

Judgment Title: Simmonds & Anor -v- Ennis Town Council

Neutral Citation: 2012 IEHC 281

High Court Record Number: 2011 10285P

Date of Delivery: 10/02/2012

Court: High Court

Composition of Court:

Judgment by: Clarke J.

Status of Judgment: Approved

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THE HIGH COURT

[2011 No. 10285 P.]

BETWEEN

TOBY SIMMONDS AND BY ORDER THE REAL OLIVE COMPANY LIMITED

PLAINTIFF

AND

ENNIS TOWN COUNCIL

DEFENDANT

JUDGMENT of Mr. Justice Clarke delivered the 10th February, 2012

1. Introduction

1.1 The first named plaintiff ("Mr. Simmonds") and the second named plaintiff ("Real Olive"), a company of which he is the proprietor, are involved in the importation and sale of olives principally at markets held in various parts of the country. The term "market" or "fair" has a specific legal meaning. Not all markets, as the term might be used in general discussion, are actually markets or fairs in the legal sense of the term. The law of markets and fairs relates to the entitlement of persons or bodies to conduct a periodic market subject to the terms set out in the legal instrument which confers the right in the first place. That right is typically conferred by royal charter or by statute. The right is, therefore, often referred to as a franchise right. In addition to the rights conferred on the operator of the market, it is well established as a matter of common law that parties have a right to trade at such markets subject again to the terms of the instrument creating the market right including, for example, an obligation to pay for that right in accordance with the terms of the relevant instrument.

1.2 As will be seen from that definition, a market which is organised on an entirely private basis does not qualify as a franchise market in the sense in which that term developed at common law. For example, farmers' markets are organised on a variety of bases in recent times and are, indeed, a growing phenomenon. Some such markets are, for example, organised by the owners of shopping centres as an added attraction for their customers. However, the entitlement of any trader to conduct business at such a market is dependent on the owners of the shopping centre in question giving them permission.

1.3 However, despite their ancient historical lineage, franchise markets still continue to exist as a matter of law and the common law rules, which developed in relation to the rights and obligations of all concerned, remain largely operational today.

1.4 On the other hand, the casual trading legislation of recent years (the Casual Trading Act 1980 ("the 1980 Act") and the Casual Trading Act 1995 ("the 1995 Act")) has sought to regulate a type of trading in public places that was formerly, at least in part, regulated by a range of older legislation, much of which has since been repealed. It will be necessary to analyse the casual trading legislation in due course. However, at a simple level, and in its current form under the 1995 Act, that legislation permits local authorities to designate casual trading areas and to license traders to conduct their business within such casual trading areas. The core issue which I have to decide concerns the interaction between those two schemes, that is the common law market, and the rights and obligations of those who might wish to trade at such, and the regulatory scheme provided for by the casual trading legislation and, in particular, the 1995 Act. The issue arises between the parties because Mr. Simmonds asserts that the 1995 Act has no application to persons who wish to trade on foot of their common law rights at an established franchise market while the defendant ("Ennis Council") asserts that it is entitled to regulate, under the 1995 Act, the conduct of such markets and that, in particular, in the light of the bye-laws adopted by Ennis Council, Mr. Simmonds is obliged to hold a licence under the 1995 Act in order to be able to trade in the historical Ennis Market.

1.5 At an early stage it was directed by the court (Laffoy J.) on the 15th December, 2011, that two preliminary issues be tried, which are in the following terms:-

(1) Whether the exercise of a common law right to trade at a market or fair comes within the definition of "Casual Trading" in section 2(1) of the Casual Trading Act 1995 so as to disentitle a member of the public from exercising such right unless he holds, and trades in accordance with, a Casual Trading Licence as required pursuant to section 3(1) of the Act of 1995?

(2) Is [Mr. Simmonds] lawfully entitled to sell produce at the market held in Ennis at Market Street, Market Place and the immediate environs thereof, without holding and trading in accordance with a current Casual Trading Licence under the Casual Trading Act 1995?

1.6 Those preliminary issues were tried before me and this judgment is, therefore, directed to those issues. I should also note that Real Olive was, at the commencement of the hearing, joined as a co-plaintiff, without objection, as a result of a motion in that regard moved by Mr. Simmonds and Real Olive.

1.7 The question for decision is, therefore, a net one. On its proper construction does the 1995 Act have any application to franchise markets and, perhaps, if so, to what extent? One might like to think that the answer to that question would be fairly obvious from a reading of the 1995 Act. It would have been easy enough for the Oireachtas to make plain, one way or the other, what its intention was. However, sadly, that is not the case. In order to understand the reasons why it proved possible for both Mr. Simmonds and Ennis Council to put forward credible and realistic arguments for their respective positions it is, perhaps, appropriate to commence this judgment by setting out the arguments of the parties. I, therefore, turn first to the arguments advanced by Mr. Simmonds.

2. Mr. Simmonds' Case

2.1 Mr. Simmonds suggests, as a starting point, that there are a number of significant areas of common ground between the parties, from which proposition I did not understand Ennis Council to demur. It was submitted that the following seven points are not in contention:-

“(i) There is a public market held on Saturdays in Ennis pursuant to market rights granted by patents of the 27th February, 1610 and the 24th February, 1835 [the origin for the holding of same is contained in Grants of Letters Patent from the Crown to Donogh, 4th Earl of Thomond of the 27th February, 1610 and to the Earl of Egremont on the 24th February, 1835.]

(ii) [Ennis Council] is the lord of Ennis Market having acquired the market rights pursuant to section 103 of the Public Health (Ireland) Act, 1878 in 1907 [...].

(iii) Trading at Ennis Market was formerly regulated from 1988 pursuant to 'Bye-laws with respect to markets and fairs in the urban district of Ennis made by the Council of the urban district of Ennis' (the 'Ennis Market Bye-Laws', 1988) confirmed on the 21st March, 1988 and made pursuant to section 9(1) of the Casual Trading Act, 1980 and section 103 of the Public Health (Ireland) Act, 1878.

(iv) Ennis Council made the Ennis Town Council Casual Trading Bye-Laws, 2011 which came into operation on the 1st October, 2011, and which revoked the Ennis Market Bye-Laws, 1988.

(v) [Mr. Simmonds] attended the Ennis Market for several years to trade. He was concerned that the introduction of the Ennis Casual Trading Bye-Laws was the prelude to an attempt to interfere with Ennis Market.

(vi) The correspondence reveals that [Ennis Council] does not claim to have extinguished the market right, but instead claims that the Plaintiff requires a casual trading licence issued under the Ennis Casual Trading Bye-Laws, to trade at Ennis Market. It is stated in the letter from the solicitor for Ennis Council of the 4th of November, 2011, that the Defendant's legal argument is that the general power of a local authority to make casual trading byelaws 'clearly extends the power to regulate a market area which is in the location of an established market right.' Ennis Council sought an immediate undertaking from Mr. Simmonds not to trade at Ennis Market unless and until he has received a casual trading licence and threatened to involve the Gardaí in dismantling and impounding his stall should he attend the following day.

