Case No: HC-2015-000041

Neutral Citation Number: [2016] EWHC 2545 (Ch)
IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice
Rolls Building, Fetter Lane, London EC4A 1NL

Date: 17/10/2016

Before :

MASTER BOWLES

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Between :

Dorinda Irene Holland	**Claimant**
- and -	
Oxford City Council	**Defendant**

- -
- -

Mark Warwick QC (instructed by **Gordon Dadds**) for the **Claimant**
Nicholas Grundy QC (instructed by **Head of Law and Governance**) for the **Defendant**

Hearing dates: 12th, 13th, 14th 20th and 21st April 2016

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Judgment

Master Bowles :

1. The Claimant, Dorinda Holland (Mrs Holland), asserts a tenancy over two sites, or parcels of land, which have been occupied by her, over a number of years, at the annual St Giles Fair in Oxford (the Fair). Additionally, she seeks declaratory relief as to the extent of the two sites, together with damages for breach of covenant for quiet enjoyment arising out of her contention that, in 2013, 2014 and 2015 and in breach of covenant, she has been denied the full use of her sites at the Fair and has, in consequence, been unable to use the sites to deploy a particular fairground attraction (a 'ride' called the Cyclone) that she had intended to bring to the Fair in those years.

2. The Fair takes place, in each year, on the first Monday and Tuesday following the 1st September; 1st September being the feast day of St Giles. It has for some many years been organised by the Defendant, the Oxford City Council (the Council), albeit that the land upon which the Fair is held is not in the ownership of the Council. As its name suggests, the bulk of the fairground, when the Fair is taking place, is to be found in St Giles, a broad central street in Oxford, running North to South between St Giles Churchyard in the North and St Mary Magdalen Churchyard in the South.

3. Both the sites, or parcels, with which this case is concerned, sites 129 and 130, are on the Eastern side of St Giles in the general vicinity of the Lamb and Flag public house. As already stated, the particular dimensions and the positioning on the ground of the two sites is one of the questions in issue and for my determination.

4. The land, itself, because St Giles is a public highway, is in the ownership of the relevant Highways Authority, namely Oxfordshire County Council. The highway is, however, closed during the pendency of the Fair and during the period prior to and following the Fair, when the Fair is being set up and dismantled.

5. I am told that the first references to the Fair occur in 1625. The Fair is not, as I understand it, held under Act of Parliament or pursuant to a Royal Charter, but is what is termed a 'Wake' fair; meaning a fair held as the annual festival of the parish and, therefore, by reference to the feast day of the patron saint of the parish; in this case St Giles.

6. As is clear from the foregoing, the tenancy contended for by Mrs Holland is an unusual one. Her case is that, in respect of each of the two sites, 129 and 130, she has an annual periodic tenancy for, what is termed in the pleadings, the Fair Period; namely the period embracing the Sunday, when attractions are brought in and set up for the fair, the two days of the fair and the period, on the relevant Wednesday in each year, when attractions are being dismantled and removed. In respect of the Wednesday, each site holder must clear his site by early (in 2015, 5.00a.m) in the morning, so that the highway can be brought back in to use. In the case of site 129, it is pleaded that she has had her tenancy since March 1992. In the case of site 130, it is pleaded that she has had her tenancy since about March 2007

7. The Council deny that Mrs Holland has a tenancy. Its case is that she has no more than a licence, granted annually, in respect of the sites that she occupies at the Fair. If that be right, then the fact, that, historically, the sites that she has occupied over the years may have had particular dimensions, does not require the Council, in granting her a licence for any given year, to grant her a licence over the same ground area as in

previous years. In any event, the Council has put Mrs Holland to proof as to her alleged loss and damage, arising out of any breach of covenant and as to the steps that she has taken to mitigate her loss.

8. In broad terms, the history of the two sites, in issue in this case, and of the circumstances in which Mrs Holland came to be interested in the sites is not in any significant dispute.

9. Mrs Holland is of a Showman family and her family have, traditionally, had the benefit of fairground sites over a large number of locations at fairs across the country. She is a member of the Showmen's Guild, which is a trading association for the travelling fairground community.

10. The rights, inter se, of showmen, are an important part of the factual matrix in this case. In short form, in order to avoid, or limit, competition over fairground sites, the Showmen's Guild has developed rules, whereby a Guild member who has a particular site at a particular fair will be entitled, as against another Guild member, who might otherwise seek to acquire the use of that site, to priority, year on year, to that site and will, as against other Guild members, be entitled to retain that right, unless and until either the Guild member showman in question ceases to use the site (and then, subject to a system whereby rights can be protected), or until it is given up, or transferred to another Guild member.

11. In established fairs, such as St Giles Fair, the majority of the major site holders, year on year, are Guild members, with established rights, inter se, to their sites. Because, however, St Giles Fair is not, as some fairs, operated by Guild members and because the Council is not a Guild member, the Council is not bound to give effect to the rules of the Guild. In the interests of good management, however, the practice of the Council, as was explained to me by Mr Newman, the Council's Fair Co-ordinator, was to have regard to the Guild rights of site owners and to manage the fair with those rights very much in mind. The undoubted result is that, year on year, the same Guild member will, ordinarily, occupy the same site.

12. Although, at trial, there was much discussion and much evidence as to the size and position of the two sites the subject of this litigation, in the end, that issue, or question, very largely fell away.

13. In regard, at least, to that part of St Giles with which this case is concerned, there is no doubt that, long ago, the Fair site was divided into numbered sites and that the site numbers have not changed, significantly, over the years, save where sites may have, from time to time, merged, or been divided.

14. In the case of site 129, by 1985, the usual annual occupier of the site was Charles Thurston. Charles Thurston was Mrs Holland's uncle and a fellow Showman. According to Mrs Holland, he and his father before him had occupied site 129 and other sites at the Fair for many years.

15. In 1985, Charles Thurston wrote to the Council enquiring as to the dimensions of both sites 129 and 130. The Council's response, by letter of 28th October 1985, was to indicate that the dimensions of site 129 were that the depth of its Southern boundary was 72 feet, the depth of its Northern boundary was 66 feet and that its frontage was

69 feet. In regard to site 130, the dimensions given were 72 feet depth and 36 feet frontage.

16. Those dimensions exactly replicate the dimensions given for site 129 and site 130 on two plans, dated respectively 1999 and 2000, produced by Mr Newman in the course of his evidence at trial. Mr Newman explained that these plans had been taken off a master plan, which he referred to as the 'negative', but which was no longer in existence. There seems no doubt, given the correlation of the measurements and given that the 1999 and 2000 plans, themselves identical, in terms of plot size and position, had been taken from the original master plan, that it was this master plan which was the source of the information given to Mr Thurston in 1985 and, further, that the position and dimensions of each of sites 129 and 130 had appeared on the master plan as now shown on the 1999 and 2000 plans.

17. Mr Newman confirmed that it was these plans which were intended to define the precise positions of each site, albeit that, in practice, the Council, which marked out the sites on the roadway, with paint marks, each year, in preparation for the Fair, tended to make use of previous paint marks, when available, and only to re-measure the sites, in accordance with the plans, if the previous markings had been worn away.

18. The 2000 plan, headed St Giles Fair 2000, has marked upon it the following note: 'Measurements shown at the rear on the plan refer to the front of the sites'. Reference to the plans themselves, show that the 69 feet and 36 feet dimension given for the frontage of each site are to be found, marked on the plans, at the East side of the site, where the site abuts the kerb of the pavement. Mr Newman explained and accepted that, in the parlance of the fair, the frontage, in respect of sites 129 and 130 and the other sites to, the North and the South of those sites on the Eastern side of St Giles, was, in each case, the Western side of the site in question and, therefore, that, on the face of the plan, the dimensions for both sites 129 and 130, in respect of their frontage, were to be measured along their Western boundary.

