* to the main trade in Centra.

94. Therefore, in terms of identifying two distinct retail coffee phenomena, Mr. Doyle's evidence serves to confirm the understanding of Mr. Butler, who distinguished between the wholesale provision of coffee to businesses whose primary product is not coffee, and coffee shops where coffee is the *"primary"* or *"lead"* product.

95. In line with the principles of interpretation as set out above, this understanding of Mr. Butler, which has in effect been confirmed by Mr. Doyle as correct, is reflected in the drafting of Clause 3.1. A chain of coffee shops with coffee as its primary product is excluded, whereas the incidental sale of coffee as part of a food offering is *"ancillary"* and protected by the proviso.

96. Reading the proviso in Clause 3.1 as a whole, and in particular looking at the examples of a bakery, sandwich bar or a restaurant which are specifically enumerated – though I think it is clear these are not intended to be exhaustive – it is quite clear that the sales of coffee and other hot beverages which are regarded as *"ancillary"* within the meaning of that proviso are the types of sales of coffee and other hot beverages that one finds in every sandwich bar or restaurant in modern times. Coffee is not the primary product but is ancillary to the purchase of the food. It is notable that, in this case, the Freshii counter itself offered coffee for sale. That was clearly lawful having regard to the proviso and this was at all times accepted by the plaintiff.

97. I have already outlined the evidence as to layout and operation of the Freshii and Handprint offerings within Unit 1, and I am satisfied that the Tenant was in fact conducting two businesses. One of these (Handprint) lead with the sale of coffee, whereas the other (Freshii) sold coffee as an ancillary part of its food offering. The wording of Clause 3.1 was directed at the type of business which is being conducted and not at the floor area used. It

follows from that the operation of the Handprint franchise, which was a separate business with coffee as a lead product, was not saved by the proviso to Clause 3.1.

98. The defendants attempted to rely on the proviso by focussing on the user of Unit 1 as a whole, but that is neither how the clause is drafted nor is it how *"ancillary"* is to be interpreted in this case. As I have already found, there is nothing in Clause 1 which requires the overall user of the Unit to be considered, as the prohibition in Clause 3.1 applies to every part of the Unit. Furthermore, the focus of Clause 3.1 is clearly the market distinction accepted in evidence by Mr. Doyle. In fact, this distinction was neatly reflected in the two businesses which in fact operated from Unit 1.

99. In considering the submission that Mr. Doyle gave evidence as to the meaning of *"ancillary"* which was uncontradicted, I would first point out that that opinion is inadmissible on this point as the interpretation of *"ancillary"* is a question of interpretation of this particular Exclusivity Clause and is therefore a matter of law rather than a matter for expert evidence. However, even if Mr. Doyle's evidence as to the meaning of *"ancillary"* in the context of Clause 3.1 were admissible, I would not accept it for the following reasons:

100. First, having made the distinction between the two types of retail market, Mr. Doyle proceeds to conflate them so as to equate the existence of a Frank and Honest coffee machine in Centra with a separately branded coffee shop such as Costa in an Applegreen service station. It is not clear why he did this but it may be that, in valuation matters, the overall usage per square foot is material. However, that is not material to an interpretation of Clause 3.1, which I have found prohibits a letting for use as an Excluded Coffee Chain, even if that is going to account only for some of the use of the Unit that is being let. By treating these retail offerings as belonging to the same category, he contradicts his own evidence that Costa is a coffee chain with coffee as its primary product, as opposed to a food outlet where the sale of coffee is merely ancillary to the main business.

101. Secondly, this approach does not consider the wording of Clause 3.1 which is directed to the type of business being carried on in any other part of the Centre and which maintains a clear distinction between businesses with coffee as the lead product and food outlets where coffee is an ancillary product for sale. Mr. Doyle's interpretation of *"ancillary"* is based on identifying the dominant user of the Unit and then identifying a subsidiary or ancillary user. But that is not how the word is used in Clause 3.1.

102. Thirdly, in his oral evidence, Mr. Doyle inferred from the fact that each of the three Handprint outlets which had opened were present in a Freshii outlet meant that Handprint was ancillary. This ignores the fact that the proviso defines as *"ancillary"* something which is ancillary to the Permitted Business of Unit 1. The pattern described merely tends to suggest that there was a collaboration of some kind between Freshii and Handprint; it is not relevant to the question of whether a dedicated coffee counter was *"ancillary"* to the *"permitted business"* of Unit 1.

103. In any event, I am not sure that this is based on a correct understanding of the word *"ancillary"*. The plaintiff cited in its written submissions the Oxford English Dictionary definition of "*ancillary*" as *"providing necessary support to the primary activities or operation of an organization, institution, industry or system."* The plaintiff stresses the support provided must be *"necessary"* and says it was not necessary in this instance because Freshii could, and did, sell its own coffee to its own customers.

104. Reliance was also placed in Jowitts Dictionary of English Law (5th ed. 2019) which defines an *"ancillary claim"* as *"a claim made alongside another claim which either arises from it or is otherwise connected with it in some way and of obviously lesser importance (which normally means that either it could not or would not have been brought but for the principle claim)."* From that, the plaintiff says that the critical question is whether the Handprint coffee offering could exist as a stand-alone user of the premises or whether it was so connected with

and supportive of the Freshii user that it could not exist in its own right. Clearly the Handprint coffee user could easily have existed as a stand-alone user of Unit 1 and was fully capable of standing independently as its own business. Indeed, as pointed out above, Handprint was operated under a separate franchise agreement which necessitated the maintenance of a separate till and the maintenance of separate accounts. That was indicative of a separate business being run from the same Unit, not the mere sale of coffee as ancillary to the Freshii business.

