THE COURT OF APPEAL

Neutral Citation Number: [2019] IECA 233

Record Numbers: 2017 468 &

2017 602

Irvine J.
Whelan J.
Baker J.

BETWEEN/

POINT VILLAGE DEVELOPMENT LIMITED

(IN RECEIVERSHIP)

PLAINTIFF/RESPONDENT

- AND -

DUNNES STORES

DEFENDANT/APPELLANT

JUDGMENT of Ms. Justice Máire Whelan delivered on the 30th day of July 2019

Introduction

1. Writing extrajudicially in 1984 on the role of judges in construing commercial contracts, Lord Goff of Chieveley stated: -

> "We are there to help businessmen, not to hinder them; we are there to give effect to their transactions, not to frustrate them; we are there to oil the wheels of commerce, not to put a spanner in the works, or even grit in the oil."

2. Twenty years later Lord Steyn in "*Democracy through Law: Selected Speeches and Judgments*" (2004) pp. 225-226 wrote: -

> "A thread runs through our contract law that effect must be given to the reasonable expectations of honest men… The function of the law of contract is to provide an effective and fair framework for contractual dealings."

Lord Bingham's paper "*A new thing under the sun? The interpretation of contracts and the ICS decision*" Edin LR Vol 12, 374-390, considered that problems only arise when one tries to give practical effect to these laudable aims.

Background

3. This is firstly an appeal from the judgment of Costello J. delivered on the 14th November, 2017 on foot of which orders were made in the High Court on the 24th November, 2017 and perfected on the 8th December, 2017 directing that: -

> (1) The appellant (Dunnes) was obliged forthwith to release the sum of €15,000,000 (plus accrued interest to the date of release) from a nominated account for the benefit of the respondent (Point Village).
>
> (2) That Dunnes take all such steps necessary to release the said sum of €15,000,000 (plus accrued interest to the date of release) from the nominated account to Point Village including, if necessary, procuring that Dunnes' former solicitors assign an instruction to Allied Irish Banks Plc (AIB) releasing the said sums.

The appeal's scope is limited primarily to the parts of the decision of the High Court which interpreted and construed Clause 11(c) of the Terms of Settlement concluded between the parties on 7th July, 2010 compromising High Court proceedings 2009/5004P. The High Court determined (para. 123) that Point Village had complied with its obligations pursuant thereto such that Dunnes was required to release forthwith the said sum to Point Village.

Inspection Motion

4. Secondly, there is an appeal against an order of Mr. Justice Twomey made on the 15th September, 2017 refusing Dunnes' application for an order pursuant to O.31 r.18(1) of the Rules of the Superior Courts ("RSC"), as amended, directing Point Village to produce for inspection copies of documents identified in a notice to produce delivered on behalf of Dunnes on the 3rd July, 2017. The said documents were also specified in para. 7.14 of an affidavit of Stephen Tennant sworn on the 6th April, 2016 and comprise agreements for lease exchanged between Point Village and specified corporate entities.

5. Regarding the latter appeal, 2017/468, counsel for Dunnes indicated that if they fail in the substantive appeal, then production of the said documents for inspection "... isn't going to get me anywhere anyway because I have lost the main point." (transcript of hearing p.95). Point Village rely on the judgment of Mr. Justice Hogan in this Court (*Point Village Developments v. Dunnes Stores* [2017] I.E.C.A. 159) upholding a decision of Mr. Justice McGovern to refuse an application for discovery brought in these proceedings in respect of the same documents. The identical language found in O.31 r.18(3) RSC and O.31 r.12(3) RSC was emphasised by Point Village. Appeal 2017/468 will be considered at the conclusion of this judgment.

Appeal 2017/602: The Background

6. By virtue of an agreement for sale executed on the 26th February, 2008 between Mr. Henry A. Crosbie as vendor of the one part, and Dunnes as purchaser of the other part, Mr. Crosbie agreed to sell the Anchor Site in The Point Village development at North Wall Quay in the City of Dublin by way of lease to Dunnes for the term of 250 years, subject as therein specified. Dunnes was to be the Anchor Tenant in the development. Dunnes entered into a Development Agreement dated the 27th February, 2008. Thereafter, a lease (the long-lease) was duly executed by the parties on the 28th November, 2008. The judgment of the High Court sets out in detail the relevant provisions of the Development Agreement and the history of litigation between Dunnes and Point Village from 2009 onward concerning same, including Terms of Settlement entered into on the 7th July, 2010 by way of compromise of High Court proceedings record number 2009/5004P between Dunnes and Point Village and Mr. Crosbie.

7. Point Village company is now in receivership. Mr. Paul McCann and Mr. Stephen Tennant were appointed statutory receivers of certain assets of Mr. Crosbie and Point Village company, including their respective interests in The Point Village Centre, the lessor's interest on foot of the long-lease and the Development Agreement pertaining to development of The Point Village Centre and Point Square as amended by the Terms of Settlement.

8. Further litigation ensued upon that compromise and as Costello J. observes at para. 5 of her judgment: -

> "Despite the fact that the Settlement Agreement was intended to dispose of the 2009 proceedings, further disputes arose between the parties and the matter came back before court. The parties subsequently negotiated supplemental Terms of Settlement which were referred to as the supplemental agreement but the details of which are not relevant to the issues in this case."

Terms of Settlement

9. Clause 6 of the Terms of Settlement of the 7th July, 2010 provided: -

> "The developer/landlord will discuss with Dunnes the tenant mix for the ground floor of the Centre prior to entering into binding agreements for leases with tenants."

Clause 11(b) provides: -

> "The sum of €500,000 (plus interest accrued to date) shall be released within five working days of receipt by Dunnes or their solicitors of a solicitor's certified copy of the receipts or other evidence from Dublin City Council /DDDA of compliance with the financial conditions payable on foot of the Section 25 certificates insofar as they relate to or affect the store or as varied by agreement with Dublin City Council/DDDA (as the case may be) or by order of the Court."

Clause 11(c) provides: -

> "The sum of €15,000,000 (plus accrued interest to date) shall be released within five working days of receipt by Dunnes' solicitors of confirmation from William Fry that binding agreements for lease or leases have been exchanged with tenants in respect of at least seven of the ground floor units marked "X" on the annexed ground floor plan, four at least of which shall be internal units. The agreements for leases or leases may contain a clause that it is a pre-condition to the tenant being obliged to enter into the lease that Dunnes should have commenced the fit-out of the store."

10. Pursuant to the Terms of Settlement the adjusted consideration of €31,000,000 – which represented a reduction of €15,000,000 in favour of Dunnes under the Development Agreement – was to be lodged by Dunnes into a nominated account. The process of drawdown and payment out under the original Development Agreement was varied and replaced by Clause 11 of the Terms of Settlement. The said consideration was to be released to Point Village and Henry A. Crosbie in four discrete tranches. The first, in the sum of €11,888,000 (plus interest accrued) was released from the nominated account to Point Village in November, 2010 following execution of supplemental Terms of Settlement, the terms of which are not material in the context of this appeal.

11. The second tranche of €500,000 plus interest accrued was payable pursuant to Clause 11(b) "within five working days of receipt by Dunnes or their solicitors of a solicitor's certified copy of the receipts or other evidence from Dublin City Council/DDDA of compliance with the financial conditions payable on foot of the Section 25 certificates insofar as they relate to or affect the store…" Point Village furnished certified copies of the said receipts on or about the 28th August, 2015. Dunnes failed to release the sum of €500,000 from the nominated account. However, it transpires that on the 6th October, 2017, four days prior to the commencement of the hearing of this action before the High Court, Dunnes consented to the release of the said sum of €500,000 and Clause 11(b) is not the subject of any specific issue in this appeal.

12. The third tranche of €15,000,000 fell to be paid pursuant to Clause 11(c), the terms of which are outlined above. Same is the subject of this appeal.

13. Prior to the institution of the within proceedings, no further monies were released by Dunnes from the nominated account since November, 2010. Dunnes contended that their obligation to release the funds specified at Clauses 11(b) and 11(c) of the Terms of Settlement had not validly arisen for the reasons advanced in their Defence and discussed hereafter.

Judgment of the High Court

14. At para. 18 of the judgment the High Court noted that it was Point Village's case that acting through its receivers it had satisfied the requirements of Clauses 6, 11(b) and 11(c) of the Terms of Settlement and that in accordance with the terms of Clauses 11(b) and 11(c) Dunnes was obliged to release the sum of €500,000 (Clause 11(b)) and €15,000,000 (Clause 11(c)) plus accrued interest. Relevant to this appeal, Dunnes denied that there had been compliance by Point Village with the provisions of Clause 6 or Clause 11(c) and therefore it was contended that Dunnes was not obliged to release the sum of €15,000,000 plus accrued interest from the

monies held in the nominated account.

Characterisation of dispute

15. The issues to be determined were identified by the trial judge at para. 20 as follows: -

> "This Court must determine what is required to satisfy the provisions of Clause 11 (c) of the Settlement Agreement and Clause 6 of the Settlement Agreement. This Court must then determine whether, in fact, the plaintiff has met those requirements. If so, is the defendant obliged to release the sum of €15 million plus accrued interest from monies deposited in a nominated account?"

Jurisprudence considered

16. The trial judge considered the decision of Laffoy J. in *Point Village Developments and Anor v. Dunnes Stores* [2012] I.E.H.C. 482, an earlier decision involving the same parties, as authority for the proposition that the task of the Court in construing a contract is to ascertain the true meaning and intention of the parties which is to be found "from a consideration of the document as a whole and the factual background against which the contract was made".

17. The trial judge had regard to the Supreme Court decision in *Analog Devices B.V. v. Zurich Insurance Company* [2005] 1 I.R. 274 and the five principles of construction it enunciated. She also considered the Supreme Court decision in *ICDL v. European Computer Driving Licence Foundation Limited* [2012] 3 I.R. 327.

18. Having reviewed the decision of the Supreme Court in *Marlan Homes Limited v. Walsh and Wedick* [2012] I.E.S.C. 23 the trial judge found that the conclusions of McKechnie J. underscore the "limits of the role of the court in relying upon commercial common sense to construe a contract". At para. 24 the trial judge also considered the UK Supreme Court decision in *Arnold v. Britton* [2015] U.K.S.C. 36, noting that Lord Neuberger had observed that: - "Commercial common sense is not to be invoked retrospectively."