19. That explanation was, in its turn, consistent with and confirmed by correspondence before the court (the accuracy of the contents of which was confirmed by Mr Newman) from the previous Fair Co-ordinator, a Mr Oldroyd. The potential importance of this, as is explained later in this judgment, is that the kerb line of St Giles is curved on its Eastern side, with the result that, if the measurement were to be taken along the rear of the site (the Eastern boundary), that would not (and does not in this case) produce an equivalent length on the Western boundary.

20. Be that as it may, the fact is that the site plans, the dimensions of the sites and the mode of measurement are all made clear on the 1999 and 2000 plans, which replicate, because taken from the original master plan, the site plans, dimensions and mode of measurement, which would have been shown on the master plan and which, because of the exact correlation of the relevant site dimensions, would have been so shown, at the time when Charles Thurston made his enquiry to the Council in 1985.

21. I am in no doubt, therefore, but that the position of sites 129 and 130, in 1985, was precisely as is now shown on the 1999 and 2000 plans and, further that the dimensions and mode of measurement of those sites was then precisely as was shown on the 1999 and 2000 plans. I am equally in no doubt but that, since the 1999 and 2000 plans are the documents which have continued to define and describe the precise

positions of the various sites shown thereon, including, of course, sites 129 and 130, any subsisting tenancy of the character, or type, alleged by Mrs Holland which may have been granted over those sites, as at the dates that she has alleged and pleaded, would have been tenancies of sites 129 and 130 of the dimensions and in the position shown on the 1999 and 2000 plans.

22. Mrs Holland's direct involvement in the use and occupancy of site 129 commenced in 1992. In that year, Charles Thurston, Mrs Holland's 'Uncle Charlie', agreed that he would transfer the use of the site to Mrs Holland. By letter of 26th March 1992, Mr Oldroyd, on behalf of the Council, agreed to transfer the site to her and that he would invoice the relevant registration fee in respect of the transfer of the site. In due course an invoice for the site registration fee of £1,270 was sent and was paid by Mrs Holland. My understanding is that that fee was based upon a multiple of the annual toll, or fee, payable for that site in that year, that toll, or fee, being based, at least as regards sites such as sites 129 and 130, upon the type of fairground attraction (in this instance dodgems) that the site holder was, or would be, bringing to the fair.

23. Mr Newman's evidence, which was not put in issue, was that the registration fee was not payable for, or to reflect, an interest in the site, itself, but to register, or record, that the Guild rights in respect of the site had passed into new hands and that, in consequence, the Council would deal with that new person, when it came to the 'letting' of the site in future years.

24. In that regard, by letter of 14th May 1992, the Showmen's Guild wrote to Charles Thurston confirming that his application to transfer his Guild rights in respect of site 129 had been granted. By a further letter, dated 18th July 1992, Charles Thurston wrote to Mrs Holland and her then husband, enclosing, so it would appear, his correspondence with the Guild and with the Council in respect of the transfer. Subject only to the problems which have arisen in respect of the occupation and use of the two sites, in recent years, and which have, in essence, given rise to this litigation, Mrs Holland has occupied site 129 at every St Giles Fair since 1992.

25. In regard to site 130, that site was for many years occupied at each Fair by members of the Messham family. In 1988 the Guild rights in respect of the site were transferred from Mr Messham to Mrs Messham with the consent of the Council. That consent was given subject to a reservation that that consent did not extend to Mrs Messham acquiring any Guild rights over site 129, by reference to, or by reason of, an encroachment on to site 129 by the 'Super Bob' 'ride' brought to the fair by Mrs Messham and which had been permitted by way of an informal arrangement with Charles Thurston. Those arrangements continued, with the consent of Mrs Holland after she took occupation of site 129.

26. In 2007, the Council agreed the transfer of the site to Mrs Holland, subject to the payment of a registration fee of £5,847.95. Although there is no correspondence before the court, there is no suggestion that the transfer process was not identical to that effected in respect of site 129, or that the transfer was not associated with and did not reflect a transfer, with the consent of the Council, of the Guild rights pertaining to site 130. Despite the problems which have developed since 2010 and which arise, as set out later in this judgment, from a dispute as to the size of the two sites, Mrs Holland has, with the exception of 2014 and 2015, used and occupied site 130 at every Fair since 2007.

27. Although, as already stated, the fact, that the Council, in operating the Fair, has regard to and recognises Guild rights, has the effect that the very large majority of site holders operate the same site year on year, application is, nonetheless, required in each year for the allocation of a site. Applications are made in April and May in each year, although application forms for the succeeding year are handed out in the course of the Fair itself. The earliest application form in evidence goes back to 1999 and relates to site 130. There is no reason to believe, however, that similar application forms were not used prior to that date, or that the process of application has substantially altered over time. The application form used in 1999 is not materially different to the form which was used in 2015.

28. Taking Mrs Holland's application form for site 129, in 2000, as an example, by that form, she applied 'for a site at St Giles Fair to be held on Monday and Tuesday 4th and 5th September 2000'.

29. In response to the question 'SITE *DESIRED IN 2000', she replied '129', citing the attraction that she wanted to bring as 'dodgems'. The form asked her as to sites occupied in the previous years 1999 and 1998, to which she replied '129', citing, again, dodgems as the attraction that she had brought. The asterisk against the word DESIRED, took the applicant to an explanatory note to the effect that it was important that sizes be stated on the form, as where different rated transactions were on the same site and sizes were not given, the whole site would be charged at the higher rate. This would appear to relate to the fact that, as already stated and as discussed further below, the annual fee, or toll, is not related to the site size, as such, but to the type and, I suppose, size of the attraction being brought to the site.

30. At the bottom of the form and by way of further explanation, the form stated that the applicant was not required to make payment with the application, but that 'if … subsequently notified that you have been allocated a site' the applicant would be advised 'of the arrangement for paying the site fee'.

31. The process of application, as explained by Mr Newman, is that on receipt of an application form for a particular site, consideration is given by the Council to the type of attraction which the applicant seeks to bring to the Fair.

32. The Council will not allow an attraction which will not fit on the relevant site, although this can be mitigated, as with the Messham's 'Super Bob', by adjoining showmen agreeing encroachments from one site into another and although some modest measure of encroachment over the frontage of a site into the areas used for public access to the sites will be allowed, provided it does not affect either safety, or the flow of pedestrian traffic. By way of example, it is acknowledged that Mrs Holland's dodgems, which have been set up, in recent years, on site 130, have been allowed to encroach to a limited extent into the walkways to the pedestrian area to the front of her site. Consideration is also given to the balance of attractions at the Fair and to ensure an appropriate 'mix'.

33. On receipt and approval of an application, a payment voucher is sent to the successful applicant, specifying the annual toll, or fee, to be paid. As earlier indicated, in the case of sites of the type in issue in this case, the toll, or fee, is based not upon the size of the site, but upon the nature of the attraction; there being an annual schedule of fees,

or tolls, related to the type of attraction (Super Ride, Major Ride, Major Amusement) that the showman is bringing to the fair.

34. Mr Newman gave evidence as to the process which has been used to determine the amount of the fee, or toll, payable for a site in each year. The starting point, he told me, was research, carried out some time ago, in respect of the charges made to showmen at other fairgrounds. That research had provided a 'base' figure, which had then been uplifted each year to reflect inflation. In addition, from time to time, further uplifts are made to the fees, or tolls, to reflect costs incurred by the Council in putting on the fair. In recent times, for example, the annual tolls, or fees, had been raised to reflect the costs incurred in the provision of additional security.