105. The defendants submitted that part of the relevant context at the time the Exclusivity Clause was negotiated and against the background of which it should be interpreted, was that that you could get a dedicated coffee chain outlet as part of a larger brand, for example service stations. It was the defendants' case that Mr. Butler was well aware of this and therefore he must be taken to have agreed not to exclude this type of arrangement.

106. However, I cannot accept this argument. I do not think it is disputed that Mr. Butler knew about these outlets, but I do not see how this supports the defendants' interpretation of the Exclusivity Clause. Mr. Butler's concern was to obtain the exclusive right to operate a coffee chain anywhere in the Centre.

107. I think Mr. Butler, as an experienced businessman, was undoubtedly aware that there were dedicated coffee outlets in service stations, department stores, and so on. But although this was stressed in argument by the defendants, I do not think it advances their position in any way. Mr. Butler was aware of these matters and that is why he negotiated an Exclusivity Clause to exclude them. He did so by agreeing a wording that said that there should not be in any *"part of the Centre"* a coffee chain selling coffee as its primary product. That would include the type of collaboration or colocation arrangement described by Mr. Doyle by reference to coffee chain outlets which are located in service stations. It also included the type of arrangement between Freshii and Handprint. It is not that Mr. Butler was aware of this possibility and did not provide

for it: it is that Mr. Butler was aware of this possibility and *did* provide for it, by ensuring that Clause 3.1 was drafted in general or expansive terms, so as to exclude the opening of an Excluded Coffee Chain *"in any part of the Centre"*.

Conclusion on whether there was a breach of the Exclusivity Clause

108. I think it is abundantly clear that the opening of the Handprint offering within Unit 1 was a breach of Clause 3.1 of the Exclusivity Clause. Freshii already had the capacity to sell coffee and did not need a separate supplier. The reality of the matter was that there were two separate businesses being run by the same corporate tenant within the one unit. This was, in my view, covered by the wording of this particular clause, and the plaintiff is therefore entitled to damages for breach of that clause. However, before turning to quantify those losses, I must first deal with an objection raised by the defendant as to the standing of Rexbay to claim those losses.

109. This issue arises because Rexbay is part of a group, and it will be necessary to consider some of the evidence in relation to the particular functions of individual companies within the group for the purpose of considering whether Rexbay, who is undoubtedly the tenant of Units 3 and 20, and the beneficiary of the Side Letter, has in fact suffered a loss. This turns on the question of whether Rexbay was in fact trading in the Starbucks outlet or whether it was another company within the Group.

II. WHETHER REXBAY WAS TRADING

110. Rexbay was incorporated in 2013 and its directors are Ciarán and Colum Butler, who are brothers. Its parent and sole shareholder is Desert International which, along with Rexbay, is part of the Group.

111. The plaintiff does not have a bank account and invoices for rent were addressed to the plaintiff and dealt with by the accounts department of the Group. The rent was actually paid by Atercin Liffey Unlimited Company ("Atercin"). Mr. Butler gave that Atercin was another company in the Group which performed the treasury function for the Group and managed Rexbay's business for it — Rexbay's sole business being the running of the Starbuck's coffee shop in Point Village. Atercin were approved by Starbucks to run the franchise and were therefore named as franchisee in the relevant franchise agreement. It was also approved by the Revenue Commissioners to handle all VAT on behalf of the Group.

112. He agreed that Atercin was approved by Starbucks and was the franchisee. He also confirmed that Rexbay did not have and never had a bank account, and that financial remittances, including VAT, tax and salary, were paid by Atercin but was very clear that the payments were made on behalf of Rexbay. He drew an analogy with running a doctor's practice, where he himself is not a qualified doctor. He said he could hire a doctor to run the practice but ultimately the business would be his. He said a similar situation pertained as between Rexbay, which was not the franchisee, and Atercin, which was.

113. Much was made of the fact that, in correspondence on this issue, Rexbay's solicitors confirmed that actual sales in the Starbucks outlet were made by Atercin, which then remitted the gross margin to Rexbay. But that does not mean that the sales were not made to the benefit of Rexbay and I do not think it bears the significance which has been attributed to it by the defendant.

114. Mr. Declan Walsh, a Chartered Accountant and Certified Fraud Examiner, who has worked exclusively in the area of forensic accountancy and expert evidence since 2016, gave evidence on behalf of the defendant. His view was that the plaintiff was not trading from the Starbucks outlet as it was a related company, Atercin, who employed the staff, managed payroll, made VAT returns and so on. Atercin was the company within the Group who had been approved by Starbucks to operate its franchises in Ireland and was therefore named as the franchisee in the agreement relating to the Starbucks in Point Village.

115. In preparing his first report, Mr. Walsh compared the figures given by the plaintiff's expert in his first report for gross sales in the Starbucks outlet in the years ending 31 July, 2016, and 31 December, 2017, with the figures given for turnover in the plaintiff's abridged accounts as filed in the CRO, and offered the view that the plaintiff was not trading from the premises. He also pointed to the absence of any figures in the abridged accounts for creditors, cash on hand or overdraft, and so on.

116. In response, the plaintiff's expert accountant, Mr. Joseph Walsh, took as his essential position that this was a legal issue rather than one within the accountants' expertise, but noted that only very limited information would be available from limited abridged financial statements and that it was *"wholly incorrect to form an opinion that the Company does not carry out the trade"* based on them. He noted, however, that the employees working in the outlet were employed by a group company, that the fit-out was owned by another Group company, and that profits were remitted to a Group company, but he also pointed out that income and expenses (which included wages and any activities outsourced to other Group companies) were recharged and accounted for in the plaintiff's accounts.

117. He also referred to the full financial statements of the plaintiff for the years ending 2018 and 2019, with the figures for 2017 being included for comparative purposes in the 2018 statements, and noted that these figures tallied with the figures given by him for gross sales in

his first report. The financial reporting requirements changed with effect from 2018 and that explained why the figures in the abridged accounts in 2017 and previous years did not tally with the sales figures available for the Starbucks outlet. The 2017 figures given as a comparator in the 2018 statement tallied with the actual turnover of the unit.