(vii) Mr. Simmonds attended on Saturday the 5th November, 2011. He was confronted by three traffic wardens. The wardens summoned an Garda Síochána who prevented the Plaintiff from setting up his stall.”

2.2 The crux of Mr. Simmonds' case is what he describes as the fundamental distinction at law between “market trading” and “casual trading”. He contends that the dispute between the parties is narrow and is focused on the proper interpretation of s. 2 of the 1995 Act and in particular the question of whether market trading is separate and distinct from, or squarely within the rubric of, “casual trading”. Mr. Simmonds sought to draw the court's attention to the historical distinctions between the various types of “trading”, with a particular focus on the separation of market trading from other types of trading. In that context it is appropriate to turn to some of the other types of trading that were formerly the subject of separate regulation.

2.3 “Hawking”, as governed by the Hawking Act 1888, is the traditional term for street vending other than at a market. While “peddling” is a similar concept, there is a distinction in that a hawker traded with an animal and cart and later a vehicle, whereas a peddler travelled on foot. Peddling was governed by the Pedlars Act 1871 until both concepts were merged together into “casual trading” by the 1980 Act, by which act the respective earlier legislation was repealed. The 1980 Act was later

repealed and replaced by the 1995 Act.

2.4 Two other concepts are of note in this regard. First, there is "street trading" which is a statutory concept, carried out under the Street Trading Act 1926, and limited mainly to the City of Dublin. Second, the concept of "occasional trading" was introduced by the Occasional Trading Act 1979 and later amended by the 1995 Act. Neither of these types of trading has any direct bearing on the present questions before the court but were nevertheless canvassed, presumably to highlight that there are a number of different concepts that are often confused or conflated with the generic term "market trading".

2.5 It was said that the existence of a "market", properly so called, presumes two separate but related rights. On the one part there is the right of the owner of the market, traditionally the "lord of the market", to hold the market. On the other hand members of the public hold the right to attend the market to buy and sell. This latter right is framed by counsel for Mr. Simmonds as a public right, likened to a public right of way or a public right of navigation, and one which amounts to an interest in land, and which is now recognised by s. 11(4)(g) of the Land and Conveyancing Law Reform Act 2009. This right, the public right of trading at markets and fairs, is said to be governed by a "self contained statutory code" contained in terms of the Market and Fairs Clauses Act 1847 ("the 1847 Act"). The provisions of this act were later incorporated into the Public Health (Ireland) Act 1878 ("the 1878 Act") by s. 103. Section 103 provides that:-

"[...]

For the purpose of enabling any urban authority to establish or to regulate markets, there shall be incorporated with this Act the provisions of the Markets and Fairs Clauses Act, 1847, in so far as the same relate to markets; that is to say,

With respect to the holding of the market or fair, and the protection thereof; and

With respect to the weighing goods and carts; and

With respect to the stallages, rents, and tolls:

Provided that all tolls leviable by an urban authority in pursuance of this section shall be approved by the Local Government Board.

An urban authority may with respect to any market belonging to them make byelaws for any of the purposes mentioned in section forty-two of the Markets and Fairs Clauses Act, 1847, so far as those purposes relate to markets, and printed copies of any byelaw so made shall be conspicuously exhibited in the market. [*sic*]"

2.6 Section 42 of the 1847 Act, referenced above, and which deals with bye-laws, provides that:-
"The undertakers may from time to time make such bye laws as they think fit for all or any of the following purposes; (that is to say,)

For regulating the use of the market place and fair, and the buildings, stalls, pens, and standings therein, and for preventing nuisances or obstructions therein, or in the immediate approaches thereto:

For fixing the days, and the hours during each day, on which the market or fair shall be held:

For regulating the carriers resorting to the market or fair, and fixing the rates for carrying articles

carried therefrom within the limits of the special Act:

For regulating the use of the weighing machines provided by the undertakers, and for preventing the use of false or defective weights, scales, or measures:

For preventing the sale or exposure for sale of unwholesome provisions in the market or fair:".

2.7 Counsel for Mr. Simmonds contended that it was precisely this power, pursuant to s. 42, which Ennis Council exercised when it made the Ennis Market Bye-Laws 1988. He argued that, as market trading is distinct from casual trading, it would be extraordinary to allow the 1995 Act to silently treat market trading as a form of hawking. While, accepting that market trading may be subjected to statutory regulation, he further argued, placing reliance on the *dicta* of Keane C.J. in *Bridgeman v Limerick Corporation* [2001] 2 I.R. 517, that it would be perverse to allow the 1995 Act to trammel on the distinction between the two concepts which had previously been governed separately by respective statutory codes.

2.8 A number of grounds are advanced to support the argument that such an approach is absurd. Among them is a proposition based on s. 26(2)(e) of the Interpretation Act 2005 which provides that:-

"Where an enactment ('former enactment') is repealed and re-enacted, with or without modification, by another enactment ('new enactment'), the following provisions apply:

[...]

to the extent that the provisions of the new enactment express the same idea in a different form of words but are in substance the same as those of the former enactment, the idea in the new enactment shall not be taken to be different merely because a different form of words is used".

2.9 The 1995 Act repealed and replaced the 1980 Act with certain modifications. One such change was the omission from s. 2 of the 1995 Act of the express exclusion of "selling at a market or fair held in pursuance of a market right" from the definition of casual trading in s. 2 of the 1980 Act. It was argued that the 1995 Act gives no indication that the draftsman intended to change the law or to produce a different effect as and between the 1980 and 1995 Acts. Instead, it was suggested that the exclusion was otiose or redundant following the decisions in *D.P.P. (Long) v McDonald* [1983] 1 ILRM 223 and *Skibbereen U.D.C. v Quill* [1986] I.R. 123 and was therefore omitted. As such, the Interpretation Act 2005 was used to ground the argument that the 1995 Act should be construed as including the same exclusion from the scope of casual trading of the exercise of market rights.

2.10 This proposition is further developed into the argument that in seeking to identify the intention of the draftsman the court should be wary of adopting an approach which requires it to infer an intention by reasoning from omission. For the court to take the view that, because s. 2 of the 1995 Act does not expressly exclude market trading, the intention must have been to include market trading within the scope of the act, then it would, it is said, be attracted to a superficial and ultimately deceptive logic. Emphasis was laid on the Supreme Court decision in *Hutch v Dublin Corporation* [1993] 3 I.R. 551 and the judgment of O'Flaherty J. in particular, where, at p. 564, he held that:-

"While this submission has a superficial attraction the answer to it must be that it is not necessary for the legislation to exclude in express terms something which is fundamentally foreign to its policy and purpose [...]".