35. On receipt, in any given case, of the relevant fee, or toll, the Council sends out what Mr Newman called a letter of authority, in respect of the site, or sites, to which the fee, or toll, related. The sample, or template, of such a letter, which was before the court at trial, reads, after identifying the site and the name of the recipient, as relevant: 'I am pleased to advise you that you have permission from me to occupy the above site(s) at this year's Fair .. to trade in (whatever attraction had been applied for and approved). This letter of authority is issued subject to the attached Conditions of Letting and on the understanding that you conform to the requirements of the Council and the Police.'

36. As stated in the template letter, Conditions of Letting accompany the letter. There was produced in evidence copies of the Conditions of Letting for every year from 2003 to 2015, other than 2004 and 2005. Although, the format and content of the Conditions of Letting have remained remarkably constant across the years, there have been regular changes of detail and form, the most obvious being a gradual uplifting in the prescribed level of maximum charges in respect of particular types of attraction.

37. A number of the particular conditions were raised, before me, as being material to and of assistance in my determination as to the status of Mrs Holland's occupancies of sites 129 and 130.

38. Mr Grundy, for the Council, drew particular attention to the fact that it has been a constant condition, over the years, that allocated sites are so allocated subject to any road signs, lamp standards, or other street furniture that might be erected on any given site; to the fact that sites, when allocated, are to be used only by the site holder (although that provision is mitigated by a provision that the phrase 'site holder' should be treated as including immediate family, business partners and any associated company of the named site holder); and to the fact that any operator 'who fails to comply with these conditions, or the reasonable requests of the Fair Co-ordinator, may be required to remove all equipment from the Fair and be suspended or prohibited from using the site or attending St Giles Fair ..'.

39. Mr Grundy also drew my attention to the lack of any right of re-entry in the letting conditions, or any overt reservation of any right to the Council to enter on to the site; this, in the context of provisions, for example, in the 2009 Letting Conditions, that checks of relevant examinations of equipment be available for inspection, that site holders should have their letters of authorisation available for production to the Fair Co-ordinator when requested, be prepared to close down and move their stalls on the occasion of an emergency; and in the context, further, of the overriding provision of

the letting conditions (which has been a constant throughout each set of letting conditions) that the requirements of the Fair Co-ordinator be complied with in all matters. In earlier letting conditions, such as the 2003 Conditions, the conditions provided, also, for structures to be constructed, or erected, to the satisfaction of the Fair Co-ordinator and for equipment to be presented and maintained to the satisfaction of the Council's consultant engineer.

40. Although both parties acknowledged that the question of lease, or licence, was a matter of substance not form, it is right to record, firstly and obviously, that the conditions in question are described as Conditions of Letting and, secondly, that, in at least one of the conditions, reference is made to site holders as 'tenants of the fair'.

41. The language of tenancy is also to be found in a number of other documents, referred to and relied upon by Mr Warwick, for Mrs Holland.

42. In a letter to the Showmen's Guild, dated 19th August 1988, in relation to site 129, Mr Oldroyd, when dealing (as already set out in paragraph 25 of this judgment) with the transfer of the Guild rights from Mr to Mrs Messham, in respect of site 130 and with the Council's concern that that transfer should not be taken as establishing any Guild rights in favour of Mrs Messham over site 129, by reason of the agreed encroachment of the Messhams' 'Super Bob' attraction into site 129, made reference to the fact that that encroachment was permitted only 'by the good auspices of the tenant' of that site.

43. On the same theme, by a letter of 22nd December 1997, written in respect of the still continuing arrangement, whereby Mrs Messham utilised part of site 129 for her 'Super Bob', Mr Oldroyd wrote to Mrs Holland, confirming that that arrangement could continue, but that the entirety of site 129, nonetheless, was 'let and allocated' to her. Mr Warwick prayed that particular letter much in aid as demonstrating that there was a continuing tenancy relationship from year to year and not a relationship subsisting only at Fair time.

44. The current dispute has its genesis in a complaint from an adjoining site holder, a Mr Willy Wilson, who occupies, in the name of Bob Wilson Funfairs, sites 127 and 128 (as well as occupying, or having an interest in, a number of other sites across the fair). Mr Wilson's complaint was made at, or following, the 2009 Fair and was to the effect that the two attractions brought to the Fair, in that year, by Mrs Holland, namely her dodgems and an attraction called 'Equinox' were too big for sites 129 and 130 and that 'Equinox' had encroached upon a part of 'his' site 128.

45. The consequence of that complaint was that, in early 2010, Mr Newman wrote to the relevant parties, indicating an intention to re-measure sites 127 to 135A and specifying, from the 'measurement plan for the fair', meaning the 1999/2000 plans, the recorded width of each of those sites. In regard to sites 129 and 130, Mr Newman, correctly, recorded the relevant widths of the two sites as being 69 feet and 36 feet. He stated, however, somewhat ambiguously, that these dimensions were 'shown at the rear of the sites rather than the frontage', albeit, that, in his view, that this was unlikely to have given rise to any significant variation in the size of the sites.

46. In fact, when the postulated re-measurement did take place, in July 2010, Mr Newman determined that the frontage of site 129 was 68 feet, rather than 69 feet, and that the frontage of site 130 was 33 feet, rather than 36 feet. He came to that conclusion, as I

understood his evidence, on the basis that the trees, which line the Eastern side of St Giles and which appear on the 1999 and 2000 plans, formed the 'obvious boundary' of the sites, on the basis of the painted marks, which had been put down in previous years and on the basis that the sites, when measured in this way, gave rise to a measurement on the Eastern boundary (not the frontage) of, respectively, 69 feet and 36 feet, such as to lead him to believe that the rubric on the 1999 and 2000 plans was erroneous and that the original plan maker had failed to appreciate that the effect of the curve of the kerb at the Eastern boundary of the two sites was that a measurement taken along that kerb line would give rise to a shorter straight line boundary at the frontage of the sites at their Western boundary. He did not, as he told me, believe that he was, in fact, changing the sizes of the relevant sites. Rather he thought that the sites had always, in truth, had his suggested dimensions.

47. I have no doubt but that Mr Newman carried out his re-measurement in good faith and with the best of intentions. Equally, I have no doubt, as appears earlier in this judgment, that his re-measurement did not accord with the site plans, as shown on the 1999 and 2000 plans (and hence the original master plan), including, in particular, the clear rubric on the site plans, to the effect that the 69 feet and 36 feet dimensions were the dimensions of the frontage; this notwithstanding that, on his own evidence, it was the 1999 and 2000 plans which were intended to define the dimensions of the relevant sites. Mr Newman's measurements ignored the rubric on the 1999 and 2000 plans and, by measuring the sites by reference to tree positions and the painted marks, rather than the measurement plan itself, produced a result which did not accord with that plan.

48. Mr Newman set out his conclusions as to the site sizes in a letter dated 30th July 2010. He considered that his adjustments would allow the 'most appropriate utilisation of each piece of ground'. He made clear that his conclusions were not intended to affect any arrangements between individual site holders as to the location of their attractions upon adjoining ground. He expressed the hope, not borne out by events, that he had resolved matters to the mutual satisfaction of all parties.