19. At para. 26 Costello J. noted that Dunnes had placed particular reliance on the decision of Lord Hoffmann in *Mannai Investment Company Limited v. Eagle Star Life Assurance Company Limited* [1997] A.C. 749 and observed: -

> "Lord Hoffmann distinguished between the meaning of words and the question of what would be understood as the meaning of the communication...Lord Hoffmann said that the meaning of the notice was clear even though the words used were mistaken. He construed the notice by reference to the lease which it sought to terminate and said that a reasonable recipient of the notice will understand it to mean that the tenant wished to terminate the lease on the date which accords with the relevant clause in the lease. In other words, he held that the meaning was clear by reference to the fact that this was a notice intending to terminate a lease even though on its face the wording was incorrect."

The trial judge concluded at para. 118 that *Mannai* did not assist in the construction of Clause 11(c).

Analysis of Clause 11(c)

20. At para. 29 the trial judge noted that Clause 11(c)

> "…reflects the mechanism chosen by the parties to determine when the €15m was to be released from the nominated account. It also determined when the defendant was contractually required to commence fit out of the store in the Centre. Clause 14 of the Settlement Agreement stated that the Access Date shall be 30 days after the date of receipt by the defendant of the clause 11 (c) certificate."

At para. 30 she noted: -

> "The agreement was that solicitors for the plaintiff were to confirm to the defendant that a particular state of facts existed. There was no provision for a review of this confirmation. This is in contrast to the provisions of clause 7 of the Development Agreement."

She continued at para. 31 –

> "There is no equivalent involvement by the defendant or a representative of the defendant in the confirmation to be provided by the plaintiff's solicitors as set out in clause 11(c). It follows that the parties have agreed to accept the independent assessment of the solicitors acting for the plaintiff that the binding agreements for lease or leases have been exchanged with tenants in respect of at least seven of the designated units of which at least four are internal units."

The Court noted, having reviewed certification provided by McCann Fitzgerald Solicitors pursuant to Clause 11(c) dated the 29th February, 2016 that: -

> "There was no agreement that the defendant would be entitled to look behind this confirmation. It follows that it cannot do so absent fraud, or manifest error. Fraud has not been alleged in this case." (para. 38)

Confirmation

21. In the High Court, Dunnes had argued that the said solicitors erred on two counts in purporting to file confirmation of the requisite binding agreements under Clause 11(c). It was submitted that two of the alleged agreements for lease which they had purported to confirm as binding were not binding within the meaning of Clause 11(c). In one instance the tenant company had been struck off the Register of Companies and dissolved about 20 months after having executed the agreement for lease. It was contended on behalf of Dunnes that in the circumstances there never was a binding agreement for lease in respect of the said unit and that this was fatal to the claim of Point Village of compliance with the provisions of Clause 11(c).

22. A separate issue concerned an agreement for lease concluded on the 25th August, 2015 with Rossport Retail Services Ltd/Kix which had incorporated a long-stop date. The latter provided that should Dunnes, as Anchor Tenant, fail to commence fit-out of the anchor unit on or before two years from the 25th August, 2015 either party was at liberty to rescind the agreement for lease on giving the other seven working days' notice in writing whereupon the contract for lease would be null and void and have no further force or effect. On the 11th September, 2017 Kix exercised the said condition and served notice rescinding the agreement. Dunnes

contended the said agreement was not binding as of the date of its execution as contemplated by Clause 11(c).

Clause 6

23. The trial judge, having analysed the relevant provisions of the Development Agreement and the long-lease, concluded at para. 58 that neither gave Dunnes any right to discuss the tenant mix of the Centre with Point Village company. The question then was the extent of which, if at all, Clause 6 of the Terms of Settlement may have altered that position. She analysed the contentions advanced on behalf of Dunnes who argued they had a right to object to tenants in other units "if they were not of a high quality". Dunnes contended that the tenants had to be "… what everyone had understood the tenants to be", arguing in the High Court that Point Village was frustrating the Development Agreement if it contended that there was an entitlement to let the units to any tenant of any standard. They posited that the Development Agreement gave them the right to object to tenants in other units if they were not of a high quality. An entitlement to object to tenants was contended for by Dunnes to derive primarily from the Development Agreement. The trial judge concluded at para. 62 of her judgment that such a construction: -

> "…seriously overstates the meaning of Clause 6 and what is required by this clause. The plaintiff agreed to discuss with the defendant the tenant mix for the ground floor of the Centre. It did not agree to discuss the tenant mix for the whole Centre. The agreement was to discuss the tenant mix, not prospective tenants for each of the units of the ground floor."

At para. 63 she observed that: -

> "The implications of the defendant's construction of Clause 6 is that the defendant was entitled to discuss each and every prospective tenant for each unit of the ground floor prior to the plaintiff entering into a binding agreement with each individual tenant. … This is not what Clause 6 provides. It is important to construe the document by what was permitted by Clause 6 and not in the light of what actually happened in this case. The fact that the plaintiff entered into seven agreements for leases in August 2015 does not imply that it was required to do so."

24. She then considered whether Point Village had complied with Clause 6 in light of the sequence of events over the years 2014 and 2015 in particular. She concluded that there had been a "discussion" with Dunnes regarding the tenant mix contemplated by Clause 6 of the Terms of Settlement. The case had proceeded before the High Court on affidavit. In evaluating whether a discussion of the tenant mix had ever taken place in accordance with the requirements of Clause 6 of the Terms of Settlement, the Court noted the arguments advanced on behalf of Dunnes that there was no affidavit from anyone present at a meeting on the 18th July, 2014 to provide direct evidence of what had occurred in circumstances where Dunnes denied Point Village's contention that the tenant mix had been discussed at that meeting. Emails of the 17th and 18th July, 2014 from Dunnes suggested that "there was no discussion of tenant mix". It was further contended on behalf of Dunnes that since the meeting of the 18th of July, 2014 had been convened at their instigation it could not thereby be a meeting that could satisfy Clause 6.

25. The trial judge found at para. 81 of the judgment that: -

> "It is not open to the defendant to argue that there was no discussion of tenant mix for the purposes of Clause 6 at the meeting of the 18th July, 2014. Both Mr. Sheridan for the defendant and Mr. Tennant for the plaintiff stated on affidavit that tenant mix was discussed at this meeting. The defendant cannot resile from the averment of its deponent and it cannot do so on the basis of the emails of the 17th and 18th July 2014 when the authors of the emails did not swear affidavits. Furthermore Mr. Sheridan did not dispute Mr. Tennant's account of the discussion of the 18th July, 2014."

She considered it to be highly relevant that Dunnes' representative, Mr. Deeny, who had attended the said meeting had not contested that the tenant mix was discussed at the meeting, nor had he asserted that the July emails supported the view that the tenant mix was not discussed. (para. 82 of the judgment)

26. The trial judge considered the evidence and expressed the view that –

> "…the plaintiff made many attempts over a period from 30th April, 2014 to 26th August 2015 to meet the defendant to discuss the tenant mix of the ground floor of the Centre. The defendant failed to respond to the correspondence substantively."

She concluded that there was: -

> "…no merit in the defendant's argument that the receivers failed to carry out their obligations under Clause 6." (para. 87)

She was satisfied that there was no conflict in the testimony before the Court that there had been a high level of discussion of tenant mix on the 18th July, 2014. There was no conflict of fact which required to be resolved by oral evidence in relation to the matter (para. 93).

"Tenant"

27. The other issue for resolution was the proper construction of the word "tenant" in Clause 11(c) of the Terms of Settlement. It being contended on behalf of Dunnes that the word ought to be construed to mean a high quality tenant. By contrast, Point Village argued that the word should be given its ordinary and natural meaning. The trial judge noted Clause 25 (the Entire Agreement Clause) of the Development Agreement and observed that: -

> "The defendant accepted that the clause precluded the introduction of implied terms into the Development Agreement based upon materials produced or representations made prior to the conclusion of the Agreement. But it did not accept that it precluded reliance on such materials to construe the terms of Development Agreement. On that basis, it sought to rely upon marketing materials issued by the plaintiff or Mr. Crosbie prior to the date of the Development Agreement to assist in the construction of clauses 6 and 11 of the Settlement Agreement." (para. 105 of judgment)

28. Having considered the arguments advanced by Dunnes for the proposition that self-evidently only high quality tenants were contemplated and same was not require to be expressly provided in the agreement, the judge concludes at para. 110: -

> "The defendant may well have been far from indifferent as to the quality of tenants in the other units but it by no means follows that the plaintiff agreed that the tenants referred to in Clause 11 (c) all had to be high quality tenants as determined by the defendant. On the contrary, Clause 11 and in particular Clause 11 (c) reflects a compromise reached

by the parties. The clause must be construed objectively by reference to the language chosen by the parties, and not by reference to the subjective intentions of one – or even both – of the parties."

29. She considered that the construction of the word "tenant" and accordingly the meaning of Clause 11(c) of the Terms of Settlement as contended for by Dunnes would impose three obligations which were not to be found in the Development Agreement, the long-lease or the Terms of Settlement:

> "(i) A restriction on the plaintiff's freedom to contract with tenants as it can only contract with high quality tenants;
>
> (ii) If the defendant is of the opinion that any or all of the seven tenants in seven of the units marked X is not a high quality tenant (as defined by it) then the defendant is not obliged to release the money in the nominated account in accordance with the provisions of Clause 11 (c);
>
> (iii) The plaintiff is obliged to provide detailed financial information about the prospective tenants of the seven units in order that the defendant may satisfy itself that they are high quality tenants."

She noted Point Village's contentions that the word "tenant" in the Terms of Settlement was used to connote a tenant as opposed to a licensee or occupier of a unit on any other basis and found that: -

> "No particular quality is to be attached to the tenants of the seven units. It was at all stages acknowledged that there was to be a mix of tenants in the Centre. This necessarily means that not every tenant in the Centre has to be of high quality as contended by the defendant."

She concluded at para. 114: -

> "Clause 11 (c) has to be seen in the correct context. Detailed agreements were entered into between the parties in 2008 which, as I have discussed above, gave the defendant no involvement in the choice of the tenants for the Centre and established no quality threshold for any of the tenants in the Centre. On the eve of the trial of the 2009 proceedings the parties reached a detailed, thorough compromise agreement. The Terms of Settlement clearly reflect the terms upon which the parties were prepared to compromise the 2009 proceedings…the silence of all agreements on the meaning to be attributed to the word 'tenant' in this Clause is significant."