On this basis it was suggested that, as the "mischief" sought to be governed by the 1995 Act was the consequences of unregulated hawking, market trading should not be implied into its scope.

2.11 A further related argument was advanced to the effect that there is an internal inconsistency evident on the face of the 1995 Act. It was accepted that s. 8 deals with market regulation generally,

that s. 8(1) deals with the power of a local authority to manage and regulate a market as if it were a market established by it under the 1878 Act and that s. 8(2) and following set out the conditions under which a local authority may extinguish a market right. However, it was suggested that if s. 2 was to be given a broad interpretation sufficient to include trading at a franchise market then it would, for example, allow a local authority to bypass s. 8 by using the general power of regulation to, in practice, extinguish or move an established market. It was said that it would be ludicrous for a statute to make market trading lawful only when in compliance with casual trading bye-laws and at the same time provide for the making of what were said to be futile and irrelevant market trading bye-laws. Furthermore, it would be equally ludicrous for a statute to provide safeguards before the courts to prevent local authorities acting so as to reduce the attraction of a market by regulating it to a less attractive location, and at the same time to provide a means by which the market can be smothered without any recourse or redress. It was for those reasons that Mr. Simmonds contended that franchise market trading should be held to be excluded from the scope of the 1995 Act.

2.12 Against that backdrop it was argued that Mr. Simmonds' market rights, unlike any casual trading rights that may be granted by licence, were protected from unjust attack by the provisions of Art. 43.1.2° of the Constitution. As such, it was said that the double construction rule, as described in *East Donegal Co-Operative v Attorney General* [1970] 1 I.R. 317, should be applied to prevent a situation in which Mr. Simmonds' property rights were rendered illegal and instead replaced by a precatory licence.

2.13 In the light of those arguments it is next appropriate to turn to the case made on behalf of Ennis Council.

3. Ennis Council's Case

3.1 Ennis Council submits that the answer to the first of the two preliminary issues is the following:-

"The exercise of a Common Law right to trade at a market fair comes within the definition of casual trading so that a person is disentitled from exercising such rights without holding and operating in accordance with a Casual Trading Licence as required under Section 3(1) of the Casual Trading Act, 1995."

On the second of the issues, Ennis Council's submission is the following:-

"The Plaintiff is not lawfully entitled to sell produce at the market held at Ennis in Market Street market place or in the immediate environs thereof without holding and trading in accordance with a current Casual Trading Licence under the Casual Trading Act, 1995."

3.2 Ennis Council contends that the legislative history is important in understanding the scope and intent of the draftsman of the 1995 Act. It submits that the legislature has exhibited an intention to bring "franchise market trading" under the remit of the 1995 Act. Particular reliance is placed on the fact that s. 103 of the 1878 Act was repealed by s. 4(1) of the Local Government Act 1994, which section was commenced by the Local Government Act 1994 (Commencement) (No. 4) Order 1995 (S.I. No. 362 of 1995) which provided 1st January, 1996, as the date on which the repeal of, *inter alia*, s. 103 was to take effect.

3.3 Furthermore, Ennis Council points to the Local Government Act 1994 (Bye-Laws) Regulations 1995 (S.I. 360 of 1995). Regulation 11 repealed s. 42 of the 1847 Act with effect from the 1st January, 1996, while reg. 4 provided that:-

"Bye-laws made by a local authority under section 37(1) may apply in respect of land, services or any other thing whether within or without the functional area of that local authority."

Further, s. 37(1) of the Local Government of Ireland Act 1994 provides that:-

“A local authority may, subject to subsection (8), make a bye-law for or in relation to the use, operation, protection, regulation or management of any land, services, or any other thing whatsoever provided by or under the control or management of the local authority or in relation to any matter connected therewith.”

Finally s. 37(8) provides that:-

“The appropriate Minister may by regulation prescribe matters or classes of matters in respect of which local authorities shall not be entitled to make a bye-law.”

3.4 The passing of these provisions, it was said, demonstrate that, from the mid-1990s, the regulation of markets, in any form, could lawfully be carried out through bye-laws generally and specifically under the 1995 Act. It was also noted that s. 43 of the Local Government Act 1994 amounted to a form of temporary grandfather clause in that it made provision for any bye-laws made by a local authority under any repealed legislation to remain in force for a period of three years following the entry into operation of any such repeal. Section 43 was commenced by reg. 2 of the Local Government Act 1994 (Commencement) (No. 4) Order 1995. The effect of this was to repeal the Ennis Urban District Council Bye-Laws of the 21st March, 1988, as and from the 31st December, 1998.

3.5 The Local Government Act 1994 was later repealed by s. 5 of the Local Government Act 2001 which was commenced by the Local Government Act 2001 (Commencement Order) 2006 (S.I. 361 of 2006) with effect from the 10th July, 2006. While s. 209(1) of the Local Government Act 2001 is a provision in similar terms to s. 43 of the Local Government Act 1994, given that there were no bye-laws still in force in 2006, there were no bye-laws to continue, even if only for a time. As such, there was a lacuna of sorts. Ennis Council then purported to fill this vacuum by introducing the Casual Trading Bye-Laws 2011 (“the 2011 Bye-Laws”).

3.6 This then begs the question of whether the authority relied on to introduce the 2011 Bye-Laws, namely the 1995 Act, is sufficient to encompass market trading. Ennis Council’s argument in this regard is quite simple: s. 2 of the 1995 Act is broad enough to encapsulate “market trading” and as there is no particular exclusion, as there was in the 1980 Act, it falls within the scope of the act.

3.7 As already noted above, there is but a fine point of distinction between the parties. Both agree that it is a franchise market which is in question and that such a market may be regulated, at least at the level of principle. However, while both rely on historical and legislative developments which have impacted on market trading, Mr. Simmonds suggests that these are indicative of a legislative intention, supported by judicial interpretation, that market trading is to be governed entirely separately and distinct from casual trading. Ennis Council suggests the contrary. Its position is that the legislative developments, in particular, should be interpreted as demonstrative of a clear intention that both casual trading and market trading should be covered by a single piece of legislation, namely the 1995 Act.

3.8 Were Mr. Simmonds to be correct that the 1995 Act can have no bearing on market trading, except as provided for in s. 8, a question would arise as to whether new legislation is required in order to allow for the orderly regulation of franchise markets. However, in a similar fashion, were Ennis Council to be correct that the definition of casual trading under the 1995 Act covers market trading, a question would arise as to how the rights which attach to a franchise market are to be construed in circumstances where the provisions of the 1995 Act are held to apply.

