



THE COURT OF APPEAL

Record Number: 2021/289

High Court Record Number: 2018/6540P

Neutral Citation Number [2022] IECA 39

**Donnelly J.
Noonan J.
Binchy J.**

BETWEEN/

POINT VILLAGE DEVELOPMENTS LIMITED

PLAINTIFF/RESPONDENT

-AND-

DUNNES STORES UNLIMITED COMPANY

DEFENDANT/APELLANT

JUDGMENT (*Ex Tempore*) of Mr. Justice Noonan delivered on the 28th day of January, 2022

1. In a substantial commercial case like this appeal, it would be normal for this Court to reserve judgment for delivery at a later date. However, the Court feels it is possible to deal with this appeal on an *ex tempore* basis for several reasons. First, the issue in this appeal is extremely net and concerns the proper construction of a single sentence in a written agreement made between the parties. Secondly, the extremely comprehensive judgment of the High Court sets out in great detail the entire history of this matter, described more than once in the past as a "saga", and all the relevant facts which are not in dispute. Thirdly, the High Court conducted an extensive review of all relevant authorities and again, there is no dispute between the parties about the applicable law, but rather its application to the facts. Fourthly, given the relevant timeline in this matter and the fact that an order for specific performance has been made against Dunnes, which is not subject to a stay, and which provides a period in which the works must be carried out, a resolution of this appeal is very time sensitive.
2. For all these reasons, I believe it is possible and appropriate for the court to give its judgment now in this matter. Accordingly I do not propose to set out the factual background or the relevant legal principles but will gratefully adopt those in their entirety as they appear

in the judgment of the High Court. The essential question arising before the High Court, and in this appeal, is the meaning of Clause 1.38 of the Development Agreement which defines the expression "Fit Out Works" as: -

"Such fitting out or other works as Dunnes may require to carry out in connection with the intended use and enjoyment of the store;"

3. In a nutshell, Dunnes argue that this clause gives it a discretion as to when, or indeed if at all, it will carry out the fit out works. It places strong emphasis on the use of the words "may require to carry out" as being purely permissive and discretionary. Dunnes' argument goes that if the intention of the clause was to mandate the carrying out of the work by Dunnes, the word "must" or "shall" would appear rather than "may". The word "shall" appears in several other clauses of the relevant agreement and it would be to do violence to the natural and ordinary meaning of the language used to construe it as compulsory rather than permissive. Dunnes make no secret of the fact that, at present at any rate, it has no desire or intention to operate a retail store in the Point Village as it says it is commercially non-viable at this time.
4. In support of its submission, Dunnes places significant reliance on the fact that the 250 year long lease entered into by it does not contain a "keep open" clause in respect of the store and this is inconsistent with an obligation to proceed with fitting out, at very substantial cost, a store which could open one day and be closed the next without any breach of the lease or the agreement.
5. The judge concluded that the interpretation of Clause 1.38 contended for by Dunnes was untenable for the detailed reasons he gave. I will refer to some briefly.
6. At para. 137, he said: -

"To determine the extent of the obligations on Dunnes in the context of fitting out the anchor store solely by reference to the words used in the definition of "Fit Out Works" in clause 1.38 and not to consider the terms of the relevant provisions of clause 11 which impose the substantive contractual obligations on Dunnes, in order to properly understand the extent of those obligations would, in my view, be a classic case of the 'tail wagging the dog'."

7. He continued at para. 139 to say: -

"I am quite satisfied that interpreting the words used by the parties in clause 11 and in clause 1.38 in the context of the agreement as a whole leads the court inexorably to the conclusion that the interpretation of the relevant provisions put forward by the plaintiff is clearly correct and is also consistent with commercial logic and common sense. In my view, the interpretation advanced by Dunnes is inconsistent with the ordinary meaning of the terms used in the relevant contractual provisions which are not just clause 1.38 but also include the relevant subclauses of clause 11 and is not

supported by the context of the Development Agreement itself, or the wider context, or by commercial logic and common sense.”

8. At para. 143 the judge explained why he considered that the plaintiff’s construction of Clause 1.38 accommodated its apparently discretionary nature as follows: -

“Where clause 1.38 refers to such works as Dunnes ‘may require to carry out in connection with the intended use and enjoyment of the store’, the plaintiff’s construction acknowledges that the detail of the works which Dunnes ‘may require’ may change depending on its precise requirements for the store. The plaintiff’s construction also recognises that there is some degree of flexibility as to the precise ‘intended use and enjoyment of the Store’ by Dunnes. The store is defined in clause 1.66 as including a ‘retail anchor store’. I note that the permitted user of the premises by Dunnes under the Long Lease is the ‘Permitted Business’ which is defined in clause 1.1.24 of the Long Lease in very wide terms as permitting a broad range of retail and related uses and envisaging changes which may be necessary depending on new trends. The plaintiff’s construction, therefore, would permit a situation where Dunnes might change its intention for the use and enjoyment of the store in terms of the nature of the retail business to be carried out from the store.”