30. She then proceeded to consider how Clause 11(c) might operate were Dunnes' construction of "tenant" correct. She identified that the failure to establish criteria setting out the threshold or standard required so that the solicitors could reach a determination in respect of each tenant weighed against the construction contended for by Dunnes. She further considered it significant that the Terms of Settlement was conditional on Point Village's bank AIB consenting to the agreement: -

> "As such, it was the intention of the parties and essential that the terms upon which the monies in the nominated account would be released could be clearly understood by that third party. The defendant's construction of the word 'tenant' in Clause 11 (c) as meaning a high quality tenant means that 'in the absence of the appropriate tenant mix being confirmed [by the defendant] following satisfaction of Clause 6…the plaintiff [could not] secure any tenants so as to give effect to Clause 11(c)' is not apparent from an objective reading of the documents." (para.116)

31. She considered the arguments of Dunnes in regard to the construction of the word "tenant" by reference to what they contended was an appropriate tenant mix for the Centre as a whole. She noted that Clause 11(c) "…expressly contemplated that three of the seven units could be cafés or other food outlets. This underscores the fact that letting seven units (which does not necessarily imply seven different traders) is not to be equated with establishing a tenant mix for the Centre as a whole or even of the ground floor." (para. 117)

She distinguished the decision of Lord Hoffmann in *Mannai Investments* and considered that it did not provide assistance in the construction of Clause 11(c).

Plenary hearing

32. Regarding the contention that the action be remitted to plenary hearing the trial judge observed at para. 121: -

> "I do not accept that such oral evidence is required in order to construe the terms at issue in the Settlement Agreement. I have construed the clauses by reference to the terms of the Settlement Agreement itself and the fact that it recorded the compromise reached by the parties to settle High Court litigation. I have construed the Settlement Agreement in the light of the original contracts, the Development Agreement and the long-lease, precisely in the way in which Laffoy J. construed the Settlement Agreement in her decision in earlier proceedings between the parties construing Clause 11 (a) referred to above. I am satisfied that I am in a position to construe this document without the need for oral evidence and so it is not necessary to refer this special summons for plenary hearing."

33. She concluded that the requirements of Clause 11(c) of the Terms of Settlement had been complied with in full by Point Village upon receipt by Dunnes of the letter of the 29th February, 2016 and accordingly Dunnes was required to release forthwith the sum of €15,000,000 plus accrued interest to Point Village from the nominated account. (para. 123)

Grounds of Appeal

34. Dunnes appealed relying on twelve grounds: -

> (i) That the High Court judge erred in her interpretation and application of the legal principles relevant to the proper construction and interpretation of contracts. The ordinary and natural meaning of the word "tenant" is not in dispute, rather the type of "tenant" referred to in Clause 11(c) of the Terms of Settlement to which resort to the factual matrix was necessary in order to properly interpret and construe the said clause.
>
> (ii) The High Court failed to properly interpret and apply the principles set out in *Mannai Investment Co. Limited v. Eagle Star Life Assurance*, in particular the distinction to be drawn between what words actually mean and what is to be understood as the meaning intended by a person who uses a particular word.

(iii) The High Court judge erred at para. 117 of her judgment in finding that Clause 11(c) of the Terms of Settlement is not to be construed by reference to the tenant mix of the whole centre.

(iv) The High Court judge erred in finding that, although the entire agreement clause in the Development Agreement permitted Dunnes to introduce marketing material falling within the applicable factual matrix in aid of the construction of Clause 11(c) of the Terms of Settlement, it was not permissible to consider same as part of the exercise of construing Clause 11(c) for the reasons stated.

(v) The High Court judge erred in fact and law in failing to imply the term "high quality" in reference to "tenant" in Clause 11(c) of the Terms of Settlement.

(vi) The judge erred in finding that there was no manifest error on the part of Point Village's solicitors in declaring that binding agreements for lease had been executed in satisfaction of Clause 11(c). It was contended that since the agreement for lease with Kix being conditional (in a manner not permitted by Clause 11(c)) it was not binding within the meaning of Clause 11(c) of the Terms of Settlement.

(vii) The judge erred in finding that binding agreements for lease had been entered into in satisfaction of Clause 11(c) of the Terms of Settlement where there was no evidence that same complied with Clauses 4.7.1. and 4.7.2 of the long-lease.

(viii) The High Court judge erred in failing to require Point Village to produce the agreements for lease: Costello J. endorsed and accepted the reasoning of Twomey J. in his decision of September, 2017 ([2017] I.E.H.C. 538) that Dunnes had no entitlement to look behind the confirmation issued by McCann Fitzgerald on 29th February, 2016.

(ix) The High Court erred in finding that Dunnes had no entitlement to involvement in the process whereby Point Village's solicitors confirmed the existence of binding agreements for lease.

(x) The High Court erred in assuming the understanding of AIB that a requirement in the Terms of Settlement that it consent to same required it to be alerted to any particular construction of the Terms of Settlement including the construction advanced by Dunnes.

(xi) The High Court judge erred in not remitting the matter to plenary hearing.

(xii) The High Court judge erred in finding that Point Village had complied with its obligations under Clause 11(c) thereby requiring Dunnes to release the sum of €15,000,000 from the nominated account for the benefit of Point Village.

Point Village oppose both appeals on all grounds.

Submissions on behalf of Dunnes

35. Dunnes submit that the trial judge identified the applicable case law concerning the construction of contracts but failed to correctly apply the said principles, and in particular failed to properly reconcile the requirement to have regard to the natural and ordinary meaning of the words used and the applicable factual matrix. Dunnes relied on *Kramer v. Arnold* [1997] 3 I.R. 43 at p. 55 as authority for the proposition that where a dispute exists as to the proper construction of a contract –

> "…the task of the court is to decide what the intention of the parties was, having regard to the language used in the contract itself and the surrounding circumstances."

It is not a case of favouring one approach over another, rather a unitary approach is to be adopted.

36. Dunnes relies on the five principles enunciated by Lord Hoffmann in *I.C.S. v. West Bromwich Building Society* [1998] 1 W.L.R. 896 at p. 912 and the decision of Lord Neuberger in the UK Supreme Court decision of *Arnold v. Britton* [2015] U.K.S.C. 36. Dunnes submits that for the matrix of fact to be taken into account in construing a contract it is not necessary to first raise an ambiguity in the express words used. Reliance was placed on judicial and academic authorities for this proposition, including the decision of Lord Steyn in *R. v. National Asylum Support Service* [2002] 1 W.L.R. 2956 at para. 5 wherein it was contended that the process of construction is a "unitary exercise" requiring all the principles of construction to be considered in the round. It is not a process that favours one principle over another. In this regard reliance was also placed on the judgment of Lord Hodge in *Arnold v. Britton*.

37. Dunnes argued that in construing the meaning of a contractual provision, there is a distinction to be drawn between what the words actually mean and what is to be understood by a person who uses the words. Reliance was placed on Lord Hoffmann's decision in *Mannai Investment v. Eagle Star Life Assurance Co. Limited* that part of the process of construing the meaning of words is –

> "…our knowledge of the background against which the utterance was made. It is that background which enables us, not only to choose the intended meaning when a word has more than one dictionary meaning but also, in the ways I have explained, to understand a speaker's meaning, often without ambiguity, when he has used the wrong words."

38. It was contended that to appreciate the distinction between the word "tenants" and what the parties actually intended it was necessary to adopt the unitary approach to construction and have particular regard to the applicable factual matrix so as to fully understand the knowledge and assumptions of the parties as they were at the time of execution of the contract, and that the trial judge failed to do this. Dunnes contend for a wide construction of the factual matrix.

Commercially sensible construction – Business Common Sense

39. It was argued that the agreements the subject of the dispute should be given a commercially sensible construction with reliance being placed on the decision of *Rainy Sky S.A. v. Kookmin Bank* [2011] U.K.S.C. 50 where it was stated: -

> "If there are two possible constructions, the Court is entitled to prefer the construction which is consistent with business common sense and to reject the other."

The evidence as to the objective intention of the parties

40. Dunnes contend that the relevant undisputed evidence is that at the time of execution of the Development Agreement and the Terms of Settlement between the parties the type of tenant of the Centre that both parties had in contemplation was of a high quality. It is posited that the evidence adduced in that regard by Dunnes as comprising the applicable "matrix of fact" is not representative merely of the subjective intentions of Dunnes. Rather, it reflects the mutual understanding and intention of the parties to the Development Agreement and to the Terms of Settlement which amended it. Hence, it is highly probative of the matters in issue.

41. Dunnes seek to rely on extrinsic material produced by or on behalf of Point Village at the time of execution of the Development Agreement and in advance of conclusion of the Terms of Settlement. It was contended that such material would evidence the generally publicised understanding of Point Village as to the quality of tenant contemplated to occupy the Centre. It was argued that the understanding of both parties as to the quality of the Centre as a retail destination had not varied between the execution of the Development Agreement in February 2008 and the Terms of Settlement in July 2010.

42. Reliance was placed on the affidavit of Hugh Markey, a retail property expert sworn on the 12th June, 2017 who deposed that the tenant mix proposed by the receivers does not accord with the quality of tenant envisaged by Point Village as Mr. Markey "generally" understood it to be. It was contended that the affidavit evidence of Andrew Bond, an expert in retail property in London, to the effect that the type of tenants proposed by the receivers to occupy the Centre is against what a rational developer, landlord, funder/investor or retail agent in this type of scheme would adopt, offered support for Dunnes' position that the tenants as proposed by the receivers do not meet the objective of Clause 11(c) of the Terms of Settlement.

43. Dunnes contended that the trial judge erred in finding that Clause 11(c) is not to be construed by reference to the tenant mix of the whole Centre.

44. It was submitted that no evidence had been adduced as to the understanding, if any, on the part of AIB as to the proper construction of the agreements:

> "Having adopted a literal construction to Clause 11(c), to the exclusion of the applicable factual matrix, it is remarkable that the learned trial judge then proceeded to copper fasten her construction of Clause 11(c) by reference to the unknown understanding of AIB."

Implied terms

45. It was contended that were the Court to find in favour of Dunnes in respect of their submissions pertaining to the proper construction of the agreements, then it is entitled to imply a term into the agreements that the tenants referred to are to be of a high quality, commensurate with the status of the Centre as understood by the parties at the time of execution of the agreements. In support of a contention that a term amplifying the description of tenant might be inferred on the basis of the presumed intention of the parties, Dunnes rely on the decision of the Court of Appeal in *Flynn v. Breccia* [2017] I.E.C.A. 74 and the Supreme Court decision of *Sweeney v. Duggan* [1997] 2 I.R. 531.

46. Relying on the decision of O'Higgins J. in *Meridian Communications v. Eircell Limited* [2002] 1 I.R. 17 Dunnes contends that, if this Court is satisfied that it was the intention of the parties to the agreements that the "tenants" referred to in Clause 11(c) of the Terms of Settlement were intended to be tenants of a high quality then, it is open to this Court, as it was to the High Court, to imply such a term into Clause 11(c).