3.9 Given that the court is presently tasked with two preliminary issues which revolve around the interpretation of the 1995 Act, it is now appropriate to turn to a consideration of the terms of the act itself.

4. The 1995 Act

4.1 The long title of the 1995 Act describes its purpose in the following terms:-

"An act to provide for the control and regulation of casual trading and to provide for connected matters".

4.2 Section 1 of the 1995 Act defines "market right" as "a right conferred by franchise or statute to hold a fair or market, that is to say, a concourse of buyers and sellers to dispose of commodities". It defines a "casual trading area" as "land standing designated by bye-laws under section 6 as an area where casual trading may be carried on".

4.3 Section 2 of the 1995 Act, described in the margin as "casual trading" provides that:-

"(1) Subject to *subsection (2)*, '*casual trading*' means selling goods at a place (including a public road) to which the public have access as of right or at any other place that is a casual trading area.

(2) Casual trading does not include—

(a) selling by auction (other than by Dutch auction) by the holder of a licence or permit for the time being in force under the Auctioneers and House Agents Acts, 1947 to 1973,

(b) selling to a person at the place where he resides or carries on business,

(c) selling in respect of which it is shown by the seller—

(i) that any profits therefrom are for use for charitable purposes or for other purposes from which no private profit is derived, and

(ii) that no remuneration, emolument, gain or profit will accrue to the seller or his servants or agents therefrom.

(3) The Minister may, by regulations, amend (whether by the addition, deletion or alteration of classes) the classes of selling specified in subsection (2) and that subsection shall have effect in accordance with any such regulations.

(4) A local authority may, as respects its functional area, by bye-laws under section 6 add to the classes of selling specified in subsection (2) and that subsection shall, in relation to that functional area, be construed and have effect in accordance with any such bye-laws for the time being in force."

4.4 Section 3 deals with the restriction on trading without a licence. Of particular note is s. 3(2)(a) which provides that, where a casual trading area has been designated within the functional area of a local authority, it is an offence for a person to trade outside that designated area unless they are in possession of a licence granted under s. 4(1)(a)(iii). Section 3(2)(b) also provides that the designation of a casual trading area cannot be retrospectively applied to the holder of a casual trading licence during the currency of that licence.

4.5 Section 4 deals with casual trading licences generally and the conditions which may be attached to the grant of licences by a local authority. Of particular relevance to this case are the conditions which may apply in relation to location. For example, where no casual trading area has been designated then the licence may be used anywhere within the functional area of the local authority. Conversely, even where a casual trading area has been designated, the licence may confine the holder to a single

location either within the casual trading or functional area. Section 4(1)(a)(iii) provides for the licensing of casual trading at "an event or events". The discretion accorded to the local authority in respect to the conditionality that may be attached to licences is clearly broad. It goes so far as to allow a local authority to refuse to grant a casual trading licence to a person if a trading place for the purposes of casual trading is not available.

4.6 Section 6 makes it mandatory for a local authority to make bye-laws in relation to the control, regulation, supervision and administration of casual trading in its functional area. Section 7 allows local authorities to acquire, compulsorily or by agreement, market rights in their functional areas. It also provides that a market right which has not been exercised for ten years at the date of the commencement of the 1995 Act will stand extinguished.

4.7 Section 8, described as "powers of local authorities in relation to market rights owned by them", provides:-

"(1) A local authority may carry on, manage and regulate a market or fair to which a market right owned by it relates as if it were a market established by it under the Public Health (Ireland) Act, 1878, and shall have all such powers as may be necessary for those purposes.

(2) A local authority may by order extinguish a market right owned by it.

(3) (a) A local authority shall not extinguish a market right under this section unless it provides, or has already provided, alternative facilities in the same vicinity as the market or fair to which the right relates and comprising or including facilities reasonably corresponding in all respects, having regard to all the circumstances, to the market or fair.

(b) Where a local authority acquires a market right compulsorily under this Act, it shall not discontinue the holding of the market or fair to which it relates unless it provides, or has already provided, alternative facilities in the same vicinity as the market or fair to which the right relates and comprising or including facilities reasonably corresponding in all respects, having regard to all the circumstances, to the market or fair.

(4) (a) Whenever a local authority proposes to extinguish a market right under this section the local authority shall—

(i) give notice in writing of the proposal to any person appearing to the authority to have an interest in the right,

and

(ii) publish notice of the proposal in at least two newspapers circulating in the area in which the market or fair to which the right relates is held.

(b) Notices under this subsection shall include particulars of the facilities proposed to be provided or already provided by the local authority in the place of the market or fair to which the right proposed to be extinguished relates.

(c) A notice under this subsection may be served on any person by sending it by registered post in an envelope addressed to him at his usual or last known address.

(5) (a) A person who is aggrieved by a proposal of a local authority to extinguish a market right may, within a period of 21 days beginning on the date of compliance by the local authority concerned with subsection (4) (a) (ii) in relation to the right, appeal to the District Court against the extinguishment and that Court may, on the hearing of the appeal, if it is of opinion that the

extinguishment would, notwithstanding the alternative facilities to be provided or already provided by the local authority and having regard to all the circumstances, constitute an undue interference with the facilities enjoyed by the public in relation to the market right, prohibit the proposed extinguishment or authorise the extinguishment subject to such conditions (if any) as it may deem appropriate and specify.

(b) Notice of an appeal under this subsection shall be given to the local authority concerned and an officer of the local authority shall be entitled to appear and be heard on the hearing of the appeal.

(c) A party concerned may appeal to the Circuit Court from a decision of the District Court.

(6) A local authority shall not proceed with a proposal to extinguish a market right under this section before the expiry of 30 days from the date of compliance by the local authority concerned with subsection (4) (a) (ii) in relation to the right or, if an appeal is brought against the proposal, before the final determination of the appeal.

(7) The extinguishment of a market right under this section shall be a reserved function.

(8) A local authority may do any act or thing which may be necessary or incidental to the doing of anything which the local authority is authorised by the other provisions of this section and of sections 6 and 7 to do."

4.8 The remaining provisions of the 1995 Act are largely concerned with the powers of An Garda Síochána and certain other largely technical matters. Before coming to any conclusions on the correct interpretation of the 1995 Act or on the questions put before this court for determination, it is now appropriate to turn to a consideration of the relevant jurisprudence.

5. Case law on Casual Trading/Market Trading

5.1 The question of the interplay between the rights of market trading under a franchise market and those of casual trading under the relevant casual trading legislation, and in particular the 1995 Act, is one that has troubled the courts in this jurisdiction in at least a tangential manner on more than one occasion. However, it is difficult to see that the matter has been decisively disposed of in any real sense. In truth, it might be remarked that the antiquity of the rights at stake, the subtlety of the distinction between market versus casual trading and the rather opaque manner in which the legislature has attempted to regulate the area have all conspired to produce a veritable legal hodgepodge that does not immediately invite judicial scrutiny on more than narrow dispositive grounds as arise in each case. Nevertheless, the jurisprudence opened before the court does provide some guidance in a number of areas.