118. In response, in his second report, Mr. Declan Walsh reiterated his view that the plaintiff was not trading from the Starbucks outlet. On the basis of Mr. Joseph Walsh's second report and *inter partes* correspondence, he had become aware that it was Atercin who held the franchise, who employed the staff, and who accounted for VAT on sales and purchases. He was also informed that the gross profit from the trade in the Starbucks outlet was remitted by Atercin to the plaintiff, who accounted for it as turnover and from which it accounted for the staff costs, the rent and service charges for the Starbucks outlet, other overheads and corporation tax.

119. Although Mr. Declan Walsh said in his second report that the plaintiff was obliged to remit its profits to another Group company, that is not correct and Mr. Butler's clear evidence was that the plaintiff did so as a matter of policy but was in no way obliged to do so.

120. In addition, Mr. Declan Walsh says in this report that Atercin *"appears to be a tenant of the Plaintiff, in that the Plaintiff has permitted it to trade from the demised premises."* That is also incorrect and there is no evidence of any kind that Atercin is a tenant of the plaintiff. It is a fundamental of landlord and tenant law that the relationship involves the payment of rent (see s. 3 of Deasy's Act, 1860), but it has never been suggested that Atercin pays any rent in respect of the Starbucks outlet. In fact, it performs the treasury function for the Group – a role which Mr. Declan Walsh acknowledged in his oral evidence was not unusual within a group structure – and therefore handles payments. As a result, the Landlord invoices Rexbay for the rent and the payment is made by Atercin on behalf of Rexbay. The plaintiff does not have – because it does not need – a bank account. There is no suggestion that the plaintiff ever sought

the consent of the first and second defendants to a sub-letting and indeed there is no evidence whatsoever that Atercin are a tenant.

121. Instead, all of the evidence points to the plaintiff continuing to enjoy exclusive possession of the Starbucks outlet on foot of the Rexbay Lease. It is invoiced for rent which is discharged by Atercin in pursuit of that company's treasury function, but which is accounted for in the nominal ledgers of the plaintiff, which date from 2018 onwards. It also pays the service charge, albeit that Atercin presumably makes the payment on its behalf.

122. As a result of this opinion, Mr. Joseph Walsh gave more detailed attention to this issue in his third and final report. He confirms that the plaintiff does not employ the staff but points out that staff costs are charged to the plaintiff and are recorded in the plaintiff's accounts for 2018 and 2019. He points out that it is commonplace for businesses to operate with staff not directly employed by the business itself and confirms that while the plaintiff has no bank account, this is because Atercin provide the treasury function for the Group. This is done for efficiency purposes within the group. While the fit-out is owned by another Group company, such that the plaintiff does not own the fit-out, it has full use of the fit-out.

123. Mr. Joseph Walsh says that there is nothing unusual in a group structure and there were many reasons for doing this, including: tax planning, free flow of funds between companies, segregation of business types, centralisation of overheads and so on. Mr. Butler also gave evidence that use of a group structure in this fashion could achieve economies of scale.

124. Mr. Walsh also pointed to the fact that the turnover declared by the plaintiff in its filed accounts was referable to the sale of coffee in the Starbucks outlet. From that, it acknowledged a liability for corporation tax on profits, which it calculated at the rate applicable to trade (as opposed to investment). It also distributed profits to another group company, which by virtue of s. 117 of the Companies Act, 2014, it could only do if it had profits. It was in a VAT group

with Atercin, who handled its VAT affairs, and again, this was standard practice and had been approved by Revenue.

125. I would digress here to say that the defendants' accountant did not at any point purport to give an explanation as to why, if Atercin was trading and therefore necessarily entitled to the profits, they would nevertheless be remitted to Desert Limited, which is the sole shareholder of the plaintiff but is not a shareholder in Atercin. The remittance of the profits to Desert Limited would seem to contradict his view that only Atercin were trading and that only a trading company could retain the profits. Mr. Declan Walsh did not comment on this in his evidence.

126. Neither did Mr. Declan Walsh give any explanation as to why Rexbay would allow Atercin into occupation of the Starbucks outlet and allow it to trade there without paying any rent. He said that Atercin was trading and was therefore entitled to the profits, but that is simply not the case. The plaintiff accounted for them and remitted them to its shareholder.

127. Notably, the plaintiff also seems to have accounted in its nominal ledgers for royalties, which Mr. Declan Walsh assumed were the franchise fee payable to Starbucks. It therefore seems that the plaintiff was reimbursing Atercin for the franchise fee payable by it as franchisee of Starbucks.

128. Mr. Walsh in his third report and his oral evidence, relied on the obligation in s. 282 of the Companies Act, 2014, to maintain adequate accounting records. However, the plaintiff maintained nominal ledgers from 2018 and, as Mr. Butler confirmed in his supplemental affidavit of discovery of 22 February, 2022, Atercin provided administrative functions to Rexbay. I do not see the difficulty, therefore, with Atercin maintaining receipts and other records on behalf of Rexbay, provided appropriate records were maintained.

129. Finally, even in his third report, Mr. Declan Walsh pointed to the difference in the manner of accounting in the 2016 and 2017 financial statements, with more detail being

provided in the 2018 accounts (which included more detailed figures for 2017 for comparative purposes) onwards. However, it was accepted in the evidence that the reporting requirements for the financial statements changed from 2018 onwards. The difference in accounting treatment, therefore, is not probative of anything.

130. I also did not really understand why the defendants' accountant relied on the *"Badges of Trade"* published by the Revenue to assist in distinguishing between trading activity and investment, as these really have no application to the issue which he raised. Those Badges of Trade seek to distinguish between the respective activities of trade and investment, as the tax treatment will differ accordingly. However, it is not disputed that the activity in the Starbucks outlet constitutes trade, and the only issue raised by Mr. Declan Walsh is *who* is trading.