49. The immediate result of that letter was that Mrs Holland instructed solicitors. By letter dated 3rd August 2010, those solicitors asserted her tenancy over sites 129 and 130 with the dimensions of 69 feet and 36 feet along their Western boundaries. That letter was met with a response from Mr Newman in which he reiterated his conclusion that the overall length of Mrs Holland's two sites (105 feet) was determined by the measurement along the kerb and not the Western boundary and that it was that measurement which resulted in the straight line length of the Western boundary being only 101 feet. He reiterated that the measurement plan showed, as it does, the length of the sites against, or along, the kerb edge. He made no mention, however, of the explanatory rubric on the plans. Mr Warwick points out that the characterisation of Mrs Holland's rights in respect of the two sites as being rights of tenancy was not challenged.

50. Notwithstanding Mr Newman's adjustment, or, as he might put it, clarification of the dimensions of the sites, Mrs Holland was permitted to bring 'Equinox' to the 2010 Fair, in the expectation, according to Mr Newman, that she would reach an arrangement with Mr Wilson in respect of any encroachment. Unfortunately, no such arrangement was reached and, in the result, Mr Wilson complained to the Council as

to Mrs Holland's alleged encroachment and both Mr Wilson and Mrs Holland complained to the Showmen's Guild as to their respective conduct.

51. Prompted, no doubt, by Mr Wilson's complaint, following the Fair, Mr Newman carried out further re-measurements, which, in his view, confirmed his approach and which resulted in his preparation of a modified measurement plan confirming the reduction in the extent of Mrs Holland's frontage. By his letter to Mrs Holland's solicitors, dated 28th September 2010, Mr Newman described his re-measurement as giving rise to the most practical solution to the problem and as being in the best interests of the Fair. In response to points made by Mrs Holland's then solicitors as to the impact of his re-calculation upon Mrs Holland's and Mr Wilson's Showmen's Guild rights, he made clear that the Council was not a member of the Guild, or bound by those rights.

52. In addition to her complaint to the Showmen's Guild, Mrs Holland also complained to the Local Government Ombudsman, in respect of the reduction in the size of the two sites. The investigation by that body was still continuing at the time of the 2011 Fair and, in consequence, although Mrs Holland was, initially, refused permission to bring 'Equinox' to the Fair, by reason of its putative encroachment onto the re-measured site 128, in the event permission was eventually given, albeit that, as I understand it, that permission involved a minor encroachment on to that site.

53. By 2012, matters had been considered by the Showmen's Guild. That body concluded that the effect of the Council's re-marking of the boundary between site 128 and site 129, in accordance with Mr Newman's re-measurement, had been that Mr Wilson had, for purposes of Guild rights, encroached on Mrs Holland's 'ground'. The effect of that seems to have been that, in that year, when Mrs Holland brought an attraction called 'Tagada' to the Fair (which, according to Mr Newman, did not, in any event, encroach over the re-measured site boundaries), the Fair went off without problems.

54. Problems, however, recurred in 2013, which is the first year of the Fair in respect of which Mrs Holland claims damages. In that year, Mrs Holland applied to bring a new attraction called 'Cyclone' to the Fair. Mr Newman had concerns that 'Cyclone' would not fit on site 129, as re-measured, and, in an attempt to resolve matters, a meeting took place of all relevant parties at the end of August 2013 and, therefore, shortly before the 2013 Fair. The result of that meeting was set out in a note sent by Mr Newman to all attendees. He concluded that, although, he was prepared to increase Mrs Holland's overall frontage to 102 feet, 'Cyclone' could, nonetheless, not fit on the re-measured site, without an agreed encroachment on to site 128, which, in the circumstances obtaining with Mr Wilson, would not be forthcoming. Accordingly, he denied Mrs Holland permission to bring 'Cyclone' to the Fair and suggested that she bring a different (and smaller) attraction. In his attendance note, dated 2nd September 2013, he made clear the Council's position in respect of Guild rights, namely that the Council did not regard itself as bound thereby, albeit that they were taken into account when allocating sites annually. In that context, he informed Mrs Holland that, unless she notified the Council, by 4th September 2013, that she was bringing an attraction to the Fair that would fit site 129, as re-measured, then he would re-allocate the site for that Fair.

55. Faced with this situation, Mrs Holland was able to hire, at short notice, a smaller 'ride' ('X-Flight'), which did fit the re-measured site 129 and which she did bring to

the Fair. Her case, however, is that that arrangement was not economically effective and that the smaller ride ran at a loss.

56. Notwithstanding the position taken by Mr Newman and the Council in 2013, for the 2014 Fair, Mrs Holland again applied to bring 'Cyclone' to the Fair. She was again met with a refusal by Mr Newman to allow this to happen and she was again asked to find an alternative attraction that would fit the re-measured site that she was to be allocated. Her decision, in light of the loss she felt that she had suffered in 2013 and in light, as I understand it, of the fact that her alternative attraction ('Equinox') required the same footprint and frontage as 'Cyclone' was not to bring any attraction to the Fair (other than the dodgems on site 130) and to leave site 129 vacant even although the site fees for both sites had been paid. To protect her Guild rights over site 129, Mrs Holland published a notice in World's Fair, the Showman's newspaper, to the effect that any infringement, or encroachment, on to site 129, or 130, would be dealt with under Guild rules.

57. In 2015, a broadly similar situation arose. Mrs Holland again applied to bring 'Cyclone' to the Fair and again Mr Newman refused her permission. Again, site 129 was left empty and again Mrs Holland published a warning notice in World's Fair.

58. By the time, however, that Mrs Holland made her application in respect of the 2015 Fair (May 2015), a number of events had taken place.

59. Firstly, in October 2014, an application by Mrs Holland to preserve her Guild rights over site 129, notwithstanding her election to leave the site unoccupied in 2014, was rejected by the committee of the London & Home Counties Section of the Guild, which, in consequence, determined that her Guild rights over site 129 had lapsed. Mrs Holland attaches no weight to that rejection, which is subject to appeals both to an appeals committee and, ultimately, to a Guild tribunal. Having seen the minutes of the relevant committee meeting, I can well understand Mrs Holland's stance. Mrs Holland was not heard by the committee and a fair reading of the committee's decision (such as it is) would seem to suggest that the committee, which had, apparently, been accused of being corrupt, simply wished to reach a decision which would allow the appeals process to proceed and which would, as it was put, put itself 'out of the equation.'

60. Be that as it may, the decision of the committee, in respect of Guild rights, whether right or wrong, can have no bearing, in itself, upon my determination as to whether Mrs Holland has the periodic tenancy for which she contends, over the two relevant sites. In particular, I do not think that the fact, that this litigation, which was commenced in January 2015, was so commenced following the adverse decision of the committee, is to be regarded as at all material to the merits of the legal arguments that I am called upon to determine.

61. Secondly and as just stated, by May 2015, this litigation was firmly on foot. Understandably, therefore, given the contention that Mrs Holland has an annual periodic tenancy over the two sites for the Fair Period and is entitled, in consequence to occupy those sites at the Fair as of right, in making her application to the Council in respect of the 2015 Fair, her solicitors took the sensible step of stating on her application, or, at least, one copy of it, that her application was made without prejudice to her contentions made in these proceedings. The course adopted by the

solicitors is familiar in property litigation, in circumstances where parties adopt alternative positions, and, if and in so far as the contrary was argued, I do not take the fact of the 2015 application, as amounting to any concession, or admission by Mrs Holland as to the merits of her case on tenancy.

62. Thirdly, by May 2015, Mrs Holland had renewed her complaint to the Local Government Ombudsman, as to the conduct of the Council in respect of the re-measurement of the two sites, and the Ombudsman had ruled in her favour. That ruling, however, was put, as it had to be, on the footing of maladministration by the Council, in respect of the management of the Fair and the re-measurement and adjustment of the two sites, and did not and could not, as the Ombudsman rightly recognised, import any adjudication as to the size of the sites, or Mrs Holland's legal entitlement to sites of any particular dimensions. I would only say, as to that, that having seen and heard Mr Newman at length in the witness box, I have, as already stated, no doubt at all as to his good faith and no doubt at all that he has, at all times, sought to act both in the best interests of the Fair and in a manner and with the intention of being fair to all comers.