5.2 In *Loughrey v Doherty and Others* [1925] I.R. 103, the Supreme Court refrained from setting out any definition of disturbance of a (franchise) market remarking instead that the question of "disturbance" is a matter of evidence.

5.3 In *D.P.P. (Long) v McDonald*, the Supreme Court was confronted with questions arising out of the application of the Road Traffic Act 1961 to the use by traders of motor vehicles as mobile shops at a franchise market. On appeal from a case stated, the traders argued that the bye-laws in question were bad for being unreasonable, made in bad faith and otherwise inapplicable to their situation. Henchy J., in dismissing the appeal, made the following comments:

"[...] a fair or market is a property right. It is a franchise conferring a right to hold a concourse of buyers and sellers to dispose of commodities. The property rights involved in that franchise are required by Art. 40.3, of the Constitution to be protected as far as practicable by the laws of the State. The Legislature, by s. 92 [of the Road Traffic Act 1961] obviously considered that the

common good warranted that a fair or market held on a public road could be encroached on by bye-laws made under that section, but only to the extent of securing the free passage of vehicular traffic through the public road on the occasion of the fair or market. Such an inroad on the property right was obviously deemed by the Legislature to be constitutional."

He went on to remark, in relation to ss. 89 and 90 of the Road Traffic Act 1961, that:

"If the prohibitions in these bye-laws could be said to apply to a fair or a market, they could be used to cripple or put out of existence, without any compensation, the particular fair or market. And that could be unconstitutional."

5.4 In *Bridgeman v Limerick Corporation* [2001] 2 I.R. 517, Keane C.J. was faced with a question arising out of a market established pursuant to the Limerick Markets Act 1852 (as amended) which the respondents had sought to regulate through the making of bye-laws under s. 6 of the 1995 Act. The applicant's case ultimately failed on a number of grounds. Having regard to the statutory context of the Limerick Markets Act 1852, which was said to have been enacted *inter alia* for the purpose of regulating hawking, the court held that, by the introduction of the 1980 Act and later the 1995 Act, the Oireachtas had merely, in the context of hawking, replaced one form of statutory regime designed to regulate hawkers with another. Nevertheless, at pp. 524-525, Keane C.J. made the following apposite comments which are noteworthy:-

"I have been proceeding on the assumption that the establishment of a casual trading area is a 'market' as that expression is understood by the law. However, that is not necessarily the case. The following definition appears in *Halsbury's Laws of England*, (3rd ed.) Vol. 25, at p. 381:-

'At common law a market is a franchise conferring a right to hold a concourse of buyers and sellers to dispose of the commodities in respect of which the franchise is given. The term is also applied to the like right when conferred by Act of Parliament. Though strictly applicable to the right itself, the term is often applied to the concourse of buyers and sellers, or to the market place, or to the time of holding the market. A gathering of buyers and sellers, though held at regular intervals in a fixed place, if it is not held by virtue of a franchise or under statutory authority, is not in law a market, and cannot enjoy the privileges of a franchise market or fair.'

I do not think that it was the intention of the Oireachtas, in enacting the Act of 1995 and enabling bye-laws to be made, designating areas in which casual trading could take place, to create a 'market' as thus defined. That view is confirmed by the wording of the Act of 1995 which expressly empowers a local authority, in ss. 7 and 8, to acquire and extinguish a 'market right' and defines such a right as:-

'a right conferred by franchise or statute to hold a fair or market, that is to say, a concourse of buyers and sellers to dispose of commodities.'

Those provisions are patently inapplicable to the casual trading licences which the local authority is empowered to grant under the Act and, in respect of which, a self-contained statutory scheme is provided for their grant and revocation."

5.5 The dicta of Keane C.J. is useful in that it clarifies that there are two forms of "market", one created by franchise, as in the present case, with the other created by legislative acts which do not establish the set of rights and obligations which constitute a franchise market as the term is understood in law. It is also of note that the Supreme Court found that a "casual trading area" created under the 1995 Act does not automatically amount to a market, properly so called. However, it is less clear that this ruling can be taken to imply the inverse, in other words, that trading at a market can be said not to constitute casual trading.

5.6 In *Skibbereen U.D.C. v Quill*, Lynch J. when faced with a consultative case stated from the District Court arising out of a prosecution of offences contrary to the 1980 Act, made a number of relevant findings. Having made reference to the definition of a "market right" as set out in s. 1 of the 1980 Act, he held that the non-user of a franchise to hold a market or fair does not extinguish the franchise or the right to do so. Similarly, the fact that the owner of the franchise had not collected tolls over a long period of time equally would not extinguish the right of that owner to resume collecting proper tolls at any time at his discretion. He then went on to find, at 127, that a franchise holder could:-

"[...] subject now of course to the planning laws, lay out a market place with appropriate stalls, pens and weighbridges at any time even though he had not exercised his rights under the franchise for a very long time. If an owner should neglect to hold a market it seems to me that he can have no cause of complaint if traders and customers continue to assemble then they would form a concourse of buyers and sellers to dispose of commodities within the meaning of the definition of 'market right' which I have already quoted above. [...]"

He then concluded, at 128, that:-

"[...] once a franchise to hold a market is granted, potential sellers have rights in the nature of proprietary rights to use the market apart from the proprietary right of the owner of the franchise to hold the market [...]"

5.7 A question may arise as to how this decision is to be interpreted in light of s. 7(4) of the 1995 Act, however that issue is not presently before this court. Nevertheless this decision does establish that market rights possess a certain enduring quality which is not lightly removed.

5.8 In *Listowel Livestock Mart Ltd. v William Bird & Sons Ltd.* [\[2009\] 4 I.R. 631](#), I made a number of findings which disposed of the discrete issue which then arose. At 639, I found that:-

"A market at common law has been defined as a franchise right of having a concourse of buyers and sellers to dispose of commodities in respect of which the franchise is given

[...]

The right of holding a market or fair is regarded as an incorporeal hereditament, which not only authorised the fair to be held but gave the owner of the market rights an entitlement to prevent others from interfering with it

[...]

The principal public entitlement in respect of a fair or market would appear to be a right of coming into the place of the market and frequenting it for the purposes of buying and selling, subject to the limitation that that right can only be exercised when the market or fair is open and can be confined to a specific category of goods where the market or fair is limited, in its terms, to those goods.

[...]

Turning to the obligations of the owner of a market place, it is clear that the grant is made for the benefit of the public as well as for the benefit of the grantee and that certain obligations, therefore, lie on the grantee."