131. The trade/investment distinction may be relevant in this respect, however: there is no evidence of any investment by Rexbay. On Mr. Declan Walsh's analysis, Rexbay have taken on a lease and therefore considerable liabilities on foot of the covenants in the lease, including – but most certainly not limited to – the covenant to pay rent. Mr. Walsh says that Rexbay has sub-let the premises to Atercin without requiring any rent and has allowed Atercin to make and retain or control all of the profit from the trading activity. I do not think this can be a plausible interpretation of the arrangements between these companies.

132. If Atercin are in occupation – which does not appear to be the case – they could only be there as licensees of Rexbay and this begs the question of why Atercin would be allowed to occupy the Starbucks premises rent free? In my view, the only sensible answer to this is that if Atercin were permitted to occupy the premises without paying any rent – or indeed any licence fee – to Rexbay, it could only be because it was allowed to go into occupation as Rexbay's nominee company, for the purpose of managing the day-to-day business associated with the Starbucks, the two companies being part of the same Group. As Mr. Butler put it, Atercin ran

the business on behalf of Rexbay and remitted the gross margin to Rexbay, who then reflected that in its accounts.

133. Mr. Walsh has appended to his third report a portion of the Revenue's Tax and Duty Manual, 2022, headed *"What constitutes a trade?"* the relevant passage of which to be para. 2.3, which deals with group structures. That states:

> *"Where a company seeking trading status is a member of a group and another group company or companies have an involvement in the conduct of the particular trade, Revenue would need to be satisfied as to the role of the various companies. In particular, the company seeking trading status in respect of an activity must establish that it carried on sufficient activity to be trading. Evidence in relation to the levels of authority and responsibility across the group will clarify where the real decision-making lies, and information in relation to the deployment of assets and personnel will clarify the business activities carried on by each company. An explanation of the commercial reasoning and the business objectives behind a particular group structure will be helpful in understanding the underlying strategic business purpose and the value added by the applicant company."*

134. There is, of course, no evidence whatsoever that Revenue have questioned the trading status of the plaintiff but it does not appear from that paragraph that it would do so. The evidence is to the effect that the plaintiff negotiated the Lease, the Side Letter, and indeed the Licence permitting it to use an outside area for seating, and it holds the benefit of each of these documents. It pays the rent and service charge and reimburses Atercin in respect of the franchise fee. It accounts for turnover in the Starbucks outlet as well as the staff and other costs, accounts for the profits, assumes responsibility for the tax on those profits, and then decides what is to be done with them (which generally means that it remits them in full to its sole shareholder). All of this points to Rexbay controlling the deployment of all significant assets

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

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

136. Mr. Butler also gave evidence that the sales and expenses were not reflected in Atercin's accounts. These accounts were not in evidence and complaint was made about this, both by the defendants' accountant and also by the defendant themselves, through counsel.

137. There was some debate about this at the conclusion of the defendants' accountant's evidence during which the plaintiff took the view that it was not required to discover these accounts, that Mr. Butler was in a position to give positive evidence that the gross sales attributable to the trade in the Starbucks outlet were not reflected in Atercin's accounts, and that the defendants had not sought third party discovery. There was some debate about this in the course of the hearing, but I was satisfied that the Atercin accounts were not included in the relevant agreed category of voluntary discovery. In addition, having looked again at the correspondence relied upon, they were never identified as documents which the defendants were seeking, even though they could easily have been specified.

138. I accept the evidence of Mr. Butler that Atercin did not account for the sales from the Starbucks outlet and it would seem highly improbable that they did so, given that Rexbay accounted for the turnover in the outlet and paid the tax on the profits.

III. QUANTIFICATION OF LOSS ARISING FROM BREACH OF EXCLUSIVITY CLAUSE

139. As Handprint closed on 4 November, 2022, a previous, very substantial, claim for future losses to the end of the Lease and indeed any renewal of it in pursuance of Rexbay's rights as tenant under Part II of the Landlord and Tenant (Amendment) Act, 1980, has been abandoned, and the only claim now is for losses suffered to date.

140. The plaintiff claims the sum of €116,518 for losses from 11 December, 2017, the date on which Handprint opened, to 4 November, 2022. This sum is calculated by reference to the sum of the total sales made by Handprint in that period (for which figures are available) and the application to that sum of the various agreed rates of gross profits on sales made by Rexbay in the Starbucks outlet during the relevant period. That figure is then reduced by the costs savings (notably reduced staff costs) which Starbucks made by reason of its lower sales.

141. The only issue which remains in dispute between the parties, the relevant rates of gross profits and amounts of costs saving having been agreed, is the fundamental one of whether the plaintiff is entitled to claim that its probable losses equate to the full amount of Handprint sales which Handprint actually made between December, 2017, and November, 2022.

142. The plaintiff claims that all of the Handprint sales were sales which were diverted from its business, including what Mr. Butler described as the impulse purchases that were made by customers when ordering the primary product of coffee. These would include pastries, bottled water, and other soft drinks. Mr. Butler gave evidence that the food and drink (other than coffee) which was sold by Handprint were the same as those sold by Starbucks and the import of his evidence was that these ancillary products would also have been purchased in Starbucks along with the coffee, if Handprint had not opened. The small amount of merchandise sold by

Starbucks was similarly classed as an impulse product, purchased by someone who went into Starbucks to buy coffee and then made an impulse decision to make an additional purchase.

143. The logic of the plaintiff's argument is that customers go into Starbucks to buy the primary product, which is coffee, but once there they can made additional purchases, effectively on impulse. Once the customer was diverted into the neighbouring unit, Starbucks lost the opportunity to make those other sales. It was therefore irrelevant that Handprint did not sell merchandise.