144. In my view, the plaintiff’s construction of clause 11 fully accommodates the words used in clause 1.38. Dunnes’ construction does not and would allow Dunnes to avoid its contractual obligation merely by deciding that it does not wish to trade from or use the store. I do not believe that that construction is open to the court on the basis of the words used in clause 11.1 when read with defined terms in clause 1, and, in particular, the defined term ‘Fit Out Works’ in clause 1.38. I do not accept that that interpretation involves the court interpreting the word ‘may’ in clause 1.38 as ‘must’ as Dunnes contended at the hearing.”

9. At para. 149, he gave a further reason which supported this construction: -

“I agree with the plaintiff that if it had not been the intention of the parties that Dunnes would retain the sort of discretion as to whether it would carry out any works to fit out the store, one would have expected that such would have been very clearly and expressly provided in the Development Agreement (or in the subsequent agreements between the parties). It was not. On the contrary, the parties went to the trouble of setting out in some detail the extent of Dunnes’ obligations with respect to those works without clearly stating that Dunnes had no obligation to take any of the steps referred to in clause 11 if it decided that it did not wish to trade from the store.”

10. Finally, the judge expressed the view at para. 153-5, that it would defy commercial logic and common sense, were he to interpret the dispute of provisions in the manner proposed by Dunnes and that it was “inconceivable that a commercial entity such as PVDL would have entered into an arrangement giving such discretion to Dunnes. The idea that two

commercial entities would enter into an agreement which had the effect for which Dunnes contends is beyond belief and utterly implausible.”

11. At this juncture, I have to say that I agree entirely with the judgment of the trial judge.
12. The arguments agitated on this appeal are essentially precisely the same as those raised in the High Court. Dunnes primarily allege that the High Court erred in not acceding to its arguments. There is a complaint that the High Court failed to have any, or any adequate, regard to the absence of a “keep open” clause in the lease. However, I am satisfied from a reading of the judgment as a whole that the trial judge did not overlook this point but indeed expressly referred to it at para. 73 and 135 of his judgment. It is true to say that he did not separately analyse the argument but nonetheless, having referred to it expressly, clearly considered it in reaching his overall conclusion which I believe to be entirely correct.
13. I am also persuaded by the respondent’s arguments concerning the absence of a “keep open” covenant in the lease. That is not, in my view, inconsistent with Clause 1.38 having mandatory effect. It is also consistent with the obligation on Dunnes pursuant to Clause 11.12 of the Development Agreement on Dunnes to commence trading to the public no later than the store opening date. The settlement agreement modified the requirement to open until at least seven of the ground floor units have opened and there has been compliance with that requirement. The corollary of Dunnes having no obligation to open until the specified events have occurred is that once they have occurred, Dunnes is obliged to open and trade from the store.
14. Of course none of those events could occur until the fit out works have been completed.
15. Therefore I do not find the absence of a “keep open” clause to be inconsistent with the mandatory operation of Clause 1.38. As the respondent submits, the lease is for a period of 250 years and there are obvious and understandable commercial reasons why a tenant might not submit to a “keep open” clause for that duration. Even if it were strictly the legal position that the absence of a “keep open” clause means that Dunnes, having expended substantial monies on the fit out works and complied with its opening obligation, could elect to close the next day, it seems to me that commercial reality would take over at that stage, something that was no doubt within the contemplation of the parties when they entered into the agreements.
16. In placing great emphasis on its suggested literal meaning of Clause 1.38 Dunnes seeks to construe the clause in a vacuum, entirely outside the overall context of the agreement in which it appears. Such a literal construction would give rise to the absurd result of setting at naught the elaborate contractual provisions painstakingly negotiated by the parties. The very substantial obligations imposed on the parties, and indeed the entire project, could be cancelled at any time by Dunnes simply deciding that it did not wish to proceed. It hardly needs to be stated that it is simply inconceivable that any commercial entity would enter into a contractual business arrangement which in effect binds one party and not the other.

17. It seems to me, as the respondent submits, that the discretion conferred by Clause 1.38 relates to the nature and type of fit out works that Dunnes may wish to undertake which will of course depend in the particular configuration of the store it decides to adopt and the type of business it elects to transact there. It does not, however, confer a discretion to whether any works at all may be carried out.
18. Accordingly, I am in complete agreement with the views of the trial judge and I am satisfied that no error in the approach of the High Court has been demonstrated before this court. I would therefore dismiss this appeal.