The obligation to exchange "binding" agreements for lease

47. To trigger the obligation of Dunnes to release €15,000,000 from the nominated account pursuant to Clause 11(c), Point Village was obliged to exchange binding agreements for lease for seven units. Dunnes objects that the certificate served by McCann Fitzgerald solicitors on behalf of the receivers asserting compliance does not expressly confirm that the agreements for lease were "binding" and neither was it specifically deposed to in the affidavit of the receiver that the agreements for lease were binding. Further, the receivers have not provided Dunnes with copies of the agreements for lease as exchanged with the said tenants. Reliance was placed on events surrounding an agreement for lease concluded by Point Village with Rossport Retail Services Limited trading as Kix and in particular Clause 2.1 thereof which provided same was conditional upon Dunnes Stores commencing its fit-out of the anchor unit on or before a long-stop date two years post execution of the agreement for lease.

48. Dunnes contended that this provision represented a condition precedent rendering the agreement for lease non-compliant with the requirements of Clause 11(c) of the Terms of Settlement. It was argued on behalf of Dunnes that Clause 11(c) did not permit the inclusion of any conditions in an agreement for lease save as expressly provided therein; "The extent to which the parties contracted to any such additional clauses operating in an agreement for lease is as expressly provided in Clause 11(c)." It was argued that the trial judge failed to address these arguments and so fell into error. It was posited that the receivers misconstrued Clause 11(c) and the said clause did not permit or contemplate Clauses 2.1. and 2.2. of the Kix agreement for lease. It was contended that the trial judge erred in failing to appreciate that it is not the ability to rescind the agreement for lease that renders it incompatible with Clause 11(c) but rather the fact that it is not representative of an agreement for lease as provided for by the said clause.

49. It was contended that the trial judge erred in finding that the agreements for lease were "binding"; Dunnes argued that: "It is entirely plausible that the subjective exercise engaged in on behalf of the receivers was erroneous. If that is the case, then the receivers have not complied with Clause 11(c)." It followed, Dunnes maintain, that they should not be compelled to release €15,000,000 pursuant to Clause 11(c).

50. Dunnes further allege failure on the part of the receivers to provide any information as to whether the agreements for lease furnished by Point Village are valid in accordance with the obligations on the receivers to comply with the long-lease dated the 28th November, 2008 between Mr. Crosbie and Dunnes. Clauses 4.7.1 and 4.7.2 of the long-lease require the receivers to include certain restrictions in leases with other tenants of the Centre for Dunnes' benefit. It is contended that the trial judge erred in finding that, absent fraud or manifest error, Dunnes had no entitlement to go behind the written confirmation provided to Dunnes on 29th February, 2016. It was said that that Dunnes ought not be precluded by the Terms of Settlement from litigating the validity of the certification of the exchange of agreements for lease and that the trial judge erred in failing to look behind the said certification.

Hearing of proceedings on affidavit

51. It was contended that the trial judge erred in failing to remit the matter to plenary hearing. As a result, it was argued that Dunnes has been deprived of the opportunity of testing what Point Village understood and intended the agreements to mean. Reliance

was placed on O.38 r. 9 of the RSC regarding the circumstances where special summons proceedings are remitted to plenary hearing.

Dunnes' contended construction of "tenants" in Clause 11(c)

52. Dunnes contended that "tenants" must by necessary implication be "of a high quality consistent with the projected quality of the overall Point Village development" and this is deposed to in the affidavit of Thomas Sheridan sworn before the High Court on the 9th May, 2016. The word "tenant", it is argued, is required to be read as connoting "high quality tenants" or "high class tenants". Dunnes further argued that to trigger their obligations pursuant to Clause 11(c), the agreements for lease entered into must be proven to be valid and in accordance with the obligations on the receivers to comply with the long-lease between Mr. Crosbie and Dunnes dated 28th November, 2008. Clauses 4.7.1 and 4.7.2 of the long-lease require the receivers to include certain restrictions in leases with other tenants of the Centre to Dunnes' benefit. In the absence of such proof, any agreement for lease cannot be considered valid in the context Clause 11(c). The receivers failed to provide any information by affidavit or otherwise on this, notwithstanding Dunnes having raised the issue. In the circumstances, Dunnes assert that significant doubts surround the validity of the agreements for lease. In order to satisfy Clause 11(c), an agreement for lease must prove actual compliance with the requirements of the long-lease, it was contended.

Ducas

53. Dunnes contend that since Ducas, a corporate entity which executed an agreement for lease, was dissolved twenty months after execution of same and struck off the Register of Companies, its agreement for lease was not binding as required pursuant to Clause 11(c) of the Terms of Settlement.

Kix

54. A separate basis on which Dunnes seek to impugn the validity of the purported confirmation by Point Village of the existence of seven binding agreements for lease arose from the agreement entered into with Kix, which, it contended, ought not to be considered as a "binding agreement for lease" within the meaning of Clause 11(c) of the Terms of Settlement by reason that a provision in that agreement for lease rendered it conditional (as outlined at para.22 above) and as such, Dunnes argue, it was not binding.

Entire Agreement Clause

55. The entire agreement clause at Clause 25 of the Development Agreement provides: -

> "The developer and Dunnes each acknowledge that the terms and conditions set out and incorporated in this agreement constitute the entire contract and arrangement between them relating to the subject matter of this agreement."

Dunnes argue that the receivers' submissions in the High Court that it was precluded from relying on evidence that preceded the Development Agreement were flawed. Dunnes rely on *John v PriceWaterhouseCoopers* [2002] E.W.C.A. Civ 899 to support the contention that the entire agreement clause does not preclude the admission of evidence in aid of the construction of a contract. Dunnes contends that the marketing material adduced in evidence can be used in aid of construction of the Development Agreement and to properly construe the word "tenant" in Clause 11(c).

Arguments advanced on behalf of Point Village

56. Point Village contends that the trial judge was correct in her determination and there is no legal basis for Dunnes' refusal to release the €15,000,000 forthwith from the nominated account. They argued that: -

> (a) There was no condition in either the Development Agreement or the Terms of Settlement which permitted Dunnes to decline to release the monies if not satisfied that the tenants were of a "high quality". Clause 11(c) of the Terms of Settlement was silent regarding the quality or any particular qualifications to be held by a tenant.
>
> (b) The Terms of Settlement was a commercial contract heavily negotiated on an arm's length basis by two sophisticated counterparties who enjoyed the benefit of legal advice, and in such circumstances the meaning attributed to the words used in the agreement must be their literal ordinary meaning.
>
> (c) Confirmation under Clause 11(c) of the Terms of Settlement merely envisaged receipt by Dunnes' solicitors of confirmation from Point Village's solicitors – McCann Fitzgerald – "that binding agreements for lease or leases have been exchanged with tenants…" Such notice constituted the "event" which commences time running for the release of €15,000,000 plus accrued interest within five working days of said receipt.
>
> (d) The material on which Dunnes rely to support its construction of "tenant" comprises pre-contractual promotional material together with affidavit evidence of opinion which purports to identify what Dunnes' subjective intentions were at the time of entering into the said agreements. Same was inadmissible in evidence.
>
> (e) Reliance was placed, *inter alia*, on the "entire agreement clause" in Clause 25 of the Development Agreement and also the jurisprudence, in particular the decision of the Supreme Court in *Analog Devices* for the proposition that such material was not admissible.
>
> (f) It was argued that Point Village had complied with the provisions of Clause 6 of the Terms of Settlement. No basis was identified by Dunnes for the proposition that the word "discuss" in that clause meant anything more than its plain and ordinary meaning. It was contended that nothing in either the Development Agreement or the provisions of the Terms of Settlement entitled Dunnes to insist that it be provided with, *inter alia*, confidential financial or commercial information pertaining to prospective tenants. Neither did Dunnes have any entitlement to make decisions regarding the selection of prospective tenants for the Centre.
>
> (g) It was contended that in the case of Ducas and Kix binding agreements for lease had been entered into which were valid at their respective dates of execution and same were valid and within the ambit and intendment of Clause 11(c).
>
> (h) Point Village contended that there was no legal basis upon which the matter ought reasonably to have been adjourned to plenary hearing; extensive discovery had been made by Point Village prior to hearing and Dunnes had the entitlement to apply to cross-examine any of the deponents who had sworn affidavits on behalf of Point Village but declined to avail

of this option. It was contended that Dunnes failed to identify any specific issue of fact which was in dispute between the parties and as such, they had failed to identify any valid ground for adjourning the action to plenary hearing.

(i) Point Village argued that Dunnes had a motive to delay: "Dunnes has for a period of years sought to delay fitting out the anchor unit, which would involve significant financial outlay and for this reason has declined to accept that the confirmation which was provided under Clause 11(c) is valid."

Key issues for determination

57. In written submissions and arguments before this Court at the appeal hearing, Dunnes relied primarily on two key issues to support their contention that Point Village had not satisfied the terms of Clause 11(c): -

(i) The term "*tenants*" referred to in Clause 11(c) is to be construed as meaning tenants of a high quality commensurate with the status of the Centre as a whole as mutually understood by Point Village and Dunnes on execution of the Agreements. The tenants acquired by the receivers are not of a high quality and accordingly Point Village has not yet satisfied Clause 11(c).

(ii) The receivers have not established that "binding" agreements for lease have been executed within the meaning of Clause 11(c) of the Terms of Settlement.

58. Dunnes contended that if they succeed on either of these grounds then the High Court judge erred in concluding that the confirmation furnished pursuant to Clause 11(c) of the Terms of Settlement that binding agreements for lease had been exchanged with tenants in respect of seven units was valid so as to trigger immediate release of the sum of €15,000,000 together with accrued interest from the nominated account. It was further argued that the High Court judge erred in concluding it was not necessary to adjourn this suit to plenary hearing.

Discussion

59. It is noteworthy that in *I.C.S. v. West Bromwich Building Society (No. 1)* Lord Hoffmann framed his discussion of the principles of contractual interpretation by reference to the speeches of Lord Wilberforce in two earlier keynote decisions, *Prenn v. Simmonds* [1971] 1 W.L.R. 1381 and *Reardon Smith Line Limited v. Yngvar Hansen-Tangen* [1976] 1 W.L.R. 989. In the former case, it had been contended that a volume of evidence, oral and documentary, as to the parties' intentions which would be admissible on a claim for rectification was also admissible when considering an issue of construction. The House of Lords unanimously rejected this proposition. *Prenn v. Simmonds* continues to be clear authority for the proposition that extraneous material and documents, brochures and the like, are inadmissible as an aid when considering an issue of construction. In his judgment in *Prenn* Lord Wilberforce observed at p.1384: -

"The time has long passed when agreements, even those under seal, were isolated from the matrix of facts in which they were set and interpreted purely on internal linguistic considerations."

Lord Wilberforce went on to clearly set out however that prior negotiations could not be looked at in aid of the construction of a written document.