144. The dispute between the parties as to whether the plaintiff is entitled to claim that all of Handprint's sales were sales diverted from the Starbucks outlet centres on two further issues on which the parties' expert accountants have not reached agreement. These are: a dispute as to the degree to which Handprint caused Starbucks to fall short of its projected sales in Year 3 of trading ("the causation issue") and a related issue about the reasonableness of the rate of growth projected for the Starbucks outlet in Year 3 which it will be necessary to consider before proceeding to determine the causation issue.

145. However, the starting point is to set out the basis upon which the plaintiff's expert gives as his opinion that the entire value of the Handprint sales can be claimed.

Basis for claiming entire of Handprint actual sales

146. Mr. Joseph Walsh says that he took a number of factors into account in concluding that every sale made by Handprint was one lost to Rexbay and that the amount of those sales, which only came to hand immediately before the trial, equates to the loss suffered by Rexbay.

147. The first of these was the sheer proximity of the Handprint offering to the Starbuck's unit. He said that he clearly realised the impact of that when he visited the Units and saw how close they were to each other. Secondly, he said that they both sold speciality coffee as their

primary product. Thirdly, he considered the fact that Starbucks was entitled to exclusivity, that is to be the only dedicated coffee shop in the centre. (I have of course found that he is not only correct in that, but that the opening of the Handprint offering was a breach of the plaintiff's rights).

148. Fourthly, prior to disclosure of the amount of the actual Handprint sales, he had done an exercise based on projections as to what the plaintiff's sales should actually have been. As Starbucks opened in November 2015, from November, 2017, it was in Year 3 of trading. After enjoying strong growth in Year 2, which apparently was expected from experience in opening other outlets, it was anticipated that the Starbucks outlet would continue to enjoy growth in Year 3, but at a lower level. It was then anticipated that from Year 4, sales would grow only in line with inflation.

149. Mr. Joseph Walsh projected growth of 10% for the Starbucks outlet in Year 3. On that basis, he had calculated that the plaintiff's gross profits in the period up to February, 2020, were approximately €144,000 lower than they should have been. The same calculation done with the benefit of the actual Handprint sales, when they became available, was approximately €143,000, a remarkably similar figure.

150. By contrast Mr. Declan Walsh, who gave evidence for the defendants, said that the plaintiff's projections as to its sales in Year 3 were overstated. Whereas the plaintiff said that its sales should typically have increased 10% in Year 3 (which, given that the Starbucks opened in November, 2015, is the period from November, 2017, to October, 2018), the defendants' expert argued that 6% was a more likely figure.

151. As the discrepancy between the Starbucks actual sales and its projected sales is material to a comparison with the actual Handprint sales, it is convenient first to deal with the dispute between the experts as to the reasonableness of the Starbucks projections.

Reasonableness of projection of 10% increase in sales in Year 3

152. The basis for the plaintiff's accountant's projection of 10% increase in sales in Year 3 was: instructions from Mr. Butler as to his experience in other Starbuck's outlets, his own experience, the fact that growth in the first two months of Year 3 (November and December, 2017) was approximately 18.82%, the increased footfall activity in the immediate vicinity of the Starbucks outlet due to increased development in the area in 2018, and the fact that Bord Bia had given a general prediction of an increase of 8.7% in coffee sales in 2018.

153. This latter prediction was a general figure affecting all outlets, whether start-ups, established, or growing, and also affecting all sales of coffee, including wholesale coffee. However, the plaintiff's accountant said that it reassured him that the 10% figure was reasonable.

154. Furthermore, the plaintiff's accountant had projected growth of 10% prior to receiving the figures for the actual Handprint sales. On receipt of those sales figures, it transpired that the actual Handprint sales figures made during Year 3 of trading at the Starbucks outlet were quite similar to the projected Starbucks sales. This confirmed him in his view that 10% was a reasonable figure (and caused him to drop reliance on a higher projected figure which he had posited as the upper end of the range which Starbucks could achieve in Year 3).

155. I have mentioned that the plaintiff's accountant based his projection in part on increased activity within the vicinity of the Starbucks outlet in 2018. First, construction works commenced on the Exo Building which is right beside the Starbucks outlet and that brought increased custom. While the defendants' accountant says that the numbers of construction workers would be limited, as initial works consisted of excavation and groundworks, it must nevertheless have increased the footfall. Secondly, Point Student Village, which offers accommodation for 950 students, opened 95 metres from the Starbucks outlet in the autumn of

that year, possibly counteracting the effect of the opening of an Insomnia outlet in September, 2018, and the impact of Centra's coffee offering which was available from the second quarter of 2019.

156. The defendant's accountant, by contrast, posited a projected growth rate of 6% for the Starbuck's outlet in Year 3 of trading. He was undoubtedly correct in stating that these figures were in the nature of estimates and there was no hard and fast scientific method of identifying the correct projected rate of growth.

157. However, for a number of reasons, I prefer the evidence of the plaintiff's accountant on this issue. This is because the plaintiff's accountant identified a number of factors which he took into account in calculating the 10% projected growth rate and, while the defendant's accountant contested the assumptions underlying these factors, I am satisfied that the assumptions were rational. By contrast, insofar as there were assumptions underlying the 6% posited by the defendant's accountant, his rationale is not as compelling as that of the plaintiff's accountant on the same point.

158. The first factor taken into account by the plaintiff's accountant concerns the general growth figure of 8.7% predicted by An Bord Bia for all coffee sales in 2018, January to October of which were within Year 3. The plaintiff's accountant took this as a general figure which informed, but did not dictate, the figure of 10% on which he eventually settled.