63. At trial a significant part of Mr Grundy's argument, for the Council, turned upon, or related to, a failure of the tenancy for which Mrs Holland contended to comply with the necessary formalities relevant to such a tenancy. On the footing that any tenancy held by Mrs Holland must have been acquired, by way of assignment, from Mrs Holland's predecessors in respect of the use of sites 129 and 130, he submitted that, by reason of a lack of any assignment, or disposition, in her favour, in writing and signed by the person conveying the alleged tenancy interest and by reason of the consequent non-compliance with section 53(1)(a) of the Law of Property Act 1925, any tenancy held by her predecessors had failed to pass to her, such that her occupancy must have been one of licensee. Additionally and on the footing that any tenancy held by Mrs Holland, or her predecessors, was, or would have been, a tenancy by parol, he submitted that any such tenancy must be and have been a tenancy at will, by reason of section 54(1) of the Law of Property Act 1925, because the terms of Mrs Holland's occupancy did not amount to a tenancy 'at the best rent reasonably obtainable without taking a fine', for purposes of section 54(2) of the Act. In this latter regard, he submitted that, since it was Mrs Holland who was asserting a tenancy, it was for her to prove that the payment made in respect of her occupancy, each year, was the best rent reasonably obtainable for that occupancy without taking a fine.

64. In relation to the suggested dispositions in favour of Mrs Holland by each of her predecessors, there is no evidence at all, in respect of site 130, of any documentation at all that might be said to constitute a written disposition in favour of Mrs Holland of any tenancy then in the hands of her predecessor, Mrs Messham. The only material before the court is Mr Newman's letter to Mrs Messham, referred to in paragraph 26 of this judgment, whereby Mr Newman agreed to the transfer of site 130 to Mrs Holland upon payment of the transfer registration fee of £5,847.95.

65. In respect of site 129, there is more material before the court. Mr Warwick, for Mrs Holland, placed some reliance upon Mr Thurston's letter of 18th July 1992, which would appear to have included all the correspondence both with the Council and with the Showmen's Guild, as, potentially and cumulatively, constituting a written

disposition of the site to Mrs Holland. I have real doubts about this and, in fairness to Mr Warwick, the point was not placed at, or even close to, the centre of his argument.

66. The first question which arises, assuming for this purpose, that Mr Thurston had a tenancy to transfer, is whether the process which I have described earlier in this judgment was a process to transfer that tenancy, or was a process designed to transfer to Mrs Holland the Guild rights over site 129, then held by Mr Thurston, and to procure the consent of the Council to the transfer of those rights to Mrs Holland and her registration with the Council as the person entitled to those rights.

67. It seems to me that the latter, not the former, was the case. Mr Grundy took me to the provisions of the Showmen's Guild rules (Clause 7(h)) dealing with transfers of rights. Those provisions set out the process to be complied with when one member of the Guild wishes to transfer established Guild rights to another. Such a transfer requires the approval of the relevant Section committee of the Guild and further requires that, in the case of a Fair, which is not administered by a Guild member, such, therefore, as St Giles Fair, the written agreement of the entity administering the Fair (here, the Council) is required.

68. This is precisely the process which took place when site 129 was transferred to Mrs Holland and which, as I infer, took place, subsequently, when site 130 transferred and, accordingly, I am satisfied that it is that process and not an attempt to transfer, or assign, any tenancy that might have been held by the transferor that was implemented in respect of the two sites and that it was Guild rights and not any rights in land which were the subject of the relevant transfers. That view is, as it seems to me, entirely consistent with the approach adopted by and the understanding of the Council. The fee payable by a Guild member upon a transfer is described as a site registration fee and is paid as a condition of the Council's consent to the transfer of Guild rights from one Guild member to another and for the registration by the Council of the fact that those rights have been transferred. Historically, as is explained by Mr Oldroyd, in a letter to Mrs Holland, dated 14th May 2014, the payment of a registration fee upon a transfer of Guild rights was something that Mr Oldroyd had agreed with the Showmen's Guild in order to regularise ('facilitate and register') agreed transfers of ground between Showmen and to avoid the risk of corruption.

69. A secondary question, touched upon, but not at any great length, in argument was whether any tenancy that Mr Thurston or Mrs Messham might have held over sites 129 and 130 was, in the circumstances of this case, susceptible of transfer at all. That question arises out of the fact that the land occupied by Mrs Holland and other stall, or site, holders at St Giles Fair is not in the ownership of the Council, with the result that any tenancy arrangements could only arise by estoppel. That an estoppel tenancy could arise is not in any doubt. However, whether such a tenancy by estoppel is, or could be, assignable is rather more questionable. A tenancy is usually assignable because it creates an estate in land and because such an estate, being property, can be transferred by its owner to another. A covenant against alienation does not preclude assignment. It merely renders the assignment a breach of the contract of tenancy, giving rise to the potential remedies, such as forfeiture, arising on such a breach.

70. In the case of a tenancy arising by way of estoppel and in circumstances where the landlord under the estoppel tenancy has no estate to grant to the tenant, it may well be that, as explained by Lord Hoffman, in **Bruton v London & Quadrant Housing**

Trust [2000] 1 AC 406, at page **415 below B**, the tenant secures no legal estate in the land and no proprietary right, susceptible of transfer. In that circumstance, there being no estate to assign, no assignment could take place.

71. In this case, there is no need, or reason, to give a definitive answer in respect of the foregoing. Mr Warwick does not, by his pleading, or at all, assert an assignment. His case is that, quite irrespective of any assignment, Mrs Holland acquired tenancies of the two sites as and when she secured her Guild rights in the two sites and that those tenancies arose out of her own dealings with the Council in respect of each of the two sites.

72. In this regard, while Mr Warwick has, as it seems to me, to acknowledge that Mrs Holland's predecessors held tenancies of the two sites, since otherwise her own identical status in respect of the sites could not constitute a status of tenancy, his case is that, on the transfer of the Guild rights in each of the two sites to Mrs Holland and upon her taking up her occupancy of each site, the tenancy held by her predecessor in respect of each site came to an end by way of a surrender by operation of law.

73. In my view, on the continuing assumption that Mrs Holland's predecessors were themselves tenants, that analysis is correct. Surrender by operation of law is another estoppel based doctrine and arises where the tenant of property acts, unequivocally, in a way which is inconsistent with the continuation of his tenancy and where that unequivocal conduct is coupled with unequivocal conduct by the landlord consistent only with the tenancy being at an end.

74. In this case, I have no doubt at all but that the conduct of, respectively, Mr Thurston and Mrs Messham, in transferring their Guild rights over sites 129 and 130 to Mrs Holland and in, thereafter, allowing her, as against each of them, the untrammelled use and occupancy of each site and to deal directly with the Council as to her use of each site, was unequivocally inconsistent with their retention of any underlying rights of tenancy that they may previously have had in respect of each site.

75. I have, likewise, no doubt at all that the conduct of the Council, in accepting Mrs Holland as the transferee of the Guild rights over the two sites and in, thereafter, dealing exclusively with Mrs Holland in respect of the use and occupation of each of the two sites, was, also, unequivocally inconsistent with any assertion, or contention, that Mrs Holland's predecessors retained any rights of tenancy, or otherwise, over the two sites.