60. Such an approach is always subject to the principle that evidence of the parties' pre-contractual negotiations remains inadmissible in this jurisdiction for the purpose of drawing inferences about what the contract means. This reflects the position re-stated in *Chartbrook Limited v. Persimmon Homes Limited* [2009] U.K.H.L. 38 where Lord Hoffmann, speaking *obiter*, emphasised the importance of the distinction between the different approaches to be adopted when merely interpreting as distinct from dealing with a question of rectification of a document. In that case, the appellant succeeded in reliance on the equitable remedy of rectification. Lord Hoffmann noted that when the Court construes a document it states what the document has always meant. There is no element of discretion in such an exercise. With rectification, the Court is in effect retrospectively altering the document and has an equitable discretion to refuse the remedy if it is shown that it will cause injustice or hardship.

Mannai

61. Dunnes relied on the decision in *Mannai Investment Co. Limited v. Eagle Star Life Assurance Co.* where Lord Hoffmann considered that part of the material which we use to understand a speaker's utterances –

"…is our knowledge of the background against which the utterance was made. It is that background which enables us, not only to choose the intended meaning when a word has more than one dictionary meaning but also, in the ways I have explained, to understand the speaker's meaning, often without ambiguity, when he has used the wrong words."

62. This observation in *Mannai* is merely reflective of a case where the error of expression was so obvious in a notice to quit that the Court had to construe the contractual provision in question to make sense of it. The notice in question specified the wrong day of the month. The error was obvious to both parties. Lord Hoffmann's position is later repeated in his statement: -

"If the clause had said that the notice had to be on blue paper, it would have been no good serving a notice on pink paper, however clear it might have been that the tenant wanted to terminate the lease".

A distinction must be drawn between matters of form and matters of substance.

63. McDermott and McDermott in *Contract Law* (2nd Ed., Bloomsbury Professional, 2017) succinctly analyse the jurisprudence, noting at 10.116: -

"Traditionally there was a limited scope for a court in construing a contract to correct mistakes. However in *Mannai Investments*… a broader approach was indicated in relation to mistakes, with Lord Steyn emphasising the need for a commercially sensible construction. He stated;

'It is of course true that the law is not concerned with the speaker's subjective intentions. But the notion that the law's concern is therefore with the "meaning of his words" conceals an important ambiguity. The ambiguity lies in a failure to distinguish between the meaning of the words and the question of what would be understood as the meaning of a person who uses words. The meaning of words, as they would appear in a dictionary, and the effect of their syntactical

> arrangement, as would appear in a grammar, is part of the material which we use to understand a speaker's utterance. But it is only a part; another part is our knowledge of the background against which the utterance was made. It is that background which enables us not only to choose the intended meaning when a word has more than one dictionary meaning but also, in the ways I have explained, to understand the speaker's meaning, often without ambiguity when he has used the wrong words.'"

64. The authors further note at 10.122 that –

> "There remain cases where a more restricted, technical approach should properly be maintained. In *Mannai Investments* Lord Hoffmann said;
>
> 'There are documents where the need for certainty is paramount and in which admissible background is restricted to avoid the possibility that the same document may have different meanings for different people according to their different knowledge of the background documents. Documents required by bankers, commercial credits fall within this category.'"

Dunnes do not allege mistake. Neither do they seek rectification of the Terms of Settlement.

Intention

65. Lord Hoffmann in *I.C.S.* had also relied on the decision of Lord Wilberforce in *Reardon Smith Line Limited v. Yngvar Hansen-Tangen*. In the latter judgment Lord Wilberforce had cited *Wickman Machine Tool Sales Limited v. L. Schuler AG* [1974] A.C. 235 stating: -

> "When one speaks of the intention of the parties to the contract, one is speaking objectively – the parties cannot themselves give direct evidence of what their intention was – and what must be ascertained is what is to be taken as the intention which reasonable people would have had if placed in the situation of the parties. Similarly, when one is speaking of aim, or object or commercial purpose, one is speaking objectively of what reasonable persons would have in mind in the situation of the parties…"

In *Bank of Credit and Commerce International S.A. v. Ali* [2002] 1 A.C. 251 the House of Lords stated at para. 8 that: -

> "In construing this provision, as any other contractual provision, the object of the Court is to give effect to what the contracting parties intended. To ascertain the intention of the parties the Court reads the terms of the contract as a whole, giving the words used their natural and ordinary meaning in the context of the agreement, the parties' relationship and all the relevant facts surrounding the transaction so far as known to the parties. To ascertain the parties' intentions the Court does not of course enquire into the parties' subjective states of mind but makes an objective judgment based on the materials already identified."

66. As is clear from the jurisprudence in this jurisdiction, including the *Law Society of Ireland v. MIBI* [2017] I.E.S.C. 31, the operative principles governing construction are those set out in the judgment of Lord Hoffmann. Referring to the *I.C.S.* decision of Lord Hoffmann, O'Donnell J. noted at para. 8: -

> "These principles represent a significant staging point in the development of what might be described as a modern approach to the interpretation of contracts, a development which, as the principles recognise, has not necessarily reached its terminus."

O'Donnell J. cautioned at para. 8 that it was: -

> "…necessary to be aware of the significance of this development for the overall approach to the interpretation of agreements, and not to simply mix and match authorities drawn from different eras and contexts, as if they were a body of coherent rules produced by a single author."

67. The third of Lord Hoffmann's five principles in *I.C.S.* unequivocally states that the law excludes from the admissible background the previous negotiations of the parties and declarations of subjective intent.

The importance of language

68. In cases where the language of the relevant clause is unambiguous, recent authorities make clear there must be greater emphasis on the text. In *Rainy Sky S.A. v. Kookmin Bank* Lord Clarke observed at para. 23 that –"… Where the parties have used unambiguous language, the court must apply it."

69. In *Arnold v. Britton* the majority of the UK Supreme Court held that the language of the clauses in the leases under consideration was clear and ought to be given effect to, even if the result was highly unsatisfactory for the lessees. Lord Neuberger identified seven factors to be considered regarding interpretation of an agreement. Of note is the first, cited at para. 17 of the judgment: -

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

70. That dictum is particularly apposite in the instant case in my view. The Development Agreement and the Terms of Settlement which amended it comprise a commercial contract which was negotiated on an arm's length basis with the benefit of extensive legal and expert advice by two highly experienced counterparties in the context of a commercial transaction and the compromise of subsequent litigation.

***Analog Devices* and the words the parties used**

71. *In Fitzpatrick v. the Board of Management of St. Mary's Touraneena National School and Anor.* [2013] I.E.S.C. 62 McKechnie J.

considered the operative principles of contractual interpretation in this jurisdiction citing the key principle from *Analog Devices* at p.294, that –

> "Insofar as Irish law is concerned, the contract is to be interpreted objectively in accordance with the meaning of the words the parties have used."

He continued –

> "The opinion of Lord Hoffman in *Investors Compensation Scheme Limited v. West Bromwich Building Society v. Hopkins and Sons (a Firm) and Ors.* [1998] 1 W.L.R. 896 is to the same effect." (para. 39)

72. Hence, in light of the jurisprudence from the Supreme Court and until such time as the principle is revisited, it is established law in this jurisdiction that in order to determine the common intention of the parties to an agreement which has been reduced to writing, same must be construed by reference to the document itself. Extrinsic evidence of what may or may not have been in the minds of the parties at the time of the agreement is not admissible for such a purpose.

Construction of a Compromise

73. The Terms of Settlement is a contract and, as such, its provisions fall to be construed in accordance with the general rules governing the interpretation of contracts.

74. In *Danske Bank v. Hegarty* [2012] I.E.S.C. 30 Clarke J. observed at 7.7 –

> "It is well established in law that the subjective views of the parties to a written agreement are not properly taken into account in its interpretation. This principle applies equally to settlements. See *Dattani v. Trio Supermarkets Ltd.* [1998] I.R.L.R. 23 CA and *Rees v. West Glamorgan County Council* [1994] P.I.Q.R. 37. When parties choose to reduce their Settlement Agreement to a written form then both sides are kept to that written form. It follows that [the defendant's] view as to what the settlement means is no more relevant than the view of [the plaintiff]. It is for the court to interpret the settlement objectively in accordance with its terms but in context."

It is clear therefore that any subjective understanding on the part of one party as to the effect of words used in the Terms of Settlement or compromise is neither relevant nor admissible in the absence of any plea of mistake or a claim for rectification.

75. There is no suggestion by Dunnes that a construction of the disputed provisions of the Terms of Settlement, particularly Clause 11(c) in accordance with the plain meaning of the words would give rise to an absurd result. There is no specific error contended for such as would engage the principles governing the equitable remedy of rectification in the manner outlined by Lord Neuberger in *Arnold*. Dunnes does not contend that the text itself is ambiguous. Rather it is argued that for the matrix of fact to be considered in construing a contract, it is not necessary to first raise an ambiguity on the express words of a contract.

Matrix of fact

76. Lord Steyn in *R. v. National Asylum Support Service* stated that: -

> "… Lord Hoffmann made crystal clear that an ambiguity need not be established before the surrounding circumstances may be taken into account."

However, where the text itself is plain and unambiguous and admits of one clear meaning and then, absent anything untoward in the context which militates against the plain language of the text itself, there is a coincidence between both text and context and the Court ought to give effect to the plain language of the text.

McDermott and McDermott in *Contract Law ,opus cit*.at 10.08 observe –

> "There are two basic approaches to the interpretation of contracts. *The plain meaning rule* and *the factual matrix approach*. The best explanation of the two approaches is to be found in the following quote from *United Pukekohe Limited v. Grantley* [1996] 3 N.Z.L.R. 762 where Baragwanath J. stated: -
>
> '[There are] two quite different judicial philosophies: one focusing closely on the black letter of the language used and denying efficacy to anything more unless the strict necessity test for imputing a term that is not there is met; the other taking a wider view in seeking to deduce a contractual intention applying Lord Wilberforce's 'factual matrix" approach for inferring something to be treated as already there.'"

Purpose

77. No contract is concluded in a vacuum. There is always a setting and a context in which it takes place. In a commercial agreement it is material that the Court should have regard to and an understanding of the commercial purpose of the contract and that in turn presupposes an understanding of the background which framed the transaction, its context and the material circumstances which led to its conclusion.

The Preamble

78. The Terms of Settlement in this case are to be construed having due regard to the existing contractual documents referred to and as effecting an amendment to the Development Agreement but in a context where the parties expressly conferred primacy on the language of the Terms of Settlement itself as set out in its preamble: -

> "The parties agree to settle the above proceedings and all issues raised therein on the terms set out below, which terms amend their obligations under the Development Agreement, the contract for sale and the lease ('the existing contracts'). In the event of any inconsistency between the terms of the existing contracts and this agreement, this agreement shall prevail."