5.9 In *Simmonds & Ors v Cork County Council & Ors* (Unreported, High Court, Ó Caoimh J., 22nd February, 2002), the court was concerned with an interlocutory injunction application seeking to restrain an alleged interference with the applicant's market rights, pursuant to a franchise market, through the application of bye-laws under the 1995 Act. While on its face this decision ought to have been of particular relevance in this case, the fact that it was concerned with interlocutory proceedings should explain why Ó Caoimh J. limited his judgment, in granting the relief sought, to finding that there were "real issues to be tried" in the action.

5.10 More recently, in *Simmonds v Kilkenny County Borough & Ors* [2011] IESC 20, the Supreme Court was faced with a situation involving a franchise market originally established by a charter of King James I dated 16th October, 1608, which was later followed by the Kilkenny Markets Act 1861. On the basis of the decision of the House of Lords in *New Windsor Corporation v Taylor* [1899] 1 A.C. 41, the court appeared to accept that the rights associated with a franchise market could be amended by statute, or, as it was described, this case was "another example of a new market Act superseding the old market right". Fennelly J. then adopted a two stage test in coming to his decision: first the court would have to be satisfied that the applicant held a valid claim to exercise a market right in Kilkenny before it would secondly turn to a consideration of the relationship between market rights and the operation of the Casual Trading Act 1995. Having then found that Mr. Simmonds, in that case, had not established any market right to trade his particular brand of produce, the court refrained from deciding the status of market rights in relation to the Casual Trading Act 1995.

6. Discussion and Determination

6.1 In my introductory remarks I noted that one might have thought that the task of construing the legislative intent of the Oireachtas in a case such as this ought to be a relatively straightforward exercise.

6.2 The argument on behalf of Ennis Council is, as has been pointed out, simple and clear. The definition of casual trading contained in s. 2(1) involves "selling goods at a place to which the public have access as of right, or any other place that is a casual trading area". Ordinarily, a franchise market will take place at an area to which the public have access as of right whether that right stems from the fact that the area in which the market takes place is ordinarily one to which the public have access (such as public roadways or a central square in a town), or because the obligation on the owner of the market rights to hold the market confers a right on the public to attend the area, even if privately owned, where the market is to take place. It follows that trading at a franchise market involves selling goods at a place to which the public have access as of right. On that basis it is argued that selling goods at a franchise market sits neatly within the definition of casual trading as set out in s. 2 of the 1995 Act. Certainly on a literal reading of the section it is hard to disagree with that proposition.

6.3 The real question seems to me to be as to whether there is anything in the arguments addressed on behalf of Mr. Simmonds which might displace the consequences of that simple argument.

6.4 I am not sure that a great deal of weight can be attached to the change brought about between the 1980 Act and the 1995 Act, whereby the exclusion from the definition of casual trading of trading at a franchise market (as appeared in the 1980 Act) was not repeated in the exclusions contained in the 1995 Act. There may be circumstances where the re-enactment of legislation with significant alterations can be viewed in much the same way as an amendment to the earlier legislation which, for reasons of convenience, is dealt with by repeal and re-enactment with changes rather than an amendment. In some such cases it may be appropriate to view alterations between the repealed legislation and the legislation as re-enacted as being analogous to an amendment and where, as here, the change amounts to a deletion to regard that change as being analogous to an amendment which simply deleted the provision now omitted. But even if viewed in that way, it is not clear that the omission of the exclusion in favour of franchise markets really puts the matter any further than the basic argument advanced on behalf of Ennis Council which is that the ordinary and literal meaning of the definition of casual trading, to be found in s. 2, clearly encompasses selling at a franchise market.

6.5 The next matters to be addressed are the arguments which are based on the legislative history. Much of that history is, as the extracts from the relevant legislation already cited demonstrate, somewhat convoluted and frequently of ancient lineage. I am not sure that it is possible to see the 1980 Act as simply a re-statement, with modern revision, of the code or codes previously applicable to persons such as hawkers or peddlars. The 1980 Act stands on its own and there is no reason in principle why it might not have been intended to bring other forms of trading into the same regulatory scheme. Likewise, there is no reason in principle why the 1995 Act might not have been intended to go further and bring traders at franchise markets into the same scheme as all other traders who had, between 1980 and 1995, been governed by the provisions of the 1980 Act.

6.6 The only aspect of the legislative history which seems to me to have any significant bearing is the question of the entitlement of local authorities to regulate franchise markets. There is no dispute between the parties but that, at least at the level of principle, and subject to proportionality, it is open to the Oireachtas to confer at least some powers of regulation of a franchise market on a local authority. It would be difficult to see how any other view could be taken. While it may well be appropriate, as counsel for Mr. Simmonds argued, to characterise an established right to trade at a franchise market as a species of property right, such rights are, together with all other property rights guaranteed under the Constitution, subject to legitimate and proportionate regulation in the common good. Given that it is possible, therefore, to engage in the regulation of franchise markets and given that there was at least some statutory power in that regard prior to the enactment of the casual trading legislation, it might be expected that the Oireachtas would not have left franchise markets entirely free of potential regulatory control. It is in that context that the legislative history of the power to regulate franchise markets needs to be considered. The starting point has to be the provisions of the 1847 Act, cited earlier. However, it must be remembered that that act was a "clauses" act. Similar "clauses" acts were in existence in the same mid 19th Century period in respect of other areas such as compulsory acquisition. It is important to recall how a clauses act came into being. At the relevant time many entitlements were conferred by private Acts of Parliament. Such acts might have conferred market rights on a local authority or compulsory acquisition rights on a body such as a railway enterprise. In the early days of such developments the relevant act needed to set out in great detail the nuts and bolts of how things were to operate. The Clauses Acts were designed to simplify that legislative process by providing what were, in substance, a set of standard terms that could, by reference, be incorporated into any subsequent legislation. Thus, the conferring on any local authority of market rights after 1847 could have been and was simplified by incorporating the terms, by reference, of the 1847 Act, and thus obviating the necessity of reproducing those terms in each and every private act. In like manner, standard clauses were provided for incorporation into private acts dealing with, for example, railway compulsory acquisition.

6.7 In that context the incorporation of the provisions of the 1847 Act into the 1878 Act is simply an exercise which permanently included the relevant clauses in the statutory regime applicable to the establishment and regulation of markets set out in the 1878 Act. However, it is important to note that the provisions of s. 103 of the 1878 Act previously cited make clear that the right to make bye-laws (by reference to s. 42 of the 1847 Act) only applies to an urban authority in respect of "any market belonging to them". Therefore, the statutory regulatory control of franchise markets by bye-law seems to have been confined to the control by local authorities of markets owned by them. There does not seem to have been any similar statutory entitlement to exercise control over franchise markets which were privately owned.