76. Any tenancy that may have been held by Mrs Holland's predecessors over either site 129, or site 130, has been terminated by operation of law. I add, in this regard, that that conclusion is not at all dependent upon a determination that the arrangements subsisting in respect of either site 129 or site 130 after the transfer of Guild rights to Mrs Holland constituted a tenancy. It is well established that the grant of a licence by the hitherto landlord over land previously occupied under a tenancy with the concurrence of the previous tenant will operate as a surrender of that previous tenancy.

77. The effect of the foregoing is that the determination of the status of Mrs Holland's occupancy of the two sites, since Guild rights were transferred to her and since she commenced her occupancy of the two sites at the Fair, is not affected by any question

of any assignment of any prior tenancy, or the theoretical survival of such a tenancy, but stands to be resolved, solely, by an analysis of the rights (if any) that she has acquired by reason of her dealings, year on year, with the Council since the commencement of her occupancies.

78. The starting point, in respect of that analysis, is the question as to whether those occupancies are legally capable of amounting to tenancies, other than tenancies at will. This question arises from the submission made by Mr Grundy to the effect that the arrangements between Mrs Holland and the Council cannot constitute, or give rise to, anything more than a tenancy at will because, even if otherwise fulfilling the requirements of tenancy, they amount to no more than a parol tenancy at a rent which is less than the best rent reasonably obtainable and, as such, are not protected by reason of section 54(2) of the Law of Property Act 1925 from taking effect, pursuant to section 54(1) of that Act, as an interest at will only.

79. There is no doubt but that best rent, for purposes of section 54(2) of the 1925 Act equates to market rent. There is no doubt also but that a yearly periodic tenancy, as contended for by Mrs Holland, would constitute a tenancy for a term not exceeding three years and would, therefore, be capable of protection, under section 54(2) of the Act, from the effect of section 54(1) of the Act.

80. The pleaded defence, while asserting that Mrs Holland's status at the Fair is no more than that of a licensee, did not, in terms, take any point upon formalities and, in particular, did not seek to assert that the annual payment made by Mrs Holland for each site was less than a market rent, such that her interest, or status, under her arrangements with the Council could not be one of tenancy. In consequence, no evidence was called at trial upon the specific question of market rent.

81. That said and subject to what is set out later in this judgment, Mr Grundy is entitled, as he submitted, to require Mrs Holland to prove the tenancy for which she contends and to prove, therefore, in so far as necessary, that that tenancy was at a market rent and did not, therefore take effect at will only. In determining that question, the court must do what it can on the available material, but on the footing that the ultimate burden of proof is on Mrs Holland.

82. I have set out, earlier in this judgment, the manner in which the annual fee, or toll, is determined by the Council. An assessment was made, some years ago, of the charges levied at other fairs and that assessment provided the base line for the charges levied by the Council. There is no reason to think that that assessment and the charges levied following it did not reflect a market rent. Thereafter, those charges have been increased, over time, both to reflect inflation and, additionally, to reflect additional costs which the Council has had to incur (in respect of matters such as security) in putting on the Fair. The profits of the Fair (as appears from a briefing note put in evidence by Mr Newman) are divided in agreed proportions between the Council and St John's College, which, I suspect, has an interest in the sub-soil under the highway.

83. Nothing in the foregoing, suggests that the current charges, uplifted, as they have been, from their original market base, for inflation and to reflect additional costs and intended to provide an income stream for both the Council and the College, are, in any significant way, below the market rent which could be obtained from showmen seeking sites at the Fair. The likelihood seems to me to be that the process of annual

uplifts has retained a level of fees, or tolls, which, in broad terms reflects the rent, if it be a rent, which could be obtained in the relevant (i.e. showmen) market. The fact that, when pressed in cross examination by Mr Grundy, Mrs Holland conceded, as she did, that she would have been prepared to pay a higher fee, or toll, for her sites at the Fair, does not, in my view, raise any inference that the charges levied by the Council were, or are, below market level. In so far as relevant, therefore, I conclude that the charges which have been levied from time to time at the Fair are at a market level, or so insignificantly below that level as to be de minimis.

84. Even if I am wrong in this conclusion, I am wholly un-persuaded that the necessary effect of the alternative conclusion is to preclude Mrs Holland from having obtained, or of holding, a tenancy of the two sites. It is axiomatic, at common law, that, where parties have not expressly agreed the basis upon which land is occupied, the court will step in and fill the gap and will determine, from the conduct of the parties, whether the intention to be inferred from that conduct is the creation of a tenancy. In that context, it is well established that where a party enters land under a void lease, or under an interest at will (as would arise, in this case, if Mrs Holland had been granted an oral periodic tenancy at less than the best rent), then, upon payment of a yearly, or monthly rent, an appropriate periodic tenancy will arise.

85. It follows that, if the true construction, or analysis, of the arrangements between Mrs Holland and the Council was that the intended effect of those arrangements was, as alleged, that of creating a periodic annual tenancy in her favour over the Fair Period, then the fact, that, at the outset of those arrangements, the original grant in her favour had amounted to an oral, or parol, tenancy at less than the best rent, would not preclude that tenancy arising upon payment of the annual rent.

86. It remains to consider whether such a tenancy was the intended effect of those arrangements, having regard, of course, to the fact that the intended effect of the relevant arrangements is to be determined, not by reference to the language, or terminology, used, but by the determination by the court as to whether the arrangements in question gave rise to the grant of exclusive possession of the sites for the Fair Period in each year at an annual rent.

87. A number of matters are not in dispute. It is not suggested by the Council that there is any legal impossibility in the grant of a tenancy for the Fair Period in each year; nor that space within a fairground cannot be the subject of a tenancy; nor that the fact that the annual fee, or toll, fluctuates, in each year, having regard to the attraction to be brought to the Fair, has the effect that it is insufficiently certain to constitute a rent.

88. Nor, although the point was raised and argued by Mr Grundy, do I think that the fact, that the date of the Fair and, hence, the commencement and termination of the Fair Period fluctuate in each year, so that any notice to quit, expiring at the end of a period of the potential tenancy, would have to be so drawn as to reflect the termination of the particular Fair Period, in the year that the notice was to expire, has the effect of rendering the suggested tenancy incapable of proper termination, such as not to give rise to a legally recognisable 'term'.

89. What is in dispute is whether the terms applicable to Mrs Holland's occupancies of each site give her exclusive possession of the site during the Fair Period. What is, also, in dispute is whether the arrangements between Mrs Holland and the Council

give rise to an occupancy of a periodic nature, such that she has the right, as against the Council, to the use of the sites each yearly Fair Period, or whether, as the Council contends, a new and separate occupancy agreement is made each year, entitling Mrs Holland to the use of the sites only in that year, requiring her to re-apply for the sites each year and enabling, or allowing the Council, if it so wishes, to refuse her application, or to vary the size of the site that it is prepared to allow her to use at the Fair in any given year.

90. If the arrangements between the Council and Mrs Holland do not amount to a grant of exclusive possession for the Fair Period, then those arrangements will not constitute a tenancy, but only a licence. If those arrangements do not give rise to an entitlement to a periodic occupancy, then, even although those arrangements may amount to a tenancy for the particular Fair to which the arrangements relate and in respect of which permission to occupy is granted, they will not give rise to a periodic tenancy, or one where Mrs Holland is entitled, as of right, to the same sites, of the same dimensions, year on year.

91. In regard to exclusive possession, Mr Grundy placed some reliance upon, what he termed, the high degree of control exercised by the Council over the use of the site, as demonstrated in the various Conditions of Letting. Reliance was also placed upon the open nature of the sites and the, consequent, free access thereto by members of the public and, also, upon the fact that the Conditions of Letting make clear that sites are allocated subject to any street furniture and the like that might be erected thereon.