That is a clear declaration of intent. The Terms of Settlement encompass the core matrix of fact in the instant case.

79. It is to be expected that parties to a compromise of litigation before the Commercial Court, in light of the conflicts which led to the institution of High Court proceedings in 2009 in the first place, would make clear what represent fundamental terms of the compromise agreement and the particular measures required to be undertaken to effect a valid compliance with same. As is clear from the authorities and the texts, including Foskett, *The Law and Practice of Compromise* (Sweet & Maxwell,6th Edition,2005), in the event that a dispute arises as to meaning or effect, the task is to ascertain the common intention of the parties by construing the agreement. In the succinct words of McDermott & McDermott in *Contract Law* at para. 10.15: "The document comes first."

Terms of Settlement

80. In *Delany and McGrath on Civil Procedure*, 4th Edition,the authors outline the approach of the courts to the interpretation of Settlement Agreements, illustrating that similar principles apply as to the interpretation of contracts in general at 20.12:

> "… A settlement agreement is a contract and, in *Bank of Credit and Commerce International v. Ali* [2002] 1 A.C. 251 the House of Lords confirmed that the general principles of contractual construction apply to settlement agreements and rejected the proposition that any special rules of construction were to be applied in construing the meaning of a release contained in such an agreement. Applying those principles of contractual interpretation, where a question arises as to the meaning of a provision in a written Settlement Agreement, then as explained by Keane J. in *Kramer v. Arnold*; '…the task of the Court is to decide what the intention of the parties was, having regard to the language used in the contract itself and the surrounding circumstances'. While it is open to a court to imply a term in a settlement agreement this can only be done if the requirements for doing so are satisfied."

81. The task of the Court is to ascertain, having due regard to all the relevant objective evidence, the intention of the parties at the time they entered into the contract. Notwithstanding the importance of context, the text must be the primary source of consideration for the Court.

Principles

82. The proper approach to construing a written compromise or contract was summarised by Lord Bingham of Cornhill in *Dairy Containers Limited v Tasman Orient C.V.* [2005] 1 W.L.R. 215 at para. 12: -

> "The contract should be given the meaning it would convey to a reasonable person having all the background knowledge which is reasonably available to the person or class of persons to whom the document is addressed."

The ramifications of that approach have been considered in detail in many cases including in particular by the Supreme Court in this jurisdiction. They have also been considered in the English context in *Rainy Sky S.A. v. Kookmin Bank*, *Arnold v. Britton* and *Wood v. Capita Insurance Services Limited* [2017] U.K.S.C.24. In *Arnold v. Britton* the UK Supreme Court cautioned that commercial common sense is only relevant to the extent of how matters would or could have been perceived by the parties or by reasonable people in the position of the parties as at the date that the contract was made. Lord Neuberger stated at para. 15: -

> "When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to 'what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean', to quote Lord Hoffmann in *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38, [2009] 1 AC 1101, para 14. And it does so by focussing on the meaning of the relevant words…in their documentary, factual and commercial context. That meaning has to be assessed in the light of; (i) the natural and ordinary meaning of the clause, (ii); any other relevant provisions of the lease, (iii) the overall purpose of the clause and the lease, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions. In this connection, see …*Bank of Credit and Commerce International SA (in liquidation) v Ali* [2002] 1 AC 251, para 8, per Lord Bingham, and the survey of more recent authorities in *Rainy Sky*, per Lord Clarke at paras 21-30."

Text and Context

83. Lord Hodge in *Wood v. Capita Insurance Services Limited* observed at paras. 10-13: -

> "[10] … When in his celebrated judgment in *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 Lord Hoffmann (pp 912-913) reformulated the principles of contractual interpretation, some saw his second principle, which allowed consideration of the whole relevant factual background available to the parties at the time of the contract, as signalling a break with the past. But Lord Bingham in an extra-judicial writing, '*A new thing under the sun? The interpretation of contracts and the ICS decision*' Edin LR Vol 12, 374-390, persuasively demonstrated that the idea of the court putting itself in the shoes of the contracting parties had a long pedigree.
>
> [11] Lord Clarke elegantly summarised the approach to construction in *Rainy Sky* at para 21f. In *Arnold* all of the judgments confirmed the approach in *Rainy Sky*
> (Lord Neuberger paras 13-14; Lord Hodge para 76; and Lord Carnwath para 108). Interpretation is, as Lord Clarke stated in *Rainy Sky* (para 21), a unitary exercise;
> where there are rival meanings, the court can give weight to the implications of rival constructions by reaching a view as to which construction is more consistent with
> business common sense. But, in striking a balance between the indications given by the language and the implications of the competing constructions the court must
> consider the quality of drafting of the clause… and it must also be alive to the possibility that one side may have agreed to something which with hindsight did not serve his interest… Similarly, the court must not lose sight of the possibility that a provision may be a negotiated compromise or that the negotiators were not able to
> agree more precise terms.
>
> [12] This unitary exercise involves an iterative process by which each suggested interpretation is checked against the provisions of the contract and its commercial consequences are investigated: … To my mind, once one has read the language in dispute and the relevant parts of the contract that provide its context, it does not matter whether the more detailed analysis commences with the factual background and the implications of rival constructions or a close examination of the relevant language in the contract, so long as the court balances the indications given by each.
> [13] Textualism and contextualism are not conflicting paradigms in a battle for exclusive occupation of the field of contractual interpretation. Rather, the lawyer

and the judge, when interpreting any contract, can use them as tools to ascertain the objective meaning of the language which the parties have chosen to express their
agreement. The extent to which each tool will assist the court in its task will vary according to the circumstances of the particular agreement or agreements. Some agreements may be successfully interpreted principally by textual analysis, for example because of their sophistication and complexity and because they have been negotiated and prepared with the assistance of skilled professionals. The correct interpretation of other contracts may be achieved by a greater emphasis on the factual matrix, for example because of their informality, brevity or the absence of skilled professional assistance. But negotiators of complex formal contracts may often not achieve a logical and coherent text because of, for example, the conflicting aims of the parties, failures of communication, differing drafting practices, or deadlines which require the parties to compromise in order to reach agreement. There may often therefore be provisions in a detailed professionally drawn contract which lack clarity and the lawyer or judge in interpreting such provisions may be particularly helped by considering the factual matrix and the purpose of similar provisions in contracts of the same type. The iterative process, of which Lord Mance spoke in *Sigma Finance Corpn* … assists the lawyer or judge to ascertain the objective meaning of disputed provisions."

84. In *Jackie Greene Construction Limited v. Irish Bank Resolution Corporation in Special Liquidation* [2019] I.E.S.C. 2, Clarke C.J. observed, having cited from *Delany and McGrath on Civil Procedure*, (4th ed., Round Hall, 2018) that: -

> "[5.12] The more recent authorities in this area suggest that the detailed rules for the proper approach to the construction of contractual documents all derive in substance from the approach which can be encapsulated in the phrase 'text in context'….
>
> [5.13]… in *The Law Society of Ireland v. The Motor Insurers" Bureau of Ireland* [2017] IESC 31, I described the 'text in context' method of construction in the following terms: -
>
> 'The modern approach has sometimes been described as the "text in context" method of interpretation. It might be said that the older approach in the common law world placed a very high emphasis indeed on textual analysis without sometimes paying sufficient regard to the context or circumstances in which the document in question came into existence. On the other hand, it is important not to lose sight of the fact that the document whose interpretation is at issue forms the basis on which legal rights and obligations have been established. That is so whether the document in question is a statute, a contract, the rules of an organisation, a patent or, indeed, any other form of document which is designed, whether by agreement or unilaterally, to impose legal rights and obligations on either specific parties or more generally. To fail to have sufficient regard to the text of such a document is to give insufficient weight to the fact that it is in the form of the document in question that legal rights and obligations have been determined. However, an over dependence on purely textual analysis runs the risk of ignoring the fact that almost all text requires some degree of context for its proper interpretation. Phrases or terminology rarely exist in the abstract. Rather the understanding which reasonable and informed persons would give to any text will be informed by the context in which the document concerned has come into existence.
>
> Perhaps it is fair to say that the main underlying principle is that a document governing legal rights and obligations should be interpreted by the courts in the same way that it would be interpreted by a reasonable and informed member of the public who understands the context of the document in question. Such a person would, necessarily, pay a lot of attention to the text but would also interpret that text in its proper context.'"

I adopt this approach as relevant to a determination of the issues in this appeal.

85. McDermott and McDermott in *Contract Law* at 10.10 offer a comprehensive and compelling analysis of the recent evolutionary trajectory of this aspect of the law: -

> "In his dissenting judgment in *BCCI v. Ali* Lord Hoffmann explained the traditional approach that it was now sought to move away from:
>
> 'in the pursuit of certainty the courts, of both common law and equity, evolved what were called 'rules of construction', by which certain words or expressions were treated, in the absence of contrary language, as having certain meanings. These rules no doubt reflected what in most cases the parties would have intended by using such language. And in the case of documents drawn up by lawyers, the skilled draftsman would be aware of the rules of construction and navigate their reefs and shoals to give effect to the intention of the parties, settlor or testator. But the generality with which they were expressed and their insensitivity to context, as opposed to the particular words which had been used, made them rigid and often productive of injustice...'"

86. In distilling Irish Supreme Court thinking as of the date of publication of their text in 2017 the authors state at 10.14: -

> "The recent decision of the Supreme Court in *The Law Society of Ireland v. The Motor Insurers'Bureau of Ireland* suggests that for the moment, contextualism has decisively won out over textualism in this jurisdiction. The radical scope of what the majority decided is evident from the following words of O'Donnell J.: 'It is clear from the principles set out in *Investors Compensation Scheme Limited v. West Bromwich Building Society*, that if the ordinary meaning of the words would lead to a conclusion contrary to the intention which emerged from the rest of the Agreement on the relevant background, then those ordinary words must give way.'"

The authors reiterate at 10.42 –

> "Agreements are concluded against a background of facts which were known to, or which should have been known to, the parties as reasonable people, at the time when they concluded their agreement. Literal interpretation divorced from this background has fallen out of favour with the courts."

At 10.58 they emphasise that: -

> "… The factual matrix test is an objective one. The actual intention of the parties are irrelevant and direct evidence of these intentions is inadmissible. Thus, evidence of what the parties said to each other in their pre-contractual negotiations is normally inadmissible for the purposes of interpreting the contract."

I adopt the above excerpts as offering a crystalline statement of the relevant legal principles.