6.8 In that context it seems to me that s. 8(1) of the 1995 Act merely preserves that position. Section 8(1) allows a local authority to manage and regulate a market or fair "to which a market right owned by it relates" in like manner to that which applied under the 1878 Act. The historical position in respect of the regulation, under statute, of markets and fairs owned and operated by local authorities is, thus, largely preserved although any doubt as to whether the previous regime applied to markets which were acquired by the local authority rather than established under the provisions of the 1878 Act is removed by the clear wording of s. 8(1) which applies that section to any market right owned by the local authority and thus applies same irrespective of whether or not the right concerned was a

former private market since acquired by the local authority in question.

6.9 In the light of that analysis, it does not seem to me that the legislative history in respect of the regulation of franchise markets is really of any assistance. That power of regulation historically only existed in respect of markets (or perhaps only some markets) operated by local authorities. That position remains the case under s. 8(1). That history does not provide any argument one way or the other for the question that is at the core of these proceedings which is as to whether the definition of casual trading should be taken to exclude selling at a franchise market.

6.10 It is next necessary to turn to the argument which centred on the existing jurisprudence. There was much debate between counsel as to the extent to which the issue which I now have to decide can be said to have been previously determined by either the Supreme Court or by this Court to the extent that I would be bound to follow such earlier decisions, except in the limited circumstances identified in the jurisprudence in which a judge of this Court can depart from a previous decision of another judge of the court (see – *Irish Trust Bank Ltd. v Central Bank of Ireland* [1976-7] ILRM 50; *Worldport Ireland Limited (In Liquidation) v Companies Acts* [2005] IEHC 189; *O’Leary & Ors v An Bord Pleanala & Ors* [2008] IEHC 34; *Brady v D.P.P.* [2010] IEHC 231; and *Environmental Protection Agency v Neiphin Trading Ltd & Ors* [2011] IEHC 67). I am not, however, satisfied that any of the authorities relating to franchise markets, which have been cited, really address the net question which I have to decide in this case. As pointed out earlier, while it is clear that Keane C.J., in *Bridgeman*, noted that a casual trading area did not automatically amount to a market, it is less clear that that judgment can be taken to imply the inverse. It is also important to note that when Keane C.J. spoke of a self contained statutory scheme in respect of franchise markets, he was referring specifically to a scheme “for their grant and revocation”. The reference was not to regulation. I am not satisfied, therefore, that *Bridgeman* really addresses the question which I have to decide which is as to whether the 1995 Act covers, within its definition of casual trading, selling at a franchise market.

6.11 Likewise, the decision of Lynch J. in *Skibbereen UDC v Quill* predates the 1995 Act and could have no real bearing, at least directly, on the question of whether, post that act, casual trading encompassed trading at a franchise market. As has been pointed out prior to the 1995 Act, and therefore at the time of Lynch J.’s judgment, market trading was expressly excluded from the definition of casual trading.

6.12 Furthermore, as pointed out earlier, the judgment of Ó Caoimh J. in *Simmonds & Ors v Cork County Council* was a judgment at an interlocutory stage and goes no further than deciding, in accordance with the jurisprudence relevant to the grant or refusal of interlocutory injunctions, that there was a sufficient arguable case for the proposition now relied on by Mr. Simmonds. Likewise, *Simmonds v Kilkenny County Borough & Ors* turned on the extent of the produce to which the relevant market rights in Kilkenny applied so that it became unnecessary to address the issue with which I am now faced.

6.13 On the basis of that analysis, I am not satisfied that there is anything to be found in the relevant case law which specifically addresses the narrow question of whether the proper construction of s. 2 of the 1995 Act is such as encompasses trading at a franchise market within the definition of casual trading. It, therefore, follows that neither the legislative history nor the case law is of great assistance in answering the questions posed.

6.14 It seems to me, therefore, that the answer to the first question posed comes down to a consideration of the consistency of the contention put forward on behalf of Ennis Council to the effect that casual trading encompasses trading at a franchise market with two specific provisions of the 1995 Act. Those provisions seem to me to be s. 4 and s. 8. In relation to s. 4, questions are raised as to how those provisions can be said to make sense and work in a practical way in the event that the definition of casual trading encompasses trading at a franchise market. The provisions of s. 4 already cited make it clear that a person holding a casual trading licence must conduct their business in one of three places *viz.* (a) anywhere within the boundaries of the relevant local authority in circumstances where the local authority has not designated a casual trading area; (b) within a casual trading area

where same has been designated; or (c) at or near a location where an event is to take place.

6.15 The argument put forward on behalf of Mr. Simmonds is that s. 4 just does not fit in with a construction on the term "casual trading" which includes trading at a franchise market. No great difficulty might be posed in circumstances where the local authority concerned did not designate any casual trading area for in those circumstances the licensee can carry on business at any place within the local authority's functional area and could, thus, carry on business within the terms of any relevant franchise market, including its location. Equally if a local authority were to designate, as a casual trading area, an area which included all of the places in which the franchise market concerned could take place, then no difficulty would arise for the licensed casual trader would again be entitled to carry on trade on the same terms as to location as applied under the franchise.

6.16 However, in any circumstances where some of the historical franchise market area was not included within a designated casual trading area a potential difficulty arises, for in those circumstances s. 4 would seem to require that traders who wished to trade within the boundaries of a franchise market would have their entitlements reduced by the fact that not all of the franchise market area was included within the casual trading area. It is, of course, the case that, if ultimately deemed reasonable in accordance with a move to extinguish a market right by the provision of alternative facilities in accordance with s. 8 (provided that the alternative facilities meet the test contained in s. 8(3)(a)), the location of a franchise market can, in effect, be moved. I will return to the question of the interaction with s. 8 in early course. However, in the absence of the invocation of s. 8, it is hard to see how the designation of a casual trading area which did not include all market areas would not amount to a diminution of market rights.

6.17 Partially in response to that argument, counsel for Ennis Council advanced the suggestion that a market might be an "event" in the sense in which that term is used in the third alternative under s. 4. However, it does not seem to me that the term "event" as used in s. 4 can really be taken to refer to a weekly (or even more frequent) market. Rather, it seems to me that the event provision is designed to enable more generous casual trading arrangements to be put in place at or around a major infrequent event. The fact that the licence may permit trading at or near the location of the relevant event seems to me to be designed to cover the possibility that the event may be on private premises, but that it may be desired to permit traders to operate on nearby public land.

6.18 There does, therefore, seem to me to be a difficulty in reconciling s. 4 with the broader literal definition contained in s. 2 of casual trading on which Ennis Council places reliance. How is s. 4 to operate unless the relevant local authority, if it chooses to designate a casual trading area, so designates in a way which includes all of the area encompassed in the franchise market?