159. While accepting that there is no exact science to this, I found the defendant's accountant's evidence to be less than convincing on why he erred on the lower side of the general figure. On the one hand he said that the figure would be higher for a start up, because inevitably their growth rate for Year 1 would be 100%, he nevertheless seemed to assume that the Starbucks outlet, as an established brand, would be lower. This, however, contradicts his acceptance that the Starbucks outlet (notwithstanding the status of its brand) would not be fully established and would in fact still be in a period of growth for most of 2018. Actual sales figures

for the Starbucks outlet in Years 1 and 2 bear this out, as they demonstrate that, even with a strong brand, sales commence from a low level and then grow year on year, with very significant growth in Year 2. As Starbucks was still in a period of growth, then its growth rate should be somewhat higher than average for 2018, rather than lower.

160. Secondly, the defendant's accountant did not accept that the Starbucks figures for November and December 2017 were anything but outliers. The increase in those two months was 18.82%, year on year. When it was put to him these months were not outliers because the Starbucks outlet achieved 25% growth for the 12 months of 2017 overall, he refused to accept that this could be relevant as the first ten months was in Year 2, in which both sides accepted that there would be very considerable growth. However, this is to elevate convenient statistical categories – which categorises October, 2017 as Year 2 but classes November, 2017 as part of Year 3 – above real life experience. It is difficult to see how the last two months of 2017 can be seen as outliers when they follow on ten earlier months which, on average, in fact achieved similar growth.

161. In addition, he thought December, 2017, in which a year on year growth rate of almost 25% was achieved was itself an outlier, because December, 2016, was unusually low. There was no explanation for this as December was normally a busier month due to events taking place in the 3Arena.

162. In my view, it is more reliable to view an individual month as part of a larger trend. That is, they should be viewed in the context of surrounding months and individual months should not be given undue emphasis, at least in the absence of specific evidence which would justify the inference of a particular event.

163. That view will inform my analysis of the causation issue but, to return to the projected growth figures, given that the figures for December, 2017 showed a year on year increase of approximately 25%, the plaintiff's accountant appears to have made the adjustment required to

correct for the fact that those monthly figures were an outlier by projecting a much lower rate of growth for the year overall. And, although neither accountant commented on this, I assume that in projecting a growth rate for Year 3 which is lower than for Year 2, it is accepted that this consists of a downward trend over the year, rather than a sudden drop in the earlier months of the years. In other words, I am not convinced there is anything particularly strange about the earlier months being considerably higher than the average predicted for the year, with the growth rate trending downwards throughout the 12 month period.

164. Thirdly, and finally on this point, the defendants' accountant did not test his projection against the actual figures achieved in the Handprint outlet from January, 2018, onwards. The plaintiff's accountant, having initially identified 10% as at the lower range of projected growth, abandoned that position once the actual sales figures for Handprint were available. The figures for the Handprint sales for January to August, 2018, when there were no other coffee outlets in the general area, correlated quite strongly to a projection of 10% growth in Starbucks sales from the previous year. The plaintiff's accountant said this gave him comfort that the figure was reasonable.

165. Unfortunately, the defendants' accountant never tested his figure of 6% against the actual figures achieved by Handprint. It has to be said that the opening of the Handprint offering in the unit next door to Starbucks presented a very convenient way of testing the projected figures, given the similarity of the two offerings. Insofar as the figures for the Starbucks outlet are affected by footfall and location, the Handprint sales surely offer very cogent evidence as to the sales that could be achieved in the precise location where Starbucks was situated. Ultimately, all of the projections and estimates are just that, and should surely be reassessed in the light of empirical evidence obtained in a real-life context, which is what the Handprint sales offered. And in saying this, it should also be noted that, all other things being equal, the defendant's accountant accepted in his evidence on the causation issue that, until the

occurrence of a significant – but entirely unidentified event – in May, 2018, Handprint would be responsible for 100% of the shortfall in Starbucks sales.

166. Furthermore, as pointed out by the plaintiff's accountant in his second report, the defendant's accountant appears to have taken a somewhat partisan approach to the issues by stressing that additional coffee outlets (Insomnia and Centra) opened in the area in September, 2018 and the second quarter of 2019, but somehow failed to record the increased development in the area which should naturally lead to greater custom over all.

167. In those circumstances, I find that the 10% projection applied by the plaintiff's accountant is more reliable than the 6% suggested by the defendant's accountant.

Causation issue

168. I turn now to the dispute between the experts as to the degree to which Handprint caused the shortfall in Starbucks sales ("the causation issue").

169. The plaintiff's accountant was of the view that 100% of the shortfall in Starbucks sales, that is, the difference between its actual and projected sales, was caused by Handprint. Because of the lack of any other competitor until September, 2018, the plaintiff's accountant took the period January to August, 2018, as a comparator to test the strength of his projections. It has to be said that the similarity in figures between first, the shortfall experienced by Starbucks, that is, the difference between its actual sales and its projected sales, and secondly, the actual Handprint sales in this period is very striking. The shortfall was €59,181, and the actual Handprint sales were €67,795, so the difference was €8,613. Against the background of actual Starbucks sales of €366,336 in this period, that is not an especially large figure and tends to suggest a high degree of correlation between the failure to meet the projected figures and the impact of the Handprint sales.

170. The defendant's accountant did not agree with this and initially assessed causation at 56%. He did this on the basis that Handprint would have been responsible initially for 100% of the shortfall in Starbucks sales, up to and including April, 2018. However, he noted that from May, 2018, Starbucks sales began to decline year on year and from this he assumed that there was a significant event in May, 2018, which accounted for that decline. He estimated that from May, 2018, onwards, Handprint was only responsible for 50% of the shortfall.

171. A complication in considering this particular issue is that, despite evidence from various witnesses (including Mr. Doyle) as to the changes going on in the area throughout 2018, no one has identified any event occurring in May, 2018, which might be relevant. It is accepted, for example, that it was not until September, 2018, that Insomnia opened in the general area and the Centra coffee offering was not available until the following year. Prior to September, 2018, only Starbucks and Handprint competed for this business.