Application of the aforementioned principles to the issues arising in this appeal

87. In reaching a determination as to whether the trial judge erred in her conclusion that the confirmation provided by Point Village's solicitors on the 29th February, 2016 that "binding agreements for lease" had been exchanged with tenants in respect of the units was valid complied with the terms of Clause 11(c) what must be considered first and foremost is the certificate together with the covering letter enclosed with same. The contention that the certificate itself omitted use of the word "binding" is not outcome determinative. The agreement did not prescribe certification for valid compliance with Clause 11(c) to be effected but rather "confirmation" of same. The letter itself is unambiguous. It is expressly confirmatory in nature, stating: -

> "In accordance with Clause 11(c) of the Terms of Settlement we hereby confirm that binding agreements for lease/leases have been exchanged with tenants in respect of nine of the ground floor units marked 'X' on the ground floor plan annexed to the Terms of Settlement, at least four of which are internal units."

88. The communication comprising the said two documents, the letter of 29th February, 2016 and the certificate, when considered together could not be clearer. I am satisfied that the trial judge correctly identified that the certificate had been enclosed merely for the purposes of good order and to ensure certainty as to which units were the subject of binding agreements for lease/leases within Clause 11(c). No cogent basis has been identified for interfering with that determination.

Alleged Manifest Error & Dissolution of Ducas Hospitality Management Ltd

89. Dunnes contended that the certification which issued on the 29th February, 2016 was invalid by reason, *inter alia*, that almost 20 months after execution of an agreement for lease, Ducas, was dissolved and struck off the Register of Companies. Thereafter, Point Village identified a prospective tenant "Freshii" to replace Ducas. By a letter of the 27th June, 2017 Point Village informed Dunnes that it proposed to enter into an agreement for lease with Freshii as replacement tenant and invited Dunnes to discuss this proposed change to the tenant mix. Dunnes contended that the requirement to replace Ducas demonstrated that there never had been a binding agreement for lease with that company in the first place, and as such the confirmation furnished on 29th February, 2016 pursuant to Clause 11(c) of the Terms of Settlement had never been valid. Dunnes argued that the failure of the receivers to "categorically swear on affidavit that the agreements for lease are, in fact and law, 'binding'" raises serious issues as to the construction by the receivers' solicitors of the requirements in Clause 11(c).

90. I am satisfied that this objection is not soundly based. All that is contemplated by Clause 11(c) is that Dunnes' solicitors be furnished with confirmation from Point Village's solicitors that binding agreements for leases have been exchanged with tenants in respect of at least seven of the ground floor units as therein specified. Had the parties contemplated a different form or more comprehensive format to the confirmation, the Terms of Settlement negotiated and executed by them on the 7th July, 2010 in commercial litigation 2009/5004P would have said so. That Ducas Hospitality Management Limited was dissolved over a year following its concluding such a contract for lease with Point Village has no bearing or relevance whatsoever as to whether its agreement for lease was binding or not in the first place. The ambit and intention of the parties, as is manifest from Clause 11(c) and the unambiguous language therein contained, was that Dunnes would not and could not go behind confirmation that binding agreements for lease had been exchanged in a manner as therein specified.

91. For a legal instrument to be vitiated by manifest error, such error must have existed at the date when the instrument was executed. Dunnes have failed to identify any such error subsisting either at the date of execution by Ducas Hospitality Management Limited of their agreement for lease, or at the date of confirmation that binding agreements for leases had been exchanged with tenants pursuant to Clause 11(c) of the Terms of Settlement, which letter and certificate were dated the 29th February, 2016. The subsequent dissolution of the company neither trenches on nor undermines the validity of the binding agreement concluded between Ducas and Point Village at the date of its execution, and the consequent validity of the certificate and the correspondence annexed thereto dated the 29th February, 2016.

Rossport Retail Services Limited (Kix) and Long Stop Date Issue

92. Dunnes further contended that matters were compounded by the terms of a letter from McCann Fitzgerald of the 21st September, 2017 concerning the purported termination by Rossport Retail Services Limited (Kix) of its agreement for lease concluded with Point Village. It is contended that on receipt of that letter Dunnes became aware that Clause 2.1 of the Kix agreement for lease provided, "This agreement is conditional upon the anchor tenant commencing its fit-out of the anchor unit on or before the Long-Stop Date". It was argued on behalf of Dunnes that this represents a condition precedent, which rendered the Kix agreement for lease rather than the grant of the subsequent lease conditional on Dunnes commencing the fit-out of its store. Clause 11(c), it was said, did not permit the inclusion of any other such conditions subsequent, or indeed conditions precedent to an agreement for lease. It was contended that the trial judge had failed to address this argument and thus fell into error. However, the latter part of Clause 11(c) encompasses distinct considerations and does not assist Dunnes' argument.

93. Under Clause 2.2. of the Kix agreement for lease, in the event that Dunnes had not commenced the fit-out of the anchor store by the long-stop date, which was two years from the date of execution of the agreement, both parties were "at liberty to rescind" the agreement, whereupon the agreement "shall be null and void and of no further force or effect but without prejudice to any antecedent breach…" Ultimately, Kix availed of Clause 2.2. to rescind the agreement.

94. From considering Clause 11(c) in its totality, it clearly deals with conditions precedent only, making no reference to conditions subsequent. I am satisfied that the High Court judge's characterisation of Clause 2 of the Kix agreement for lease as being "fairly standard" is correct from a conveyancing perspective. The Kix agreement for lease was binding from its inception as a matter of law. A condition subsequent is defined in J.C.W. Wylie, *Irish Land Law* (5th Ed., Bloomsbury, 2013) at 4.49 as: "…a condition which may result in forfeiture of an estate already vested in the grantee."

Binding agreements for lease or leases

95. Contrary to Dunnes' contention, Clause 2.1 of the Kix agreement for lease is not a condition precedent. As was stated by Stephenson L.J. in *Wickman Machine Tool Sales Limited v. L. Schuler AG,* [1972] 1 W.L.R. 840: -

> "If the condition is one to be fulfilled before the agreement comes into force, it is what lawyers have called a condition precedent (or a contingent or causal condition), that is, a condition of the agreements coming into force; and if it is not performed there is no agreement. If the condition is to be performed after the agreement has come into force, it is what

lawyers have called a condition subsequent, or a condition inherent (or a promissory condition), that is, a condition of the agreements continuing; and if it is not performed the agreement comes to an end."

96. Had the parties intended in negotiating the Terms of Settlement to provide that only irrevocable and/or unconditionally binding agreements for lease or leases were to be captured by Clause 11(c), then language consistent with such a state of affairs which would have clearly and effectively exclude any agreements made subject to condition subsequent would have been required to be used. The omission of any such provision is significant and determinative of the matter. Having duly considered same, I am satisfied that the said Kix agreement upon its execution was a concluded binding agreement for lease valid as such for the purposes of Clause 11(c).

97. The condition or event arising in the cases of Ducas and Kix whether by negotiations or by act and operation of law in either case was demonstrably not a condition precedent to the formation of a binding agreement for lease or leases within the meaning of Clause 11(c).

98. From a conveyancing perspective, a binding contract came into existence immediately upon execution of each agreement for lease, and the parties to it were from that moment subject to its obligations. Conditions subsequent of the kind arising in the instant case in the agreement concluded with Kix are part of normal commercial reality. The contention that these agreements for lease were not binding within the meaning of Clause 11(c) is unsustainable in fact and unsound in law.

99. Dunnes' contentions conflate binding agreements and unconditional agreements. A conditional agreement can be binding, provided the condition is a condition subsequent. In this instance the agreements the subject matter of the dispute were in each case at the date of their execution clearly binding in accordance with their terms. Had it been the intention of the parties to the Terms of Settlement to insist that unconditional agreements for lease or leases were required to have been exchanged in addition to being binding, then the agreement ought to have stated this. The exclusion of such language necessarily infers that it was either not in the contemplation of the parties at the date of execution of the Terms of Settlement or that Dunnes failed to successfully negotiate such a term. Either way, it never formed part of the concluded agreement between the parties, and there is no basis in law identified by Dunnes to imply that the binding agreements for lease or leases referenced in Clause 11(c) were intended to only encompass unconditional binding agreements: *expressio unius exclusio alterius*.

Extrinsic Proof of Enforceability

100. A distinct argument on the part of Dunnes was that to trigger its obligations to release €15,000,000 from the nominated account pursuant to Clause 11(c), the seven agreements for lease were required to be demonstrated by Point Village to be valid in accordance with the obligations to comply with Clauses 4.7.1 and 4.7.2 of the long-lease entered into on the 28th November, 2008. The said clauses required the receivers to include certain restrictions in leases with other tenants of the Centre for the benefit of Dunnes. It was argued that since the receivers had failed to provide information on compliance with these clauses, significant doubt surrounds the validity of the agreements for lease the subject of the certificate. This proposition seeks to impermissibly overreach the terms of the parties' concluded Terms of Settlement to satisfy the curiosity of Dunnes based on surmise. Such an entitlement was never negotiated at the time the Terms of Settlement were entered into on 7th July, 2010. Such an approach is not consistent with the norms of business or commercial conduct by lessors in general and neither is it consistent with prudent estate management. There is no evidence that the agreements for lease in question have failed or omitted to comply with the various obligations arising on foot of the long-lease including clauses 4.7.1 and 4.7.2. There was no obligation on the receivers to provide information in regard to same on foot of the Terms of Settlement, the long-lease or the Development Agreement to validly comply with clause 11(c).

101. The trial judge correctly observed at para. 46 of her judgment that the arguments being advanced on the part of the defendant to support this aspect of its claim were pure speculation amounting to a mere possibility that the agreements for lease did not include the restrictions envisaged by the said terms of the long-lease.

102. I am satisfied the trial judge was correct in that regard, particularly since the parties had agreed to a clear mechanism under Clause 11(c) which would lead to the release of the €15,000,000 from the nominated account with Point Village has on the evidence demonstrated compliance.

103. Dunnes have failed to demonstrate or establish manifest error. The trial judge was correct at para. 37 and 38 of her judgment that once Point Village had proved that their solicitors had confirmed that there were binding agreements for lease or leases exchanged within the meaning of Clause 11(c), same was sufficient for the purposes of demonstrating compliance with the said Clause.

Exceptionality

104. Dunnes' claim is wholly lacking in any valid basis that would warrant exercise of the exceptional discretion to admit extrinsic evidence to undermine the clear language of the clauses under dispute. This is not "a very unusual case". The evidence does not disclose "unusual circumstances" such as would warrant the expansive approach to the factual matrix for which Dunnes contends.

105. The substance of the contentions asserted on behalf of Dunnes distils down to this; that the perfectly clear word "tenants" in the Terms of Settlement negotiated by the parties and signed off on with extensive legal and expert advice should be construed to mean "tenants of a high quality". To accede to this contention would be to grant an Alice in Wonderland licence to Dunnes to interpret words in the negotiated and executed Terms of Settlement of 7th July, 2010 as they wish depending on the result they sought to achieve.