6.19 Like considerations arise under s. 8. The Oireachtas has set out a detailed and measured approach to the extinguishment by moving of franchise market rights backed up by an entitlement to apply to court in the event that it is contended that the measures proposed by the relevant local authority do not provide corresponding facilities to those being extinguished. It could not be that the Oireachtas intended that the same local authority, by invoking a power of regulation by bye-law, could achieve the same end without going through the procedures specified in section 8. To take such a view would be to render s. 8 meaningless.

6.20 It follows, therefore, that the broad definition of casual trading contended for on behalf of Ennis Council is only compatible with both ss. 4 and 8 if the 1995 Act as a whole is construed in a way that the power of regulation by bye-law contained in the 1995 Act cannot be used by a relevant local authority to designate an area which does not include the entirety of the area in respect of which an existing franchise market right exists and cannot be used to alter that area, other than in accordance with a scheme which complies with s. 8. The net question, therefore, seems to me to come down to one of whether the 1995 Act can be construed as having those restrictions for if it cannot be so construed, then it logically follows that the definition of casual trading in s. 2 cannot apply to franchise markets for to do so would be to create such an internal inconsistency in the 1995 Act as would render

both s. 4 and s. 8 largely inoperable.

6.21 On balance I have come to the view that the proper approach is to construe the 1995 Act as encompassing, within the definition of casual trading, selling at a franchise market but to also construe the Act, as a whole, as creating implied limitations on the power of regulation which can be exercised by the relevant local authority by means of bye-laws so as to render that power of regulation consistent with the provisions of s. 4 and s. 8. It follows that a local authority may not designate a casual trading area which does not encompass the entirety of an existing franchise market area unless the local authority goes through the process of extinguishing the franchise market area by the provision of alternative facilities that meet the conditions set out in s. 8. Either approach carries its own difficulties. To adopt the view urged on behalf of Mr. Simmonds would be to imply into the definition of casual trading in s. 2 something which is not actually there, that is a limitation, similar to that which existed under the 1980 Act, which excluded trading at a franchise market from that definition. On the other hand, in order to avoid the serious inconsistencies which I have sought to analyse, it is necessary to imply into the power of regulation conferred on the relevant local authority significant limitations of the type just discussed. Again, there are no such express limitations. On balance I have come to the view that construing the 1995 Act in the way which I have suggested does less injury to the language and overall architecture of the legislation than the alternative.

6.22 Given that view it seems clear that the first question raised in the preliminary issue must be answered in the way suggested by Ennis Council. The second question raises some further difficulties on which it is necessary to touch. It is, of course, true that, at the level of principle, a person can only carry out casual trading with a licence. Given that I have found that trading at a franchise market is encompassed within the definition of casual trading then it follows that, again at the level of principle, a person should only be able to trade at a franchise market if they hold a casual trading licence. However, it is also clear from the legislation that a licence is granted in accordance with bye-laws in that s. 4(1)(a) requires the payment of a fee fixed by bye-law so that in the absence of bye-laws there is no mechanism for the grant of a licence under s. 4. It follows further, therefore, that there needs to be in place valid bye-laws in order that the obligation to have a licence can come into practical effect. In the light of the findings which I have made concerning the significant limitations on the power of regulation in respect of franchise markets which are necessarily imposed on a local authority it remains, it seems to me, open to question as to whether the bye-laws in place in Ennis meet the statutory requirements which I have identified as being necessarily implied into the 1995 Act. In those circumstances, it does not seem to me to be appropriate to answer the second question in the manner in which it is asked for that question in turn at least arguably depends on whether, in the light of the interpretation I have placed on the 1995 Act, the relevant bye-laws remain valid.

6.23 For understandable reasons no argument on that question was addressed to me and it would, therefore, be wholly inappropriate for me to express any view on that question. I am, however, prepared to answer the second question in the affirmative subject to a proviso that the obligation to hold a casual trading licence arises only in the event that valid bye-laws, consistent with the provisions of the 1995 Act, as interpreted in this judgment, are found to be in existence.

6.24 Finally, I should comment briefly on one further matter that was mentioned in the course of argument. It is pointed out that the right of a market owner in respect of a franchise market (whether publicly or privately owned) frequently involves a right to charge sellers on a basis specified in the relevant instrument creating the market right or by statute. On that basis Mr. Simmonds complains that requiring him to pay a significant fee for a casual trading licence, to enable him to trade at a franchise market in respect of which he already has an obligation to pay, amounts to a form of double charge. It did not seem to me that that argument could represent a legitimate basis for interpreting s. 2 of the 1995 Act as excluding, from the definition of casual trading, selling at a franchise market. However, it does not necessarily follow that, for like reasons to those which I have already addressed in respect of s. 4 and s. 8 of the 1995 Act, there may be some implied limitations on the extent to which it may be legitimate to charge a licence fee for a casual trading licence whose terms are confined to trading within the bounds of a franchise market both as to time and place, which fee

places a disproportionate and unjustified burden on a franchise market trader compared with other traders who hold casual trading licences within the same local authority area but who do not trade at the traditional franchise market and are not, therefore, subject to a double charge. Likewise, nothing in this judgment should be taken as necessarily deciding that the undoubted general entitlement of a local authority to refuse a casual trading licence where there are not sufficient bays within a casual trading area, necessarily applies to the full extent in respect of trading at a franchise market. As that problem does not, in practice, as I understand it, arise on the facts of this case, it does not seem to me to be appropriate to reach any final conclusion as to the extent to which there may not also be implied limitations on the extent to which a local authority can refuse an established franchise market trader a licence in those circumstances.

7. Conclusions

7.1 I have found that the common law right to trade at a market or fair comes within the definition of casual trading in s. 2(1) of the 1995 Act. I have further found that a member of the public can be precluded from exercising that right where they do not hold and trade in accordance with a licence as required pursuant to s. 3(1). It would follow that Mr. Simmonds and Real Olive are not lawfully entitled, at least at the level of principle, to sell produce at the Ennis Market without holding such a licence.

7.2 However, of equal importance, it must be noted that I have not made any finding on the compatibility of the 2011 Bye-Laws with the 1995 Act and in the light of the franchise market rights held by Mr. Simmonds and Real Olive. Nor does it necessarily follow that the simple application of the 1995 Act serves, on its terms and in any substantial way, to abrogate the market rights held. It is to be noted that the 1995 Act contains clear protections under s. 8 and implied protections as addressed in this judgment, which any bye-laws would be required to vindicate. The question as to whether the 2011 Bye-Laws satisfy that test can only be resolved following a plenary hearing. I will now discuss with counsel any other directions as may be appropriate in the circumstances.