172. It is also the case, as addressed in re-examination of Mr. Joseph Walsh, that if one takes the average of the figures for April and May, 2018, they virtually net off. In April, Handprint sold €5,418 more than the shortfall, whereas in May they sold €5,269 less than the shortfall. If the two months are taken together, the shortfall against the projected figures coincide almost exactly with the Handprint sales and, as already stated, Handprint only sold €8,613 more than the shortfall the entire eight month period. Against a background where the projection itself is necessarily a generalised estimate, that is not an enormous differential.

173. The general approach of the plaintiff's accountant was that it was safer to look at projections from an annual perspective, to avoid focussing on what might be outliers. I think that is a more reliable approach because it tends to correct for unusual spikes or downturns and to identify the overall trend.

174. As the plaintiff's accountant points out in his second report, this focus on the year on year drop in sales from May, 2018, ignores the significant 18.82% increase year on year in

November and December, 2017. These increases halted in January, 2018, the first full month of trading in the Handprint offering.

175. I think it must be concluded that the defendant's accountant has engaged in circular reasoning here. He has concluded that something unidentified happened in May 2018, without considering that the ongoing establishment of Handprint as a brand and as an outlet might have impacted, particularly from June, 2018, onwards, and has concluded that, as a result, Handprint were only responsible for 50% of the downturn in Starbucks business from May, 2018, onwards. I do not think this assumption can be accepted in circumstances where the assumed event in May, 2018, has never been identified.

176. From its opening in mid-December, 2017, Handprint was seeking to establish itself in the Point Village location. The plaintiff's evidence was that it takes up to two years for a specialist coffee outlet to establish itself, so it may take time to make an impact. This was not only the view of Mr. Butler, who is highly experienced in the coffee shop business, but the actual sales figures for Starbucks bear this out as it traded at quite a low level in Year 1 (November, 2015 to October, 2016), but achieved growth of 25% in Year 2.

177. The sales figures for Handprint from January to August 2018 also bear this out as sales were lower in the first five months before then jumping significantly in June, 2018. All of the experts appear to agree that the business would take time to establish itself, the inference being that its effect would grow over time. But the defendant's expert infers from the fact that it was already open that it would have had no greater impact in May 2018 (and subsequently) than it had in January, 2018 to April, 2018. This is contrary to the evidence that an outlet such as Handprint would take time to establish itself and therefore that its impact would grow over at least Year 1 of its operations. I therefore do not accept the assumption on which the defendant's accountant is proceeding.

178. While from May, 2018, onwards, Starbucks sales tended to be lower than the corresponding month in the previous years as opposed to increasing, as they had been doing in November, and December, 2017, most of which period was prior to the opening of Handprint. Mr. Joseph Walsh said that these months should be included in order to establish a trend. If they are included, it seems that Starbucks, which had been experiencing strong year on year growth prior to the opening of Handprint, started to more or less mirror 2017 sales once Handprint opened, and then from May 2018, started to fall significantly below the 2017 figures from that time. This is, in my view, equally consistent with the Handprint outlet establishing itself in the area.

179. In his evidence, Mr. Declan Walsh also relied on the discrepancies between the shortfall identified between the Starbucks actual sales and its projected sales (110% of Year 2) on the one hand, and the actual Handprint sales on the other. For example, in February, 2018, Starbucks projected it would sell €51,356 and its sales were in fact €47,605, a shortfall of €3,751. However, Handprint's actual sales amounted to €8,220. Mr. Declan Walsh claims this shows that not every sale to handprint corresponds to a loss to Starbucks, so that there cannot be 100% causation.

180. With respect, this reasoning cannot be accepted. The Starbucks shortfall is derived from a projection, that is, from a notional figure. It is a best guess that, across an entire year, sales in Year 3 will increase 10% over those achieved in Year 2. It does not take into account seasonal trends, specific events which might affect footfall or sales, and so on. It may well be an underestimate for some months and an overestimate for others.

181. Having initially estimated the causation factor as being 56% in his final report, the defendants' accountant took the view that causation was not a matter for accountants and outside his expertise, but it would be less than 100%. It was put to him in cross examination that he only came to this view after the figures for the Handprint sales became available and

that in his earlier reports, he had been willing to offer a view. The suggestion, if I understood it correctly, was that he altered his attitude as to the extent to which he could offer a view on causation after the actual figures for the Handprint sales became available and it became apparent that they more or less corroborated the plaintiff's estimates of its losses. He denied this but it is the case that his first two reports offer a view on causation – the second report suggesting an ostensibly precise figure of 56% - and it is only in the third report, by which time the Handprint figures had become available, that he suggested that he was not in a position to offer an expert view on this issue.

182. However, taking the view he in fact offers in his third and final report, and bearing in mind that he admits that he does not have any particular expertise in the area, I do not agree with his basis for suggesting that 100% loss of sales cannot be assumed. Although broken down into three sub-paragraphs in his final report, he offers in substance two reasons for this.

183. First, he reverted to his assumption that a significant event happened in May, 2018. I have already referred to the fact that the defendants' accountant tended to focus on specific months rather than looking at trends, which was the approach of the plaintiff's accountant. It is my view that the latter approach is more reliable, in the absence of evidence, as to a specific event which would justify the assignment of particular significance to a particular month.

184. Secondly, he purported to offer a view on customer tastes, preferences and loyalties (though I understand he does not profess any expertise in this area). On this issue, he was of the view that Handprint's environmentally focussed brand was different from that of Starbucks. From this he infers that customers might prefer the Handprint brand and therefore might have bought a coffee in circumstances where, if only Starbucks was available, they might not have purchased at all.

185. However, the brand distinction is at least equally capable of supporting the inference that a customer, acting on a desire to buy a coffee – which everyone accepts would be an

immediate purchase – might choose Handprint over Starbucks when, if Handprint was not there, they would simply go into Starbucks as the only available option. And, of course, the purpose of the Exclusivity Clause was to ensure that Starbucks would be the only coffee chain in this particular location.