106. To construe Clause 11(c) by implication or otherwise so as to replace "tenants" with "high quality tenants" would be to obliquely impeach the clauses' clear words and distort its simple, plain language. It would supplant certainty with uncertainty, clarity with opacity and would be a measure amounting to a Trojan horse capable of sempiternally facilitating any party who wished to obstruct, delay or defeat performance of the provisions of the Terms of Settlement.

Entire Agreement Clause

107. Entire agreement clauses are to be construed strictly. Such a clause does not operate to exclude evidence which is otherwise admissible regarding the way parties to litigation considered the exercise of rights conferred on them pursuant to the terms of an agreement. Dunnes accepted that Clause 25 of the Development Agreement precluded the introduction of implied terms into it based upon materials produced or representations made prior to its execution. But it did not accept that it precluded reliance on such materials to construe the terms of Development Agreement.

108. It bears repetition that this was a settlement document negotiated with extensive expert advice at the disposal of both parties with every word reflecting the fruits of their negotiated compromise. Had either party intended to modify or circumscribe the ambit of the category of tenant intended to be encompassed, it ought to have expressly done so. No valid basis was established by Dunnes for the admission of the extrinsic materials to construe the terms of Development Agreement as modified by the Terms of Settlement.

109. The material sought to be introduced by Dunnes to support their contentions as to the type of tenants envisaged in the Development Agreement is inadmissible by reason of the "*entire agreement clause*" as well as the well-established principles in *Analog Devices*.

Mannai

110. As outlined earlier, the decision in *Mannai* must be understood in its context. The decision addresses the principles governing the correction of mistakes such as where a court construes the date in a notice to terminate a lease as the 12th rather than the 13th of the month on the basis that there would never have been any doubt on the part of either party but that the notice was intended to take effect on the former date.

111. Correction by interpretation ought to be confined to instances where the objective contextual interpretation of the words used discloses an obvious mistake such as an erroneous date. There is no basis established by Dunnes for contending that any word or provision in the Development Agreement, the long-lease or the Terms of Settlement failed to reflect the contemporaneous objective intention of the parties thereto.

112. The decision in *Mannai* does not avail Dunnes. The decisions in *Mannai* and *I.C.S.* are not a charter for the unscrupulous. They provide a mechanism for determining what the objective meaning of a contract is in the limited and narrow circumstances where the principles are engaged and where the background available to both parties makes clear that an error occurred.

Relevance of interests of third parties

113. The trial judge was correct to take into account the interests of affected third parties and in particular AIB – notwithstanding that they were not party to the litigation. Such an approach of attaching weight to the interests of third parties who may be prejudiced were the Court to rely on an overly broad factual matrix accords with authority. Where an instrument will potentially be relied on by a third party its wording should be paramount as is suggested in *Re Sigma Finance Corp.* [2009] U.K.S.C. 2 per Lord Collins – "The instrument must be interpreted as a whole in the light of the commercial intention which may be inferred from the fact of the instrument…" (para. 37).

Conclusion

114. Construction of Clause 11(c) involves balancing internal textual considerations and external factors revealing a balance struck between the need to pay attention to the language of the Terms of Settlement negotiated and drafted by the parties and the concern to give effect to the apparent commercial purpose of that clause in their Settlement. Dunnes has failed to establish any dissonance between the objective intention of the parties and the clear linguistic meaning of the said sub-clause.

115. I would dismiss this appeal on all grounds

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116. Turning then to the judgment and orders of Mr. Justice Twomey delivered on the 15th September, 2017 and order perfected on the 22nd September, 2017 refusing inspection of documents by Dunnes, the following grounds of appeal are relied on:

> (i) The High Court erred in refusing to grant the reliefs sought.
>
> (ii) The trial judge erred in placing undue weight on the purported entitlements of Dunnes Stores per the Terms of Settlement in particular that it only entitled them to "confirmation" of the existence of binding agreements for lease.
>
> (iii) The judge erred in his interpretation and in application of O.31 r. 18(2) RSC, in particular as to whether production of the agreements for lease is "necessary either for disposing fairly of the cause or matter or for saving costs".
>
> (iv) The judge erred in concluding that McCann Fitzgerald did not labour under a "manifest error" in interpreting the agreements for lease as being "binding" notwithstanding the entitlement of the landlord or tenant to terminate same by agreement.
>
> (v) The trial judge erred in his interpretation and application of para. 23 of the judgment of Hogan J. in the Court of Appeal in proceedings between the same parties. ([2017] I.E.C.A. 159)
>
> (vi) The judge erred in failing to have regard to the obligation on the receivers to comply with their obligations in paras. 4.7.1 and 4.7.2 of the long-lease to impose restrictive covenants on other tenants in the Centre for the benefit of Dunnes Stores.

117. In an earlier interlocutory motion in these proceedings, Dunnes had sought discovery from the High Court of, *inter alia*, the same documents which they sought production of pursuant to O.31 r.18 RSC:

> "All documents evidencing and / or relating to the agreement for lease and /or leases entered into by the plaintiff with the tenants set out at para. 7.14 of the affidavit of Stephen Tennant sworn on the 6th April 2016."

On appeal to this Court (*Point Village Developments v. Dunnes Stores* [2017] I.E.C.A. 159) Hogan J., refused the application for discovery stating: -

> "… the plaintiff's engagement with actual or potential tenants could only be relevant to show what the subjective beliefs of [Point Village] regarding the scope and meaning of the reference to 'tenants' in clause 11(c) actually were. But since such evidence would – generally speaking, at least – be inadmissible at trial for this purpose, the discovery sought in aid of this line of inquiry must also be deemed not to be relevant so far as any issues in these proceedings are concerned."

118. In his judgment Hogan J. also declined to order discovery of a further category ("*documents evidencing and / or relating to the agreement for lease and /or leases entered into by the plaintiff with the tenants"*) on the basis that they were not relevant to the construction of Clause 11(c) of the Terms of Settlement stating:

> "One might therefore ask: what purpose would this discovery serve? It could, at most, serve to show the understanding of the receivers' solicitors. But, as I have just explained in the context of category 2, the construction of clause 11(c) will not be dependent on the beliefs of third parties such as the receivers' solicitors regarding the meaning of the agreement".

Manifest error

119. In dismissing Dunnes' appeal against the High Court's refusal of its application for discovery, Hogan J. stated: -

> "Absent fraud or manifest error – neither of which have been alleged – it does not seem to me that Dunnes Stores can look behind the certificate provided by McCann FitzGerald." (para. 22)

120. Latching on to the language of Hogan J., Dunnes contended in a letter dated 7th September, 2017 that McCann FitzGerald had been guilty of a "manifest error" in their understanding of Clause 11(c) of the Terms of Settlement:

> "It is, in fact, the apparent interpretation of 'binding' in your letter dated 4 July 2017 which casts considerable doubt over the validity of the purported confirmation given for the purposes of Clause 11(c) of the Settlement Agreement, and which raises the concern that there has been a manifest error in respect of the interpretation of 'binding'."

121. In his judgment Twomey J. concluded: -

> "[14] Dunnes argues that this letter evidences a manifest error on the part of McCann Fitzgerald regarding the meaning of a 'binding' agreement. As such, it is argued that this justifies this Court in going behind the confirmation and ordering Point Village to grant Dunnes access to the six agreements for lease, which previously McGovern J. and the Court of Appeal had decided was not necessary for a fair disposal of the matter. In a letter to McCann Fitzgerald dated 7th September, 2017, Arthur Cox puts the matter as follows: -
>
> 'it is, in fact, the apparent interpretation of "binding" in your letter dated 4 July 2017 which casts considerable doubt over the validity of the purported confirmation given for the purposes of Clause 11(c) of the Settlement Agreement, and which raises the concern that there has been a manifest error in respect of the interpretation of "binding".'
>
> [15] In arguing that this alleged manifest error justifies the making of an order for inspection, Dunnes relies on the fact that although its application for discovery was rejected by the Court of Appeal, that Court did so in a way that suggested that if there was fraud or manifest error, it might not have been rejected…
>
> [16] On this basis, Dunnes argues that the statement by McCann Fitzgerald in its letter of 4th July, 2017, amounts to a manifest error, as envisaged by Hogan J. and thus justifies this Court in looking behind the confirmation and ordering the inspection of the six agreements for lease.
>
> [17] This Court does not find this argument persuasive. In this Court's view there is nothing illogical in the statement by McCann Fitzgerald that at any stage during the term of a legally binding agreement between two parties, both parties to that agreement can agree to terminate that agreement, in which case the agreement ceases to be legally binding, but that this termination does not result in the agreement being deemed to never having been legally binding in the first place. Thus, this Court does not accept that the statement by McCann Fitzgerald on the 4th July, 2017 amounts to a manifest error by that firm regarding the law of contract.
>
> [18] For this reason, this Court cannot conclude that a manifest error has occurred as envisaged by Hogan J. so as to justify this Court in looking behind the confirmation issued by McCann Fitzgerald that the agreements for lease are binding."

Conclusion

122. I have determined in the first appeal that there was no manifest error arising in the construction and operation by Point Village of Clause 11(c) of the Terms of Settlement of 7th July, 2010 contrary to the contentions of Dunnes. In light of the factors set out above, I am satisfied that Twomey J. was correct in finding that the test for determining whether a document was discoverable under O.31, r.12 RSC or liable to be produced under O.31, r.18 RSC is similar under both provisions; Dunnes are bound by the terms of the judgment of Hogan J. in the Court of Appeal in which its application for discovery of the agreements for lease was rejected.

123. The High Court judge was correct in his conclusion that McCann FitzGerald was not guilty of any manifest error in the statement made in its letter of 4th July, 2017 and that irrespective of whether McCann FitzGerald was guilty of manifest error or not, inspection of the agreements would also not serve any purpose since "the discovery of a document and the inspection of a document will lead to the same result, namely Dunnes having knowledge of the terms of the agreements for lease".

124. Hogan J. had stated at para. 26 of his judgment ([2017] I.E.C.A 159) that the contents of documents which might reveal the subjective beliefs of Point Village or its solicitors regarding the interpretation of Clause 11(c) of the Terms of Settlement were irrelevant to the construction of same because such an exercise would be carried out objectively by the Court at trial based on the text (as I am satisfied it was by Costello J.):

> "It accordingly all comes back to the proper construction of clause 11(c) of the 2010 agreement. But this is a matter to be determined by the High Court by reference to the standard principles of contractual construction as explained in leading cases such as *Analog Devices BV v. Zurich Insurance* [2005] IESC 12, [2005] 1 I.R. 274 and, to repeat, the beliefs of the parties regarding the meaning of the clause are irrelevant."

125. For the above reasons I would also dismiss this appeal.