92. The so-called high degree of control exercised over the site by the Council does not, in itself, point in favour of a licence, or preclude exclusive possession, unless it is implicit in the exercise of that control that the Council retains the right to come upon the sites at will. The fact of public access to the sites is not material to the question of exclusive possession. In the context of a fairground attraction and a site at a Fair, there is and must be an implied licence for the public to enter on to the site to view and use the attraction. More fundamentally, the question of exclusive possession is a question arising as between the landowner and the occupier and is not affected by the use that the public may be allowed to make of the land in question. The fact that there is something akin to a reservation imposed upon the site holders in respect of the placement of street furniture etc. points, if anything, in favour of a tenancy.

93. That said, however, having considered the Conditions of Letting, as they have existed from time to time, and their application, in the context of a working fair, it seems to me that, in this instance, the correct conclusion to be drawn is that the arrangements between the Council and Mrs Holland, as expressed in the Conditions of Letting and read as a whole did not give rise to a grant of exclusive possession.

94. In this regard, it was not suggested, on the part of Mrs Holland, that she was not bound by the Conditions of Letting. In cross examination it became clear that she did not have a high regard for the Conditions, or take them particularly seriously, but this was not because she did not regard herself as bound, but because she was disparaging as to the Council's enforcement of the terms, in particular as they related to the maximum number of sites that showmen were entitled to take up at the Fair. She was particularly critical, unsurprisingly, of the number of sites that Mr Wilson and his relatives appear to have been allowed to retain, given that the Conditions of Letting contemplate that a given showman should occupy no more than three sites and given

that Mr Wilson may, as it appears, have been allowed to retain up to seven. It was not suggested, however, that any want of enforcement had resulted in, or given rise to, a wholesale waiver by the Council of the Conditions of Letting, or of the site holders' compliance with those Conditions.

95. It seems to me that a fair reading of the Conditions of Letting and, in particular, those that I have specifically identified earlier in this judgment leads to the clear conclusion that they envisage that the Council, primarily by the Fair Co-ordinator, but, also, at least under earlier versions of the Conditions, the Council's consultant engineer, should have free access across the Fair and to the sites at the Fair.

96. It is, in this regard, significant that none of the various formulations of the Conditions of Letting, while each plainly envisaging that the Council, through the Fair Co-ordinator, has the entitlement to require sites to be closed, or moved, in emergency, to impose further, no doubt, reasonable, requirements upon site holders, to check safety records and site authorisations and, in extremis, to require a site holder to remove his, or her, equipment from the Fair, purport to reserve any right in the Council to come on site to carry out inspections, or otherwise exercise, via the Fair Co-ordinator, the various powers and entitlements set out in the Conditions of Letting.

97. In my view, the only realistic conclusion to be drawn from the absence of any reservation of such a right of access to any given site, given the variety of circumstances in which such access might be required, in the proper exercise by the Council of its powers and entitlements under the Conditions of Letting, is that such a reservation was not required. It was not required because the Council did not intend to exclude itself from possession of any part of the Fair, or any site on, or at, the Fair, and did not do so.

98. That conclusion seems to me to be entirely consistent with the realities of a working fair and with the Council's need and right to exercise control over the safe conduct of the Fair. It would, as Mr Grundy observed, in his skeleton argument be absurd if it were the case that Mr Newman, as Fair Co-ordinator, or any other official of the Council exercising the Council's powers and entitlements under the Conditions of Letting, should have to seek consent before entering onto any of the sites at the Fair. That absurdity does not, in my view, arise for the simple reason that the Council did not, in its allocation of sites at the Fair, grant exclusive possession over the allocated sites, or, therefore, grant any tenancy over the sites. The use from time to time, of words of tenancy, or lease, in respect of any of the site occupancies, cannot, as is well understood, change this and does not.

99. It remains to consider the question as to whether Mrs Holland's occupancies were, or are, as alleged, occupancies of a periodic nature. For the reasons already given, I am satisfied that the occupancies take effect by way of licence. In principle, however, there is no reason why such occupancies cannot be, as with a tenancy, periodic in nature and entitle, therefore, Mrs Holland, as a matter of contract, to return to the same site, with the same originally contracted dimensions, year by year, until termination of the contract.

100. I do not think, however, that Mrs Holland's occupancies were of such a nature.

101. Mr Warwick sought to argue that the application and allocation process that I have described earlier in this judgment did not affect the periodic nature of the rights for which he contended. I cannot agree. He argued, in respect of site 129 that, because the transfer of that site to Mrs Holland had occurred before 1999, which is the first year in which site applications are before the court, those applications could not affect Mrs Holland's rights, in so far as they pertained to that site.

102. As already stated, however, given that the process of allocation has, in essence, taken the same form in every year from 1999 and given the absence of any evidence, from Mrs Holland, or elsewhere, that a different process applied prior to that time, there is no reason to believe, or to hold, that the process of site allocation was any different prior to that date, or that the allocation process only commenced in 1999. The much greater likelihood, as I find, is that the process of allocation has, throughout Mrs Holland's connection with the Fair, operated upon the same basis. Even if that be wrong, the fact is that an allocation process, by way of an application for a site, or sites, at the Fair, has been in place since 2000 and Mrs Holland has availed herself of that process and has applied, year on year, for sites at the Fair. Unless the application process is regarded as, in some sense, a matter of form not substance, Mrs Holland has, in consequence and in respect of both sites, applied, each year, and been granted a new permission to occupy and, in so doing entered into, in each year, a new contract for the occupation of sites 129 and 130. In so doing, she must, of necessity and by a parity of reasoning with the process of surrender by operation of law, discussed earlier in this judgment, have, in entering into the new contract, discharged the old.

103. Although Mrs Holland sought to explain and Mr Warwick sought to argue that the application process was concerned not with the grant of a right to occupy the site, but with the grant of consent for the user of the site for the particular attraction sought to be brought to the Fair, that does not, in my view, fairly reflect the effect of the application process. The application, each year, is an application 'for a site' at St Giles Fair for the given year and the application form explains that 'if .. subsequently notified that you have been allocated a site', then arrangements would be made for payment of the site fee. The final part of the application process, following payment of the fee, is the delivery to the applicant of a letter of authority, in which the Fair Co-ordinator advises that permission is given to occupy the site, in that year. That permission is expressed to be granted subject to the terms of the Conditions of Letting. Although, as already stated, those Conditions of Letting have remained remarkably constant across the years, in terms of form and content, they have, nonetheless, evolved over time. It cannot be said, therefore, that each allocation, each year, is on precisely the same terms as in each preceding year. Taken overall, I cannot and do not construe this process as giving rise to anything other than an annually granted licence, upon the terms annexed, or attached, to the letter of authority.

104. Mr Warwick, understandably, made much of what he termed the 'permanency' of the arrangements, meaning, in this context, the fact that Mrs Holland had, in fact, had the use of the two sites, year by year, since the relevant transfers in her favour in 1992 and 2007. As already stated, he also placed reliance upon Mr Oldroyd's letter to Mrs Holland, in December 1997, in which he had referred to site 129 as being 'let and allocated' to her. Some reliance was also placed upon Mr Oldroyd's earlier letter to the Showmen's Guild in August 1988, in which Mr Oldroyd had referred to Mrs

Messham's use of site 130, notwithstanding her encroachment on to site 129, as being permitted by reason of the 'good auspices of the tenant' of site 129.