186. The distinct branding highlighted by the defendant's accountant in my view therefore supports the plaintiff's claim that custom was diverted from its outlet to the Handprint offering. I think, given the nature of the purchase which is an on-the-spot decision to have coffee (possibly to go) with associated impulse purchases when in the café, it is highly probable that any individuals who found themselves in Point Square and who wanted a speciality coffee, and who went into Handprint in the relevant period, would almost certainly have gone into Starbucks if that had been the only specialist coffee outlet in the area.

187. As a result, I am satisfied that the correlation between Handprint sales and losses to Starbucks is, on the balance of probabilities, 100%.

Non-coffee sales

188. Finally, there was a subsidiary issue raised by the defendant and stressed by the defendant's accountant which was that they contended that the plaintiff should only be entitled to compensation in the sum of Handprint's coffee sales and not for other products.

189. I don't accept this for a number of reasons. First, it was uncontested that the non-coffee products sold in Starbucks (pastries, soft drinks, and merchandise) were typically impulse purchases. With the exception of merchandise, Handprint sold virtually identical products. The primary product of both Starbucks and Handprint was coffee, and it was this which enticed the customer into the relevant outlet. Once there, the customer might buy an additional product, but coffee was the product which attracted the customer in the first place. The Handprint sales

themselves show that coffee sales accounted for a very large proportion of sales overall. In my view, given the nature of market catered for by a dedicated coffee outlet, losses should be calculated by reference to the overall sales.

190. The defendant asserted that Freshii also sold soft drinks. This is undoubtedly the case as evidenced in the photographs and it would probably be impossible to sell lunches and meals without offering the customer the opportunity to buy drinks with the food. However, there was no evidence that Freshii sold pastries, which are very strongly associated with coffee, and there is of course no claim in respect of sales of soft drinks – or indeed coffee – at the Freshii counter. The logic of the claim, and indeed of the Exclusivity Clause itself, is that one identifies the primary product which brings the customer into the outlet and which is the critical factor in the customer's mind when choosing where he or she will go. Once there, he or she is free to buy incidental items such as bottled water.

191. However, by establishing a separate counter at which handcrafted coffee was the primary product, Handprint effectively enticed the customer to its offering instead of going into Starbucks. Once there, Handprint had the opportunity to sell the ancillary products, thereby depriving Starbucks of making a similar sale.

192. I therefore do not think that the non-coffee sales (or indeed sales of items other than hot drinks) should be deducted in calculating the losses suffered by the plaintiff.

193. I am satisfied that the plaintiff's accountant's approach to this issue is correct and that, on the balance of probabilities, the sales in fact made by Handprint while it traded in the Point Village would have been made by the neighbouring Starbucks outlet.

CONCLUSION

194. The provisions of Clause 3.1 of the Side Letter applied to the letting of Unit 1 to the Tenant named in the Unit 1 Lease, as it was the first letting of a Unit in the Centre. The Tenant proceeded to run two separate businesses from the Unit, pursuant to two separate franchise agreements, one of which was with a new coffee chain which was at that time attempting to establish itself in the market. Although sharing premises, it is clear from the evidence about separate branding, separate counters, separate payments and so on, that it was a stand-alone business, separate from the food offering at the Freshii counter.

195. While there was no difficulty in the Freshii counter offering coffee for sale – as this was quite clearly ancillary to its main offering of wraps, burritos, and soups – the operation of a separate offering within the same premises with coffee as its primary product quite clearly constituted a breach of the Exclusivity Clause.

196. Clause 3.1 of the Exclusivity Clause was drafted to reflect what was accepted to be two distinct customer markets: one where food was the primary product and attracted the customer with any sales of coffee being ancillary to the sale of food and one where coffee was the primary product which drew the customer into the store. The two businesses run by the Tenant in Unit 1 of the Point Village Centre neatly represented these two markets, the problem being that the Landlord, in letting Unit 1 to the Tenant for partial use as a coffee chain, was in breach of the Exclusivity Clause which they had agreed with Starbucks in the neighbouring Unit.

197. I am also satisfied that the plaintiff, though not the nominal franchisee of Starbucks, held the Lease, controlled the use of the premises, and that a company in the same corporate group effectively managed the Starbucks trade for it. This was reflected in the plaintiff's financial statements in which it accounted for the profits from the Starbucks trade, paid the

relevant tax, and remitted the balance to its shareholder. As a result, the plaintiff is the person suffering a loss from breach of the Exclusivity Clause.

198. On the balance of probabilities, the sales actually made by Handprint would have been made by Starbucks. This is due to their extreme proximity, the similarity of their offerings, and is corroborated by the fact that projections done by the plaintiff as to its likely sales from the Starbucks outlet in Point Village turned out, when the figures for the actual Handprint sales became available, to be very similar to those sales figures. A comparison of the period January to August, 2018, when there was no other coffee offering in the general area, shows a high degree of correlation between Starbucks' projected sales and those actually made by Handprint. When taken together with the nature of coffee sales as resulting from on-the-spot consumer decisions, possibly driven by impulse, I am satisfied on the balance of probabilities that the sales made by Handprint would most likely have been made by Starbucks if Handprint had not opened right beside the Starbucks outlet.

199. By contrast, the suggestion on behalf of the defendants that there was an unspecified event in May, 2018, which accounts for the disappointing sales from the Starbucks outlet is speculative as there is no evidence of any significant event occurring at that time. It also fails to take into account the fact that Handprint was most likely establishing itself as a competitor for Starbucks around that time.

200. I therefore find that the plaintiff is entitled to the sum of €116,518.00 and I will list the matter in early course for the purpose of hearing counsel on the final form of order and on the question of costs, as well as any claim for Courts Acts interest.