105. It seems to me that the true source of Mrs Holland's so-called 'permanency', as occupant, each year, of the two sites lies not in any legal rights that she might have as against the Council, in that regard, but in the fact that she has had Guild rights over the two sites, binding upon other Showmen (but not the Council), and in the Council's acknowledged policy of allocating sites taking account of and having regard to the Guild rights subsisting over those sites. It is that policy and not any legal rights granted to Mrs Holland, or others, by the Council, in respect of sites at the Fair that gives rise to the stability, or permanency, of the allocation arrangements made each year by the Council.

106. It, further, seems to me that the correspondence relied upon by Mr Warwick, does no more than reflect the expectation and understanding of all parties, that, other things being equal, sites would be allocated in the same manner, year on year. In any event, I cannot see that snippets of correspondence, going back, in one instance, twenty eight years and, in the other instance, nineteen years, can, possibly, be said to establish a position which survives, or overrides, the allocation system, by way of annual licences, which has, demonstrably, been in place from at least 1999 and, as I find, very probably much earlier. A better illustration of the realities of the arrangements seems to me to be that which arose in 2013, when Mr Newman informed Mrs Holland that, unless she secured and brought to the Fair an attraction which could be contained upon site 129, as then re-measured, he would re-allocate the site elsewhere.

107. In the result, I am satisfied that Mrs Holland has no continuing legal rights, as against the Council, in respect of either site 129, or site 130, and that her status, on those sites has never been any more than that of a licensee, occupying under a licence granted to her each year, under the application process that I have explained and discussed. She has no legal entitlement, year on year, to the allocation, by the Council, in her favour, of either site 129, or site 130, although, by reason of such subsisting Guild rights as she may have, she may, as against other showmen, have contractual rights, which might preclude them from taking occupation of the sites, in the dimensions of those sites, when first licensed to her and when her Guild rights were first obtained.

108. The consequence of the foregoing, in respect of her monetary claims, is that those claims fail. As a licensee, she does not have the benefit of the implied covenant for quiet enjoyment upon which her monetary claims are said to be based. As much, or more, to the point, the licences granted to her, in 2013, 2014 and 2015, were (and were to her knowledge) granted to her over the sites as they had been re-measured by Mr Newman, in 2010 and then adjusted in 2013. As a matter of law, therefore, she can have no complaint, or claim, arising from the fact that her preferred attraction could not be contained within the dimensions of the sites, as allocated.

109. In light of the foregoing, it is not necessary to make any assessment of the quantum of damages that might have been payable had the monetary claims been made out. I limit myself, therefore, to the following observations.

110. Firstly, the point was made by Mr Grundy, basing himself upon plans drawn by Mrs Holland's expert surveyor, Mr Gleeson, that, even if Mrs Holland had had the continuing right to sites with the dimensions for which she contends, then,

nonetheless, those sites would not have enabled her to bring 'Cyclone', the attraction, the loss of the use of which has allegedly caused her losses in 2013, 2014 and 2015, to the Fair. In consequence, so he submitted, any claim for loss arising from the inability to bring that attraction to the Fair and based upon losses, calculated on the basis of the profits to be made from that attraction, must fail.

111. I am not persuaded. It is true that Mr Gleeson's plans, in which he seeks to show the way that 'Cyclone' could be contained within sites 129 and 130, on the footing of the original dimensions of those sites, demonstrate a modest encroachment into the pedestrian area to the West of the sites and it is also true that that encroachment may be understated, by reason of a mistake by Mr Gleeson as to the precise shape and 'footprint' of 'Cyclone'. Nonetheless, I am satisfied that, given the good offices of Mr Newman and a willingness, upon his part, to assist, which, in my estimation, would have been forthcoming, 'Cyclone' would, on the footing of the original dimensions, have been allowed into the Fair, notwithstanding the Westward encroachment that would have been occasioned. There was nothing in the evidence to show that that encroachment would significantly affect pedestrian flow, or vehicle movement, or impinge upon safety considerations and, accordingly, I see no reason to think that any encroachment by 'Cyclone' would not have been accommodated in the same way as, as I was told, other encroachments are and have been accommodated by the Fair Co-ordinator.

112. Secondly, I am not persuaded that the fact that Mrs Holland left site 129 empty in 2014 and 2015 demonstrates, or establishes, a failure, on her part, to mitigate her loss. Her evidence, before me, was that the arrangements that she made for 2013, when she brought a smaller attraction, 'X- Flight', to the Fair, resulted in a significant loss. I see no reason to reject that evidence, or to conclude that Mrs Holland, an undoubtedly, shrewd, experienced and able showman, elected to leave site 129 empty when a profit could have been made.

113. Thirdly, however, I am very much less than persuaded that the calculations of her loss that Mrs Holland put forward, in her evidence, stand up to scrutiny.

114. Those losses are said to be based upon the profits that could have been obtained had 'Cyclone' been at the Fair in the three relevant years. Unfortunately, however, no figures have been put forward, as demonstrating the occupancy rate and profitability of 'Cyclone' at other fairs, on the basis of the somewhat Delphic utterance, that the Fair 'is like no other in the country'.

115. Instead, Mrs Holland has chosen to calculate her projected profits from 'Cyclone' by reference to her earnings from her other attraction at the three relevant Fairs; namely the dodgems. Her argument is that 'Cyclone' has a greater capacity per given ride than do the dodgems, as well as a larger number of rides per hour and, therefore, has an earning power of something in excess of three times the earning power of the dodgems (£2,160 per hour instead of £648 per hour). Accordingly, based upon the income received from the dodgems in, in particular, the evening periods of the Fair, when the Fair is at its busiest and when, she says, 'Cyclone' would have traded at full capacity, she can extrapolate, or calculate, an earnings levels for 'Cyclone', which reflects the additional earning power that 'Cyclone' would have had over that achieved by the dodgems.

116. I do not find this convincing. It presumes that the occupancy profile for the dodgems would have been the same for 'Cyclone', even although they are, as it seems to me, very different attractions. I am not persuaded that one can simply extrapolate from the fact that one attraction procured a certain income and that another attraction, if used to its fullest extent, would have procured three times that income, that that second and entirely dissimilar attraction would, therefore, have procured three times the income of the first attraction. Dodgems are dodgems and appeal, no doubt, to a particular clientele. 'Cyclone', as explained by Mrs Holland, is an entirely different attraction, which, apparently, lifts and zig zags. There is no reason to believe and, certainly, no evidence that the same clientele would have been as attracted by the one attraction as the other, such that the earnings from one attraction provide a yardstick for the other.

117. Fourthly and finally, Mr Warwick, reflecting, in his submissions, the possibility that I might be, as I have been, un-persuaded by Mrs Holland's calculation of lost income, took the wholly legitimate point that, even in that circumstance, I would have had to do the best I could to place some figure upon the loss suffered by Mrs Holland from her inability to bring Cyclone to the site. The point is a good one.

118. Mrs Holland's evidence was that 'Cyclone' had been designed to be accommodated upon all the fair sites that she visited, each year, as a showman and in the obvious expectation, therefore, that it would be a profitable attraction at those sites. It seems highly unlikely, given that fact, given her manifest desire to bring 'Cyclone' to St Giles Fair and given her experience as a showman, that 'Cyclone' would have been an unprofitable attraction, if brought to the Fair. Profit would have been made, even if not in the sums, totalling some £68,000, that she has claimed. Had I had to assess damages, I would have been minded to discount her claimed profit, based upon full occupancy throughout the busy periods of the Fair, by about 40%, to reflect a rather less optimistic occupancy rate, and to award damages therefore, of £40,000.

119. In the event, however, for all the reasons given in this judgment, this Claim is dismissed.